THE CAMPAIGN AGAINST PUNISHMENT

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1. THE ABOLITION OF PUNISHMENT AS A POLITICAL PROGRAMME

The topic of this essay is a political programme which, under the banner "Abolition of punishment", calls for far-reaching changes in the traditional legal response to crime. There is, of course, no authoritative formulation of the programme. It has its origin in ideas put forward by the so-called positivist school of criminology founded by Lombroso, Garofalo, and Ferri in the 1870s. Since then the original views have been modified to some extent and have given way to a number of variants.[1] There has been no change in the underlying view, however, that punishment in the traditional sense should be done away with and replaced by "treatment", aimed at cure, or in special cases by precautionary measures, aimed at rendering the offender socially harmless. The idea is that these responses are to be regarded as society's way of defending itself against crime, but without moralistic prejudice. In Sweden the psychiatrist Olof Kinberg has been an ardent spokesman, in the older generation, for changes based upon views of this kind,[2] and their imprint is clearly discernible in the penal law reform which, after many years of preparation, was enacted in the Swedish Criminal Code of 1962.

In our own days, the programme's adherents are to be found mainly among psychiatrists, psychologists, sociologists, and other experts with a "scientific" outlook, who with *avant-gardiste* enthusiasm often support it as an expression of a progressive, empirically scientific approach in opposition to legal scholasticism and metaphysics.[3]

In this essay I shall not attempt to outline the development of this line of thought, or to describe its various exponents; I shall confine myself to an account of one of its outstanding contem-

[1] Concerning this see Marc Ancel, "L'évolution de la notion de défense sociale", *Festskrift tillägnad Karl Schlyter*, Stockholm 1949, pp. 32 f.

[2] See, especially, Olof Kinberg, *Basic Problems of Criminology*, 1930.

[3] Typically, e.g., Karl Menninger, *The Crime of Punishment*, 1968.

porary representative, Baroness Wootton.[4] Nor do I intend to present an exhaustive examination of the policies which Barbara Wootton and other criminologists support. For that task, I lack the necessary criminological training and experience. I will limit myself to expounding and criticizing the underlying elements of the theory upon which the demands for reform rest. Should these be shown to be untenable, it does not follow, of course, that the criminological policy is misguided, but rather that it is not well founded and should therefore be subjected to further testing.

As we have said, the programme aims at the abolition of punishment. However, in the absence of a closer definition of the concept of "punishment" it remains unclear what this means. Karl Menninger, for instance, emphasizes that the demand for the abolition of punishment "certainly ... does not mean the omission or curtailment of penalties; quite the contrary. Penalties should be greater and surer and quicker in coming".[5] Not *punishment,* we note, but *penalties.* What is the difference? Menninger tries to illustrate the distinction with examples, but he is not able to analyse it. By way of introduction, therefore, it will be useful to try to clarify what is meant by "punishment".

Legislators as well as legal theorists distinguish between "punishment" and "other legal measures" in the application of criminal law, but it is not always clear to which of these two groups a particular action belongs. Thus, for example, the imprisonment of juveniles is counted a punishment in Denmark, while the corresponding measure is not so counted in Norway. I believe that the requirements of ordinary usage, as well as of any adequate analysis of the question of the justification of punishment, are best served by attaching the following two conditions to the concept of punishment: (1) punishment is aimed at inflicting *suffering* upon the person upon whom it is imposed; and (2) the punishment is an expression of *disapproval* of the action for which it is imposed. Consequently the following are not to be regarded as punishments:

(*a*) Measures which are aimed at inflicting suffering but which are not expressions of disapproval. The standard model is to be found in the "conditioning" of reflexes in experiments with ani-

[4] I have not taken the movement's latest work into consideration, namely Karl Menninger's *The Crime of Punishment,* 1968. Compared with Barbara Wootton's close analyses and scientifically disciplined thinking Menninger's book is a superficial and rhetorical contribution, and amazingly dilettantish in dealing with the more fundamental questions.

[5] *Op. cit.,* p. 202.

mals. By inducing pleasure or pain in an animal, e.g. by giving it food or an electric shock, its behaviour can be controlled. The same kind of control can be exercised on humans.

(*b*) Measures which are expressions of disapproval but are not intended to inflict suffering. If "suffering" is taken in a sufficiently wide sense to cover any degree of displeasurable experiences, such measures become inconceivable. For the very disapproval, which, when communicated directly to the person in question, is termed *reproach,* already implies an attitude of hostility, which may range from cool disdain to physical violence, and which must therefore be experienced by the person at whom it is directed as in some degree unpleasant.[6] Consequently we must narrow the scope of this category to cover only measures which are expressions of disapproval but are intended to inflict no other suffering than that inherent in the reproach itself. Although measures of this kind occur, in the form of reprimands, warnings, public condemnations, and the like, they are of no particular significance for criminal law.

(*c*) Measures which are neither intended to inflict suffering nor expressions of disapproval. Under this category we find steps taken to educate the person in question, cure him, or render him socially harmless—steps taken in the same spirit as those taken by a doctor in treating his patient. Reproach is excluded and there is no *intention* to inflict suffering, though, as everyone who has been to a dentist knows, this is no guarantee that it will not be inflicted! So too, in the field of criminology, until science invents some means such as pills, radiation, or the like, which can cure criminal tendencies, the measures we are discussing will in general require loss of freedom for a considerable, possibly an indefinite, period of time.

It appears from the criminological literature that those writers who would abolish punishment are advocating, in the first instance, that the legal reaction to crime should consist in measures of the educative, curative, or neutralizing kind discussed under (*c*). They see crime in the same light as illness, that is, as a phenomenon calling for diagnosis and treatment based upon a theory concerning the type and causes of sickness, a treatment aimed only at recovery of health, not at suffering or censure. But they do not exclude the necessity of resorting to measures mentioned under (*a*) as well, that is the deliberate administering of

[6] Cf. Alf Ross, *Skyld, Ansvar og Straf,* 1970, pp. 41 ff.

suffering (in the form of a fine or imprisonment) as a method of changing a pattern of behaviour where remedial treatment is deemed inappropriate. On the other hand, it must certainly be assumed that measures mentioned under (*b*) will be rejected.

It appears from this that it is *punishment as disapproval,* not *punishment as suffering,* that is the target of the abolitionists. It is important to stress this if the programme is not to be misunderstood. "Abolition of punishment" might seem to hold out to criminals the promise of a carefree future. This is far from being the case. Deliberate suffering would continue to be prescribed, and the remedial measures will often in practice be more unpleasant than normal punishment. Indeed the situation is rather the opposite: when the reaction leaves no room for disapproval, its form and intensity are no longer determined by guilt, and an essential barrier to society's reaction is thus removed. When the judge (and here I mean the person who finds a man *guilty*) is replaced by the manipulator and the therapist, when the criminal law is based on a philosophy of treating citizens like mice or patients without responsibility, the vista that opens up is not so much that of a criminal's paradise as that of a totalitarian state with its mechanical and unlimited power over the individuaal.

Our task will be, first, to give a short account of the aims and basis of the abolitionist programme, with Ferri's "positive criminology" as our point of departure. The next step will be to separate out the underlying elements in this way of thinking, after which we shall make a critical evaluation of it.

2. FERRI'S "POSITIVE" CRIMINOLOGY: A PHILOSOPHICAL THEORY OF THE STATE'S RIGHT TO PUNISH

In order to provide a background for an understanding of the modern authors, it will be useful to recount briefly the content of Ferri's positivist criminology.

Ferri himself maintained that it was its choice of method that characterized the positivist school. The positivists' aim was not to approach crime and punishment as juridical phenomena but to study them with the help of scientific methods, observation, and experiment. Their inspiration was drawn, therefore, from an-

thropology, psychology, statistics, and sociology. Despite this commitment to scientific principles, however, the main problem with which Ferri dealt was the age-old moral question of the state's *right* to impose punishment.[7] His basic idea was that this right could not be derived, as the classical school would have it, from moral guilt or responsibility on the part of the offender, since responsibility of this kind presupposes a free will which scientific reason must reject as illusory.[8] The right to punish must be derived from the natural conditions of man's existence, and more specifically from every human being's struggle to exist and to defend himself against attack.[9] On this basis the concept of social responsibility develops simply out of the circumstance that men live in society, and quite independently of free will, moral responsibility, and guilt: "Voilà comme l'école positiviste au critérium, contesté et indéfini, de la responsabilité *morale,* comme raison et fondement du droit de punir, substitue le critérium positif et précis de la responsablitité *sociale* ou juridique, comme raison et fondement du droit de défense sociale des honnêtes gens contre les criminels."[1]

In the light of assumptions current in our days one may wonder how Ferri could suppose that a scientific method based upon observation and experiment would enable him to establish a moral principle, namely that the state has a right to administer punishment. Historically, however, the matter may seem less baffling. For Ferri's positivist criminology was in fact no more purely scientific than was the positivism of Auguste Comte from which it drew its inspiration. Both were metaphysical natural-law theories of morality, based on the assumption that the moral principle proceeds directly from reality itself as an expression of its inherent tendencies. From the fact that human beings defend themselves when attacked, it is inferred that they also have a moral right to do so. The description I have given elsewhere[2] of French sociological positivism as camouflaged natural law applies equally to Ferri's criminological positivism.

[7] Henri Ferri, *La sociologie criminelle,* 1893, p. 261: "Le raisonnement habituel qui sert au sens commun, à la philosophie traditionnelle et à l'école criminelle classique pour justifier la punabilité de l'homme à raison des crimes qu'il commet, se réduit à ceci: L'homme est doué de libre arbitre, de liberté morale, il peut vouloir le bien ou le mal; et partant, s'il choisit de faire le mal, il en est coupable et doit en être puni."

[8] *Ibid.,* pp. 262 f.

[9] *Ibid.,* pp. 291 and 293.

[1] *Ibid.,* p. 427; cf. pp. 330, 342, 344, 347 and 419.

[2] *Kritik der sogenannten praktischen Erkenntnis,* 1933, pp. 245 f.

Ferri himself summarized his doctrine in the following three basic theses which he opposed to the postulates of the classical school:[3]

(1) First, as already mentioned, the thesis that free will, postulated by the classical school as a presupposition of moral responsibility, is, as demonstrated by positivist physio-psychology, an illusion.

(2) Next, the thesis that the offender is, owing to organic and mental abnormalities, inherited or acquired, a special variety of humankind—a thesis that contradicts the classical school's belief that the offender has the same intellectual and affective equipment as other men.

(3) The assertion that crimes flourish, increase, decrease, or vanish from causes quite other than the imposition of punishment, a view which is opposed to the classical school's belief that the principal effect of punishment is to bring about a decrease in the number of offences.

On this basis Ferri proposed a reform programme the main idea of which was to effect a change in the nature of the criminal law's response to criminals. Rather than punishment (a censorious reaction) determined by guilt and meted out in proportion to the guilt, the reaction should be a social sanction determined by the danger constituted by the law-breaker and applied in proportion to the degree of this danger. Mental responsibility (imputability) is an illusion. There is in principle no difference between punishment and safety measures. This is the doctrine of punishment as *difesa sociale*.[4]

3. BARBARA WOOTTON'S DEMAND FOR THE ABOLITION OF BOTH IMPUTATION AND IMPUTABILITY AS REQUIREMENTS FOR CONVICTION

In England the discussion on the problem of imputability has long taken the form of a criticism of the famous *McNaghten Rules,* formulated by the House of Lords in 1843. According to

[3] Ferri, *op. cit.,* p. 22.
[4] *Ibid.,* pp. 407, 408, 429 f. and 433.

these a person is held responsible for his actions unless he is labouring "under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong". Only mental disorders which have affected the intellect are recognized as exculpating according to this doctrine. The traditional criticism has been that the McNaghten criterion is too crude and too narrow. It should be refined and extended to take in also those cases in which mental disorder has affected the emotions and the power of restraint in such a way that although the agent knew well enough what he was doing, it was not in his power to prevent himself from doing it.[5] Consequently there has been a demand to place greater stress on the distinction between responsible and irresponsible actions and to modify the criterion so that more people are exempted from criminal liability. This criticism led in 1957 to the introduction of the concept of "diminished responsibility". Under the Homicide Act, sec. 2, it was established that if the accused's mental responsibility was substantially impaired by mental abnormality he could only be convicted of manslaughter, for which the maximum penalty was life imprisonment, not for murder, the penalty for which was death.[6]

But there is also a modern school of thought which maintains, on the contrary, that a psychologically based distinction between responsible and irresponsible behaviour is impracticable and pointless. The criterion of mental responsibility (imputability) should simply be dispensed with as a condition for conviction, and the criminological reaction to crime should be arrived at in each individual case without regard to guilt, and only with a view to what in the particular instance will offer the best chance of preventing recidivism. The traditional system, which bases punishment on retribution for guilt, should be replaced, according to this view, by a system designed as a means of preventive social hygiene.

[5] See. e.g., *Royal Commission on Capital Punishment 1949–53 Report* (1953), §§ 289 f.; *Model Penal Code* (The American Law Institute, 1956), Tentative Draft No. 4, art. 2 sec. 4.01; Barbara Wootton, *Social Science and Social Pathology*, 1959, p. 231, with a discussion of the reform proposal prepared by the British Medical Association; and Herbert Morris (ed.), *Freedom and Responsibility*, 1961, ch. VIII, "Legal Insanity".

[6] On this see Barbara Wootton, *Crime and the Criminal Law*, 1963, pp. 59 f. and 85 f.; and H. L. A. Hart, *Punishment and Responsibility*, 1968, pp. 245 f.

A leading member of this group of critics is Barbara Wootton. She has been described by the legal philosopher H. L. A. Hart as "by far the best informed, most trenchant and influential advocate of these new ideas . . . 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".[7]

Barbara Wootton's attack is directed at the concept of *mens rea* which she thinks should be dispensed with as meaningless, or at least as irrelevant. English penal law is, as we know, constructed on the basis of the concepts of *actus reus* and *mens rea,* corresponding approximately to what , in Danish law, we know under the names of, respectively, objectively illegal action (*den objektivt retstridige handling*) and mental conditions of guilt (*psykiske skyldbetingelser*). These conditions include, according to the Continental view, imputation (intention, negligence) and imputability (mental responsibility) (in Danish: *tilregnelse* and *tilregnelighed*). Barbara Wootton's doctrine thus amounts to no less than the view that questions of both imputation and imputability be discounted as conditions for convicting a person of an offence, while at the same time they are to be taken into account as circumstances which partially determine the nature of legal reaction to be applied in a particular case.

Barbara Wootton's most comprehensive treatment of the question of mental responsibility is contained in her major work, *Social Science and Social Pathology* (1959), while a less detailed account is to be found in *Crime and the Criminal Law* (1963), comprising her four "Hamlyn Lectures" delivered that year.

Her argument is based upon two main theses. These, however, do not amount to mutually supporting views. If they are tenable, then each is in itself conclusive. In adducing both, therefore, her appeal is *ex abundante cautela:* if one thesis fails to convince the reader, the other may succeed.

The first of these theses is that it is simply impossible—if mental irresponsibility is allowed to extend beyond the narrow, purely intellectualistic limits set by the McNaghten rules—to set up a meaningful and applicable criterion. For then the question becomes whether the agent's emotions and powers of self-restraint have been so impaired by disease of the mind that he was unable to act otherwise than he did; or, one could also say, the crucial point becomes whether he acted from free will or was driven to

[7] Hart, *op. cit.,* p. 193.

act as he did by an irresistible impulse. Now we know that he actually did not overcome the inducement to act as he did. The question is whether it was possible for him to do so. But the answer to this question lies, according to Barbara Wootton, beyond the limits of knowledge; so if one poses such a question to a judge, jury or psychiatric expert, one is asking them something that in fact they are not able to answer.[8]

It is part of the traditional theory of mental responsibility that the exculpating intellectual or emotional deviation must be due to mental disorder—this latter being taken in a wide sense to encompass not only insanity but any lack of full mental health. The idea that any illness which causes misconduct also excuses that misconduct is, according to Barbara Wootton, deep-seated in contemporary ideas on responsibility.[9] She begins, therefore, with an analysis of the concepts of "mental health" and "mental illness".

This chapter makes fascinating reading. Traditional views depend, it is claimed, on the assumption that mental disorder is, just as is physical illness, an objective phenomenon in the sense that the occurrence of an illness can in principle be diagnosed from symptoms whose presence or absence can be established by expert scientific observation, independently of subjective evaluations and moral ideals.[1] She further claims that this assumption is untenable. This emerges from a survey of no fewer than twenty-five different definitions of "mental health" taken from expert writers. A recurring theme in these definitions is the equation of mental health with the ability to live happily, with vigour and full use of capabilities, with inner integration and outward adaptation, so that both inner and outer conflicts are avoided. It is not difficult to show, as already Kingsley Davis did,[2] that these definitions imply, more or less openly, evaluations and cultural ideals.[3] Adaptation—yes, but to what? What was considered lack of adaptation in Nazi Germany may for us be mental health and strength; and what is seen as lack of adaptation in the competitive society of the United States may be regarded in a South Sea island as the healthy unfolding of the human spirit. Development of capabilities—yes, but there are also capabilities, of course, which

[8] Wootton, *Crime and the Criminal Law*, pp. 73 f.
[9] Wootton, *Social Science and Social Pathology*, p. 208.
[1] *Ibid.*, p. 207.
[2] Kingsley Davis, "Mental Hygiene and the Class Structure", *Psychiatry* (February 1938).
[3] Wootton, *Social Science and Social Pathology*, pp. 216 f.

belong to the seamier side of the soul and which it would not be thought healthy to develop. It is particularly the discipline known as "mental hygiene" that has exploited the concept of mental health. "Disguising its valuational system ... as rational advice based on science, it can conveniently praise and condemn under the aegis of the medico-authoritarian mantle."[4]

Similarly, "mental disorder" is often—still according to Barbara Wootton—only a term used to indicate a kind of behaviour which is in conflict with recognized social norms. This is true, in any event, of the more moderate cases. "Mentally sick" is a label attached to a person simply because, in one way or another, he fails to live up to the expectations of the social environment. A man who is unusually suspicious, irritable, melancholy, or aggressive is sent to a doctor for treatment. He is considered to be ill and therefore not responsible. But in these cases there is no other indication of sickness to be found than the behaviour of which the sickness is supposed to be the cause. This means that the behaviour is its own excuse. The effect is to undermine the concept of responsibility. "For if illness excuses bad temper, and if a man is only known to be ill by reason of his temper, the same logic may be used to absolve him of responsibility for other forms of behaviour which are classified as anti-social."[5]

The claim that it is impossible to form an acceptable criterion of mental responsibility is developed by Barbara Wootton in the succeeding chapter, where she examines and rejects a series of attempted definitions. In all cases the criticism turns either on the thesis just discussed—that the argument for freedom from responsibility is circular, and therefore empty, because there is no other indication of sickness than the norm-conflicting behaviour itself—or on the thesis that the criterion of sickness offers no foothold for the assumption that the inducement has been irresistible. Take, for example, the kleptomaniac. When well-to-do people steal things they have no use for, their action seems unintelligible since it appears to lack any motive, or at least any rational motive. Beyond the behaviour itself there is no further indication of the exonerating illness, and there is no foothold for the assumption that the well-to-do man's kleptomanic yearning is more irresistible than the poor man's hunger for a proper meal or a packet of cigarettes.[6]

[4] Kingsley Davis, *op. cit.*, quoted in Wootton, *op. cit.*, p. 217.
[5] Wootton, *Social Science and Social Pathology*, pp. 225 f.
[6] *Ibid.*, pp. 233 ff.

Barbara Wootton's rejection of the concept of "medical crime" is interesting, this being defined by her as a crime due to factors in the personality which can be recognized and treated by medical means. Sickness in this sense is whatever a doctor can treat in his professional capacity or whatever is treatable by medical means. However, when these means are no longer confined to medication, surgery, and other somatic intervention, but also include psychotherapy in the form of interviews, advice on emotional and other personal matters, psychoanalysis, and so on, the concept becomes extremely elastic. Moral exhortation by a clergyman and psychotherapeutic treatment by a doctor are both forms of verbal communication, and there is no reason why a man treated by a doctor should be any more exempt from punishment than his fellow "treated" by a clergyman.[7]

The essential point in the rather wide-ranging observations of *Social Science and Social Pathology* comes out more sharply in the simpler account in *Crime and the Criminal Law*. The chief object, says Barbara Wootton, is to show the difference between "He did not resist the impulse" and "He could not resist the impulse".

> But neither medical nor any other science can ever hope to prove whether a man who does not resist his impulses does not do so because he cannot or because he will not. The propositions of science are by definition subject to empirical validation; but since it is not possible to get inside another man's skin, no objective criterion which can distinguish between "he did not" and "he could not" is conceivable.[8]

Barbara Wootton discusses a further argument for the inapplicability of the concept of mental responsibility—in fact not only for its inapplicability but also its meaninglessness—though it is not an argument she subscribes to herself. It is the determinist argument urged, among others, by Eliot Slater[9] and J. E. MacDonald[1]—and also, we may add, by Olof Kinberg and the positivist school (Ferri). This, as we know, considers mental responsibility to presuppose a metaphysical free will which has to be rejected as a figment of the imagination inconsistent with scientific determinism. Barbara Wootton does not deny that determinism ex-

[7] *Ibid.*, pp. 240 ff.
[8] *Crime and the Criminal Law*, p. 74.
[9] "The McNaghten Rules and Modern Concepts of Responsibility", *British Medical Journal* (September 1954).
[1] "The Concept of Responsibility", *Journal of Mental Science* (July 1955).

cludes responsibility but is aware that determinism is far from being a demonstrable scientific truth, and is in fact a highly controversial philosophical hypothesis.[2]

Abolition of the concept of mental responsibility does not mean, however, that the perpetrator's mental state has no relevance at all for criminal law. Although it has no significance for his responsibility and conviction, it still affects the choice of the most effective treatment for restraining him from further offences:

> The psychiatrist to whom it falls to advise as to the probable response of an offender to medical treatment no doubt has his own opinion as to the man's responsibility or capacity for self-control; and doubtless also those opinions are a factor in his judgment as to the outlook for medical treatment, or as to the probability that the offence will be repeated. But these are, and must remain, matters of opinion, "incapable", in Lord Parker's words, "of scientific proof."[3]

Barbara Wootton's second main thesis is that the concept of mental responsibility—whether or not it is meaningful or practically applicable—is in any case irrelevant for a rational criminal policy. She thinks we can simply bypass the problem of determinism and leave the concept of mental responsibility in suspense as something which is of no concern, at least to criminologists. Her argument in support of this is sketchy and is confined to the almost self-evident presupposition that the purpose of criminal law is to minimize offences, i.e. is prevention, and not to punish the guilty, i.e. retribution.[4]

The author's attack on that side of the concept of *mens rea* which relates to imputation (intention, negligence) occurs only in the shorter book.

The first thing to note is that in this part of the criticism of *mens rea* nothing is said about the impossibility of recognizing the psychological states in question. On the contrary, the possibility and relevance of identifying them for shaping the reaction to crime are taken for granted.

Barbara Wootton's thesis proposes that the perpetrator's mental attitude to his action, which is described in such terms as "intention", "negligence", and "accident", is irrelevant for conviction in criminal law, but not for determining the sentence. Her

[2] *Social Science and Social Pathology*, p. 247.
[3] *Crime and the Criminal Law*, p. 77.
[4] *Social Science and Social Pathology*, p. 247; and *Crime and the Criminal Law*, pp. 40 f.

argument for this derives from the assumption that criminal law aims at prevention and not retribution:

> If, however, the primary function of the courts is conceived as the prevention of forbidden acts, there is little cause to be disturbed by the multiplication of offences of strict liability. If the law says that certain things are not to be done, it is illogical to confine this prohibition to occasions on which they are done from malice aforethought; for at least the material consequences of an action, and the reasons for prohibiting it, are the same whether it is the result of sinister malicious plotting, of negligence or of sheer accident. A man is equally dead and his relatives equally bereaved whether he was stabbed or run over by a drunken motorist or by an incompetent one; and the inconvenience caused by the loss of your bicycle is unaffected by the question whether or not the youth who removed it had the intention of putting it back, if in fact he had not done so at the time of his arrest.[5]

As we see from this passage, not only simple negligence but also sheer accident are set alongside intention.[6]

Nevertheless, the mental conditions with which the doctrine of imputation is concerned acquire significance when, once the accused has been convicted for the deed (because he is in fact the one who perpetrated it), a decision about the appropriate legal measures has to be made:

> At a later stage, that is to say, after what is now known as conviction, the presence or absence of guilty intention is all-important for its effect on the appropriate measures to be taken to prevent a recurrence of the forbidden act. The prevention of accidental deaths presents different problems from those involved in the prevention of wilful murders. The results of the actions of the careless, the mistaken, the wicked and the merely unfortunate may be indistinguishable from one another. But each case calls for a different treatment.[7]

[5] *Ibid.*, p. 51.

[6] Thus also *ibid.* p. 52: "If the object of the criminal law is to prevent the occurrence of socially damaging actions, it would be absurd to turn a blind eye to those which were due to carelessness, negligence or even accident." In view of these clear words it can make no difference that the author occasionally speaks only of negligence in the following pages.

[7] *Ibid.*, pp. 52 f.

4. ABOLITION OF THE REQUIREMENT OF IMPUTATION: AN OBVIOUS *NON-SEQUITUR* IN BARBARA WOOTTON'S ARGUMENT, AND ITS IMPLAUSIBILITY

In turning now to the task of expounding and evaluating the underlying thought in these projected criminological reforms, I shall begin by considering Barbara Wootton's attack on the doctrine of imputation, that is, her demand that negligence and accident be put on a par with intention for purposes of conviction. The thought involved in this side of the criticism of *mens rea* is considerably less complex than that concerning the problem of mental responsibility.

Her argument is quite simple. It is that when it is the task of the legal system to prevent, as effectively as possible, those acts which are held to be criminal offences—rather than to make punishment the wages of guilt—there is no good reason to confine the reaction to cases in which guilt obtains in the form of intention. Nor do the interests of the injured party speak in favour of such a restriction. The injury for him is the same, and the wish to combat it as great, whatever the mental constellation under which it may have originated in the perpetrator's mind. "If the object of the criminal law is to prevent the occurrence of socially damaging actions, it would be absurd to turn a blind eye to those which are due to carelessness, negligence or even accident."[8]

The reasoning can be outlined more precisely in the following steps:

(1) The aim of criminal legislation is to prevent the perpetration of acts classified as criminal (because they are regarded as being socially damaging).

(2) From the injured party's point of view, interest in the non-occurrence of such acts is the same whether the perpetrator acted intentionally, negligently, or by sheer accident.

(3) Legislation which drops the requirement of criminal imputation (for conviction) will work more effectively in prevention than one which retains it.

(4) Consequently the requirement of criminal imputation as a condition for legal reaction should be dropped.

What should we say to this?

[8] *Ibid.*, p. 52.

First, regarding (1), nothing. I can subscribe fully to this premise, and would only add the rider that, if by putting it forward it is sought to suggest, as does Barbara Wootton, that the purpose of penal legislation is *not* retribution for guilt, then the point rests on a misunderstanding. For this is something no one has ever claimed. The so-called retributivist theories are not concerned with the *purpose* of penal law (its intended effects) but with the moral basis for sentencing a particular person and for the kind and extent of the punishment imposed. The substance of the retributivist's case is that the guilt requirement sets a moral limitation upon the state's right to pursue its preventive aims. I have developed this line of thought more fully elsewhere.[9] Since it has no further bearing in this context I shall not elaborate on it here. I accept premise (1) unreservedly: the purpose of penal law, or at least its typical main purpose, is to prevent the occurrence of criminal acts.

As for (2), this premise is open to question, though it is not here that we shall find the fatal flaw in the argument.

It is open to question because it is an error to suppose that an act can be described objectively as a purely physical sequence of events, that is to say without introducing into its description a reference to mental components. There is a manifest difference between *A*'s throwing a stone in the direction of *B* as part of a game, for *B* to catch it, and *A*'s throwing it at a police officer during a demonstration in order to bring him down. But this difference cannot be described in purely objective physical terms. If in describing *A*'s "action" one leaves out everything we refer to in terms of "intention", "meaning", "purpose", the action shrinks to nothing more than certain muscle contractions and arm movements. But it is not possible on this basis to distinguish between something that is a part of a game and something that involves wilful aggression. The distinction between the act itself and its attendant mental circumstances is an artificial and impossible abstraction. The act is grasped immediately as having a definite "sense" and only in this way becomes an act, or action, of a definite kind, e.g. a throw in a game or an assault.[1]

It is also clear, then, that if by mischance a stone thrown in a game strikes *B* and injures him, the hurt he receives is not the same as that when he is subjected to personal assault. And this

[9] *Skyld, Ansvar og Straf*, 1970, pp. 45 f., 90 f., 184 f.
[1] Franz From, *Om oplevelse af andres adfaerd*, 1953, p. 82.

is true even if the bodily injury is the same in each case. Even a dog reacts in different ways to a deliberate kick and to an accidental movement of the foot. Personal assault brings a mental distress and suffering that does not occur in the case of accidental injury. There is greater interest, therefore, in preventing assault than in preventing accidents.

The questionableness om premise (2) does not, however, imply the total invalidity of the argument. For even if it is conceded that the difference we have pointed to here between the intentional and the accidental is a relevant one, it may still be maintained that there is nevertheless some interest also in preventing accidental injury, and that this is enough to sustain the conclusion.

Premise (3) is doubtful. The question how a system of criminal law that drops the requirement of criminal imputation will work is surely one we cannot answer with any certainty and must leave to conjecture, fortified as best it may be by hypothesis.

It should be granted that it is reasonably certain that criminal legislation based on strict responsibility will have an immediate preventive effect. The knowledge that both negligence and accident will lead to criminal proceedings will certainly provide more inducement than does the law as it actually stands to pay greater heed to what one is doing and to take care, as far as possible, to avoid situations in which there is a significant risk of one's being the cause of some accidental injury. For example, when undertaking a journey it would, from this point of view, be wiser to walk or take a train than to cycle or go by car.

On the other hand, it is possible, and in my view even probable, that such an arrangement will in the long run weaken the general preventive effect of penal law. As has been vigorously maintained, especially in Scandinavian theory, this effect depends in the first instance on the capacity of the system to strengthen and form popular moral attitudes of disapproval of criminal acts. And as Ekelöf in particular has urged,[2] this capacity in turn depends on popular recognition of the justice of punishment, and that in turn means that the punishment should be both directed at the guilty and reasonably related to the guilt. And this condition will certainly not be fulfilled in a legal system in which it is a matter of pure luck whether one will be prosecuted and possibly sentenced to one or another form of suffering or cure.

[2] Per Olof Ekelöf, *Straffet, skadeståndet och vitet*, 1942, p. 35; cf. *T.f.R.* 1968, p. 129.

Now for step (4). This is an inference the invalidity of which proclaims itself to the high heavens. It assumes, if it is to be tenable, the rule of inference that if an agent wishes to realize a certain goal (an intended, interest-determined end) he must also be prepared to employ every means by which he might achieve that goal. This, of course, is false. Two kinds of factors may justify an agent's unwillingness to avail himself of a particular means. First, other interests. Besides promoting the end in question, the means may have what the agent considers to be undesirable after- or side-effects which must be balanced against his interest in realizing the goal—just as medicine can have harmful effects which outweigh its advantages (thalidomide!). Secondly, restrictive considerations, especially of a moral nature, which are recognized and taken into account by the agent although counter to his own interests. Barbara Wootton argues as if there could be only one goal in the world, and as if nothing else counted but the interest in achieving it. She could just as well have argued: The task of a national fire service is to devise effective means for fighting and preventing outbreaks of fire. Therefore, since prohibition of the use of inflammable materials in houses and the requirement that no two houses should be closer than a hundred yards to one another are means to this end, they should be enforced.

It should not be difficult to see what compelling reasons there are for not making responsibility in penal law strict, that is to say unqualified by imputation (intention, negligence). One need only imagine for a moment a world in which every case of negligence and mishap would lead to police action and criminal charges provided that under the rules now in force such action is regarded as criminal if intentional. In such a world any accidental damage to property would have to be brought to court as wanton destruction. Any accidental violation of another's person, a jostle, push or knock, would come under the rules relating to bodily injury. Anyone, in any circumstances, found in possession of stolen goods would be chargeable with receiving, and so on. It is clear that such a situation would be intolerable, and that strong counter-considerations can be adduced against a one-sided implementation of preventive policies, namely consideration for the individual's legal security and autonomy, his interest in knowing that he is not the prey of a capricious legal machine, but that punishment or other legal measures will normally only be imposed upon him in circumstances over which he can exercise control. The rule

that only offences which a person can be held accountable for may lead to legal reaction against him affords everyone the knowledge that his own fate in regard to society's penal machinery depends on himself, on his own will and character, and not on chance. He knows that if, by his own will power, he can live up to a sincere desire not to break the law, he is secure against criminal action. His efforts may be in vain. But even so they are meaningful, and he is sustained by the encouraging knowledge that if he succeeds the reward is security against the imposition of punishment. The requirement of imputation is the condition of the individual's ability to plan his own life with the purpose of keeping himself free of the criminal law.[3]

Hart, who has objected to Barbara Wootton's demand for the elimination of imputation, is, in my view, too lenient in his criticism. He seems to suppose that if Barbara Wootton's programme were put into effect, accidents would only lead to criminal proceedings if the circumstances indicated that some form of treatment, medical or penal, was called for; and he assumes that the prosecuting authority will show a reasonable regard for good sense.[4] However, I cannot see how, once the purely accidental is brought into the domain of crime, there can be room for any consideration at all as to whether a reaction is indicated, and if so what reaction. The perpetrator is in no way implicated with his person and character. If the desired preventive effect is to be attained, the rule must simply be that he shall be unconditionally and automatically prescribed a dose of penal suffering.

One inevitably looks for some explanation why a scholar of Barbara Wootton's calibre should have failed to see the invalidity of the conclusion. There are, I think, two fallacies which may have played a decisive part here. One is the conclusion that if retribution for guilt is not the *purpose* of punishment, then retribution and guilt have no place at all in the philosophy of punishment. This misunderstanding is in turn due to the fact that in much of the discussion on the principles of penal law in recent times among criminologists there has been a tendency to present the problems of policy under the heading "The purpose of punishment". But this provides an altogether unsatisfactory frame of reference for such complex and diverse problems.[5] The second

[3] Hart has worked out this view in detail; see, e.g., *Punishment and Responsibility*, 1968, pp. 44 f.

[4] Hart, *op. cit.*, p. 206.

[5] Cf. Alf Ross, *Skyld, Ansvar og Straf*, 1970, pp. 55 ff.

fallacy is the assumption that, if guilt (imputation and imputability) is to be accorded any relevance in penal law, this must be on the presupposition that man's will is free in the metaphysical sense, that is to say is not subject to causal laws. If one feels compelled to reject indeterminism, one feels one must also reject all talk of guilt as metaphysical delusion. It is true that the guilt requirement has often been justified in this way. But it does not, of course, follow from this that another and better, fully rational and empirical justification cannot be given. Elsewhere I have argued that such a justification can be given.

To be honest, I must admit that Barbara Wootton's case for the elimination of the requirement of imputation, as a practical programme, seems to be so badly based in theory, and so patently implausible in practice, that I would not have thought it worth discussing had it not been presented by an author whom Hart has described in the glowing terms quoted above (p. 118 at note 7).

5. THE DETERMINISTIC ARGUMENT THAT THE NOTION OF IMPUTABILITY (MORAL RESPONSIBILITY) HAS NO MEANING IS TOO IMPLAUSIBLE FOR ANYONE TO HAVE TAKEN IT SERIOUSLY

If Barbara Wootton's attack on the requirement of imputation must be termed a "speciality" of her own devising, the demand to do away with the criterion of moral responsibility, on the other hand, is a standard item in the programme of modernist reformers. In continuation of the positivist school's view, it has become increasingly the vogue among criminologists, psychiatrists, psychologists, physicians, educationists, sociologists, and other experts with scientific training and aspirations, to regard the idea of moral guilt, and the derivative ideas of responsibility and punishment (as disapproval) as metaphysical notions which are inconsistent with, or at least of no relevance to, pure-bred scientific thinking.

An underlying factor in this attitude is the determinist argument. We noted above under section 2 the central role that this argument has played for the positivist school. With the rejection

of the classical school's faith in a metaphysical free will it was thought that the ideas of guilt and mental responsibility must go out too. Punishment is not determined by, nor is it to stand in any relation to, any moral or legal guilt in the criminal; rather it is society's way of defending itself against socially damaging acts. Similar arguments based on "scientific determinism" are constantly found playing a leading role in the literature both of criminology and of moral philosophy.[6]

The determinist argument should therefore be taken up for more detailed study. It cannot be avoided by simply maintaining that metaphysical problems have no significance for practical criminology. Even if that were the correct view, as indeed I believe it is, one does not thereby escape the fact that philosophical speculations of the kind discussed, though in an undigested and confused form, do in fact play an important part in argumentation and the forming of opinions. Even if it should be true (as I believe it is) that there is no tenable formulation of determinism that would oppose the meaningful use of such notions as guilt, responsibility and punishment, this does not prevent misunderstandings from creating pseudo-problems and leading opinion astray. So we must look more closely at the reasoning.

As we have mentioned, Ferri presented his postulate that free will is an illusion in opposition to the classical school's postulate of free will. In as much as the classical doctrine of moral guilt and responsibility was based precisely upon this postulate, he thought that by rejecting it he had also disposed of the concept of responsibility.

The classical school reasoned in this way:

(1) Moral responsibility (and *ipso facto* morality as a whole) presupposes that man has a free will.

(2) Man has a free will.

(3) Therefore moral responsibility is possible.

[6] The idea has roots far back in the history of moral philosophy. See, e.g., Spinoza, who in his *Ethics* (Bk. 4, theorems 51 and 63) taught that indignation is evil and should not dictate the punishment. In a recent symposium a number of modern philosophers expressed something of the same view. E.g., John Hospers: "Someone commits a crime and is punished by the state; 'he deserved it', we say self-righteously—as if we were moral and he immoral, when in fact we are lucky and he is unlucky—forgetting that there, but for the grace of God and a fortunate early environment, go we." In Sidney Hook (ed.), *Determinism and Freedom in the Age of Modern Science* (first ed. 1958), p. 124 (Collier ed. p. 138). Similarly Paul Edwards, *ibid.*, pp. 104 f. From the literature on penal law we can mention Franz von Liszt and many others. On this see Stephan Hurwitz, *Den danske kriminalret, Almindelig del,* 1952, p. 106.

The positivist school denied premise (2). It took it as scientifically proven that man's will, like all other phenomena, is subject to causal laws. So it concluded that moral responsibility is without meaning.

There are two objections to this. First, it is oversimple to assume that determinism is "scientifically proven". It is generally acknowledged today that the determinist thesis, however precisely it may be formulated, is not a straightforward empirical statement, and that it cannot be definitely confirmed (or refuted) from experience. It does not, like a natural law, express some observable law-like connection between phenomena, but postulates—if it is to support the conclusion—that all phenomena, including the human will, are subject, without exception and in all circumstances, to determination by causal laws. Any attempt to determine the conditions for the truth of this assertion would transcend all finite bounds of experience.[7] The conflict between determinism and indeterminism cannot be regarded as having been brought to a conclusion. Modern nuclear physics has breathed new life into it, and there are even those who believe it to be an established fact that there are atomic phenomena which are by their very nature immune from any causal determination.[8] The dispute continues, and our endeavours should perhaps, for the time being, be directed principally to the task of giving meaningful interpretations to the two theses, so that we may at least begin to decide which of them is true. As matters now stand we must in any case put to rest the naive belief that determinism is "scientifically proven".

The second, and in my view crucial, objection, so long as the determinism dispute is not settled, is that the inference to the impossibility of morality is possible only because the positivists still cling to the classical school's point of departure, i.e. premise (1), which states that moral responsibility presupposes man's possession of a free will in the sense of a will that is not (or is not in all circumstances) subject to causal laws. The fundamental assumption is the postulate that, if the determinist thesis is true, then all talk of morality and of moral responsibility is meaningless.

[7] Cf., e.g., Sir W. David Ross, *Foundations of Ethics*, 1939, pp. 213 and 218.

[8] Thus, e.g., Bohr, Heisenberg and Born, as against Einstein, Planck, Schödinger, *et al.* See Percy W. Bridgman, "Determinism in Modern Science" in Hook, *op. cit.*, pp. 43 f.

But this postulate, in my view as well as that of many others,[9] is incorrect. An adequate argument in support of this view would require a more precise interpretation of the conceptual content of determinism, and logical analysis of its implications. This would take me beyond my present terms of reference, and here I must content myself with mentioning a consideration which can to some extent make it at least probable that my view is correct.

But first I must make it clearer what my view is. In contesting the assumption that moral responsibility presupposes indeterministic freedom of the will, I do not mean to deny that moral responsibility presupposes a state of freedom in a certain sense, namely something we could call *freedom of action.* Everyone agrees that moral responsibility presupposes that in a certain sense it has been in the offender's power to act otherwise than he did. He is responsible if he *could* have done the right thing, which is to say that he would have done it if he had willed to do so with sufficient strength; if he had made a serious effort to ascertain his duty and had striven to carry it out. He is free of responsibility if he could not have acted otherwise, which is to say if there existed such outer or inner compulsion as to make all his efforts in vain. Therefore the man who acts in a delirium or under an irresistible impulse is not responsible for what he does.

On this, as we have said, there is general agreement. The dispute is whether moral responsibility presupposes, apart from this freedom of action, freedom in another, deeper sense, namely genuine *freedom of will.* Those who claim that it does, state that moral responsibility must also be excluded in cases where the offender could have acted rightly (that is to say, would have done so if he had willed it), namely if his lack of will is nothing but the necessary product of inherited incapacities, environment and personal history. Moral responsibility presupposes not only that

[9] Compatibilism, i.e. the view that determinism and morality are consistent with one another, has a long tradition behind it. We may mention in passing: Hobbes, Locke, Hume, Höffding, Jodl, Westermarck, Heymans, Ayer, Schlick, and Stevenson. From the collection referred to in the preceding note (Hook, *op. cit.*) we can mention Blanchard, Brandt, Ducasse, Pap, and Hook. It is not to be denied that the contrary view, too, has had its outstanding proponents among philosophers and jurists. But it is not flattering that a number of Scandinavian authors present this view as if it was almost self-evidently true, and apparently without a hint of knowledge of the extensive literature on the subject. See, e.g., Frede Castberg, *Forelaesninger over retsfilosofi,* 1965, pp. 115 f.; Johs. Andenæs, *Avhandlinger og foredrag,* 1962, pp. 72 and 158 f.; Per Augdahl in *T.f.R.* 1920, p. 359; Ernst Kallenberg in *Sv.J.T.* 1949, p. 2; and Tore Strömberg in *Theoria,* 1957, p. 57.

we could have *acted* otherwise, but also that we could have *willed* otherwise. If one assumes, with the indeterminists, that this is precluded, it follows that all talk of morality and of moral responsibility is empty.

Let us call this doctrine—that moral responsibility is inconsistent with determinism—incompatibilism. And let us call the conclusion, that moral responsibility is impossible, moral nihilism.[1] We can see that moral nihilism presupposes a combination of determinism and incompatibilism. It is precisely this combination that we find in the positivist school and its modern extensions.

The point I shall confine myself to making is that moral nihilism is a product of philosophical speculation whose unreasonableness is so glaring that it can never have had any serious adherents, even among those philosophers who have enthusiastically defended it in their books. It can be compared to the subjective idealist theory that the external world is mere illusion and in fact exists only in one's own experience (*esse est percipi*). There is a story of a professor of philosophy in the old days who liked to ask examination candidates whether there was anyone present besides the candidate himself and failed them if they answered in the affirmative. And just as I cannot believe that any philosopher has ever seriously doubted the reality of the world, so I find it hard to credit that Ferri, Kinberg, or any other "positivist", has ever seriously rejected morality and moral responsibility as meaningless talk. Have these men never felt moral indignation and anger, and in fact given vent to it? Have they never reacted with irritation and reproach when someone offended them? Have they never rebuked themselves for anything or felt the burden of responsibility? In short, have they never reacted like other men?

Of course they have. And there is an element of absurdity in their protestations when their very rejections of moral indignation assume exactly this character. Thus Hospers, after arguing that determinism precludes moral blame and that we good citizens who have not come into conflict with the law should remember that this is due not to our being morally superior to the criminal but to our being *lucky*, goes on to say: "There is one possible practical advantage in remembering this. It may prevent us (unless we are compulsive blamers) from indulging in righteous indignation and committing the sin of spiritual pride, thanking

[1] The expression "moral nihilism" is, of course, not taken in the sense in which it is often used in the Uppsala philosophy's doctrine of the a-theoretical nature of moral statements.

God that we are not as this publican here."[2] Which is to say that Hospers the amoralist brands a certain attitude as sinful and thanks God that he is not like those who thank God that they are not like the publican.

6. THE PRAGMATIC ARGUMENT THAT THE PREVENTIVE AIM OF PUNISHMENT MAKES RESPONSIBILITY IRRELEVANT IS A MISTAKE DUE TO CONCEPTUAL CONFUSION

Barbara Wootton, as set out above, is too sophisticated to think that determinism is proven and that the meaninglessness of such concepts as moral responsibility and criminal imputability can be established in this way. She says that we should not take sides in this philosophical dispute. The main point is rather that the concept of responsibility, whether meaningful or not, is in any case irrelevant for the criminologists' discussion. For if the aim of punishment is prevention and not retribution, there is no call to make responsibility a condition for punishment. "For this purpose it is unnecessary to ask whether an offender is, or is not, a free agent, or a responsible person in the sense that he could, if he wished, have done otherwise than he did."[3] That does not mean, however, that the offender's mental state is of no importance. Although responsibility should not be considered in arriving at a conviction, an assessment of the offender's mental state is relevant in the consequent sentencing. The author gives the following sketch of the future criminal process:

> The legal process for determining who has in fact committed certain actions would continue as at present; but once the facts had been established, the only question to be asked about delinquent persons would be: what is the most hopeful way of preventing such behaviour in future? In criminal procedure the age-old conflict between the claims of punishment and of reformation would thus be finally settled in favour of the latter.[4]

That is to say: when the purpose of punishment is prevention there is no call to make responsibility a condition for convic-

[2] In Hook, *op. cit.*, pp. 126 f. (Collier ed. p. 138).
[3] *Social Science and Social Pathology*, p. 247.
[4] *Ibid.*, p. 251.

tion. This, however, is an elliptical inference which transparently assumes a number of concealed premises. These can be rendered explicitly as follows:

(1) The aim of criminal legislation is prevention, not retribution.

(2) Criminal legislation should be formed with regard to its aim, and only to that.

(3) The system of criminal law should therefore be formed, and function, only with a view to prevention; not as an expression of moral disapproval.

(4) The requirement of mental responsibility has meaning only as a condition for moral disapproval.

(5) The requirement of mental responsibility should therefore be dropped as groundless.

The fundamental mistake in this argument is to be found straight away in premise (1). The opposition between "prevention" and "retribution" contained in it, as two conceivable aims of criminal legislation, is meaningless. As I have argued in detail elsewhere, this rests on a confusion of different questions and on a misunderstanding of the classical retributivist theories.[5] It is altogether unreasonable to suppose that retribution should be an aim, that is to say an intended and deliberately pursued effect, of criminal legislation. Nor have classical retributivists, like Kant and Binding, ever claimed any such thing. The problem they were concerned with was the ethical question of the state's moral right to subject the individual person to the pain of punishment, often the severest encroachment on his freedom, his bodily integrity, indeed his very life. It was not the criminal legislator's intended effects they asked about, but the moral basis for the imposition of punishment (also termed the *Rechtsgrund* of punishment). And their theory was that not social expediency but only the fact that an individual has committed an *offence* can *justify* his being punished. That he has committed an offence implies, first, that he is actually the perpetrator and, second, that he is responsible for the perpetration because he committed it under mental conditions making him guilty. The requirement of being guilty in a violation of the law is thus a restrictive moral consideration which limits and conditions the state's right to use penal suffering in order to pursue a social aim (prevention). It

[5] Cf. p. 132 note 9, *supra*.

precludes the punishment of non-perpetrators (e.g. hostages) and of non-guilty perpetrators, regardless of whether such punishment might promote the goal of prevention.

Thus right from the start the opposition of "prevention" and "retribution" as alternatives sets us off on the wrong track. And we should go even further astray by inferring from this that, if the aim is prevention (which no one will deny), then all talk of guilt, moral responsibility, blame and retribution must be excluded.

This is a fundamental mistake—and here we come to a main point in the discussion—because *disapproval* (or *reproach* when it is directed expressly at the accused) *is in itself a form of behavioural reaction with a conduct-influencing (preventive) function.*[6] In disapproval and reproach, or censure, a more or less cool disdain, an unfriendly or patently hostile attitude is directed towards the guilty party. The reaction can vary in strength over a wide range, from a gentle snub to seething anger and indignation, which may be succeeded by violent aggression (e.g. lynching). In all cases disapproval works as a conduct-influencing factor because it is experienced by the person affected as something disagreeable, unpleasant, and painful. Moreover, in many cases, especially when it is expressed by persons in authority, or collectively by the social environment, its effect will be such that the judgment is accepted by the recipient, taken up into his own moral consciousness, and in this way come to be a determining factor in his own future behaviour, not just from fear of unpleasantness, pain, etc., but also from respect for what is regarded as right and just.

In our present society punishment is experienced as an expression of disapproval on the part of the community, which brands the punished person in a way that a morally neutral cure does not. There can be no doubt that the moral stigma attached to punishment is of great importance for the preventive effect of the penal system, both as a deterrent and as a factor influencing moral attitudes. For many persons, certainly, the shame and infamy attached to punishment are a greater deterrent than the actual pain that it involves, or at least function as a very serious addition to it. Punishment, even a fine, is not experienced just as the price one has to pay for doing a crime in the way that one pays for a cinema ticket. The moral stigma of punishment must be assumed to be of particular importance for the ability of

[6] Cf. Alf Ross, *Skyld, Ansvar og Straf*, 1970, pp. 41 f., 160 f., 184 f.

criminal legislation to influence current moral attitudes. In Scandinavian penal theory it has been vigorously stressed that the general preventive effect of punishment depends primarily on its capacity to cement and possibly shape the morality that is current among the members of the society. By "morality" here one may be thinking both of valuations and attitudes of a directly moral nature concerning certain forms of behaviour, e.g. murder and theft (material legal consciousness of law), and of the attitude of respect for the law because it is the law of the land, and independently of any exact coincidence between its requirements and one's own direct moral valuations (formal legal consciousness of law). If this is so, as I believe it is, then it means that the moral aspect of the penal system, the moral disapproval which characterizes punishment, is, through its influence on moral feelings and attitudes, of decisive significance for the preventive function of the system.

It is this most useful influence that criminal theory, according to Barbara Wootton and like-minded criminologists, is to give up by letting a morally neutral "cure" replace punishment (as disapproval). Why? On what grounds? No rational, practical argument has been adduced in support of this, only the irrational and false inference that in so far as the purpose of the penal system is prevention, that is behaviour-guiding, there is no place in it for moral disapproval—that is precisely for the reaction which by its very essence and meaning is a behaviour-guiding factor!

In any case Barbara Wootton cannot deny that the imposition of punishment is at present intended to be, and is in fact experienced as, an expression of moral disapproval.[7] There is surely little ground for supposing that this situation will change in the foreseeable future. Moreover, I believe that I have justified the contention that the desirability of any such change is no consequence of the assumption that the purpose of penal legislation is prevention. The arguments that follow presuppose, therefore, that imposing legal punishment on a man is a way of morally censuring him.

Given this presupposition, Barbara Wootton's argument for the view that the criminological system has no place for the requirement of imputability falls flat. The positive justification for a criterion of mental responsibility which is decisive for the ques-

[7] This does not imply that the judge, in pronouncing sentence, need feel and/or express any such disapproval, although, so far as I understand, this is not at all unusual in Anglo-Saxon legal practice.

tion of whether criminal law's reaction to crime is to be in the form of (censuring) punishment or (neutral) cure and precautionary measures, can be provided from two different viewpoints.

First, if sentencing a man to punishment is to be popularly experienced as moral disapproval of him and is to have the kind of effect upon current moral attitudes that we have just discussed, then the law will have to take into consideration all those exculpating or mitigating circumstances which according to common moral understanding preclude moral responsibility, and therefore also disapproval. If the law did not do this, if it ordered the judge indiscriminately to sentence children and mental defectives along with normal adults, the criminal system would appear in the people's eyes as a manifestation of a brutal will to power, and not as an exponent of society's morally based needs and of its moral disapproval of disregard of these needs. The system would thus lose its grip upon popular morality and thereby an essential part of its preventive effect. At the same time, of course, the deterrent effect would presumably be strengthened to some extent because the opportunity which occurs in the existing order to evade punishment and other legal measures under the pretext of momentary irresponsibility (e.g. because of shock, somnambulistic and similar kinds of passing unconsciousness, narcotic intoxication, etc.) will be done away with. But the increment of preventive gain will be insignificant compared to the loss in terms of the power of punishment to appeal to, and cement, moral dispositions. The consequence of this view, then, is that it would be *unwise and self-defeating* to eliminate the criterion of mental responsibility and with it the distinction between punishment and curative or precautionary measures.

Secondly, the legislator himself and those of us who try to guide him by working out a well-grounded theory of criminological policy, are also people with moral views which impose certain demands upon our actions, and not least upon those which consist in determining, by way of legislation, under what conditions our fellow men (or we ourselves!) are to be sentenced to punishment, that is to a reaction that involves both pain and censure. We, too, accept the moral view (I assume) that there are mental conditions which exclude moral responsibility. From this point of view to eliminate the requirement of imputability would lead to *morally indefensible, unjust* convictions.

These different bases for retaining the criterion do not, of course, contradict each other. As motives for its retention they

can work in concert. What they signify is that a certain course of action is to be adjudged both rational and morally desirable.

If we consider it established in this way that *some* criterion of mental responsibility is called for, this is not to say that we have established *what* criterion is appropriate. For on this point what one might call the "general moral consciousness" is extremely inarticulate. The exclusion of moral responsibility is expressed in such common locutions as "He couldn't help it", "He didn't do it deliberately", which exclude reponsibility for accidents and possibly also negligence, and thus relate to the requirement of imputation which is not discussed in this context. The requirement of imputability is expressed in such locutions as "He didn't know what he was doing", "He didn'd do it of his own free will", "It wasn't him but his illness that did it", "He was subject to an irresistible impulse". The precise meaning to be given to these expressions is, however, far from clear. They seem to indicate mental circumstances which either exclude *knowledge* of the nature of the act perpetrated (e.g. in the case of children, mental defectives, and the deluded), or neutralize or diminish *the capacity to control or master impulses in the normal way* (as with drug addicts, and those who are subject to inner or outer compulsions).

This being the case, it is desirable that philosophers and criminologists should analyse these expressions in order to arrive at their meaning and express it in formulations acceptable for juridical practice. However, this analysis should be not only of a descriptive but also of a critically evaluative kind. We cannot accept our spontaneous or acquired moral attitudes as manifestations of eternal truths. We must believe that the morality which develops in a society and is experienced by its individual members as self-validating requirements is in reality (that is, without their being aware of it) directed by needs and interests. It is the moral critic's task, therefore, in his analysis and critical reflection, to test the positive, experienced morality in order to discover the purposes it was made to serve, and how it is to be evaluated in the light of consciously accepted norms. In brief, we must attempt to rationalize our experienced morality, and especially our experienced criterion of mental responsibility, or perhaps rather the approaches to it of which we are in possession.

But this is a task that lies outside the scope of this essay, which is concerned with the question whether the criterion of responsibility should be retained, not, in the event of an affirmative answer, with its more precise formulation.

7. THE ARGUMENT FOR THE IMPOSSIBILITY OF FORMULATING A CRITERION RESTS ON EXAGGERATED DEMANDS ON THE KIND OF KNOWLEDGE THAT A MORAL AND LEGAL CODE MUST BE FOUNDED ON

Under (3) above I mentioned Wootton's argument that the requirement of imputability (mental responsibility) must be given up simply because, as soon as one tries to widen the narrow, purely intellectualistic criterion of the McNaghten rules, it is impossible to set up a meaningful and practicable criterion. As I have already remarked, I find the author's observations in support of this argument, especially those on the concepts of "mental health" and "mental illness" and their relevance for criminal law, interesting and thought-provoking. I should like to know, for instance, just what the Danish Medico-Legal Council means when it pronounces authoritatively that someone has sadistic tendencies which are not, however, to be described as morbid. What is meant by characterizing a tendency as morbid, and how does one determine whether or not sickness exists in a given case? Can one, by observation and on the basis of expert knowledge, establish objectively whether or not a person is in any way mentally sick, in the same way that one can determine whether or not he suffers from tuberculosis, or any other recognizable physical ailment? If by calling a given person's tendency sick the Council means simply that it is stronger in him than in most people, then I am afraid that my own inclination for philosophy must also be labelled a sickness. But what relevance, what moral or legal relevance is there in the statistical fact that one person differs in a certain respect from most others?

The question we shall concern ourselves with here, however, is whether Barbara Wootton's observations, whatever their inherent interest, are capable of sustaining the conclusion that the responsibility requirement should be eliminated. The answer must be in the negative.

The very idea of the impossibility argument is obviously unacceptable. How can one recommend the giving up of a distinction on the grounds that it is impossible to carry it out? Would it not be nonsense to dissuade a man from jumping over Westminster Hall on the grounds that it is impossible to do so? It is a fact that in current practice we do distinguish between re-

sponsible and irresponsible persons; and since this distinction is not applied by casting lots or by any other resort to chance, it must, in a certain sense, be possible.

It seems, then, that Barbara Wootton is thinking of impossibility in some narrow sense, namely that of formulating the criterion of mental responsibility in such a way that experts are able, on an objective, scientific basis, and without the intrusion of more or less subjective evaluations, to answer the question whether a particular person in a given situation was responsible or not. In her opinion the questions which are in practice posed to the authorities are such as they are not in fact able to answer with scientific authority.

Her argument for this is obviously constructed with such an enlargement of the McNaghten rules in view as was proposed by the British Medical Association. According to these proposals, lack of mental responsibility—beyond those cases in which the agent did not know what he was doing—will be recognized when the following two conditions are satisfied: (1) the accused was labouring under a disorder of emotion such that he did not possess sufficient power to prevent himself from committing the act; and (2) this disturbance was the result of a disease of mind. Her arguments fall, correspondingly, into two parts: (1) it is impossible to establish objectively whether an impulse was irresistible or was merely, as shown by the facts, not resisted; and (2) it is impossible to establish objectively whether a person suffers from a disease of the mind or not.

Let us take this latter argument first, since it is the easier to deal with. It relates only to a criterion of responsibility which, in the way discussed, incorporates the requirement of mental sickness, and does not apply to purely psychological criteria. If one ignores the aetiology of the proposed criterion, that is, its background in the McNaghten rules, it is hard to see why condition (2) is to be linked to condition (1). If a person acted from an irresistible impulse, is it not indifferent whether or not this state of affairs was the result of mental sickness? Indeed, is it not rather that we regard the person as mentally sick *because* he acted under an irresistible impulse? That is to say, that the irresistibility of the impulse is a criterion of sickness, not sickness a cause of the irresistibility?

There remains the first argument, that it is impossible to establish whether an impulse was irresistible or not. In support of this the author adduces, as in the passage quoted above (p. 121),

the general epistemological observation that such knowledge transcends the limits of empirical insight, since it is not possible to get inside another man's skin. Clearly this proves too much. If the observation were correct the consequence would be that no moral or legal relevance whatever could be attached to any psychological state. Moreover, the author herself has no compunction, in another context, in accepting the possibility of knowing about other people's mental states. Indeed she accepts the classical McNaghten rules which themselves presuppose knowledge of the accused person's mental state. And she recognizes that this state, especially his "capacity for self-control", must be taken into account when, after conviction, a choice of the appropriate treatment has to be made. She says that the psychiatric adviser "no doubt has his own opinion as to the man's responsibility or capacity for self-control", but adds that "these are and must remain matters of opinion 'incapable', in Lord Parker's words, 'of scientific proof' ".[8] Thus the capacity for self-control is something on which the psychiatrist nevertheless has an opinion. And this opinion can hardly be pure guesswork without any empirical basis. There is such a basis, in my view. All we have to do, I believe, is to formulate the problem in a somewhat different way. It is certainly not possible to establish that an impulse is absolutely irresistible, and therefore impervious to any motive forces that might be mobilized against it. A person who, after an heroic fight, succumbs to a craving for nicotine and alcohol may say that this craving was irresistible, and we others may perhaps, on the basis of our general experience of similar cases, agree with him. But this does not exclude the possibility that the same person in the same situation might have overcome his craving if he had been offered a million pounds to postpone gratification for a certain time; or if he had been threatened with instant, inescapable and violent pain if he gave way to his craving. The psychiatrists tell us that there are few mentally sick people who will commit an offence while a policeman is watching them.[9]

[8] *Crime and the Criminal Law*, p. 77.

[9] "There are few cases of mental disease, except cases of advanced dementia, in which the patient is so completely dominated by his symptoms that he is uninfluenced in his behaviour by motives such as self esteem, fear of consequences, social sentiments, and a sense of duty, which regulate the behaviour of normal persons ... An insane person who might otherwise commit an offence, might certainly refrain from doing so because a policeman is looking on ..." Angus MacNiven (Physician Superintendent, Glasgow Royal Mental Hospital) in L. Radzinowicz and J. W C. Turner (eds.) *Mental Abnormality and Crime*, 1944, pp. 52 f.

The irresistibility of an impulse, which is supposed to justify irresponsibility, must therefore be interpreted in some way or other as conditional, or relative. Perhaps we could put it in the following way: that the impulse is of such a strength that, according to general experience, it normally cannot be resisted, either by moral appeals (admonitions, self-admonitions, reproaches), or by threats of sanctions which are not instant, inescapable and violent, or by fear of the act's harmful effect in regard to the agent's own interests. And there is no doubt that we have empirical knowledge of this, of varying degrees of certainty. This knowledge will in all cases depend on observations as to whether the counter-motivations in question have, in certain typical situations, normally proved to be ineffectual. One knows with great certainty, for example, that the craving for habit-creating drugs in a person who has been addicted to them for a considerable time is in this sense irresistible. In other cases the empirical basis affords less certainty, and depends more on the trained expert's practical judgment than on objective criteria and publicly accessible data. So far Barbara Wootton is correct: in many instances irresponsibility cannot be established with scientific objectivity, in the way that one can point to the occurrence of cancer. But this should cause no anxiety in the moral philosopher or the jurist. For each must know that this is far from being a peculiarity of the concept of responsibility, and indeed is, on the contrary, the normal condition for the moral and juridical judgment and treatment of men. We have to make distinctions—even if the boundary often cannot be defined precisely but must be drawn according to estimates and sometimes is blotted out altogether in borderline cases where all landmarks are lost.

Failure to grasp the relativity of the criterion of irresistibility has led people to assume that an impulse is irresistible simply because it forces itself upon one in circumstances where no countervailing forces are at work. This is true, for example, in cases of posthypnotic suggestion.[1] Here the subject's psyche is subjected to an impulse which appears as a compulsion because it is not rationally grounded in his needs and interests. However, in the typical experimental set-up there are no counter-motivations for *not* performing the action, and so no basis for calling the impulse to perform it irresistible. Something similar applies in kleptomania. A well-to-do man's yearning to steal appears to us as "ab-

[1] E.g. Paul Edwards in Hook, *op. cit.*, p. 106 (Collier ed., p. 118).

normal" or "sick". But there is no real basis for saying that it is more irresistible than the poor man's "normal" desire to improve his lot.[2]

8. THE THEORY OF *L'UOMO DELINQUENTE* (THE BORN CRIMINAL) AND UNDERESTIMATION OF THE GENERAL PREVENTIVE EFFECT OF PUNISHMENT ARE CONTRIBUTORY ARGUMENTS IN SUPPORT OF THE CAMPAIGN AGAINST PUNISHMENT

In the foregoing I have dealt with the three pillars that support the criminological programme which I am criticizing; namely the determinist argument, the misconception that prevention and disapproval (retribution) are alternative aims of punishment, and the impossibility argument. And I have tried to show that none of them is capable of supporting the edifice. But now, in addition, we must discuss two secondary supports: the theory of the born criminal, and the underestimation, connected with this, of the general preventive effect of the penal system.

The theory of the born criminal was developed by Lombroso and, as we indicated in (2), taken over by Ferri. One of the fundamental tenets of the theory was precisely that the criminal does not possess the same intellectual and emotional equipment as other men but, owing to organic and mental abnormalities, is a special variety of human kind. In a less pronounced form this view is put forward by several modern adherents of the "positivist" school of criminology—though not by Barbara Wootton. It is clear that the more one approaches this view the greater is the inducement to suppose that the criminal reaction system should be shaped with a view to recovery or neutralization without moral censure. At the same time the view encourages a tendency to underestimate the general preventive effect of the penal system. But the more criminal policy is centred around the aim of fighting recidivism, and has a preference for curative methods, the less reason there is to attach any significance to the fact that to impose a sentence upon an offender is to express society's disap-

[2] *Social Science and Social Pathology*, pp. 233 ff.

proval of his action. In this way a line can be drawn from Lombroso's theory of the born criminal to the criminological school which wants to abolish mental responsibility and punishment.

It is beyond my competence to judge the merits of the theory of the criminal as being a specific pathological type. But I must be allowed to point out that this view is often opposed by modern criminologists. In evidence I can produce Barbara Wootton herself. She attacks the stereotypes of "the criminal" or "the delinquent" with their implication that all persons found guilty of breaches of the criminal law must, if we only look long enough and hard enough, reveal inherited or congenital characteristics which distinguish them from the rest of the population.[3] She claims that what looks like documentary support for the view is due to sources of error in statistical methods. "The further it [criminological research] is carried and the greater the refinement of the methods of investigation used, the more closely does any group of miscellaneous criminals appear to resemble the population at large."[4]

While Barbara Wootton, then, does not share the view that there is a specific criminal character, she does form a highly sceptical view of the general preventive effect of the penal system. But her observations in support of this lose their force through her obvious unfamiliarity with the theory of punishment's morality-building effect. She speaks only of the possible deterrent effect on potential offenders, arguing that such an effect presupposes that the offender, before his offence, makes calculations as to the risk of his being punished, something which can be supposed to happen only in the rarest instances. She thinks that we "are almost totally ignorant of the deterrent effect on potential offenders", and that for this reason it will be reasonable to give individual preventive aims priority over general preventive aims in cases where the two conflict with one another.[5]

Her observations about the offender's calculating his chances do not affect the morality-building effect of punishment. And it is incorrect to say that we do not in fact know anything about the general preventive effect. Let me only refer to the various works by Johs. Andenaes in which the author points convincingly

[3] *Crime and the Criminal Law*, pp. 11 and 17.

[4] *Ibid.*, pp. 17 f., and the full documentation in *Social Science and Social Pathology*, pp. 301 f.

[5] *Crime and the Criminal Law*, p. 101; cf. *Social Science and Social Pathology*, pp. 252 and 336.

to observations and investigations which allow us to draw conclusions with reasonable certainty as to the existence of a general preventive effect.[6] One might even go so far as to say that it is the overwhelming opinion among Scandinavian jurists and criminologists today that the general preventive effect of punishment, especially in its habit- and morality-forming function, is a factor of importance which cannot be ignored in formulating policies for the treatment of crime.

9. SUMMARY

I think that, in this essay, I have established that the basic ideas in the "campaign against punishment", which had its point of departure in the positivist school of criminology and continues to have many adherents, especially among scientifically-orientated experts in various fields, are untenable. This is so (1) because of the false assumption that moral disapproval, and punishment as an expression of it, are incompatible with scientific thinking on a deterministic basis, a mistake that is due to undigested philosophy; (2) because of the false assumption that moral disapproval, and punishment as an expression of it, are irrelevant once it is assumed that the aim of the penal system is prevention, a mistake arising from the conceptually confused view that "prevention" and "retribution" express alternative aims of punishment; and (3) of the false assumption that it is impossible to formulate and apply a criterion of mental responsibility, an error stemming from exaggerated demands on the knowledge needed to make moral and legal judgments.

But this, of course, does not establish that the criminological programme expressed by the call to abolish punishment is itself misguided. A programme can be good even if the grounds one has given for it are bad. But if there is any cogency in the arguments I have presented, we must be justified in calling for a renewed debate on the principles of criminal policy. In this debate the jurists should not allow themselves to be impressed by arrogant "scientific" claims to the effect that moral indignation, moral and mental responsibility, are prejudices which have no place in the

[6] "Straff og almenprevensjon", *T.f.R.* 1966, pp. 1 f.; "Almenprevensjon, illusjon eller realitet?" in *Afhandlinger og foredrag*, 1962, pp. 109 f.

modern world. And until chemists have invented effective anti-crime pills they should insist that it is moral forces that cement society, and that it is therefore those very forces that criminal legislation must try to mobilize in the fight against crime. But it is precisely these forces that are neglected or neutralized in proportion to the degree to which crime is equated with sickness. One meets an acquaintance and learns that he is to go into hospital. There is something the matter with his kidneys, perhaps also complications connected with his metabolism. One comforts him; after all, the doctors are so clever these days. And in the same way, in Kinberg's and Barbara Wootton's brave new world, again our acquaintance is to "go into hospital". There is a spot of bother about some embezzlement, and perhaps a few complications involving forgery, and again one reassures him: they *are* so very clever.

The jurists should also hold fast to a moral-legal thought which, as such, of course, lies outside the competence of the medical scientist. It is the thought which no one has expressed more strongly than the Danish legal scholar Carl Goos: that the requirement of guilt, and of moral and mental responsibility, is the citizen's Magna Carta in the face of the power of the state. For this requirement not only justifies but also limits the state's right to impose punishment. If it were to be dispensed with, the individual would perpetually be exposed to society's coercive solicitude in prescribing courses of treatment lasting for indefinite periods of time. Goos believed—like so many others—that guilt and responsibility presuppose a free will in the indeterministic sense, and he also believed, therefore, that freedom of the will is a postulate that one must cling to with "the power of the instinct for self-preservation".

> To keep hold of this postulate is a condition of life for society when it does not want to give up all the conquests it has made for a legally safeguarded life in society for its members, and which it has cost many struggles to win. If it is abandoned we take a step on the slippery slope back to barbarism, and that will inevitably involve sooner or later all its consequences.

We can dispose of the necessity of the belief in free will. There will still be the need, in the name of legal security, for adults

[7] C. Goos, *Den almindelige retslaere,* vol. 2, 1892, p. 618; cf. pp. 519 f. and 610 f.

and responsible persons to be punished—and not abandoned to unbridled therapy.

The ideology behind the label "campaign against punishment" has put its stamp clearly on criminological discussion, especially in Sweden. Its influence perhaps culminated in the report on a "skyddslag" ("protection law")—thus not a penal law—which was made in 1956 by the "Strafflagberedning" (Royal Commission on Penal Law) under Karl Schlyter's chairmanship. With the law reform realized by the enactment of the new Penal Code of 1962, however, this terminology was not followed. One can discern, so far as I can understand from various quarters, a tendency to react against the ideology of therapy and its practical implication of indefinite freedom-depriving sentences. I am by no means alone in my scepticism.