

Insanity and the “Gap” in the Law: Swedish Criminal Law Rides Again

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“Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means for the purposes of someone else ... He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens.”¹

“It is agreed by all jurists, and is established by the law of this and every country, that it is the REASON OF MAN which make him accountable for his actions; and that the deprivation of reason acquits him of crime. This principle is indisputable.”²

“One fine summer day in 1913, Harry Thaw walked out the front door of the Matteawan State Hospital for the Criminally Insane, stepped into a waiting car, and rode off to Canada. He was captured there and extradited back to New York, where he stood trial for escape. The prosecution was unwise. To convict Thaw, the prosecutor had to convince the jury that he was sane at the time of the escape, but if the jury found him sane, he had a legal right to escape, because a sane man cannot lawfully be confined in a lunatic asylum. By the end of the proceedings, Thaw had obtained a complete and unconditional release.”³

1 Introduction

In my contribution I will touch upon – among other things – some recent changes regarding mentally disordered offenders in Swedish criminal law. Since the enactment of the Criminal Code of 1962 (in force 1965) Sweden has had what might be seen as a peculiar – and indeed rare – regulation on the matters: also the mentally most disordered, earlier deemed as lacking legal *imputability* (legal “liability-capacity”),⁴ may be tried, convicted and sentenced for a crime. The 1962 changes thus abandoned the earlier existing division between (1) those seen as responsible for their acts, having to “answer” for them, in the end perhaps also with criminal liability, and (2) those seen as *not* responsible, not having to “answer” at all.⁵ The recent changes – in 2008 – in some senses moved

1 Immanuel Kant.

2 *Hadfield* case (1800), as quoted in Alan Norrie, *Crime, Reason, and History*, Butterworths, 2nd ed 2001, p 176.

3 Jed Rubenfeld, *The Interpretation of Murder*, Headline Review, paperback, 2007, p 519-520.

4 For the term “imputability”, see H L A Hart, *Punishment and Responsibility*, 2nd impr 1970 (1998), p 218: “Continental codes usually make a firm distinction between ... two main types of psychological conditions: questions concerning general capacity are described as matters of responsibility or ‘imputability’, whereas questions concerning the presence or absence of knowledge or intention on particular occasions are not described as matters of ‘imputability’, but are referred to the topic of ‘fault’ (schuld, faute, dolo, & c.).”

5 On “answerability” and “responsibility” as used here, see R A Duff, *Answering for Crime*, Hart Publishing, 2007. Being “responsible” means that one needs to “answer” for what one has brought about: one may be tried for it, the outcome of which might – or might not – be

further down the same road: the aim of the changes was to fill a purported “gap” which in my opinion should be seen as no “gap” at all. It should instead be looked upon as some remnants of respect for the division mentioned. The changes removed the “gap” and thus some more of these remnants. I have taken the 2008 changes as an excuse (I leave open whether it might also constitute a justification) for reflecting on some general issues regarding criminal law and insanity, with special emphasis on (1) imputability and (2) (what is often called) the “neo-classical” position in criminal law.

Things will be taken step-wise. Section 2 sketches a few schools of thought in criminal law. Section 3 deals with some aspects of the relation between criminal law and mental disorder. Section 4 briefly outlines the later development of the Swedish regulation on the matters. In section 5 the recent changes are discussed. Section 6 contains closing remarks.

2 Criminal Law

2.1 *Introductory Remarks*

Before turning to criminal law’s relation to the mentally disordered offender we shall need to contemplate for a while upon criminal law itself: some of its particularities – in comparison to other branches of law (especially social law is here of relevance) – cause potential problems for the dealing with mental disorder. But also the contents and degree of this “particularity” has to be made part of the discussion: we need to ask as *how* particular we should picture criminal law, and *on what grounds*, and *with what consequences*. These are in the end policy questions, without given answers. We will return to them continuously.

According to the “classical” and “neo-classical” positions,⁶ today dominant among those seriously engaged in the “oughts” of criminal law, an important point of departure is that criminal law *is* particular. It should be viewed as an evil, if a necessary one. Thus, it needs to be strictly limited and tightly held.⁷ It is an evil basically because it restricts individual freedom, and this in basically two ways,

- (a) through the sanction imposed on the wrongdoer, and

that one is also “liable”. The concept of “responsibility” has no fixed meaning: One finds broader as well as narrower versions than the one here used. *See e.g. Hart, Punishment and Responsibility*, chapter 9 and Tony Honoré, *Responsibility and Fault*, Hart Publishing 2002, esp. chapter 6.

6 The labels “classicism” and “neo-classicism” are far from perfect and disliked by some, but since they are widely used – and since a short-hand is useful – also I will use them. For an interesting discussion, regarding also terminological issues, *see Sten Heckscher et al, Straff och rättfärdighet –ny nordisk debatt*, Norstedts, 1980.

7 The “evilness” is not the only reason for wanting to keep criminal law restricted. Another reason concerns the hoped-for efficiency of the system. If excessively used, it will lose its force: the powder must be kept dry.

- (b) through the criminalization itself, with its threat of punishment tied to a certain behavior.⁸

The characterization of criminal law as an evil presupposes that one defines infringements on individual liberty as something *per se* bad (also when under certain conditions such infringements might be outweighed by heavier interests on the other side of the scales). The liberty referred to is “negative”;⁹ (here) more or less equalling freedom from state intervention. If we instead hold one of various opposing views, according to which restrictions on negative liberty are *not* in themselves bad (we might deem “positive” or “real” liberty the relevant, or deem “liberty” no relevant value at all),¹⁰ then we have no further problems of moral principle with criminal law and the mentally disordered offender: we could stop here. But *if* we mean – together with the two “classical” positions and many others – that criminal law’s restriction of individual liberty is an evil, *then* we shall have to continue: we need to be able, somehow, to *justify* such restrictions. In the following I shall concentrate on the imposition of sanctions, a practice which might be sought justified with either of two kinds of argument,

- (a) *forward-looking*, referring to the (positive) consequences which will be brought about, and
 (b) *backward-looking*, referring to act and actor having been blameworthy, having *deserved*.¹¹

Now if one means that the imposition of a sanction may be justified with reference exclusively to forward-looking considerations (the consequences which will be brought about) then – again – we have no problems of moral principle with the mentally disordered offender. But *if* one would be of the opinion that harsh sanctions cannot be justified with reference solely to future consequences, but instead needs justification also, or fully and exclusively, in terms of (backward-looking) blameworthiness (compare *Immanuel Kant* above at the beginning), *then* there are problems to be dealt with. This is indeed the view of the “classical” positions,¹² firmly rooted in morally-laden notions of blameworthiness, desert, censure and retribution, emphasizing the demand for

8 See e.g. H L A Hart, *Law, Liberty, and Morality*, Oxford University Press 1963, p 21.

9 For a well-known discussion, see Isaiah Berlin, *Two Concepts of Liberty*, in *Four Essays on Liberty*, Oxford University Press 1969 p 118-172.

10 Compare e.g. B F Skinner, *Beyond Freedom and Dignity*.

11 On forward- and backwardlooking considerations, see e.g. Antony Duff & David Garland, *Introduction: Thinking About Punishment*. In (ed Duff & Garland) *A Reader on Punishment*, Oxford University Press 1994, chapter 1.

12 For an overview of (what one perhaps might call) “neo-classical” thought a suitable place to start might be the work of Andrew von Hirsch. See e.g. his *Past and Future Crimes, Deservedness and Dangerousness in the Sentencing of Criminals*, Manchester University Press, 1985, and *Censure and Sanctions*, Oxford University Press 1993. An interesting critique of neo-classicism in the Scandinavian countries is to be found in Nils Christie, *Limits to Pain*, Universitetsforlaget, 2nd ed 1992.

proportionality (of a retrospective kind: fitting the punishment to the crime committed).

On the topic of the aims and justifications of punishment there are ideological alternatives to the “classicals”. When in the following I touch upon some such views more or less in the shape of a historic “development”, a few clarifications are called for. Firstly: Even if (in some sense) the different schools entered the stage “serially”, the follower did not wipe out the predecessor. Today these schools, theories or positions regarding the “rationale” of punishment (to use a vague, all-encompassing concept from English-speaking debate) exist side by side, also in concrete criminal law systems. We must note that time has passed, and that the doctrines of the general part of criminal law have continuously become more elaborated. Today few eyebrows are raised when the view is stated that *one* “rationale” should be deemed the most important at one “stage”, whereas *another* is the most important at another: you don’t have to – like quite often before – pay reverence to *one* “rationale”, denying the others’ importance.¹³ Secondly; the carving-out of the doctrines of liability (and to some extent also responsibility, “answerability”) has taken place continuously, through all phases mentioned below. Finally, connected; the doctrines regarding what is demanded for *liability* have been left largely untouched by the moves – described below – from “classicism” to individual prevention to “neo-classicism”. Regarding liability a backward-looking component was always present.

2.2 “Classicism”

The “classical” position in criminal law was a product of the enlightenment, and as this an integrated part of a more general reaction against a situation in which might more or less equalled right. The sovereign had the opportunity to rule in an utterly flexible manner. If limits were set they were due to the ruler’s “self-binding”. Social contract theorists like *Locke* and *Rousseau* aimed instead to produce external limits to the power of the sovereign.

The over-arching aim of the “classical” school was similar: better protection for the individual against the ruler. It was argued that various limits should be set and respected: right as right also in the face of might. Recommendations regarded the application of the law as well as (to a lesser extent) its contents; formal matters as well as (to a lesser extent) material; *what* might be punished as well as *how*. The backward-looking component was strengthened: blameworthiness and (retrospective) proportionality were put forward as necessary components of an acceptable system of punishment. This had consequences for all parts of criminal law: responsibility (“answerability”), where an imputability demand took firmer shape; liability, where an increasing

13 As important for this development should be mentioned e.g. H L A Hart, *Prolegomenon to the Principles of Punishment* (in *Punishment and Responsibility*, chapter 1), Claus Roxin, *Sinn und Grenzen staatlicher Strafe*, Juristische Schulung 1966 p 377-387, and Nils Jareborg, *Straffets syften och berättigande*, in *Straffrättsideologiska fragment*, Iustus, 1992, p 135-151.

number of conditions had to be met for conviction to be proper;¹⁴ and sentencing, which took firmer shape e.g. through the narrowing of written law and court practice to each other. The call for retrospective proportionality was a call also for – in the relation between offenders – equal punishment for equal crime.

For the “classicals”, the aim of punishment was mainly defined as general prevention through deterrence (today often referred to as “negative general prevention”). Little (if growing) attention was paid to individual preventive ideas. Whatever forward-looking aims existed were however restrained by (what we today would see as) backward-looking demands for guilt, desert and proportionality.¹⁵ Society’s protection from crime was not overly emphasized as an aim in the rhetorics. This was hardly necessary: it was self-evident. But, again, goal-fulfillment of such kind was restrained by the backward-looking considerations. They were in turn ultimately motivated with reference to the idea of the human being as (normally) possessing a *free will* (to which idea we shall return in section 3).

2.3 *Individual Prevention*

In a following phase society’s protection against crime, and individual prevention as the method for reaching it, in Sweden was emphasized to such an extent that other “rationales” of punishment largely disappeared out of sight (as mentioned above, though, this regarded only *sentencing*: the liability rules were untouched). But more factors than the individual preventive “rationale” itself contributed to the Swedish scenario. In the present section I shall deal only with more general ideas of individual prevention. In section 4 we shall look more specifically at the reasons for the comparatively strong reception in Sweden.

This said, the theories of individual prevention had a large impact in many countries. One general reason was that the system built on plain prison sentence as the central sanction did not seem to do much good (except through removing the person from society for a certain time): the criminal seemed to leave prison more criminal-minded than when entering it. Another reason for the growing interest in individual preventive ideas was a stronger position for various branches of science. This position was enabled by – among other things, of course – the weakened position of the christian church. If we did not need anymore to look upon the human being as the crown of creation, equipped by God with free will, completely separated from the animals and the plants, then the human being instead could be looked upon – and might also be *treated*, if we so wish – as more or less an object among other objects, as a being “caused” by environmental or genetical factors outside of her reach. And if she has been “caused” when we look in the rear-view mirror, then she can also be “caused” – that is: changed – for the future and thus made better. If this line of thought is applied to sentencing in criminal law – which it was – we might come to believe

14 See here e.g. Nicola Lacey, *In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory*. 64 *Modern Law Review* (2001) p 350-371.

15 Also such backward-looking aspirations might of course, should one want to, be seen as consequentialist: this would be so if an aim of the punishment is described (which was quite common) as restoring some kind of metaphysical balance, disturbed by the crime.

that it lies in our power to change the human being in such a way that she will not anymore commit crime.

As a practical outcome of such ideological changes, to the traditional penalties of prison and fine were added an increasing number of alternative sanctions. The core idea of the individual preventive "rationale" is that we should choose the sanction which is most likely to keep the individual criminal from further criminality. One consequence is that the idea of general prevention, at least partly, needs to be set aside.

Furthermore: With the idea of the human being as "caused" by, and "causable" through, factors outside of her reach followed a strong *deterministic* view. The idea of a freedom of the will then was easily discarded. As a natural consequence also retributive, backward-looking demands for proportionality, desert, etc, setting restrictions to goal-fulfillment, were easy to discard as irrational.

The core of the idea of individual prevention is fitting the sanction to the criminal (prospectively), not to the crime (retrospectively). We do not need to fit it to the crime, because there is no such thing as moral and criminal desert. And among competing preventive aims we choose – would there be a clash – individual prevention over general prevention. We do this because we deem individual prevention a better (more effective) tool than general prevention for preventing future crime.

2.4 "Neo-classicism"

Where individual prevention was strong followed in turn what has been labelled a "neo-classical" reaction, according to which the room for individual prevention should be (quite much) restricted, general preventive and retributive backward-looking ideas reinstated, together with the morally-laden language of the "classicals": again entered proportionality between sanction and crime (the "crime" of course consisting of harm as well as culpability), again entered responsibility, guilt, blame and censure. And again entered their *counterparts* (eradicated or severely weakened by the individual preventive ideas): non-guilt, non-responsibility, and so on. Again entered a (recommended) division between on the one hand the "answerable", on the other hand the "non-answerable". Again – at least *prima facie*, but we shall need to discuss it at more length further below – entered the idea of the human being as morally responsible, and as a being which is capable of deserving.

Thus the label "neo-classicism". And the similarities are indeed some, but we shall need to mention also a few of the *differences* between the original "classicism" and the "neo" one (at least, it should be added, as the latter has taken shape in Sweden):

- (1) Even though general prevention has been reinstated, its *operative area* has been narrowed compared to earlier: today general preventive ideas almost exclusively regard criminalization matters, whereas earlier they were of importance also to sentencing.
- (2) Also the views regarding the *modus operandi* of general prevention seem to have been slightly altered: today so-called "positive" general prevention,

relying on the idea of moral education, is put forward together with (and sometimes stronger than) “negative” general prevention. An increasingly influential view, which seems to form part of – or at least be quite closely connected to – the idea of positive general prevention is that (a) if the criminal law is to work well (in terms of general prevention) it must have people’s respect in the sense that people deem it overall tolerable and reasonable, and (b) this is best accomplished *when* (to name a few central parts) the sanction fits the crime (retrospectively), *when* such proportionality is based on harm and culpability (each necessary but not sufficient) and *when* there is also a demand for imputability.

(3) From the viewpoint of the individual’s protection against the state, the stronger position of backward-looking demands for blameworthiness hence seems to be brought about using two kinds of argument:

- i “traditional” backward-looking arguments, *restricting* whatever forward-looking aims there might be: it is not justified to punish someone who has not deserved it, or to punish more severely than was deserved.
- ii forward-looking arguments: *if* positive general prevention as described above (including the “respect” part) is the aim, *then* demands for backward-looking blameworthiness must be respected not only because they set (consequence-) independent limits to the quest for goal-fulfillment, but also because they constitute an important tool for reaching such goals. So interpreted this part of “neo-classical” theory dissolves some of the tension between on the one hand aims, on the other hand restricting considerations: respecting the (restricting) demand for blameworthiness generates forward-looking benefits.

(4) Probably as a (partly too strong) reaction to the dominance of individual prevention, the “neo” more strongly than the “original” emphasizes criminal law’s *particularity*. Despite criminal law belonging to “public law”, thus sharing at least some important characteristics with e.g. social law, the aim tends to be restricted to keeping criminal law neat and tidy, no matter what gets left outside of it in the process.

(2)-(4) elicit especially one remark, which is to be more fully developed throughout the rest of the text. The “neo” position emphasizes the demand for personal blameworthiness as an important – restricting – factor. In liability issues, this personal “blameworthiness” is arguably based on a quite shallow view of the “individual”: far from the “whole” person, and far from the “whole” situation, is taken into account. On whether (all things considered) this is good or bad we might differ in opinion without endangering the whole project of criminal law: a little bit more, or a little bit less, taken into consideration does not change or threaten our basic design. But there is another shallowness in the “neo” conception which we do need to discuss. In the time passed since the “classical” era we have been given – by the “new” science emerging as the power of the church decreased – reasons to believe that the human being does

not possess the freedom required for criminal law blame to be proper, if by "proper" is understood "morally deserved" in some reasonably profound sense: freedom of will, presumed as a starting-point by the "classicals", can hardly be presumed today.

And if so, then we shall have to find another justification for the practice of blaming. In doing this, we might be forced to change our views regarding what the "blaming" (and censuring) by the criminal law is in the end about. Perhaps the moral blaming is more correctly pictured as an exclusively *forward-looking* social practice, one among other kinds of goal-oriented conditioning? Then the "worthy" in "blameworthiness" is, ultimately, not located in the past but in the positive future consequences which the (proportional, blaming) punishment might bring about, and are the above twin reasons for caring about backward-looking considerations in reality a single and forward-looking one. We shall return to the topic later.

3 Criminal Law and Mental Disorder

3.1 A "Negative" Introduction

Many issues are of importance when relating criminal law to mental disorder. My focus here, though, will mostly be on imputability issues. Two groups, children and the insane, have "always" and in "all" legal systems been discussed in such light, resulting in various sorts of special (preferential) treatment, the design varying with time and place. We know that criminal law is often referred to as the harshest, most primitive power tool of the state (this is part of its "particularity"). To further spice things up, criminal law is at the same time arguably the part of law which rests the heaviest on dubious assumptions about human nature. The "classical" idea of blameworthiness and just deserts presuppose a human being capable of *deserving*, be it praise (here of minor interest) or be it blame. There must be some kind of morally sufficient "answerability", "control", "freedom" or whatever one might call it.

Do we have such freedom? Probably not. But perhaps this does not matter all that much: at the heart of our practices of blaming and praising, of treating our fellow human beings as are they "answerable" beings, lies a profound conviction according to which such sufficient freedom *is* in principle present. It is unlikely that any "scientific findings" could alter this conviction: the probable outcome, were there ever to be a truly sharp conflict, would rather be altered definitions of what is "scientific proof" and so on. A further part of the conviction is that certain factors, personal or situational, can make us less blameable or not blameable at all.

It is difficult, though, to bestow upon this conviction of ours a "positive" body. We shall soon touch upon the two main "languages" which historically have been used for dealing with the puzzles of freedom and blameability: (1) free will and determinism and (2) psychological normality and abnormality. But let us first lower expectations to a reasonable level. *J L Austin* has approached the concept of freedom in a liberating way by looking at it as exclusively "negative":

“While it has been the tradition to present [freedom] as the ‘positive’ term requiring elucidation, there is little doubt that to say we acted ‘freely’ (in the philosopher’s use, which is only faintly related to the everyday use) is to say only that we acted *not* un-freely, in one or another of the many heterogeneous ways of so acting (under duress, or what not). Like ‘real’, ‘free’ is only used to rule out the suggestion of some or all of its recognized antitheses. As ‘truth’ is not a name for a characteristic of assertions, so ‘freedom’ is not a name for a characteristic of actions, but the name of a dimension in which actions are assessed. In examining all the ways in which each action may not be ‘free’, i.e. the cases in which it will not do to say simply ‘X did A’, we may hope to dispose of the problem of Freedom.”¹⁶

Accepting Austin’s proposal relieves and distracts at the same time. It relieves, because we might decide to stop trying in vain to find that “grand” essence of human freedom, but it distracts, because we must still try to somehow operationalize our inner conviction, in order to be able to sift the fully blameable, the non-blameable, and the only partly blameable from each other. A substantial “positive” definition would aid on this venture.

In 3.2 are mentioned – as a background– some different functions (or aims) which the defining-out of individuals from the system in terms of insanity might have. Then, in 3.3, we turn to the two “languages” mentioned. There we shall also discuss what I have chosen to label a “third way”. This is where psychiatry and the “neo-classical” position today tend to meet, in a practice and a theory avoiding the metaphysical depths.

3.2 *Reasons for Defining-out*

What reasons might we have for putting certain people and acts outside the domain of “answerability” (or treating them more leniently) in the name of insanity? A few reasons shall be mentioned, two already touched upon and more “internal” to criminal law, the rest more “external”, functioning as a kind of regulatory tools or safety valves for society and criminal law respectively.

(a) *Backward-looking*. It is not right, thus not permitted, to punish an individual for what it brought about under the influence of insanity: the individual does not *deserve* it.

(b) *Forward-looking*. General preventive aims are better reached if persons insane enough are treated as “non-answerable”.

(c) *Escaping the problem of evil*. All human communities (and surely some others as well) operate with definitions of good and bad. According to *Emile Durkheim* every community needs to distinguish between those on the inside, seen as behaving well and correctly, and those on the outside, (in some aspect) seen as behaving badly, incorrectly. This is how the inside consolidates itself: by constructing an ever-present outside. If this mechanism produces a more or less constant relation in size between those “in” and those “out”, and this is the case independent of the type of community, then in the convent as well as in the

16 Austin, J.L., *Philosophical Papers*. Oxford University Press, Clarendon Paperbacks, 3rd edition 1979 p 180. Compare Hart, *Punishment and Responsibility*, p 28.

“gangster neighborhood”, or why not in a community of contract killers,¹⁷ the same percentage of the group is expelled to the outside (this is so also when from some kind of reasonably “objective” viewpoint the wrongs committed in the convent may be deemed less harmful: the person who prays forty times daily when others pray fifty, and so on).¹⁸

But in order for such dynamics of “in and out” or “good and bad” to function as desired, yet another wall probably needs to be maintained: some phenomena have to be put wholly outside of the moral system, phenomena which the division between good (implicating praise and consolidation) and bad (implicating blame) are not capable of coping with within the system. And if we can see the particular act neither as good (because it wasn’t) nor as bad and evil (because – regarding a too strangely wicked deed – we cannot live with the thought that an answerable fellow human being was its author), then “non-answerability” lets us escape at least some threats to our consolidating division in the “good” and the “bad”.¹⁹ If this is true it goes not only for *acts* but also for *actors*. Thus the collective sigh of relief when, after a small child has murdered another, the doctors manage to find some kind of brain abnormality in the former: we do not need to confront the possibility of the child being “evil”.²⁰

(d) *Regulating the population*. When speaking of the criminal law as the state’s most powerful tool for repression, we should note that also psychiatry, in its own right, has been and is still a quite powerful tool in the hand of the state. It has, with the label “insanity” (and its likes), for example been used (more small-scale) to get dissidents out of the way and, according to *Michel Foucault*, (large-scale) as strategies for social control.²¹

(e) *Escaping from (or hiding) unwished-for conflicts in the law...* The “insanity” label has sometimes been argued to function as a tool for hiding societal injustice of structural kinds. This line is present in gender-, class-, and culturally based critique of the criminal law. With *Alan Norrie* society (or the court) might wish to “medicalize” a potential such conflict, transform it into a

17 Compare Gilbert Harman, *Moral Relativism Defended*. 84 *Philosophical Review* (1975) p 3-22.

18 Not to say, of course, that horrendous things never have taken place in convents.

19 Compare R A Duff, *Answering for Crime*, p 289: “By contrast, a person whose serious mental disorder at the time of the offence precludes liability cannot claim such a reasonable unreasonableness. This is not because his action, as one that a reasonable person would not have committed, showed him not to be unreasonable; it is because he was not operating within the realm of reason at all, and was thus neither reasonable nor unreasonable. ‘Reasonable’ and ‘unreasonable’, like ‘rational’ and ‘irrational’, appraise the thoughts and actions of those who are operating within the realm of reason; but if a person is so disordered that he is not operating within that realm at all, he should be described as ‘a-rational’ or ‘a-reasonable’ rather than as irrational or unreasonable.” For a fascinating (and true) story, see Michel Foucault (ed): *I, Pierre Rivière, having slaughtered my mother, my sister and my brother... A case of Parricide in the 19th Century*, University of Nebraska Press 1975.

20 One recalls the murder of James Bulger. I remember having heard the examining psychiatrist of one of the murderers concluding his investigation of him with (something like) the words: “There is nothing wrong with this boy, except the fact that he is evil”.

21 See Michel Foucault, *The History of Madness*.

defect inside the person, when the issue rightly should be looked upon as one regarding the rightness or wrongness, the justifiedness or non-justifiedness of certain actions in certain situations, not as a psychiatric disease placed as mental disorder in the “weak” part, whose real conflict society does not want to recognise “legally”.

(f) ... *or just escaping the “wooden glove of criminal law” in individual cases.* As true as (e) might be (and surely sometimes is), a “medicalization” in an individual case may have also other reasons than society trying to maintain (but hide) existing structural injustice. As made clear by the expression “the wooden glove of criminal law”, criminal law is often a quite rigid tool: it must, if it is to reach its goals (among them general prevention), work with categories, generalizations, standards, and it mustn’t make too many exceptions from them (hence, partly, the above-mentioned “shallowness” of the liability rules). Also, the criminal law cannot escape hosting conflicting values. The court which in the individual case does not want to punish the defendant, or wants to punish the defendant more leniently, might (in “structural” as well as other cases) see “insanity” as the best or only way out if the court wants to be loyal to (1) the system (in terms of the system and its rules not being set aside, etc) *and* (2) the individual defendant (in terms of letting him or her escape punishment).²²

3.3 *The Two (or Perhaps Three) “Languages” of Responsibility*

3.3.1 Introduction

When insanity has been related to criminal law’s imputability issues (and, *mutatis mutandis*, to issues regarding liability etc) basically two “languages” or discourses have been in use: (1) that of freedom versus determinism, and (as a later “challenger”) (2) that of psychological normality versus abnormality. We shall discuss the contribution of each “language” to criminal law’s handling of the issues. After that we shall also turn to what I have chosen to label a “third way”, a pragmatic and “compatibilist” one.

Now to what, more exactly, need the “languages” contribute? The task in relation to the criminal law seems to be a divided one: (1) to help us paint a picture, draw a painting, which resembles as close as possible the strong but vague conviction we carry within, *and*, at the same time, (2) to make this conviction, *through* the painting, operationalizable in and for the purposes of criminal law: we need a vocabulary, rich and precise enough; we need tools for the construction of relevant categories; we need tools for a non-haphazard placing of individuals in the so-constructed categories, and so on. We need to do this in order to try to grasp much more of something which ultimately, probably,

²² See regarding (e) and (f) e.g. Alan Norrie, *Crime, Reason and History. A Critical Introduction to Criminal Law*. Butterworths, 2nd edition 2001, chapter 9 (regarding e.g. battered woman syndrome and poverty), James J Sing: *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in Criminal Law*. 108 *Yale Law Review* (1998-99) p 1845-1884 (regarding various “cultural” aspects). Compare also Jeremy Waldron, *Why indigence is not a defense*, in (ed William C. Heffernan & John Kleinig): *From Social Justice to Criminal Justice. Poverty and the Administration of Criminal Law*. Oxford University Press 2000 p 98-113.

might not be meant to be grasped; something similar to the “echoes that died away just as they caught your ear”.²³

As we shall notice, we seem to have experienced both of the first two “languages” as functioning the best in criminal law when they come quite close to common-sensish, down-to-earth ways of judging in blameworthiness issues. This is the way in which also the inner conviction works, and even if this conviction surely is not unalterable when it comes to minor adjustments it does seem to have the function of a (language-less) “compass” or yardstick, against which new suggestions are measured. In the following we should perhaps also keep in mind that neither the philosophy of freedom of the will nor the “language” of psychiatry were brought into the criminal law primarily with the criminal law in mind: They are both parts of much bigger projects. The reason for their application to criminal law issues was the plain fact that criminal law is part of larger society. Thus, neither language was (at least not initially) perfectly adapted to, compatible with, the issues which the criminal law needs to deal with.

Down-to-earth judgments are part of the “third way” which today to some extent tends to rule. This “third way” view is possible to accept only if we choose to ignore the “ultimate” questions which occupied the two original “languages”: whether we “*really*” can be held responsible for, or deserve, anything at all, etc. Another way of putting it, perhaps, is that the old “ultimate” questions have been substituted for others, but this does not weaken the significance of the changes. Today the “ultimate” questions are evaded by the philosophers, claiming that freedom of action is sufficient, and they are in some sense evaded also by psychiatry which, when it participates in judgments regarding backward-looking blameworthiness, forgets the “scientific” conviction that determinism rules. The philosophical position is often called “compatibilist”, its essence being that determinism is compatible with moral responsibility, and that (thus) freedom of action is sufficient for it. We shall elaborate this in 3.3.4 below.

As the reader might suspect we shall also need to relate this “third way” to the “neo-classical” position, with the latter’s emphasized demand for blameworthiness in order for the punishment in the individual case to be justified.

3.3.2 Freedom and Determinism

Debates regarding freedom versus determinism normally revolve round a terminology of (1) freedom of will, (2) freedom of action, and (3) determinism. That we are normally equipped with freedom of action – freedom to act in accordance with our will – needs not here be set in question. More interesting is instead (a) whether such freedom is sufficient for moral (backward-looking) blame to be proper in a way which would justify the infliction of punishment. In answering this question we must remember that criminal law punishment, conveying blame and censure, is to be seen as something particular (the degree of particularity depending on which school we adhere to); hence, we must be

23 C S Lewis, *The Problem of Pain*, as quoted in Nils Christie, *Limits to Pain*, p 118.

really sure before we punish a person. If (a) would be answered negative we shall have to ask (b) whether we are equipped also with freedom of will (something which at least under some further circumstances would satisfy criminal law’s demands regarding “desert”).

The answer to (a) I will return to later. We shall have to do so, because the answer to (b) is presumably “no”. A “yes” would probably need that we presuppose something similar to *Cartesius’* division between body (*materia*) and soul. With this follow – in the absence of religion – several more “technical” problems which according to “modern” (secular) science cannot be solved in a satisfying way. If such a free will is standing free from all, including all causal chains, what – ever – motivates it to decide anything? Is it *capable* of deciding anything at all? Furthermore, *if* we for the sake of the argument would accept the existence of a will standing free from all (*materia*), and furthermore that this will is capable of deciding, *then* how does it communicate its decisions as orders to “its” body, for the body to effectualize? (*Cartesius* located the “meeting-point” of body and soul in the pineal gland. At this one might smile, but as *P C Jersild* has noted we haven’t come up with anything much better ourselves.)²⁴ Furthermore, why needs a free will be tied to (only) one single body? Why not (try to) use several, for different occasions and purposes? Finally, of more practical importance for criminal law: how to make the idea of a will standing free-from-all compatible with it sometimes being wholly un-free, sometimes half-free, as we tend to look upon things in everyday morals and criminal law?

Beside such “technical” problems, throwing doubt (to say the least) on the existence of free will, it is also obvious that the debate revolving round the concepts of free will and determinism to a large extent fails to satisfy criminal law’s double need as sketched above. It seems, in the end, that we are not concluding that a person is answerable *because* he has a free will. Instead, we conclude – if asked – that he has free will *because* we find him answerable. This seems to reduce “free will” to an etiquette, with little additional explanatory value when related to the inner conviction, and with no additional sifting value.²⁵ The vagueness allows us to stay close to the “existential” conviction, thus satisfying our first wish, but there is hardly any progress regarding the second wish: in keeping close to the “existential”, we seem to reach little in terms of structured operationalizability. One might look upon the doctrine of freedom of will as an ideological superstructure introduced in bigger society for non-criminal law reasons (and accepted in the criminal law since criminal law is part of society), but one quite easy prey for the later, “new”, sciences. Let us now see with what these “new” sciences (here mostly psychiatry) wished to replace the free will.

24 Jersild, P C, *Darwins ofullbordade*, Bonnier Alba Essä 1997.

25 Compare Claes Lernestedt, *Concepts as Property*, in (ed Peter Wahlgren) *Perspectives on Jurisprudence. Essays in Honour of Jes Bjarup*. Scandinavian Studies in Law vol 48, 2005, p 170-173, regarding the use of the concepts of “harm” and “Rechtsgut” in debates regarding what ought to be criminalized.

3.3.3 Normality and Abnormality

The “language” of the challenger, a language of the “normal” and the “abnormal”, has some *prima facie* advantages in comparison to free will and determinism. The latter’s “technical” problem with the partially free, partially unfree will disappears: the scale of normality and abnormality offers a dimmer, not an on-off button. The “communication” problem also dissolves: the person punished is not divided into Cartesian soul and materia, does not presuppose a transcendental soul, but is in a sufficient sense all materia (albeit of a sophisticated kind). No wonder, one might add, that such problems disappeared: they were pointed out – or constructed – by the “new” sciences, in stark opposition to the “old”, religiously influenced ones.

Psychiatry furthermore supported us with a new and rich vocabulary, as well as better possibilities for empirical testing and systematization. This has enabled a solid and gradually more foreseeable body of knowledge, useful not only in the realization of consequentialist future goals (in terms of individual prevention) but also, in principle, for assisting in determining blameworthiness issues. In the latter case, though, the questions posed within the free will discourse, keeping quite close to the inner conviction, have been substituted by a question of another kind: “to which psychiatric category does this individual belong?”. To each such category is tied some kind of presumption (rebuttable or non-rebuttable) regarding the issue which the criminal law ultimately wants solved: “blameworthy or not?”. Thus, we might look upon things as has a new “station” entered the inquiry, as a floodgate occupying an area where there earlier (during the time of the free will discourse) was practically nothing: the area between on the one hand our inner conviction, on the other hand criminal law’s normative evaluation in the individual case.

One result of the development of such categories is that in the individual case the blameworthiness issue is tackled to a lesser extent by the “legal” court. If the psychological categories are established, presumptions tied to each, then the major task in the individual case is performed by the psychiatrist and not by the court: matching person with category. Thus, the normative evaluation is largely done already in the construction of the psychiatric categories. *H L A Hart*, forty years ago, saw it coming (not without approval and with an interesting parallel to *children*, the other group frequently discussed in relation to issues of “answerability”):

”Though some continental legal systems have been willing to confront squarely the questions whether the accused ‘lacked the ability to recognize the wrongness of his conduct and to act in accordance with that recognition,’ such an issue, if taken seriously, raises formidable difficulties of proof ... For this reason I think that, instead of a close determination of such questions of capacity, the apparently coarser-grained technique of exempting persons from liability to punishment if they fall into certain recognized categories of mental disorder is likely to be increasingly used. Such exemption by general category is a technique long known to English law; for in the case of very young children it has made no attempt to determine, as a condition of liability, the question whether on account of their immaturity they could have understood what the law required and could have conformed to its requirements, or whether their responsibility on account of their immaturity was ‘substantially impaired’, but

exempts them from liability for punishment if under a specified age. It seems likely that exemption by medical category rather than by individualized findings of absent or diminished capacity will be found more likely to lead in practice to satisfactory results.”²⁶

So far, so good. But let us now instead turn to some potential problems of a psychiatry-based approach to issues of blameability. One *first* such problem, related to the “floodgate” function of the psychiatric categories in the criminal law inquiry, seems to be (or at least *earlier* has seemed to be) that we tend not to experience the answers produced as fully compatible with the existential questions ultimately posed (by the inner conviction, through the criminal law). This might have general as well as contingent reasons. Firstly, general: If the wordless inner conviction has the function of a compass or a yardstick – this seems to be the case – then perhaps the closer one gets to a more deconstructed handling of the issues, full of various etiquettes hard to relate to, the more of the *Gestalt* is lost, and the less compatibility is felt, this independently of what kind of vocabulary is used. Secondly, more contingent: One can quite easily imagine that the intoxication which legal psychiatry suffered from in its early years in power resulted in too many people being classified as in some sense “insane”. This is likely to come into conflict with the inner “compass”.²⁷

Also a *second* and related problem regards compatibility, but now instead between criminal law and psychiatry (and psychology) as general ventures. Neither social sciences (psychology, anthropology, sociology, etc.), nor natural sciences (among which psychiatry is partly to be placed) normally evaluate in terms of “good” and “bad” or administer praise and blame. The aim of social science – in general – is to study and describe how we function, what we are, as individuals and in groups, to get as close as possible to *describing the existing*.²⁸ Criminal law is another venture: to blame or not to blame, *that* is the ultimate question.

Now as has been mentioned the individual preventive ideas grew stronger in criminal law at a time when the “new” sciences, natural as well as social sciences, had assisted in pushing down the church from the throne. A profoundly deterministic view on human nature began to rule, so also in psychiatry: when man was no longer necessarily the crown of creation, but instead one entity among others,²⁹ *caused* like them, then no or little room was left for freedom of will. Thus, not only in the practical sense mentioned above, but also in this metaphysical sense, the “problem” of free will was solved: no such thing existed. To the extent in which backward-looking ambitions existed within a

26 H L A Hart, *Punishment and Responsibility*, p 228-229.

27 If this is true, it is probably because the inner “compass” is aware that if a too high percentage is exempted for responsibility, then the governing will not work.

28 Not to say, of course, that there are no hidden agendas. The social sciences have, partly because of the “disinterestedness” described, at times and places been highly ideological without needing to admit it.

29 Of fundamental importance, and in 2009 celebrating its 150th birthday, is of course Charles Darwin’s *On the Origin of Species by means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life*, 1859. See also his – regarding mankind – *The Descent of Man, and Selection in Relation to Sex*, 1871.

pure framework of thought of such kind, the looking-backward was done in order to find causes, but these causes were sought for not in order to make normative judgments about guilt and moral responsibility, but instead to acquire the knowledge necessary to enable a successful (forward-looking) re-conditioning of the individual.

Things need not be like this, though: the “language” of psychiatry can be useful also if we decide to have our criminal law based on blameworthiness (including non-blameworthiness). In Sweden, as we shall see in section 4, the emergence of a strong influence of psychiatry *correlated* in time with a wish to abandon ideas of blameworthiness, the division between imputable and non-imputable and so on. This does not mean, though (at least not in practice), that the latter necessarily must accompany the former. But if it does not, compatibility problems arise. During the era of individual prevention psychiatry was engaged in fitting the sanction to the criminal, but if it is to aid also in judgments on blameworthiness then it must engage also in fitting the sanction to the crime.

With psychiatry’s task in such a way altered the relation between an *explanation* and an *excuse* becomes crucial. In criminal law as little as in everyday life an explanation is always an excuse. How, then, to draw the relevant lines: which explanations should serve as “excuses”, which not? We might assume that a strong position for psychiatry results in more explanations being accepted as relevant in criminal law (as excuses etc), a weak position in the opposite. We have seen, and still do see, quite strong fluctuations and vivid debates in the area, not least regarding issues which might be labelled “structural”.³⁰

One way of dissolving (or at least diminishing) such “compatibility” problems is of course a narrowing of the “languages” (and the ideas) to each other. This is what seems to have happened over the years, probably as a natural consequence of the two having had to cooperate professionally for decades. The result is a more down-to-earth vocabulary, seemingly quite close to the “inner” compass. One important cost of the narrowing is a “shallowing”: theory and practice avoid the “ultimate” questions regarding the relation between responsibility and freedom. It is time to turn to the “third way”.

3.3.4 A “Third Way”?

“I praise my 3-year-old daughter when she does the right thing, not because I believe she is a morally responsible agent who deserves to be praised, but because I want to encourage her to do the right thing again. Perhaps more tellingly, I do not blame her when she behaves badly – she is, after all, only 3 – but I nevertheless express what seems like blame ... in order to discourage her from acting in a similar way in the future.”³¹

30 Of interest might be e.g. Alan M Dershowitz, *The Abuse Excuse*, Back Bay Books 1994, James Q Wilson, *Moral Judgment. Does the Abuse Excuse Threaten Our Legal System?* Basic Books, 1997, and Victoria Nourse, *The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law*. 50 *Stanford Law Review* (1997-98) p 1435-1470. Compare also e.g. Norris at 3.2 above.

31 Matravers, Matt, *Responsibility and Justice*, Polity Press 2007, p 18 (referring to the theories of Smart).

“The very notion of being a person is closely tied to that of being obligable: genuinely to see another being – or oneself – as a person is to see that being as the bearer of responsibility ... if to understand all were to forgive all, then, even more obviously, to forgive all would be to forgive nothing.”³²

As we have seen, each of the first two “languages” carries with it problems of its own. But at least to the extent in which they are to be used in the determination of blameworthiness, as a necessary presupposition for punishment, there are also some shared problems which neither of the two can escape. One such problem concerns the step from general theory to application in the individual case. This was elegantly illustrated half a century ago by *Barbara Wootton*:

“Improved medical knowledge may certainly be expected to give better insight into the origins of mental abnormalities, and better predictions as to the probability that particular types of individuals will in fact ‘control their physical acts’ or make ‘rational judgments’; 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.”³³

Wootton’s view is of course at least partly true (not least when the task is to be performed regarding something which has already taken place). Hence the conclusion of *H L A Hart* under 3.3.3 above: we cannot try to deal with such issues in each individual case. We need instead to work with presumptions based on group-belonging. Such belonging is based on the person possessing or not possessing (or partly possessing) certain observable *capacities*. Such an approach probably gets us quite close to the inner conviction, and it also seems to be one approach around which criminal law and psychiatry (with a successively more profane vocabulary, at least in the relations with criminal law) can unite as acceptable. Hart talks about

”[the capacities] of understanding, reasoning and control of conduct: the ability to understand what conduct legal rules or morality require, to deliberate and reach decisions concerning these requirements, and to conform to decisions when made. Because ‘responsible for his actions’ in this sense refers not to a legal status but to certain complex psychological characteristics of persons, a person’s responsibility for his actions may intelligibly be said to be ‘diminished’ or ‘impaired’ as well as altogether absent, and persons may be said to be ‘suffering from diminished responsibility’ much as a wounded man may be said to be suffering from a diminished capacity to control the movements of his limbs”.³⁴

32 Richman, Robert J, *God, Free Will and Morality*, 1983 p 136.

33 Wootton, *Crime and the Criminal Law. Reflections of a Magistrate and Social Scientist*. Stevens & Sons 1963, p 74.

34 Hart, *Punishment and Responsibility*, p 227-8.

Now if we then seem to have satisfied the demands of "double doability" as described earlier (closeness to the conviction and operationalizability), then how are we to *justify* the practice? In the light of the scientific critique against the idea of freedom of will it is not surprising that in the last century the majority of efforts from philosophers tackling the topic of freedom and responsibility have turned to revolve round issue (a) from 3.3.1 above: whether freedom of *action* is, or should be deemed (which might be a slightly different question), sufficient for the moral responsibility required in order to justify the harsh sanctions of the criminal law.

On this venture, the modus of political and legal philosophers has mostly been to care not about the natural and the social sciences, and to re-shape the issues in a way less sharp, less directly related to criminal law, by holding views like (1) freedom of action is sufficient for moral responsibility *since* (2) the practice of holding oneself and others responsible is useful (and perhaps necessary) for human beings living together in a community. The main issue is often pictured as one of *respect* for the other: if I don't (in general) see you as responsible for your actions, then I don't respect you as a fellow human being. Neither do we show respect for our profound conviction, according to which the capacity of being held "genuinely" responsible surely exists. A lengthy quote from *Tony Honoré* might, together with *Richman* above (and siding with several others), illustrate the spirit of such a general level:

"The question is not which view is exclusively correct but which is preferable when we assess people's behaviour in everyday life and the law. The answer must be that in general we do well, indeed we are impelled ... to treat ourselves and others as responsible agents. But the argument for welcoming this conclusion is not that our behaviour is uncaused – something that we cannot know and which, if true, would be a surprise – but that to treat people as responsible promotes individual and social well-being. It does this in two ways. It helps to preserve social order by encouraging good and discouraging bad behaviour. At the same time, it makes possible a sense of personal character and identity that is valuable for its own sake ... The worry remains that, though it may make sense to treat people as responsible for their conduct, if human actions are caused by circumstances, people are not *really* responsible for what they do ... [But] how far back it is rational to go in tracing causes must depend on the purpose for which we want to get at the cause of something that has gone wrong. This must apply also to the causes of human conduct. It is rational to treat people as the authors of their actions in the context of a system of responsibility that we regard as valuable both for individuals and for society as a whole. To treat human actions as a stopping point beyond which causal inquiries are not ordinarily pursued is sensible and indeed indispensable. Perhaps we can dimly imagine an alternative world in which people were regarded as mere automata. In that world, to treat people as the authors of their actions would be a bad way of explaining events. As things are, what (if anything) determines peoples' decisions includes their make-up, preferences, and ideals, so that the hypothesis that their decisions are determined hardly makes them victims of circumstance."³⁵

35 Tony Honoré, *Responsibility and Fault*, p 125,136-7.

But how are we to move from the general to the particular? What bearing do such "larger" perspectives have on criminal law? The latter surely cannot be treated as your everyday part of law and life. If criminal law's "particularity" as pictured by the "neo" is to be taken seriously, then neither references to the *general* good for a community of persons relating to each other as responsible beings, nor the *personal* good for a person in life generally treated as a responsible being, will do. We should need to distinguish between on the one hand over-arching theories about society at large (where such "general" ideas might play a crucial part), on the other hand the criminal law, whose particularity forces us to formulate other and better arguments when imposing harsh sanctions on individuals.

But *if* such general theories are said to justify also the demands of criminal law – and this seems to be the case today (where else could one turn?) – *then* a demand for proportionality and "blameworthiness" for the imposition of the sanction to be justified is nothing but part of yet another version of operant conditioning. If so, we blame as a *social practice*, similar to the way in which one "blames" and "punishes" animals and children (compare *Matravers* above).³⁶ The issue is one about raising the population. And if it is true that it "takes a whole village to raise a child", as the african saying goes, then what much do we not need in order to raise a whole population?

With this approach to the issue of "blameworthiness" the differences between criminal law and other branches of law (e g social law) are fewer than one might have come to believe. The "neo" position, thus, should be obliged to alter the presentation. But with such a change follow obvious risks: such an altered description – "this is the best version of (exclusively) forward-looking social conditioning!" – (rightly) puts the "neo-classical" rationale on the same level as the others (as all exclusively forward-looking). This means that the issue might be looked upon, if one wants, as if all we have to do is compare the pros and cons of various forward-looking practices; and what comes natural then but look the most intense at goal-efficiency? It is likely that such a development would open up for more of engineering (or, more correctly, for engineering of a worse kind), less of protection for the individual.³⁷

Isn't there, then, anything more which could be said in advantage of a "neo-classical" approach, when compared to the others alternatives? There is indeed, if we stay on the "shallow" level and set aside the "ultimate" questions regarding freedom of the will and determinism. *H L A Hart*, in an essay concerned with excusing conditions, uses an analogy to civil law transactions and argues that the

36 Compare also Frans de Waal, *Good Natured. The Origins of Right and Wrong in Humans and Other Animals*, Harvard University Press 1996 p 105-111. Such conditioning is meaningful, in terms of individual prevention, at least in the sense that it might change behavior (as long as the recipient understands that the harsh treatment is a consequence of what he or she - or it - has done).

37 It should perhaps be remarked here, that also the rules for establishing liability have forward- as well as backward-looking components. One obvious example is the regulation regarding provocation: even if you might be provoked by someone doing *p* against you, this does not mean that you are "allowed" to be provoked (in a way that matters to the criminal law) by this *p*. This is another place where the "blaming as a practice", in order to teach the population on what to be provoked by and not, is clearly visible.

improved possibilities to *choose* and *plan* one’s life constitute justification enough for the existence of excusing conditions, not strict liability, in criminal law. In the end the issue is one of respect for the individual:

”We must cease ... to regard the law simply as a system of stimuli goading the individual by its threat into conformity. Instead I shall suggest a mercantile analogy. Consider the law ... a *choosing* system, in which individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways. This done, let us ask what value this system would have in social life and why we should regret its absence. I do not of course mean to suggest that it is a matter of indifference whether we obey the law or break it and pay the penalty ... What I do mean is that the conception of the law simply as goading individuals into desired courses of behaviour is inadequate and misleading; what a legal system that makes liability generally depending on excusing conditions does is to guide individuals’ choices as to behaviour by presenting them with reasons for exercising choice in the direction of obedience, but leaving them to choose ... By attaching excusing conditions to criminal responsibility, we provide each individual with benefits he would not have if we made the system of criminal law operate on a basis of total ‘strict liability’. First, we maximize the individual’s power at any time to predict the likelihood that the sanctions of the criminal law will be applied to him. Secondly, we introduce the individual’s choice as one of the operative factors determining whether or not these sanctions shall be applied to him. He can weigh the cost to him of obeying the law – and of sacrificing some satisfaction in order to obey – against obtaining that satisfaction at the cost of paying ‘the penalty’. Thirdly, by adopting this system of attaching excusing conditions we provide that, if the sanctions of the criminal law are applied, the pains of punishment will for each individual represent the price of some satisfaction obtained from breach of law.”

Also Hart, then, works with the shallow “as if”-framework, leaving the “ultimate” questions aside.

In closing this section, one might ask whether the profound inner conviction regarding sufficient freedom to be held “responsible” and “liable” for what one has caused, is, as feelings of guilt, shame, and so on, evolution having played a trick on us. As (later) with the church and the doctrine of free will, we might be dealing with an ideological superstructure invented by ourselves to justify a practice – “the practice of blaming” – which from an evolutionary perspective has been, and perhaps is, necessary in order for the group to survive. If so, then the “neo-classic” idea of proportionality between sanction and blameworthiness surely defends an important value, even if not one we thought and claimed.

4 Mentally Disordered Offenders – some Historical (Swedish) Remarks

The regulation regarding insanity in the Swedish criminal code of 1864 (Strafflagen), in force until 1965, was in a comparative light a quite “normal” one: those deemed disordered severely enough were also deemed legally non-imputable and thus not “answerable” at all (see SL 5:4-5:5). A century later, at

the time of enactment of the 1962 code (BrB), much had changed, for society in general and for the criminal law.

Generally, Sweden had witnessed growing wealth, an expanding welfare state and profound social engineering, the latter guided by a firm belief that it was (almost) as justified as it was possible to re-shape society and (to some extent) individual into more well-functioning units. Thus, rather few limits had been set to state power: since the state was and did good, flexibility in its hands was seen mostly as a virtue. Furthermore, the state and the individual were to a large extent seen as having shared, not opposed, interests. If freedom had been a prominent concept at this point, then we would have talked in terms of "positive" or "real" freedom, not seldom as defined by the state.

In the *criminal law* such general ideas had – when combined with a profound reception of individual preventive ideas, a strong position for psychiatry and a ("scientific") strong determinism – produced a view of the criminal law as an integrated part, not particularly "particular", of the bigger tool-box to be used in the struggle for the good society. The state was not the individual's (potential) enemy – as for the "classical" school – but its friend. A new criminal law should be progressive and forward-looking. Its issues were "technical" more than concerned with "justice": the "moral" language of the "classical" school belonged to history. It was suggested (although in the end rejected) that the concept of "punishment" should be removed altogether from the vocabulary of the code: former "punishments" as well as other measures should be referred to (and looked upon) as "protective measures" of equal moral significance or, more correctly, equal moral insignificance. The suggested name for the new code was "protective law". Even if this particular suggestion did not make its way to legislation much else did, and we might borrow *Barbara Wootton's* vision of the future (desirable) criminal law as a good description of the Swedish framework of ideas at the time:

"One of the most important consequences must be to obscure the present rigid distinction between the penal and the medical institution. As things are, the supposedly fully responsible are consigned to the former: only the wholly or partially irresponsible are eligible for the latter. Once it is admitted that we have no reliable criterion by which to distinguish between those two categories, strict segregation of each into a distinct set of institutions becomes absurd and impracticable. For purposes of convenience offenders for whom medical treatment is indicated will doubtless tend to be allocated to one building, and those for whom medicine has nothing to offer to another; but the formal distinction between prison and hospital will become blurred, and, one may reasonably expect, eventually obliterate altogether. Both will be simply 'places of safety' in which offenders receive the treatment which experience suggests is most likely to evoke the desired response."³⁸

As was mentioned earlier the 1962 code abolished the *imputability* demand. But in the end it was perhaps not abolished altogether: it was indeed removed as a bar against responsibility – thus enabling liability – but instead given relevance

38 Barbara Wootton, *Crime and the Criminal Law*, p 79-80.

at the later stage regarding choice of sanctions: those with a mental disorder severe enough could not be sent to prison.

But why was the demand, in its original shape, abandoned? In 1962 the ideas connected to "imputability" had already been under pressure for quite some time: critics, not least legal psychiatrists, had – as part of the "new" science's successful battle against the "old" science – repeatedly asked for the empirical reality on which such metaphysical speculation supposedly was built, but they had not received satisfactory answers. When this metaphysical critique was combined with the idea of (justified and successful) social engineering, it was quite easily argued that also criminal law's division between the responsible and the non-responsible, the "answerable" and the "non-answerable", should disappear as false (because it could not be empirically verified) as well as pointless (since its rigid bars restricted the state's flexibility). *Olof Kinberg*, prominent legal psychiatrist during the first half of the last century, argued in 1917 for the concept of imputability to be abolished. Kinberg disliked

"the dangerous misconception that there would be certain psychological exceptional states which invalidate the *social* responsibility" of a person:" "all living in a society, healthy and unhealthy, normal and abnormal, are to the same extent responsible to society for their actions, to the extent that these actions affect societal interests. Psychological states of exception are, with reference to the social responsibility, of interest only in so far as they should be taken into account when society chooses between its protective measures, in order for the latter to be as efficient as possible."³⁹

Half a decade later, Kinberg's wish had come true. In the preparatory works of the 1962 code everything – including imputability issues – was approached exclusively and coherently with forward-looking, goal-oriented spectacles. The reason for abolishing the figure of imputability was that it was not *needed* anymore. The demand had been there in order to make sure that the severely mentally disordered were not sent to prison. In earlier times, when prison was the only sanction available for crimes of some magnitude, a bar against having to *answer* was in practice a bar against having to *go to prison*. But *now*, it was argued, with so many alternative sanctions possible, such a bar was no longer necessary. More rational with a possibility to convict, giving the court room for manoeuvre in finding the sanction most suitable. Matters of restriction, of backward-looking demands for justification, were non-matters.

One question arises, though: *if* flexibility was the goal, *then* why exclude even the *possibility* of prison sentence for the severely mentally disturbed? Why maintain *any* such rigid bars? It is hard to believe that the makers of these parts of the code pictured prison to such a degree unsuitable for *every* possible case that such a prohibition was motivated. The probable explanation is that concessions were needed, perhaps in the shape of a "compromise":

But the winds quite soon were to change. Already in 1962 the individual preventive ideas had – although it was not realized at the time – reached their peak and were losing ground. In the sixties an increasingly stronger critique took shape, not least against a practice where different offenders received completely

39 Olof Kinberg, *Om den s.k. tillräkneligheten*, Nord. Bokh., 1917, p 203 (the translation done by me).

different sanctions (also with regard to severity) for identical crimes. The critique further developed in the seventies, when also the "neo-classical" position was formulated.⁴⁰ Blameworthiness, guilt, proportionality (the "moral" language) were again held forward as important parts of a decent criminal law. The increasing influence of the "neo-classical" approach culminated with the sanction reform in 1988, which threw over board much of the individual preventive ideology (and restricted its practical impact): detailed rules were now given on how the court should go about deciding the "penal value" of the crime. This penal value should also to quite a high degree govern the following choice of sanction.⁴¹

Among the "rationales" of punishment the "neo-classical" ideas also today continue to influence strongly Swedish criminal law. It is somewhat interesting, though, that neither the changes effectuated in the law, nor the debate, focussed extensively on the lost imputability demand. The prison prohibition in 30:6 has more or less been unchanged since 1962, and no imputability demand has been re-enacted. There indeed *was* such criticism, but the issue did not seem as central as one might expect in the light of the imputability demand being a cornerstone in a "classical" world-view. As time has passed, though, a couple of official reports have suggested a reinstated imputability demand.⁴² A 2002 report took as a transparent starting-point the view that three interests need to be balanced against each other: the defendant's need for justice (proportionality etc), the defendant's need for care, and society's (including the victim's) need for protection. Against this background, and aiming for clear divisions between the three interests, the report among other things suggested that (1) the prison prohibition should be abolished and (2) an imputability demand should be reinstated. As a result, the group suffering from "severe mental disturbance" would be divided into two groups: the *most* severely disturbed offenders would be deemed non-imputable, not "answerable" at all, and the lesser disturbed offenders, would be handled in the "normal" system (with no bar against prison sentence).⁴³

Such suggestions, though, have yet to result in changes in the law. Why the hesitation? A few reasons should be mentioned. The legal regulation regarding mental disorder is indeed a large and complex area, something which in itself makes change more difficult (one common fear is e g that changes in one part will have unforeseen consequences in another). Furthermore, even if the "neo-classical" ideology still has quite a strong "formal" position in Sweden, or at least a strong position among the "rationales", there are other forces at work –

40 Here should particularly be mentioned a report from a working group within BRÅ, The Swedish Council for Crime Prevention. The report is in Swedish called BRÅ-rapport 1977:7. *Nytt straffsystem. Idéer och förslag*. Arbetsgruppen rörande kriminalpolitik. There is also an english summary, called A New Penal System. Ideas and Proposals, Stockholm 1978, report no 5).

41 See SOU 1986:13-15 and prop 1987/88:120.

42 Among them an influential report from 1996: SOU 1996:185. *Straffansvarets gränser*. An english translation of the title could be "The limits of criminal liability".

43 SOU 2002:3. *Psykisk störning, brott och ansvar*. Betänkande av Psykansvarskommittén.

which I hesitate to call “rationales” – against which the “neo” has no good cure: today can be seen an overall more repressive attitude from society’s (at least political society’s) side, affecting all parts of criminal law in various repressive directions. Society’s protection against crime is again put forward more independently and strongly in the rhetorics, in a way reminding of the individual preventive era. Also, not without importance, a “new” actor is being emphasized in such rhetorics: the *victim* (whose interests indeed were not given much attention half a decade ago). To this is added a few nasty doses of populism. It is in this light, I believe, that one should view and evaluate the 2008 changes.

5 The Recent Changes

We have had to wait until 2008 for changes of potential ideological interest in BrB 30:6. These changes, however, did not move in the direction which one (or more correctly I) would have wished for: also the prison prohibition – in the 1962 code “replacing” the imputability demand as the mode for preferential treatment of the most severely mentally disordered – was abolished.⁴⁴

The prison prohibition was replaced by a *presumption* against prison, rebuttable when “extraordinary” reasons are present.⁴⁵ In deciding whether such reasons are at hand, the court is to consider (1) whether the penal value of the crime is high; (2) whether the defendant has no or little need for psychiatric care; (3) whether the defendant him- or herself has brought about the (mental) condition through intoxication; and (4) other circumstances.

In the new regulation there is also an *exception* to the main presumption: prison may *not* be used *if* the defendant, following the serious mental disturbance, lacked the capacity to realize the meaning of the act, or to adjust his or her behavior to such knowledge. But the exception is not the fully rigid bar it seems, because there is also an *exception* to the exception: prison is also in such cases possible, *if* the defendant has brought about the state through self-intoxication.

I shall briefly touch upon *why* the changes were wished-for in the political camps, *how* they were motivated in the preparatory works, and finally add some personal reflections. Firstly; Why these changes, why now? The most important aim of the legislator was, it seems, to close a “gap” described as follows.

- (1) If the defendant at the *commission of the crime* was under the influence of a serious mental disturbance, the defendant could not be sentenced to prison.
- (2) If the defendant at the *time of the trial* had little or no need for psychiatric care, the defendant could not be sentenced to psychiatric forcible care.

44 See prop 2007/08:97. *Påföljder för psykiskt störda lagöverträdare*.

45 In Swedish “synnerliga”. This translation has been chosen after consulting SOU 1999:3, an English translation of the Swedish criminal code.

From a "classical" point of view both rules seem reasonable (or indeed more or less demands of a decent system). Now if each rule is reasonable they hardly turn unreasonable when seen together. But that is exactly the view which the Swedish legislator now entertains, and this is so *because* each year in a few (rare) cases both of these conditions are present regarding the same defendant, *meaning* that in these few (rare) cases the outcome can be a defendant walking free of any forcible measures. This, it was argued, should not be allowed to happen; especially regarding grave crimes forcible detentive measures need *always* be available. Hence, in order for such situations to be avoided, today also someone having committed a crime under the influence of serious mental disturbance (and thus earlier having fallen under the prison prohibition) *can* be sentenced to prison. As this is written (march 2009) court practice is yet to come.

Some personal reflections: One's view on the 2008 changes depends to quite a large extent on (1) one's view regarding *the past*, more precisely on how the 1962 prison prohibition actually should be interpreted, what it "was", and (2) one's view regarding *the future*, which in turn largely depends on how one judges the present state of criminal law politics in Sweden. If one sees the prison prohibition of 1962 as if its "replacing" the imputability demand signified nothing at all, in fact *was* no "replacing" at all, the prison prohibition just "happened" (some seem to be of this opinion), then the 2008 changes are of no interest in principle: they hold on to an already established ideological position. But if one looks upon the 1962 prison prohibition as meant to signify something of moral importance (as being the old imputability demand in new clothing, demanding a justification for prison sentence, in Sweden the harshest punishment available), then the 2008 changes *are* of ideological importance. And if so, they are in my opinion *negative*. Then the clock has been turned back to 1962, and the step which was then not fully realized is instead realized now: all restricting and obligatory considerations of a backward-looking kind, regarding the severely disordered offender *qua* severely disordered, are abolished. This is a significant ideological step. It goes *away* from classicism. But what does it go *towards*?

This is more difficult to formulate. The 2008 changes took place in an ideological surrounding different from that of 1962: not one of individual prevention *par excellence* (which would only applaud the 2008 changes as removing bars and thus increasing flexibility) but instead one to a large extent shaped by "neo-classical" considerations and demands. It is interesting to see how this potential problem was tackled in the preparatory works. The method seems to have been to use what could be used of "classical" rhetorics, but to avoid what would be counter-productive to the aims (the aims being getting the proposed changes through parliament). Thus, the concept of "blameworthiness" was altogether avoided, like all morally-laden expressions ("guilt" and so on). The proposal is almost completely devoid of them: had they been there, the reader might have started thinking about the mentally disordered offender in such terms, in the end finding the proposal "unjust". Instead, the reader more or less is brought the impression that we are only (or almost only, at least) dealing with "technicalities", practical problems and technical adjustments. The concept of "proportionality", on the other hand (as more "neutral" and technical), is in

the government proposal strongly encompassed. The changes are more or less motivated with reference to its importance.

What kind of proportionality, then? The proportionality rhetorically wished-for is *not* the prospective one of individual prevention, making the sanction fit the criminal (-s successful readjustment in society). But *nor* is it the proportionality of the "neo-classical" (or "classical") school, retrospectively fitting the sanction to the crime, the crime consisting of harm and culpability. The proportionality wished-for is one retrospectively fitting the sanction to the crime, thus far at par with "classical" ideals, but here the "crime" to which the sanction is to be fitted seems, ideologically, to be more or less the "objective" crime; the act, e.g. of killing someone: if someone causes a grave *outcome*, then the existence of a mental disorder should not be able to bar us from using grave *sanctions*: society not having such a possibility is in the proposal described as "unsatisfactory consequences".

In the "neo-classical" position the demand for proportionality is an integrated part of a coherent ideology, its role quite much defined through its connection to the roles of guilt and blameworthiness, to the criminal law as a restrictive and nuanced system for blame and censure. The demand for "proportionality" rhetorically put forward to motivate the 2008 changes is in the light of this something of a caricature. If it were to be taken ideologically seriously it would be proportionality of a more primitive kind, resembling the one of earlier historical stages, where the objective act (or, more correctly, objective outcome) provided the yardstick for the counter-reaction, independent of guilt and blameworthiness as understood by the "classics". There is resemblance also with the "social responsibility" as put forward by *Olof Kinberg* in section 4. This is not even part of "blaming as a practice": it seems not to be about blaming at all.

Some more general views on the 2008 changes: From the transparent and quite coherent whole which was suggested in the 2002 report mentioned earlier (this does not mean that I agree with everything in the report, only that it is a good effort), only a very limited part of the cake was in the 2008 changes given the legislator's attention. One might call the activity picking raisins from the cake. And the raisins in today's cake are the *repressive* ones. It was by the government deemed – in the name of proportionality – important and urgent to make sure that no one with a mental disorder can get away with a sanction too lenient. The opposite situation, that someone from the view of proportionality might risk a sanction too severe, was seen as an issue more complex (more investigation was needed) and thus not urgent enough.⁴⁶ Also the rest of the suggestions in the 2002 report, in an area regarding which there is total agreement that major changes are needed, have been post-poned for an indeterminate future. The skeptics ask (rightly) whether a major reform will ever take place. This we shall know only if and when the day comes. What we do

46 This resembles a view which is sometimes referred to as *positive retributivism* (whereas the "neo-classical" view is closer to *negative retributivism*). See John Braithwaite and Philip Pettit, *Not Just Deserts. A Republican Theory of Criminal Justice*, Oxford University Press 1990 (reprint 2002) p 34-35.

know today is that the 2008 changes signal populism, laziness and an eagerness for more repression.

6 Closing Remarks: Stagflation and Inflation

My closing remarks will concern two main issues: (1) "neo-classicism" and what kind of conditioning is to prefer (where we also have to relate "neo-classicism" to the "compatibilist" position), and (2) the imputability demand.

(1) Obviously, the rhetorics of "neo-classicism" need to be altered: the "blameworthiness" quite emphatically held forward is – from the reasonable point of departure that such freedom does not exist which would justify *backward-looking* blame – "only" part of one forward-looking preventive practice among others: "blaming" in order to prevent future crime. There *is* indeed the undeniable inner conviction, and it *is* to be deemed important – not least for the forward-looking preventive practice to work well (it needs approval from the "compass") – but probably also the inner conviction regarding a "real" capacity of moral responsibility is a product of evolution, a superstructure designed – ultimately – to secure future "survival". It might also be, for the same reasons, that we are evolutionarily brought up with some vague notion of *proportionality*. The vision of *Barbara Wootton* (see above 4) was in Sweden to become practical reality (at least in the "theory" of practical reality). But the idea that the "moral" language of guilt, censure, blame and (retrospective) proportionality would eventually wither away turned out to be wrong. Something, obviously, was by the inner compass felt missing. This "something" might very well have been the practice of blaming. The desert we are left to use in our conception is *experienced* desert, as (wordlessly) formulated by the inner conviction. We have to live life – also the parts of it which regard the criminal law – "as if".

What, then, to do with our choice between the different modes of conditioning? To me it is obvious that *if* we are to have a criminal law (the reason for having one would be that we need to have one, something on which a majority seems to agree), *then* the "neo-classical" model of conditioning is to be preferred over the other alternatives. What one then has to accept is the relative "shallowness" in some aspects of the conception: when we ask, e g, why the last in a long line of dominos falls, we must content ourselves with the causal chains being brutally short in comparison: the cause of the last one falling is the one directly before, but not the one before that one, nor the rest of the dominos in the chain. We see the shallowness in the liability rules, we see it in the compatibilist conception of the world, forming the base also for the "neo-classical" one. We shall have to accept that an ultimate answer will not be sought for. In return we get – and this must, in the absense of better alternatives, be deemed good enough – foreseeability (remember also Hart and the possibility to plan one's life), protection against potential abuse of power, and the kind of respect for the person which is shown through holding her responsible (even if I am not particularly fond of such argumentation in a "neo" conception of the criminal law).

(2) What about the be or not be of an imputability demand? If there is no such thing as sufficient freedom of will and desert (and, correspondingly, non-freedom and non-desert), then the issue is quite open for discussion. First, I would like to underline that even if we would agree – on whatever basis, using whatever “language” – that a demand for imputability is a necessary part of a decent criminal law, we would still have problems with deciding how broad or narrow a range of disorders should fall under it.⁴⁷ Accepting the figure says little about its shape and scope. Thus, a decision as such to narrow or broaden the group cannot be criticized: imputability is a legal, not ontological, category, and history (including that of the present) shows quite strong fluctuations regarding such issues.

Secondly, psychiatry has given us a sliding scale between normality and abnormality. This might be seen to pave the way for the conclusion that if there exists no such thing as an on-off in the ontological (empirical) world of human beings, then neither is it motivated to entertain a strong on-off division when it comes to the consequences of someone being deemed “answerable” or “non-answerable”, respectively. If there is no on-off, no black-or-white, regarding the “real” blameworthiness (whatever that is), then why construct on-offs in criminal law’s evaluation? The only reason left for the opponent seems to be that since this division is there in our inner conviction, it should be respected (either *an sich* or because this is argued to bring about good general preventive effects).

And this is where we stand. The answer would ultimately depend on which “rationale” or position one advocates among the different species of conditioning. If one is of the opinion that the “neo-classic” design is to prefer, then one should want an imputability demand in criminal law to the extent in which such a demand is part of the inner “compass” which we need to follow quite closely if the conditioning (through moral education) is to be as successful as possible.

One potential problem for the “neo-classical”, though, then is that the “inner compass” might not be exactly like that. In the light of the discussions preceding the 2008 changes one might argue that it seems to form no part of our inner “compass” that such a division should be upheld. Perhaps such a view *would* be the view of the “compass” *if* we all had sufficient information, sufficient interest, and sufficient intelligence to think about the issues in an elaborated way. But, as we know, one’s opinions are seldom formed under such optimal conditions. The concept of *stagflation* might very well have become out-dated in the discourse of national economics. It is still useful, though, when we discuss criminal law’s relation to the mentally disordered offender. Earlier we have seen a (moral and criminal law) division between on the *one* hand those who are mentally disordered enough, where (moral) blameworthiness is said to be lacking and thus punishment is not possible, on the *other* hand those who are sane or not mentally disordered enough, where (moral) blameworthiness is said to be present and thus punishment is possible.

47 Compare, remarkably entertaining (though not related to criminal law), Joaquin Maria Machado de Assis, *The Psychiatrist, in The Psychiatrist and Other Stories*, University of California Press, 2000.

But there has always been hard cases, where criminal law stagflation comes into existence (one such case is the pedophile, which we tend to deem fully insane *and* blameworthy, something which in theory couldn't happen). The Swedish approach as it shows in the 2008 changes even goes *beyond* the concept of stagflation by putting it into systematic use. This seems to have been accepted by the population (as represented by the parliament) without much negative reactions from the inner “compass”. A “positive” interpretation is that this non-reaction is due to the proposal's (self-chosen) incapacity to make the bigger questions of principle *visible*. This would not weaken the “neo” position. A “negative” interpretation is that the division is experienced as out-dated, also by the compass.

This leads us naturally and finally to the issue of *inflation*, the phenomenon which we are today witnessing in Swedish criminal law. It is reasonable not to look too deep into the 2008 changes for changes of ideology particularly concerning the mentally abnormal. It is reasonable instead to look upon these changes as an integrated part of a bigger, more general – and at least in some senses coherent – whole. In today's Swedish criminal law, the compass is eagerly pointing, in all areas, towards more repression, more dense repression. The “gap” which we have discussed here is only one of many “gaps”, of various kinds and in various areas of the criminal law. I hesitate to call it an ideology – it is more like a force or movement, seeking at every stop on the way the suitable ideological superstructure to legitimize more repression – but if something short is to be said then the maxim is “more is more”, in every area of criminal law. And why, then, should the insane get away?