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DETERMINISM AND FREEDOM

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Chapter 1

Legal Responsibility and Excuses

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I

IT IS CHARACTERISTIC of our own and all advanced legal systems that the individual's liability to punishment, at any rate for serious crimes carrying severe penalties, is made by law to depend on, among other things, certain mental conditions. These conditions can best be expressed in negative form as *excusing* conditions: the individual is not liable to punishment if at the time of his doing what would otherwise be a punishable act he is, say, unconscious, mistaken about the physical consequences of his bodily movements or the nature or qualities of the thing or persons affected by them, or, in some cases, if he is subjected to threats or other gross forms of coercion or is the victim of certain types of mental disease. This is a list, not meant to be complete, giving broad descriptions of the principal excusing conditions; the exact definition of these and their precise character and scope must be sought in the detailed exposition of our criminal law. If an individual breaks the law when none of the excusing conditions are present, he is ordinarily said to have acted of "his own free will," "of his own accord," "voluntarily"; or it might be said, "He could have helped doing what he did." If the determinist [1] has anything to say on this subject, it must be because he

[1] Earlier papers in this session will doubtless have specified the variety of theories or claims that shelter under the label "determinism." For many purposes it is necessary to distinguish among them, especially on the question whether the elements in human conduct that are said to be "determined" are regarded as the product of sufficient conditions, or sets of jointly sufficient conditions, which include the individual's character. I think, however, that the defense I make in this paper of the rationality, morality, and justice of qualifying criminal responsibility by excusing conditions will be compatible with any form of determinism that satisfies the two following sets of requirements.

A. The determinist must not deny (*a*) those *empirical* facts that at present we treat as proper grounds for saying, "He did what he chose," "His choice was effective," "He got what he chose," "That was the result of his choice," etc; (*b*) the fact that when we get what we chose to have, live our lives as we have chosen, and particularly when we obtain by a choice what we have judged to be the lesser of two evils, this is a source of satisfaction; (*c*) the fact that we are often able to predict successfully and on reasonable evidence

makes two claims. The first claim is that it may be true—though we cannot at present and may never be able to show that it is true—that human conduct (including in that expression not only actions involving the movements of the human body but its psychological elements or components such as decisions, choices, experiences of desire, effort, etc.) is subject to certain types of law, where law is to be understood in the sense of a scientific law. The second claim is that, if human conduct so understood is in fact subject to such laws (though at the present time we do not know it to be so), the distinction we draw between one who acts under excusing conditions and one who acts when none are present becomes unimportant, if not absurd. Consequently, to allow punishment to depend on the presence or absence of excusing conditions, or to think it justified when they are absent but not when they are present, is absurd, meaningless, irrational, or unjust, or immoral, or perhaps all of these.

My principal object in this paper is to draw attention to the analogy between conditions that are treated by criminal law as *excusing* conditions and certain similar conditions that are treated in another branch of the law as *invalidating* certain civil transactions such as wills, gifts, contracts, and marriages. If we consider this analogy, I think we can see that there is a rationale for our insistence on the importance of excusing conditions in criminal law that no form of determinism that I, at any rate, can construct could impugn; and this rationale seems to me superior at many points to the two main accounts or explanations that in Anglo-American jurisprudence have been put forward as the basis of the recognition of excusing conditions in criminal responsibility.

In this preliminary section, however, I want to explain why I shall not undertake the analysis or elucidation of the meaning of such expressions as "He did it voluntarily," "He acted of his own free will," "He could have helped doing it," "He could have done otherwise." I do not, of course, think the analysis of these terms unimportant: indeed I think we owe the progress that has been made, at least in determining what the "free will problem" is, to the work of philosophers who have pursued this analysis. Perhaps it may be shown that statements of the form "He did it of his own free will" or "He could have done otherwise," etc., are not logically incompatible with the existence of the type of laws the determinist claims may exist; if they do exist, it may not follow that statements of the kind quoted are always false, for it may be that these statements are true given certain conditions, which need not include the nonexistence of any such laws.

that our choice will be effective over certain periods in relation to certain matters.

B. The determinist does not assert and could not truly assert that we *already know* the laws that he says may exist or (in some versions) *must* exist. Determinists differ on the question whether or not the laws are sufficiently simple (*a*) for human beings to discover, (*b*) for human beings to use for the prediction of their own and others' conduct. But as long as it is not asserted that we know these laws I do not think this difference of opinion important here. Of course if we knew the laws and could use them for the detailed and exact prediction of our own and others' conduct, *deliberation* and *choice* would become pointless, and perhaps in such circumstances there could not (logically) be "deliberation" or "choice."

Here, however, I shall not attempt to carry further any such inquiries into the meaning of these expressions or to press the view I have urged elsewhere, that the expression "voluntary action" is best understood as excluding the presence of the various excuses. So I will not deal here with a determinist who is so incautious as to say that it may be false that anyone has ever acted "voluntarily," "of his own free will," or "could have done otherwise than he did." It will help clarify our conception of criminal responsibility, I think, if I confront a more cautious skeptic who, without committing himself as to the meaning of those expressions or their logical or linguistic dependence on, or independence of, the negation of those types of law to which the determinist refers, yet criticizes our allocation of responsibility by reference to excusing conditions. This more cautious determinist says that, whatever the expressions "voluntary" etc. may mean, unless we have reasonable grounds for thinking there are no such laws, the distinctions drawn by these expressions cannot be regarded as of any importance, and there can be neither reason nor justice in allowing punishment to depend on the presence or absence of excusing conditions.

II

In the criminal law of every modern state responsibility for serious crimes is excluded or "diminished" by some of the conditions we have referred to as "excusing conditions." In Anglo-American criminal law this is the doctrine that a "subjective element," or "mens rea," is required for criminal responsibility, and it is because of this doctrine that a criminal trial may involve investigations into the sanity of the accused, into what he knew, believed, or foresaw; into the questions whether or not he was subject to coercion by threats or

provoked into passion, or was prevented by disease or transitory loss of consciousness from controlling the movements of his body or muscles. These matters come up under the heads known to lawyers as Mistake, Accident, Provocation, Duress, and Insanity, and are most clearly and dramatically exemplified when the charge is one of murder or manslaughter.

Though this general doctrine underlies the criminal law, no legal system in practice admits without qualification the principle that *all* criminal responsibility is excluded by *any* of the excusing conditions. In Anglo-American law this principle is qualified in two ways. First, our law admits crimes of "strict liability."[2] These are crimes where it is no defense to show that the accused, in spite of the exercise of proper care, was ignorant of the facts that made his act illegal. Here he is liable to punishment even though he did not intend to commit an act answering the definition of the crime. These are for the most part petty offences contravening statutes that require the maintenance of standards in the manufacture of goods sold for consumption; e.g., a statute forbidding the sale of adulterated milk. Such offenses are usually punishable with a fine and are sometimes said by jurists who object to strict liability not to be criminal in any "real" sense. Secondly, even in regard to crimes where liability is not "strict," so that mistake or accident rendering the accused's action *unintentional* would provide an excuse, many legal systems do not accept some of the other conditions we have listed as excluding liability to punishment. This is so for a variety of reasons.

For one thing, it is clear that not only lawyers but scientists and plain men differ as to the relevance of some excusing conditions, and this lack of agreement is usually expressed as a difference of view regarding what kind of factor limits the human *capacity* to control behavior. Views so expressed have indeed changed with the advance of knowledge about the human mind. Perhaps most people are now persuaded that it is possible for a man to have volitional control of his muscles and also to know the physical character of his movements and their consequences for himself and others, and yet be *unable* to resist the urge or temptation to perform a certain act; yet many think this incapacity exists only if it is associated with well-marked physiological or neurological symptoms or independently definable psychological disturbances. And perhaps there are still some who hold a modified form of the Platonic doctrine that Virtue is Knowledge and believe that the possession of knowledge[3] (and muscular control) is per se a sufficient condition of the capacity to comply with the law.[4]

[2] For an illuminating discussion of strict liability, see the opinion of Justice Jackson in *Morisetts v. United States* (1952) 342 U.S. 246; 96 L. Ed. 288; 78 S. Ct. 241. Also Sayre, "Public Welfare Offences," 33 *Col. L. Rev.* 58; Hall, *Principles of Criminal Law* (Indianapolis: Bobbs-Merrill Co., 1947), chap. x.

Another reason limiting the scope of the excusing conditions is difficulty of *proof*. Some of the mental elements involved are much easier to prove than others. It is relatively simple to show that an agent lacked either generally or on a particular occasion volitional muscular control; it is somewhat more difficult to show that he did not know certain facts either about present circumstances (e.g., that a gun was loaded) or the future (that a man would step into the line of fire); it is much more difficult to establish whether or not a person was deprived of "self-control" by passion provoked by others, or by partial mental disease. As we consider these different cases, not only do we reach much vaguer concepts, but we become progressively more dependent on the agent's own statements about himself, buttressed by inferences from common-sense generalizations about human nature, such as that men are capable of self-control when confronted with an open till but not when confronted with a wife in adultery. The law is accordingly much more cautious in admitting "defects of the will" than "defect in knowledge" as qualifying or excluding criminal responsibility. Further difficulties of proof may cause a legal system to limit its inquiry into the agent's "subjective condition" by asking what a "reasonable man" would in the circumstances have known or foreseen, or by asking whether "a reasonable man" in the circumstances would have been deprived (say, by provocation) of self-control; and the system may then impute to the agent such knowledge or foresight or control.[5]

[3] This view is often defended by the assertion that the mind is an "integrated whole," that if the capacity for self-control is absent, knowledge must also be absent. See Hall, *op. cit.*, p. 524: "Diseased volition does not exist apart from diseased intelligence"; also reference to the "integration theory," chap. xiv.

[4] English judges have taken different sides on the issue whether a man can be said to have "lost self-control," and killed another while in that condition, if he knew what he was doing and killed his victim intentionally. See *Holmes v. D.P.P.* (1946) A.C. 597 (Lord Simon) and *A.G. for Ceylon v. Kumarasinghege v. Don John Perera* (1953) A.C. 200 (Lord Goddard).

[5] But see for a defense of the "reasonable man" test (in cases of alleged provocation) Royal Commission on Capital Punishment, pp. 51–56 (§§ 139–145). This defense is not confined to the difficulties of proof.

For these practical reasons no simple identification of the necessary mental subjective elements in responsibility, with the full list of excusing conditions, can be made; and in all systems far greater prominence is given to the more easily provable elements of volitional control of muscular movement and knowledge of circumstances or consequences than to the other more elusive elements.

Hence it is true that legal recognition of the importance of excusing conditions is never unqualified; the law, like every other human institution, has to compromise with other values besides whatever value is incorporated in the recognition of some conditions as excusing. Sometimes, of course, it is not clear, when "strict liability" is imposed, what value (social welfare?) is triumphant, and there has consequently been much criticism of this as an odious and useless departure from proper principles of liability.

Modern systems of law are however also concerned with most of the conditions we have listed as excusing conditions in another way. Besides the criminal law that requires men to do or abstain from certain actions whether they wish to or not, all legal systems contain rules of a different type that provide legal facilities whereby individuals can give effect to their wishes by entering into certain transactions that alter their own and/or others' legal position (rights, duties, status, etc.). Examples of these civil transactions (acts in the law, *Rechtgeschäfte*) are wills, contracts, gifts, marriage. If a legal system did not provide facilities allowing individuals to give legal effect to their choices in such areas of conduct, it would fail to make one of the law's most distinctive and valuable contributions to social life. But here too most of the mental conditions we have mentioned are recognized by the law as important not primarily as *excusing* conditions but as *invalidating* conditions. Thus a will, a gift, a marriage, and (subject to many complex exceptions) a contract may be invalid if the party concerned was insane, mistaken about the legal character of the transaction or some "essential" term of it, or if he was subject to duress, coercion, or the undue influence of other persons. These are the obvious analogues of mistake, accident, coercion, duress, insanity, admitted by criminal law as excusing conditions. Analogously, the recognition of such conditions as invalidating civil transactions is qualified or limited by other principles. Those who enter in good faith into bilateral transactions of the kind mentioned with persons who appear normal (i.e., not subject to any of the relevant invalidating conditions) must be protected, as must third parties who may have purchased interests originating from a transaction that on the face of it seemed normal. Hence a technique has been introduced to safeguard such persons. This includes principles precluding, say, a party who has entered into a transaction by some mistake from making this the basis of his defense against one who honestly took his words at face value and justifiably relied on them; there are also distinctions between transactions wholly invalidated *ad initio* (void) and those that are valid until denounced (voidable) to protect those who have relied on the transaction's normal form.

III

The similarity between the law's insistence on certain mental elements for both criminal responsibility and the validity of acts in the law is clear. Why, then, do we value a system of social control that takes mental condition into account? Let us start with criminal law and its excusing conditions. What is so precious in its attention to these, and what would be lost if it gave this up? What precisely is the ground of our dissatisfaction with "strict liability" in criminal law? To these fundamental questions, there still are, curiously enough, many quite discordant answers, and I propose to consider two of them before suggesting an answer that would stress the analogy with civil transactions.

The first general answer takes this form. It is said that the importance of excusing conditions in criminal responsibility is derivative, and it derives from the more fundamental requirement that for criminal responsibility there must be "moral culpability," which would not exist where the excusing conditions are present. On this view the maxim *actus non est reus nisi mens sit rea* means a morally evil mind. Certainly traces of this view are to be found in scattered observations of English and American judges—in phrases such as "an evil mind with regard to that which he is doing," "a bad mind," "there must be an act done not merely unguardedly or accidentally, without an evil mind."[6] Some of these well-known formulations were perhaps careless statements of the quite different principle that *mens rea* is an intention to commit an act that is wrong in the sense of legally forbidden. But the same view has been reasserted in general terms in England by Lord Justice Denning: "In order that an act should be punishable it

[6] Lord Esher in *Lee v. Dangar* (1892) 2 Q.B. 337.

must be morally blameworthy, it must be a sin."[7] Most English lawyers would however now agree with Sir James Fitz-James Stephen that the expression *mens rea* is unfortunate, though too firmly established to be expelled, just because it misleadingly suggests that in general moral culpability is essential to a crime, and they would assent to the criticism expressed by a later judge that "the true translation of *mens rea* is an intention to do the act which is made penal by statute or common law."[8] Yet, in spite of this, the view has been urged by a distinguished American contemporary writer on criminal law, Professor Jerome Hall, in his important and illuminating *Principles of Criminal Law*, that *moral* culpability is the basis of responsibility in crime. Again and again in Chapters V and VI of his book Professor Hall asserts that, though the goodness or badness of the *motive* with which a crime is committed may not be relevant, the general principle of liability, except of course where liability is unfortunately "strict" and so any mental element must be disregarded, is the "intentional or reckless doing of a *morally* wrong act."[9] This is declared to be the essential meaning of *mens rea:* "though *mens rea* differs in different crimes there is one common essential element, namely, the *voluntary* doing of a *morally* wrong act forbidden by the law."[10] On this view the law inquires into the mind in criminal cases in order to secure that no one shall be punished in the absence of the basic condition of *moral* culpability. For it is just only to "punish those who have intentionally committed *moral* wrongs proscribed by law."[11]

Now, if this theory were merely a theory as to what the criminal law of a good society should be, it would not be possible to refute it, for it represents a moral preference: namely that legal punishment should be administered only where a "morally wrong" act has been done—though I think such plausibility as it would have even as an ideal is due to a confusion. But of course Professor Hall's doctrine does not fit any actual system of criminal law because in every such system there are necessarily many actions (quite apart from the cases of "strict liability") that if voluntarily done are criminally

[7] Denning, *The Changing Law* (London: Stevens, 1953), p. 12.
[8] *Allard v. Selfridge* (1925) 1 K.B. 137. (Shearman.) This is quoted by Glanville Williams in *The Criminal Law* (London: Stevens, 1953), p. 29, note 3, where the author comments that the judge should have added "recklessness."
[9] Hall, *op. cit.*, p. 166.
[10] *Ibid.*, p. 167.
[11] *Ibid.*, p. 149.

punishable, although our moral code may be either silent as to their moral quality, or divided. Very many offenses are created by legislation designed to give effect to a particular economic scheme (e.g., a state monopoly of road or rail transport), the utility or moral character of which may be genuinely in dispute. An offender against such legislation can hardly be said to be morally guilty or to have intentionally committed a moral wrong, still less "a sin" *proscribed* by law;[12] yet if he has broken such laws "voluntarily" (to use Professor Hall's expression), which in practice means that he was not in any of the excusing conditions, the requirements of *justice* are surely satisfied. Doubts about the justice of the punishment would begin only if he were punished even though he was at the time of the action in one of the excusing conditions; for what is essential is that the offender, if he is to be *fairly* punished, must have acted "voluntarily," and not that he must have committed some moral offense. In addition to such requirements of justice in the individual case, there is of course, as we shall see, a different type of requirement as to the *general* character of the laws.

It is important to see what has led Professor Hall and others to the conclusion that the basis of criminal responsibility *must* be moral culpability ("the voluntary doing of a morally wrong act"), for latent in this position, I think, is a false dilemma. The false dilemma is that criminal liability *must* either be "strict"—that is, based on nothing more than the outward conduct of the accused—or *must* be based on moral culpability. On this view there is no third alternative and so there can be no reason for inquiring into the state of mind of the accused—"inner facts," as Professor Hall terms them—except for the purpose of establishing *moral* guilt. To be understood all theories should be examined in the context of argument in which they are advanced, and it is important to notice that Professor Hall's doctrine was developed mainly by way of criticism of the so-called objective theory of liability, which was developed, though not very consistently, by Chief Justice Holmes in his famous essays on common law.[13] Holmes as-

[12] "The criminal quality of an act cannot be discovered by intuition: nor can it be discovered by any standard but one. Is the act prohibited with penal consequences? Morality and criminality are far from coextensive nor is the sphere of criminality part of a more exclusive field covered by morality unless morals necessarily disapproves of the acts prohibited by the state, in which case the argument moves in a circle." Lord Atkin, *Proprietory Articles Trade Association v. A.G. for Canada* (1931) A.C. 324.
[13] Holmes, *The Common Law*, Lecture II, "The Criminal Law."

serted that the law did not consider, and need not consider, in administering punishment what in fact the accused intended, but that it imputed to him the intention that an "ordinary man," equipped with ordinary knowledge, would be taken to have had in acting as the accused did. Holmes in advocating this theory of "objective liability" used the phrase "inner facts" and frequently stressed that *mens rea*, in the sense of the actual wickedness of the party, was unnecessary. So he often identified "mental facts" with moral guilt and also identified the notion of an objective standard of liability with the rejection of *moral* culpability as a basis of liability. This terminology was pregnant with confusion. It fatally suggests that there are only two alternatives: to consider the mental condition of the accused only to find moral culpability or not to consider it at all. But we are not impaled on the horns of any such dilemma: there are independent reasons, apart from the question of moral guilt, why a legal system should require a voluntary action as a condition of responsibility. These reasons I shall develop in a moment and merely summarize here by saying that the principle (1) that it is unfair and unjust to punish those who have not "voluntarily" broken the law is a moral principle quite distinct from the assertion (2) that it is wrong to punish those who have not "voluntarily committed a moral wrong proscribed by law."

The confusion that suggests the false dilemma—either "objective" standards (strict liability) or liability based on the "inner fact" of *moral* guilt—is, I think, this. We would all agree that unless a legal system was as a whole morally defensible, so that its existence was better than the chaos of its collapse, and more good than evil was secured by maintaining and enforcing laws in general, these laws should not be enforced, and no one should be punished for breaking them. It *seems* therefore to follow, but does not, that we should not punish anyone unless in breaking the law he has done something morally wrong; for it looks as if the mere fact that a law has been voluntarily broken were not enough to justify punishment; the extra element required is "moral culpability," at least in the sense that we should have done something morally wrong. What we need to escape confusion here is a distinction between two sets of questions. The first is a general question about the moral value of the laws: Will enforcing them produce more good than evil? If they do, then it is morally permissible to enforce them by punishing those who have broken them, unless in any given case there is some "excuse."

The second is a particular question concerning individual cases: Is it right or just to punish this particular person? Is he to be excused on account of his mental condition because it would be unjust—in view of his lack of knowledge or control—to punish him? The first, general question with regard to each law is a question for the legislature; the second, arising in particular cases, is for the judge. And the question of responsibility arises only at the judicial stage. One necessary condition of the just application of a punishment is normally expressed by saying that the agent "could have helped" doing what he did, and hence the need to inquire into the "inner facts" is dictated not by the moral principle that only the doing of an *immoral* act may be legally punished, but by the moral principle that no one should be punished who could not help doing what he did. This is a necessary condition (unless strict liability is admitted) for the moral propriety of legal punishment and no doubt also for moral censure; in this respect law and morals are similar. But this similarity as to the one essential condition that there must be a "voluntary" action if legal punishment or moral censure is to be morally permissible does not mean that legal punishment is morally permissible only where the agent has done something morally wrong. I think that the use of the word "fault" in juristic discussion to designate the requirement that liability be excluded by excusing conditions may have blurred the important distinction between the assertions that (1) it is morally permissible to punish only voluntary actions and (2) it is morally permissible to punish only voluntary commission of a moral wrong.

IV

Let me now turn to a second explanation of the laws concerned with the "inner facts" of mental life as a condition of responsibility. This is a Benthamite theory that I shall name the "economy of threats" and is the contention that the required conditions of responsibility—e.g., that the agent knew what he was doing, was not subject to gross coercion or duress, was not mad or a small child—are simply the conditions that must be satisfied if the threat to punish announced by the criminal law is to have any effect and if the system is to be efficient in securing the maintenance of law at the least cost in pain. This theory is stated most clearly by Bentham; it is also to be found in Austin and in the report of the great Criminal Law Commission of 1833 of which he was a member. In a

refined form it is implicit in many contemporary attempted "dissolutions" of the problem of free will. Many accept this view as a common-sense utilitarian explanation of the importance that we attribute to excusing conditions. It appeals most to the utilitarian and to the determinist, and it is interesting to find that Professor Glanville Williams in his recent admirable work on "The General Principles of Criminal Law,"[14] when he wished to explain the exemption of the insane from legal responsibility compatibly with "determinism," did so by reference to this theory.

Yet the doctrine is an incoherent one at certain points, I think, and a departure from, rather than an elucidation of, the moral insistence that criminal liability should generally be conditional on the absence of excusing conditions. Bentham's best statement of the theory is in Chapter XIII of his *Principles of Morals and Legislation:* "Cases in Which Punishment Must be Inefficacious." The cases he lists, besides those where the law is made ex post facto or not adequately promulgated, fall into two main classes. The first class consists of cases in which the penal threat of punishment could not prevent a person from performing an action forbidden by the law *or any action of the same sort;* these are the cases of infancy and insanity in which the agent, according to Bentham, has not the "state or disposition of mind on which the prospect of evils so distant as those which are held forth by the law" has the effect of influencing his conduct. The second class consists of cases in which the law's threat could not have had any effect on the agent in relation to the *particular* act committed because of his lack of knowledge or control. What is wrong in punishing a man under both these types of mental conditions is that the punishment is wasteful; suffering is caused to the accused who is punished in circumstances where it could do no good.

In discussing the defense of insanity Professor Glanville Williams applies this theory in a way that brings out its consistency not only with a wholly utilitarian outlook on punishment but with determinism.

> For mankind in the mass it is impossible to tell whom the threat of punishment will restrain and whom it will not; for most it will succeed, for some it will fail. And the punishment must then be applied to those criminals in order to maintain the threat to persons generally. Mentally deranged persons, however, can be separated from the mass by scientific tests, and being a defined class their segregation from punishment does not impair the efficacy of the sanction for people generally.[15]

[14] Williams, *op. cit.*, pp. 346–47.

The point made here is that, if, for example, the mentally deranged (scientifically tested) are exempted, criminals will not be able to exploit this exemption to free themselves from liability, since they cannot bring themselves within its scope and so will not feel free to commit crimes with impunity. This is said in order to justify the exemption of the insane consistently with the "tenet" of determinism, in spite of the fact that from a determinist viewpoint

> every impulse if not in fact resisted was in those circumstances irresistible. A so-called irresistible impulse is simply one in which the desire to perform a particular act is not influenced by other factors like the threat of punishment. . . . on this definition every crime is the result of an irresistible impulse.

This theory is designed not merely to fit a utilitarian theory of punishment, but also the view that it is always false, if not senseless, to say that a criminal could have helped doing what he did. So on this theory when we inquire into the mental state of the accused, we do not do so to answer the question, Could he help it? Nor of course to answer the question, Could the threat of punishment have been effective in his case?—for we know that it was not. The theory presents us with a far simpler conceptual scheme for dealing with the whole matter, since it does not involve the seemingly counterfactual speculation regarding what the accused "could have done." On this theory we inquire into the state of mind of the accused simply to find out whether he belongs to a defined class of persons whose exemption from punishment, if allowed, will not weaken the effect on others of the general threat of punishment made by the law. So there is no question of its being unjust or unfair to punish a particular criminal or to exempt him from punishment. Once the crime has been committed the decision to punish or not has nothing to do with any moral claim or right of the criminal to have the features of his case considered, but only with the causal efficacy of his punishment on others. On this view the rationale of excuses is not (to put it shortly) that the accused should in view of his mental condition be excused whatever the effect of this on others, but rather the mere fact that excusing him will not harm society

[15] Williams, *loc. cit.*

by reducing the efficacy of the law's threats for others. So the relevance of the criminal's mental condition is purely the question of the effect on others of his punishment or exemption from it.

This is certainly paradoxical enough. It seems to destroy the entire notion that in punishing we must be just to the particular criminal in front of us and that the purpose of excusing conditions is to protect him from society's claim. But apart from paradox the doctrine that we consider the state of a man's mind only to see if punishment is required in order to maintain the efficacy of threats for others is vitiated by a *non sequitur*. Before a man does a criminal action we may know that he is in such a condition that the threats cannot operate on him, either because of some temporary condition or because of a disease; but it does not follow—because the *threat* of punishment in his case, and in the case of others like him, is useless—that his *punishment* in the sense of the official administration of penalties will also be unnecessary to maintain the efficacy of threats for others at its highest. It may very well be that, if the law contained no explicit exemptions from responsibility on the score of ignorance, accident, mistake, or insanity, many people who now take a chance in the hope that they will bring themselves, if discovered, within these exempting provisions would in fact be deterred. It is indeed a perfectly familiar fact that pleas of loss of consciousness or other abnormal mental states, or of the existence of some other excusing condition, are frequently and sometimes successfully advanced where there is no real basis for them, for the difficulties of disproof are often considerable. The uselessness of a *threat* against a given individual or class does not entail that the *punishment* of that individual or class cannot be required to maintain in the highest degree the efficacy of threats for others. It may in fact be the case that to make liability to punishment dependent on the absence of excusing conditions is the most efficient way of maintaining the laws with the least cost in pain. But it is not *obviously* or *necessarily* the case.

It is clear, I think, that if we were to base our views of criminal responsibility on the doctrine of the economy of threats, we should misrepresent altogether the character of our moral preference for a legal system that requires mental conditions of responsibility over a system of total strict liability or entirely different methods of social control such as hypnosis, propaganda, or conditioning.

To make this intelligible we must cease to regard the law as merely a causal factor in human behavior differing from others only in the fact that it produces its effect through the medium of the mind; for it is clear that we look on excusing conditions as something that *protects* the individual against the claims of the rest of society. Recognition of their excusing force may lead to a lower, not a higher, level of efficacy of threats; yet—and this is the point—we could not regard that as sufficient ground for abandoning this protection of the individual; or if we did, it would be with the recognition that we had sacrificed one principle to another; for more is at stake than the single principle of maintaining the laws at their most efficacious level. We must cease, therefore, to regard the law simply as a system of stimuli goading the individual by its threats into conformity. Instead I shall suggest a mercantile analogy. Consider the law not as a system of stimuli but as what might be termed 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. Punishment *is* different from a mere "tax on a course of conduct." What I do mean is that the conception of the law simply as goading individuals into desired courses of behavior is inadequate and misleading; what a legal system that makes liability generally depend on excusing conditions does is to guide individuals' choices as to behavior by presenting them with reasons for exercising choice in the direction of obedience, but leaving them to choose.

It is at this point that I would stress the analogy between the mental conditions that excuse from criminal responsibility and the mental conditions that are regarded as invalidating civil transactions such as wills, gifts, contracts, marriages, and the like. The latter institutions provide individuals with two inestimable advantages in relation to those areas of conduct they cover. These are (1) the advantage to the individual of determining by his choice what the future shall be and (2) the advantage of being able to predict what the future will be. For these institutions enable the individual (1) to bring into operation the coercive forces of the law so that those legal arrangements he has chosen shall be carried into effect and (2) to plan the rest of his life with a certainty or at least

the confidence (in a legal system that is working normally) that the arrangements he has made will in fact be carried out. By these devices the individual's choice is brought into the legal system and allowed to determine its future operations in certain areas, thereby giving him a type of indirect coercive control over, and a power to foresee the development of, official life. This he would not have "naturally"; that is, apart from these legal institutions.

In brief, the function of these institutions of private law is to render effective the individual's preferences in certain areas. It is therefore clear why in this sphere the law treats the mental factors of, say, mistake, ignorance of the nature of the transaction, coercion, undue influence, or insanity as invalidating such civil transactions. For a transaction entered into under such conditions will not represent a real choice: the individual might have chosen one course of events and by the transaction procured another (cases of mistake, ignorance, etc.), or he might have chosen to enter the transaction without coolly and calmly thinking out what he wanted (undue influence), or he might have been subjected to the threats of another who had imposed *his* choices (coercion).

To see the value of such institutions in rendering effective the individual's considered and informed choices as to what on the whole shall happen, we have but to conduct the experiment of imagining their absence: a system where no mental conditions would be recognized as invalidating such transactions and the consequent loss of control over the future that the individual would suffer. That such institutions *do* render individual choices effective and increase the powers of individuals to predict the course of events is simply a matter of empirical fact, and no form of "determinism," of course, can show this to be false or illusory. If a man makes a will to which the law gives effect after his death, this is not, of course, merely a case of *post hoc:* we have enough empirical evidence to show that this was an instance of a regularity sufficient to have enabled us to predict the outcome with reasonable probability, at least in some cases, and to justify us, therefore, in interpreting this outcome as a consequence of making the will. There is no reason why we should not describe the situation as one where the testator *caused* the outcome of the distribution made. Of course the testator's choice in his example is only one prominent member of a complex set of conditions, of which all the other members were as necessary for the production of the outcome as his choice.

Science may indeed show (1) that this set of conditions also includes conditions of which we are at the present moment quite ignorant and (2) that the testator's choice itself was the outcome of some set of jointly sufficient conditions of which we have no present knowledge. Yet neither of these two suppositions, even if they were verified, would make it false to say that the individual's choice did determine the results, or make illusory the satisfaction got (*a*) from the knowledge that this kind of thing is possible, (*b*) from the exercise of such choice. And if determinism does not entail that satisfactions (*a*) or (*b*) are obtainable, I for one do not understand how it could affect the wisdom, justice, rationality, or morality of the system we are considering.

If with this in mind we turn back to criminal law and its excusing conditions, we can regard their function as a mechanism for similarly maximizing within the framework of coercive criminal law the efficacy of the individual's informed and considered choice in determining the future and also his power to predict that future. We must start, of course, with the need for criminal law and its sanctions as at least some check on behavior that threatens society. This implies a belief that the criminal law's threats actually do diminish the frequency of antisocial behavior, and no doubt this belief may be said to be based on inadequate evidence. However, we must clearly take it as our starting point: if this belief is wrong, it is so because of lack of empirical evidence and not because it contradicts any form of determinism. Then we can see that by attaching excusing conditions to criminal responsibility, we provide each individual with something 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. Ths, of course, can sound like a very cold, if not immoral, attitude toward the criminal law,

general obedience to which we regard as an essential part of a decent social order. But this attitude seems repellent only if we assume that all criminal laws are ones whose operation we approve. To be realistic we must also think of bad and repressive criminal laws; in South Africa, Nazi Germany, Soviet Russia, and no doubt elsewhere, we might be thankful to have their badness mitigated by the fact that they fall only on those who have obtained a satisfaction from knowingly doing what they forbid.

Again, the value of these three factors can be realized if we conduct the *Gedankenexperiment* of imagining criminal law operating without excusing conditions. First, our power of predicting what will happen to us will be immeasurably diminished; the likelihood that I shall choose to do the forbidden act (e.g., strike someone) and so incur the sanctions of the criminal law may not be very easy to calculate even under our system: as a basis for this prediction we have indeed only the knowledge of our own character and some estimate of the temptations life is likely to offer us. But if we are also to be liable if we strike someone by accident, by mistake, under coercion, etc., the chance that we shall incur the sanctions are immeasurably increased. From our knowledge of the past career of our body considered as a *thing*, we cannot infer much as to the chances of its being brought into violent contact with another, and under a system that dispensed with the excusing condition of, say, accident (implying lack of intention), a collision alone would land us in jail. Secondly, our choice would condition what befalls us to a lesser extent. Thirdly, we should suffer sanctions without having obtained any satisfaction. Again, no form of determinism that I, at least, can construct can throw any doubt on, or show to be illusory, the real satisfaction that a system of criminal law incorporating excusing conditions provides for individuals in maximizing the effect of their choices within the framework of coercive law. The choices remain choices, the satisfactions remain satisfactions, and the consequences of choices remain the consequences of choices even if choices are determined and other "determinants" besides our choices condition the satisfaction arising from their being rendered effective in this way by the structure of the criminal law.

It is now important to contrast this view of excusing conditions with the Benthamite explanation I discussed in Part III of this paper. On that view excusing conditions were treated as conditions under which the law's threat could operate with maximum efficacy. They were recognized *not* because they ensured justice to individuals considered separately, but because sanctions administered under those conditions were believed more effective and economical of pain in securing the general conformity to law. If these beliefs as to the *efficacy* of excusing conditions could be shown false, then all reasons for recognizing them as conditions of criminal responsibility would disappear. On the present view, which I advocate, excusing conditions are accepted as independent of the efficacy of the system of threats. Instead it is conceded that recognition of these conditions may, and probably does, diminish that efficacy by increasing the number of conditions for criminal liability and hence giving opportunities for pretense on the part of criminals, or mistakes on the part of tribunals.

On this view excusing conditions are accepted as something that may conflict with the social utility of the law's threats; they are regarded as of moral importance because they provide for all individuals alike the satisfactions of a costing system. Recognition of excusing conditions is therefore seen as a matter of protection of the individual against the claims of society for the highest measure of protection from crime that can be obtained from a system of threats. In this way the criminal law respects the claims of the individual as such, or at least as a *choosing being*, and distributes its coercive sanctions in a way that reflects this respect for the individual. This surely is very central in the notion of justice and is *one*, though no doubt only one, among the many strands of principle that I think lie at the root of the preference for legal institutions conditioning liability by reference to excusing conditions.

I cannot, of course, by unearthing this principle claim to have solved everyone's perplexities. In particular, I do not know what to say to a critic who urges that I have shown only that the system in which excusing conditions are recognized protects the individual better against the claims of society than one in which no recognition is accorded to these factors. This seems to me to be enough; yet I cannot satisfy his complaint, if he makes it, that I have not shown that we are justified in punishing anyone *ever*, at all, under any conditions. He may say that even the criminal who has committed his crime in the most deliberate and calculating way and has shown himself throughout his life competent in maximizing what he thinks his own interests will be little comforted when

he is caught and punished for some major crime. At *that* stage he will get little satisfaction if it is pointed out to him (1) that he has obtained some satisfaction from his crime, (2) that he knew that it was likely he would be punished and that he had decided to pay for his satisfaction by exposing himself to this risk, and (3) that the system under which he is punished is not one of strict liability, is not one under which a man who accidentally did what he did would also have suffered the penalties of the law.

V

I will add four observations *ex abundante cautela.*

1. The elucidation of the moral importance of the mental element in responsibility, and the moral odium of strict liability that I have indicated, must not be mistaken for a psychological theory of motivation. It does not answer the question, Why do people obey the law? It does not assert that they obey only because they choose to obey rather than pay the cost. Instead, my theory answers the question, Why *should* we have a law with just these features? Human beings in the main do what the law requires without first choosing between the advantage and the cost of disobeying, and when they obey it is not usually from fear of the sanction. For most the sanction is important not because it inspires them with fear but because it offers a guarantee that the antisocial minority who would not otherwise obey will be coerced into obedience by fear. To obey without this assurance might, as Hobbes saw, be very foolish: it would be to risk going to the wall. However, the fact that only a few people, as things are, consider the question, Shall I obey or pay? does not in the least mean that the standing possibility of asking this question is unimportant: for it secures just those values for the individual that I have mentioned.

2. I must of course confront the objection the Marxist might make, that the excusing conditions, or indeed *mutatis mutandis* the invalidating conditions, of civil transactions are of no use to many individuals in society whose economic or social position is such that the difference between a law of strict liability and a law that recognizes excusing conditions is of no importance.

It is quite true that the fact that criminal law recognizes excusing mental conditions may be of no importance to a person whose economic condition is such that he cannot profit from the difference between a law against theft that is

strict and one that incorporates excusing conditions. If starvation "forces" him to steal, the values the system respects and incorporates in excusing conditions are nothing to him. This is of course similar to the claim often made that the freedom that a political democracy of the Western type offers to its subjects is merely formal freedom, not real freedom, and leaves one free to starve. I regard this as a confusing way of putting what may be true under certain conditions: namely, that the freedoms the law offers may be *valueless* as playing no part in the happiness of persons who are too poor or weak to take advantage of them. The admission that the excusing conditions may be of no value to those who are below a minimum level of economic prosperity may mean, of course, that we should incorporate as a further excusing condition the pressure of gross forms of economic necessity. This point, though valid, does not seem to me to throw doubt on the principle lying behind such excusing conditions as we do recognize at present, nor to destroy their genuine value for those who are above the minimum level of economic prosperity, for a difference between a system of strict liability and our present system plays a part in their happiness.

3. The principle by reference to which I have explained the moral importance of excusing conditions may help clarify an old dispute, apt to spring up between lawyers on the one hand and doctors and scientists on the other, about the moral basis of punishment.

From Plato to the present day there has been a recurrent insistence that if we were rational we would always look on crime as a disease and address ourselves to its cure. We would do this not only where a crime has actually been committed but where we find well-marked evidence that it will be. We would take the individual and treat him as a patient before the deed was done. Plato,[16] it will be remembered, thought it superstitious to look back and go into questions of responsibility or the previous history of a crime except when it might throw light on what was needed to cure the criminal.

Carried to its extreme, this doctrine is the program of Erewhon where those with criminal tendencies were sent by doctors for indefinite periods of cure; punishment was displaced by a concept of social hygiene. It is, I think, of some importance to realize why we should object to this point of view, for both those who defend it and those who attack it

[16] Plato, *Protagoras*, 324; *Laws* 861, 865.

often assume that the *only* possible consistent alternative to Erewhon is a theory of punishment under which it is justified simply as a return for the moral evil attributable to the accused. Those opposed to the Erewhonian program are apt to object that it disregards moral guilt as a necessary condition of a just punishment and thus leads to a condition in which any person may be sacrificed to the welfare of society. Those who defend an Erewhonian view think that their opponents' objection must entail adherence to the form of retributive punishment that regards punishment as a justified return for the moral evil in the criminal's action.

Both sides, I think, make a common mistake: there *is* a reason for making punishment conditional on the commission of crime and respecting excusing conditions, which are quite independent of the form of retributive theory that is often urged as the only alternative to Erewhon. Even if we regard the over-all purpose of punishment as that of protecting society by deterring persons from committing crimes and insist that the penalties we inflict be adapted to this end, we can in perfect consistency and with good reason insist that these punishments be applied only to those who have broken a law and to whom no excusing conditions apply. For this system will provide a measure of protection to individuals and will maximize their powers of prediction and the efficacy of their choices in the way that I have mentioned. To see this we have only to ask ourselves what in terms of these values we should lose (however much else we might gain) if social hygiene and a *system of compulsory treatment* for those with detectable criminal tendencies were throughout substituted for our system of punishment modified by excusing conditions. Surely the realization of what would be lost, and not a retributive theory of punishment, is all that is required as a reason for refusing to make the descent into Erewhon.

4. Finally, what I have written concerns only *legal* responsibility and the rationale of excuses in a legal system in which there are organized, coercive sanctions. I do not think the same arguments can be used to defend *moral* responsibility from the determinist, if it is in any danger from that source.