

# TOWARDS A RATIONAL THEORY OF CRIMINAL RESPONSIBILITY: THE PSYCHOPATHIC OFFENDER

## PART TWO

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### PSYCHOPATHY, LOGIC AND CRIMINAL RESPONSIBILITY: SOME CONCLUSIONS

Lady Wootton has argued for the abolition of the determination of criminal responsibility primarily on the ground that the distinction it required between normals and those afflicted with mental illness is impossible to draw satisfactorily.<sup>1</sup> The main shaft of her attack was directed at the attempt to administer the criminal responsibility determination in the case of the psychopathic offender: here, she argued, there was simply no way of distinguishing the sick from the wicked offender.

The singling out of the psychopath as scapegoat rested, I have argued, upon certain assumptions which Wootton makes about the nature of psychopathy as a personality disorder.<sup>2</sup> In this, the second part of this article, I turn to question the validity of those assumptions in the light of the earlier account of psychopathy. Then, if it is suspected that Wootton's assumptions are invalid, the question is what can become of her proposal that we abandon the responsibility determination and substitute a dispositional hearing later in the process.

The contention I propose to defend in this article is that Wootton's assumptions are invalid: if it is proposed that the substance of the responsibility determination be removed from the culpability-determining stage to the dispositional stage of the criminal process, such a proposal must rest, *not* upon the putative unreliability or unworkability of criminal responsibility at the trial stage, but upon the evolution of a new concept of the *purpose* of the criminal law. The issues raised by an evolving ideology can not be passed over *sub silentio* or smothered in a feather-bed of comfortable practical issues. They are in fact abiding and intractable problems of ethics and political theory. Further, the practical difficulties in the working of criminal responsibility are really not as critical as

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<sup>1</sup> This is discussed in Bleechmore 'Towards a Rational Theory of Criminal Responsibility: The Psychopathic Offender: Part I (1975) 10 *M.U.L.R.* 19, 19-26.

<sup>2</sup> *Ibid.* 26-27.

Wootton would have us believe: I contend that even in the hard case of the psychopath, modern formulations of the rule of responsibility work reasonably well, both from a logical and practical point of view. Any radical change must be premised upon a demonstrated ideological change. A further aim in this part is to adumbrate some of the issues which must be faced if the proposal to metamorphose criminal responsibility is seriously made. And finally, I am hopeful that my account of psychopathy may prove to be tendentious and contain an implication that change is ultimately necessary.

## I

It will be recalled that Wootton had condemned the attempt to deduce an exculpatory basis in non-responsibility solely from the fact of commission of certain acts on the ground that such an argument was logically circular.<sup>3</sup> We should look at this question of circularity before turning to the underlying assumption that the sole evidence of psychopathy is the fact of a pattern of criminal behaviour.

A logically circular argument is one in which the conclusion is inferred from the premise and the premise, in turn, is inferred from the conclusion. Where A is inferred from B, and B is inferred from A, neither proposition is established because the validity of each is dependent upon the other. But Wootton's argument does not consist of a set of propositions which are interdependent in this sense. First, the proposition that a subject has committed antisocial actions is a *given*: it is established *ab initio*, and certain other propositions can be established by way of inference from it. Secondly, the logical relation between Wootton's component propositions is quite different from that obtaining in a 'circular' argument. Thus, the antisocial acts are provided with a causal explanation in the process of categorizing the individual diagnostically, in one relation; and in the other relation, the diagnosis is said to have consequences in terms of the light in which these antisocial acts should be viewed, that is, they are acts for which the individual is not responsible. These two logical relations are quite different from that linking two propositions, A and B, where B is inferred from A. Putting it another way:

For all A's and B's, from the fact that we come to know B through our study of A, it does not follow that B cannot be a candidate for explaining A.<sup>4</sup>

Wootton's assertion that the argument in question is circular gains its initial plausibility simply because the direction of movement of the reasoning is circular not linear; but, upon analysis, it appears that it is not tainted with that *logical* circularity which renders it fallacious.

<sup>3</sup> *Ibid.* 25.

<sup>4</sup> Haksar 'The Responsibility of Psychopaths' (1965) *Philosophical Quarterly* 135, 137.

Of course, the argument assumes that the diagnosis of psychopathy is in fact made solely and exclusively upon the basis of a record of antisocial behaviour. It is convenient at this point to turn to the larger issue here: the validity of this and the other assumptions about the character of psychopathy which Wootton makes in support of her assertion that the determination of responsibility as a culpability determinant is unworkable.

From the rather detailed account I have given of psychopathic personality and its diagnostic criteria and etiology, I submit it is plain that the diagnosis of psychopathy is predicated upon a great deal more than the *fact* of a record of antisocial behaviour.

In this context it is simplistic to speak of the *fact* of behaviour if to do so conveys the suggestion that it is at all meaningful to consider the existence of certain events in isolation from their total nature and circumstances. This point is cognate with the line of argument adopted in refutation of Wootton's contention that certain reasoning is logically circular. Antisocial behaviour can be committed in varying circumstances and may take quite different forms which permit of internal differentiation and give rise to different explanatory hypotheses.

No respectable physician is going to commit himself to a diagnosis on the basis of a bare record of charges or the raw enumeration of facts. Psychopathic behaviour is distinguished from normal criminal or opportunistic behaviour by careful study of the nature and circumstances of criminality in the total context of individual life style. Close scrutiny of the circumstances, for example, may reveal whether or not the act was adequately motivated, or whether there is present the tell-tale characteristic meagreness of rational purpose. Were precautions against detection taken in a more or less systematic way? Or was there the baffling failure to take even elementary precautions against punishment? Does the individual evidence remorse or shame? Does he seem anxious?

The total picture is examined. In the habitual criminal it is useful to determine whether he possesses loyalties to his companions in crime. It is significant for the purpose of ruling out a diagnosis of psychopathy that a subject gives indication of a firmly held creed of defiance of law and society held in common with others in a spirit of loyalty and co-operation. The criminality of many ghetto blacks, often cited as psychopathic behaviour, is committed by individuals who maintain a purposive, highly organized and sharply directional allegiance to an ideology (in earlier days epitomized by the black panther movement), and is maximally dissimilar from the frivolous whim-inspired antisociality of the psychopath.

To be soundly based, the diagnosis of psychopathic personality must take careful account of every aspect of the individual's life including

elements not related to his criminality. The search will include a study of the emotional life with an eye to the characteristic psychopathic poverty of affect. It will include an analysis of the internal relationship of the subject with his family and children. Psychometric tests may reveal normal intelligence giving rise to the suspicion that an entrenched pattern of criminality should be (in the presence of other factors) attributed to psychopathic personality. Patterns of egocentricity, inexplicable lack of personal insight combined with normal rationality, gross behaviour under the influence of alcohol, aimless and whimsical indulgence in sexual promiscuity, insignificant in themselves may combine to present a strong impression of psychopathy.

This enumeration of diagnostic features is, of course, not complete. But it is enough to make plain that diagnosis is not based on the mere *fact* of a pattern of antisocial behaviour. There is a palpable difference between behaviour which is the product of psychopathy and that which is committed by the 'normal' criminal: even the inattentive student observes that

(t)here are persons who indulge in vice with such persistence, at a cost of punishment so heavy, so certain, and so prompt, who incur their punishment for the sake of pleasure so trifling and so transient, that they are by common consent considered insane although they exhibit no other indication of insanity.<sup>5</sup>

Wootton would have us believe that basing exculpation upon a pattern of antisocial behaviour evokes an invidious paradox in which the 'worse your conduct, the better your chance'.<sup>6</sup> Again, the assumption is that the behaviour of the psychopath and the behaviour of the 'normal' are indistinguishable except that the behaviour of the psychopath is usually worse. But, once demonstrate that the behaviour of the two groups is different in kind and circumstance and the paradox dissolves.

Wootton's third assumption (not an assumption, really, but an assertion) is that the criteria distinguishing the psychopath from the mentally whole criminal are unscientific in that they are unobservable, unobjective and not empirically verifiable. I propose to leave most of my reply to these assertions until later in this article. For the moment, however, it is again clear that almost every diagnostic characteristic I have relied upon in my account of psychopathy is of a palpable and observable nature. Much of the etiological theory of psychopathy is, concededly, unverifiable: Freud's theory of human behaviour provided Karl Popper with his archetype of the 'unscientific' theory because it did not and does not possess the characteristic of refutability; and most of the modern psychodynamic

<sup>5</sup> Quotation attributed to Mercier, quoted in Henderson *Psychopathic States* (1939).

<sup>6</sup> Wootton 'Diminished Responsibility: A Layman's view' (1960) 76 *Law Quarterly Review* 224, 234.

formulations of the causes of psychopathy share the same vice.<sup>7</sup> It is true that some diagnosticians may be reluctant to identify a case of psychopathic personality in the absence of at least some etiological data. Nevertheless, identification of psychopathy is almost always based upon an exhaustive examination of diagnostic criteria or symptoms rather than background or family history viewed etiologically. All the symptoms, while not delineated individually with any great claim to precision, are nevertheless observable, empirically verifiable and possess an objective existence. Where there is a confluence of these criteria, the diagnosis which distinguishes the psychopath from the normal, the mentally ill from the mentally whole, emerges clear, precise and formidably accurate.

## II

We are left, then, with Lady Wootton's proposition that 'to infer diminished responsibility from increased propensity to crime is a sheer act of faith.'<sup>8</sup> To say that a psychopath is not *able to control his conduct* is, according to Wootton, a 'philosophical, not a scientific statement.'<sup>9</sup> If we leave aside for the moment the unresolved (and perhaps unresolvable) issue of free will and determinism, Wootton declares that we are 'still in no position to assess the strength of another man's temptations. On that, the evidence lies buried in another man's consciousness into which no human being can enter.'<sup>10</sup> And she might have added: 'or buried in another's *unconscious*.'

Granted that Wootton is mistaken about the logical and practical problems in deducing non-responsibility, does this general objection, nevertheless, demonstrate the sterility of the responsibility determination? Is it impossible to distinguish a psychopath from a 'normal' criminal because whether or not an individual was able to control his conduct is something only he knows and no one else can ever find out?

It is easy to see Wootton's point here but difficult to see how it is a problem which is in any way novel to the criminal law: the fact that a legal enquiry pertains to internal individual mental processes does not prevent courts making the enquiry. Wootton's objection is, I suppose, that conclusions about the nature of individual thought (or for that matter ones pertaining to unconscious mental processes) are never verifiable. But lack of any possibility of final verification has never discouraged legal

<sup>7</sup> Popper contrasted the model of psychoanalytical theory with the archetypal scientific theory, Einstein's theory of relativity, a theory which was obviously verifiable and refutable, and was in fact verified in 1919 by means of certain observations which could be made only on that date.

<sup>8</sup> Wootton, *op.cit.*, 232.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

officials from asking whether a defendant *intended* to kill or to commit grievous bodily harm or to steal; or to enquire whether a defendant *fore-saw* the consequences of certain actions in the context of a recklessness determination. Inner thoughts manifest themselves externally: by processes of inductive reasoning it is more or less possible to draw conclusions about mental behaviour on the basis of extrinsic action. Thus a jury, in deciding whether a defendant intended to kill his victim, addresses itself to the actions of the defendant and enquires whether an ordinary person acting in that way could be said to have intended to kill. I think this is a fair account of the reasoning process in such situations even though the process may often appear intuitive rather than discursive. It may be objected that the problems of determining whether a man could not prevent himself from performing a certain action may be more difficult than those of determining whether he intended something; but, if so, they are problems which inhere in the logical nature of the notion of compulsion, philosophically loaded as it is with intractable problems of free will and determinism, rather than in any putative elusiveness entailed by their wholly internal nature. But so far as its character as an unverifiable creature of the mind is concerned, there is no more reason to condemn the responsibility enquiry than the search for subjective intention.<sup>11</sup>

Wootton's statement of the problem is, in any case, tendentious: arguing that one cannot 'assess the strength of another man's temptations' employs the vague, imprecise and suggestive term 'temptation' to strengthen the impression of intangibility and elusiveness.<sup>12</sup> If the proposition were put: 'it is difficult to assess the impairment of behavioural controls,' the neutral statement of the objection leaves room for the inference that while difficult, the task is not impossible.

Wootton has, I think, misstated the issue in yet another way; again the choice of language is tendentious and adds plausibility to her contentions. Let us reconstruct her argument. Wootton insists that we are in no position to assess the strength of another man's temptations, that we cannot distinguish the irresistible impulse from the impulse that was not resisted and (reproducing the argument not in chronological order but in order of progressive generality) that we cannot 'distinguish the sick from the healthy mind'.<sup>13</sup> This way of stating the issue tends to tangle the multifarious problems that it contains into a Gordian Knot of philosophical and prac-

<sup>11</sup> There is a sense in which there is rather less reason: in the case of the responsibility determination, the test of culpability requires a showing of mental illness. It provides external, objective evidence of the internal breakdown of volition. Recognition that the disease is of a kind which characteristically is said to impair volitional processes corroborates the account of the mental processes given in a denial of responsibility. In the case of the intention enquiry, this corroboration may be absent.

<sup>12</sup> Wootton, p. 232.

<sup>13</sup> Wootton, *Social Science and Social Pathology* (1959) 227.

tical strands. But if the point is restated it is revealed to be not nearly as intractable as Wootton suggests. We can first separate out the issue of free will and determinism: it is not the real sticking point between psychiatrists and neoclassicists; to posit non-responsibility through the mental impairment of disease is not necessarily disharmonious with either hypothesis: compulsion to commit an act may be seen either as that which destroys free will or as a salient and overwhelming component in the structure of determining events. There is nothing new in this; Wootton herself recognizes it at one stage.<sup>14</sup> Second, to posit an absolute dichotomy of sick and wicked provides no indication of where the line between the two should be drawn except that suggested by the extremely vague definitional parameters of the two categories themselves. In the face of this lack of clarity and conceptual delineation, argues Wootton, the law requires (as usual) clear-cut distinctions whereas the truth is that 'in reality we are all strung out along a continuum which reaches from the most responsible to the most hopelessly weak-willed and weak-minded.'<sup>15</sup> But the point is that the law does recognize this fact: modern statements of the insanity test (apart from the hopelessly misconceived Durham Rule)<sup>16</sup> do attempt to provide at least a general indication of where the line should be drawn for the benefit of juries.<sup>17</sup> Finally, to make the relevant distinction one between the sick and the healthy suggests that mental disorder or disease excuses rather than a state of mind which it engenders. Wootton does not make this mistake (in the way, say, that the court in *Durham* did); but stating the issue in this way does obscure the point: for it is much easier to distinguish the victims of compulsion from those who do not labour under a compulsion, than it is to distinguish the sick from the healthy. In the latter case, it is difficult to even agree upon a definition of 'sickness' as a particular kind and measure of deviation from a putative behavioural norm.

The real problem faced by courts utilizing modern statements of the test is to distinguish, not between the sick and healthy *per se*, but between those whose behavioural controls have been substantially impaired by mental illness and those whose behavioural controls are intact.<sup>18</sup> Such a

<sup>14</sup> Wootton *Crime and the Criminal Law* (1936) 78-9.

<sup>15</sup> Wootton, *Crime and the Criminal Law* (1963) Book Review (1968) 77 *Yale Law Journal* 1019.

<sup>16</sup> In *Durham v. United States* (1954) 214 F.2d 862 (D.C. Cir.), the submersion of the traditional conditions of criminal responsibility and the elevation of the notion of 'mental disease', hitherto merely an evidentiary concept, to the status of excusing element is, I consider, misconceived. I have argued the matter at some length elsewhere. Blechmore, 'The Denial of Responsibility as a General Defense' (1971) 23 *Alabama Law Review* 237. Among other things, *Durham* deprives he jury of a standard by which to test the question of criminal responsibility.

<sup>17</sup> By this I mean the kind of standard implicit in the requirement that a defendant's capacity to conform his behaviour be 'substantially impaired' in order to deny responsibility.

<sup>18</sup> See note 16 *supra*.

test does not commit itself to any underlying hypothesis on the free will issue, provides a typical general line-drawing concept (which is far more precise than, for example, 'reasonable' or 'unconscionable' or 'substantial similarity' in copyright law) through which the relevant policy may find expression and evolve through decision in particular cases, and places the central distinction upon the palpable footing of the notion of mental processes, which notion is delineated with some regard for psychological accuracy and juridical viability, rather than upon the shaky footing of a nebulous or chimerical concept of 'disease'.<sup>19</sup>

### III

The application of this rule can now be illustratively tested for the problems, philosophical, methodological, definitional and semantic which it is argued render it inoperable and otiose, which justify its abolition. We may do so by considering the case of the psychopath which it will be recalled had been described as the 'critical case for those who would retain a distinction between the responsible and the irresponsible'.<sup>20</sup>

Is our subject psychopath criminally responsible for his antisocial behaviour which is proscribed by the criminal law? If we employ the statement of the test which has attracted perhaps more favourable recognition than any other (if only because it has avoided making any interested group completely unhappy with it), we may put the enquiry: Is the individual afflicted with a mental illness which substantially impairs his ability to conform his behaviour to the requirements of the law?<sup>21</sup>

It is plain that in this test the element of 'mental disease' does not serve the logical function of excusal; it merely provides for an evidentiary basis for that which does excuse, the denial of responsibility, which in turn comprises an assertion that the conditions of responsibility are not satisfied. There is no logical reason why psychopathy should not qualify

<sup>19</sup> On the concept of mental disease see SZASZ, *The Myth of Mental Illness* (1961).

<sup>20</sup> Wootton, *Social Science and Social Pathology* (1959) 250.

<sup>21</sup> The test put forward by the American Law Institute in its Model Penal Code. See s. 4.01 (Tent. Draft No. 4 at 27). The question posed is doubly theoretical. The ALI test, although increasingly accepted in the United States, has not been adopted anywhere in Australia. There is a valuable discussion of the test in *U.S. v. Brawner* (1972) 471 F.2d 969 (D.C. Cir.), a landmark case in which the United States Court of Appeals for the District of Columbia Circuit laid aside the embattled Durham Test in favour of the Model Penal Code formula.

I have chosen to proceed by reference to the ALI test rather than the more familiar M'Naghten rules in order to avoid becoming bogged down in the definitional and interpretational difficulties which beset the older test. The danger is that frustration with problems of that kind may lead one to confuse them with the kind of moral and conceptual problems that Lady Wootton has drawn our attention to. In any case, Wootton herself claims that the M'Naghten formula is, by comparison with suggested alternatives, a model of clarity and precision; and that a volitional test raises practical difficulties far more formidable even than those involved in a purely cognitive formula. See the discussion on pp. 22ff in Part One of this Article.

as a 'mental disease or defect' provided that it contains at least a *prima facie* indication of non-responsibility.

Concededly, sec. 4.01(b) expressly excludes from the category of relevant 'mental disease or defect' those diseases which are evidenced solely by antisocial behaviour.<sup>22</sup> There are probably sound policy reasons for the proviso: it is, of course, undesirable that a disease manifested only by antisocial conduct should operate to excuse that conduct; if there *is* such a disease: certainly I have argued that psychopathy is not. But there are cases where a diagnosis of one disease or other, usually psychopathic personality, is based solely on the pattern of anti-social behaviour. In *those* cases it is undesirable that this diagnosis should be the instrument of exculpation in respect of those acts. So the proviso is sound. In any case this would not be the first occasion on which the drafter of the Model Penal Code allowed popular conceptions to indicate the direction of criminal law reform.<sup>23</sup>

These considerations outweigh the purely negative counterweight that it is not *illogical* to deduce non-responsibility from antisocial behaviour. But I have demonstrated at considerable length that the psychopath cannot be diagnosed solely on the basis of antisocial behaviour. Therefore the disorder of psychopathy is not an excluded 'disease' within the meaning of s. 4.01(b).

To reiterate, there is no logical reason why psychopathy (or any number of other criminogenic states such as drug addiction, chronic alcoholism or abnormal chromosomal makeup) should not qualify as a foundation for a denial of responsibility. Let us ask the question, then: Is psychopathic disorder a condition which may, in reference to a certain act, substantially impair a defendant's capacity to conform his conduct to the requirements of the law?

On the basis of the understanding we now possess of psychopathy, the question is a meaningful one and can be answered coherently. One answer might be that in the case of the clear psychopathic personality manifesting the full panoply of diagnostic criteria, it in no way strains either the language of the test or its purpose to assert that the disorder *has* substantially impaired his capacity to conform his behaviour to the strictures of the law. All the interpretive accounts and etiological analyses of psycho-

<sup>22</sup> S. 4.01(b) states: As used in this Article, 'The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.' Tent. Draft No. 4 at 27.

<sup>23</sup> In another place the drafters of the Model Penal Code adopted a system of mandatory commitment as the proper sequel to a successful plea of insanity on the ground not only that the public needed maximum protection, but also that such a system 'may also work to the advantage of mentally diseased or defective defendants by making the defense of irresponsibility more acceptable to the public and to the jury.' Tent. Draft No. 4 at 199 s. 4.08.

pathy we have considered proceed as elaborations of a universal model, that of an individual in whom instinctual desires press imperiously for release, countered only by an impaired set of behavioural controls. This is true whether a theory hypothesizes a weak super-ego, an inadequate social Self, impaired reality testing, an unconscious carrying out of parents' unconscious wishes, or whatever. Thus an answer to the responsibility enquiry is contained quite explicitly in the description of the disorder, whatever form it may take; it provides an answer *ex hypothesi*.

Application of the Model Penal Code test to fully defined diagnostic categories is readily accomplished because of one notable feature of this formulation of the insanity defence. The test as stated relies upon a model of human behaviour which is in accord with current theoretical views: this is the fundamental notion that human behaviour is the product or resultant of a conflict between instinctual drives which press for gratification and a set of behavioural controls which operate to subjugate them; or, in Freudian terms, the instinctual drives of the id are contained and 'civilized' by the reality testing functions of the ego and the conscience of the super-ego. It is quite significant that modern formulations of the insanity test embody this model of human behaviour. Clearly, it is a great improvement over the 'faculty psychology' model espoused by the M'Naghten Rule with its separation of cognitive and conative aspects of mental life. And, for our purposes, the conceptual harmony of the test of criminal responsibility with psychological theory makes it difficult to argue that the determination of responsibility cannot be made in a criminal trial.

Formulations such as those of the Model Penal Code insanity test, although preserving the old cognitive-volitional dichotomy, nevertheless avoid many of the disadvantages of older formulations. For example, the 'volitional' leg of the Model Penal Code test will include not only cases of what has been traditionally thought of as volitional impairment, such as cases of 'irresistible impulse', but also cases of 'cognitive' impairment which were not embraced by the narrow language of M'Naghten, but which were cases intuitively felt to lie within the definitional limit of non-responsibility. When Cleckley argues that the psychopath suffers from a 'semantic' personality disorder, there is a sense in which he is saying that he suffers from a cognitive disorder; certainly the dissociation of the affective content of language from its referential function can hardly be characterised as a "volitional" dysfunction. Yet Cleckley's psychopath is someone of whom, in some circumstances, it may be said that his capacity to conform his behaviour to the requirements of law is impaired. In this way, the reformulation of old insanity tests cuts across the old distinction between volitional and cognitive disorders, and by employing a more acceptable psychological model, facilitates its application to an important class of cases.

The harmonious application of the test obtains when we move from the standard psychodynamic interpretations of psychopathy to other accounts that we have considered. If the presence of the disorder is attributed to constitutional factors, then the observation of a constant conjunction between that factor and a pattern of criminality will give rise to hypotheses describing the effect of that biological abnormality. But these hypotheses will normally proceed along lines compatible with the usual model of drives and controls and will impute some biological derangement or distortion of one or other aspect of the personality. So far as sociological accounts of the disorder are concerned, I have already emphasized the harmony which exists between these formulations and psychodynamic theories: for the sociologist, it follows naturally from the fact that the psychopath cannot see himself as an object in social experience that his capacity for social control is impaired.<sup>24</sup>

#### IV

The analysis can now be brought to a point. If Wootton's demonstrations of the unreliability and the unworkability of the criminal responsibility determination are not compelling, are nevertheless her conclusions sound, that criminal responsibility ought to be abandoned and that all enquiries relating to the defendant's state of mind should be relegated to the dispositional stage of trial?

The major thesis of this article is that they are not. My aim here is to clarify the reasoning underlying the proposal that responsibility ought to be abandoned or converted into a dispositional instrument. My observations so far have been that it is a mistake to predicate such proposals upon the putative *unworkability* of the responsibility determination: for that is an evanescent phenomenon, fading (if it ever really existed) behind the eburnation of vague responsibility criteria into a hard, palpable rule which is clear and precise, which lucidly reflects societal intuitions about the proper ambit of responsibility, and which is conceptually and structurally compatible with the data in the organization of which the test is employed.

What should be understood is that the proposal for a positivist determination of responsibility (if one may call a forward-looking guide to disposition a determination of *responsibility*), one geared to the matter of disposition, ultimately depends upon the evolution of conceptions of the purpose of the criminal law which are crime-preventive rather than retributive. If a society has cast off the traditional idea that the criminal law exists to identify wickedness and to punish it, in favour of the notion that law exists to protect society against criminals and other dangerous

<sup>24</sup> Discussed in *Bleechmore Part One*, 42-44.

individuals, then the way is clear to reshape the central concept in the retributive model, the concept of moral responsibility, into one oriented to the vicissitudes of dispositional selection. Wootton's preoccupation with the conceptual and logical problems which attend the administration of criminal responsibility in the context of the trial is mistaken because these problems can be shown to be chimerical, or at least greatly exaggerated, and because they lead her to place a mistaken emphasis upon the need to abolish responsibility at the expense of a full account of the issues and philosophical problems of a crime-preventive or utilitarian concept of criminal law.

These problems have never been fully explicated in the context of this proposal. Lady Wootton is probably the most influential and thorough of the positivists and she fails to deal with the real issues entailed by the proposal to reshape criminal responsibility. In this sense the positivist argument is a negative one.

Any such proposal naturally rests upon a foundation of moral and political premises. Where there are implications, they should be made explicit. What follows is an account of this conceptual foundation:

(a) How can we justify the retention of punitive sanctions as one kind of dispositional mode?

(b) If the goal of the criminal law be the prevention or the minimization of socially undesirable human behaviour with the least cost in individual human suffering, can there be any other justification for the continued use of punishment than general *deterrence*?

(c) With the disappearance of moral responsibility, what constraints can be placed upon the employment of punishment as a preventative device operating through the instrument of general deterrence? If prevention is the only aim of the criminal law, the only limits upon punishment can be those imposed by the mechanics of the instrument of deterrence modified by the Benthamite theory of 'economy of threats'.<sup>25</sup> If this is true how can we justify the continued retention of a dispositional enquiry which includes query into the volitionality of a convict's act? Most influential writers on the problem agree that such an enquiry may in fact reduce the deterrent effect of a threat by promoting the illusion (if not the fact) that false excuses may be tendered to courts with some prospect of success.<sup>26</sup>

<sup>25</sup> J. Bentham, *Principles of Morals and Legislation* (1823) Ch. XIII.

<sup>26</sup> H.L.A. Hart, *Punishment and Responsibility* (1968) 43. H. Packer, *The Limits of the Criminal Sanction* (1968) 65. But compare G. Willams, *Criminal Law, The General Part* (1st Ed. 1961) 346-47. Hart points out that Williams in the second edition of the work published in 1961 omitted the passage in which he asserts that undeterrables being a defined class, their segregation from punishment does not impair the efficacy of the sanction for people generally. Hart, *supra* footnote 15.

(d) How can we reconcile this proposition that a crime-preventive system excludes enquiry into the voluntariness of acts with H.L.A. Hart's manifesto that for him (and, he suspects no doubt accurately, for many others), before an individual can be punished, that is used (through deterrence) for the benefit of society, it must be demonstrated that he could have prevented himself doing what he did, had he chosen to do so.<sup>27</sup>

(e) Must we re-evaluate our protestation of purely utilitarian (crime-preventive) aims? How do we justify our concern for the rights of the individual, in particular his right to have the voluntariness or otherwise of his acts considered as relevant to the matter of disposition?

My own view is that it is best to view criminal law as existing primarily to prevent crime. I therefore accept the postulate of a utilitarian system of criminal law. Secondly, I would submit that in order to escape the charge of retributivism one must accomplish the elimination of the notion of moral responsibility from the trial stage of criminal justice. The only purpose of such a determination during trial is the identification of blameworthiness: Wootton is correct when she labels this 'retributivism in disguise'.<sup>28</sup> At the same time, I believe it to be absolutely necessary for the protection of individual justice that questions of 'voluntariness' *inter alia* be raised at the dispositional stage if not at the trial stage of the procedure. Hart is right when he says that we cannot punish people — that is, use them for the benefit of society — without a determination that they could have helped doing what they did. And if this is incompatible with a purely utilitarian goal of prevention, as Hart and Herbert Packer say that it is,<sup>29</sup> then that must be faced squarely. We can simply say that as a matter of selection of values, we choose not to pursue the preventive aim with a single mind.

When we speak of the 'aims' of the criminal law, we may use the word *aim* in two different senses. If we argue that the aim of the criminal law is crime prevention we mean that it is a *purpose* which justifies its creation and maintenance as an institution which may deny the individual his liberty. To say, on the other hand, that the criminal law *aims* to promote individual justice is to employ a different sense of the word *aim*, one in which it connotes not the underlying purpose or motivation of the institution but rather indicates a value which *guides* its administration.<sup>30</sup>

<sup>27</sup> H.L.A. Hart, *The Morality of the Criminal Law* (1965) 27. H. Packer, *The Limits of the Criminal Sanction* (1968) 62-70.

<sup>28</sup> *Ibid.* 27.

<sup>29</sup> See note 26 *supra*.

<sup>30</sup> I would suggest, for example, that the two senses of 'aim' are confused in this famous quotation from Henry M. Hart Jr's classic article 'The Aims of the Criminal Law':

Man is a social animal, and the function of law is to enable him to realize his potentialities as a human being through the forms and modes of social organization. It is important to consider how the criminal law serves this ultimate end.

We may then conclude that we should not pursue in the criminal law unqualifiedly utilitarian aims but that we should temper them with justice for the individual. This is not a view which is demonstrably 'valid'; but a value accepted by our society to be important. And what determines a value choice is an extremely complicated matter. If I might quote myself:

... the ideal of subjective guilt is not an *a priori* one; it is not inferred from the basic notions of society, government, the individual and the relationship between them. Rather, it is an arbitrary value, consciously or unconsciously *chosen* by a society in which the Judeo-Christian tradition shaped a conceptual prism, passing through which the entities of society and the individual are diffracted and re-ordered.<sup>31</sup>

There is, in any case, no compelling reason why the aims of the law should be purely utilitarian; the search for the imprimatur of rationality or demonstrability may be ultimately misguided.

Requiring that the voluntariness issue be part of the dispositional rather than culpability hearing does, I think, avoid the charge of the retention of a retributivist ideological orientation. At the dispositional stage the substance of the responsibility enquiry is clearly in service of the crime-preventive aim: it separates out those who through palpable mental disorder could not have been deterred by the threat of punishment or the spectacle of the punishment of others. And punishment, when administered, is not inflicted to restore the retributivist 'moral equilibrium' theoretically upset by the commission of crime, but simply as a kind of social hygiene.

## V

In this article so far I have, for the most part, remained neutral on the question whether there *ought* to be radical changes of the determination of criminal responsibility. I have tried to clarify the issue by identifying the problems that a proposal for radical change evokes, and with rather more emphasis indicated those issues which are *not*, in my opinion, raised. In this final section I would like to briefly shed this mantle of objectivity and express the hope that the account I have given of psychopathic disorder has in fact been tendentious; and that it implicitly points to the adoption of a positive hearing on the 'voluntariness' issue in service of rational disposition. I wish to suggest that my account of the disorder

(1958) 23 *Law and Contemporary Problems* 401, 409. Of course, there is no confusion if it is conceded that Hart views this positive effect of law as the ultimate *i.e.* motivating aim of the criminal law.

Both meanings of the word are exquisitely limned, on the other hand, in Bertrand Russell's manifesto that his life was 'motivated by love, but guided by reason.'

<sup>31</sup> Bleachmore, 'The Denial of Responsibility as a General Defense' (1971) *Alabama Law Review* 237.

supports the conclusion that 'responsibility' should be removed to the dispositional stage — but supports it for reasons different from those relied upon by Lady Wootton.

In a positivist system the sole purpose of all enquiries pertaining to the mental state of the individual who committed a criminal act (apart, of course, from those enquiries designed to eliminate cases of accident or mistake) is to clarify the matter of proper disposition. Ideally a variety of dispositional modes should be available so as to facilitate achievement of the crime-preventive goal by providing a unique and effective dispositional programme — whether it be punitive or curative and rehabilitative — for each individual. In the crime-preventive system, therefore, where the examination of an individual's mental processes is made in the service of proper disposition, the enquiry will not be limited to the narrow and restricted question whether a mental disorder 'substantially reduced the defendant's capacity to conform his conduct to the requirements of law'.

This, of course, is part of the enquiry, and an important part because it will identify those who could not have been deterred by the threat of punishment and whom, therefore, taking the view of individual justice that I have already adumbrated, it is useless and therefore wrong to punish. But it is by no means the whole of the enquiry which rationally should be made to effect proper disposition. That task requires identification of the reasons why the crime was committed and the selection of dispositional modes which may remove those causal conditions.

An open-ended dispositional investigation can perform the task required by the aim of crime prevention far better than the narrow moral responsibility enquiry. It does so because it addresses itself *directly* to the purpose at hand rather than indirectly as does the moral responsibility enquiry: Determining whether the behavioural controls of an individual have been substantially impaired may help one decide upon a punitive disposition in favour of a rehabilitative one; but only incidentally will such an enquiry elicit information which will be of assistance in the *choice* of curative modes or the amount of punishment justified in the situation. The classic responsibility hearing will not distinguish the psychoneurotic from the psychopath, for example. And the difference is critical in terms of the choice of disposition.

It is important to distinguish psychopathy from other pathological conditions which predispose to crime because rational disposition may vary radically from case to case. Cleckley and others have noted that it is worse than useless to commit the psychopath to an ordinary mental institution. Large federal and state psychiatric institutions, organized for the treatment of patients psychotic in the traditional sense, are not well adapted to

handle the special problems of the psychopath.<sup>32</sup> And the apparently well-adjusted psychopath, free of neurotic anxiety and psychotic delusion, may suffer a great deal of personal distress through the experience of confinement with radically disordered patients. On the other hand, the need for some restraint is obvious; it often exceeds such a need in patients belonging to any other diagnostic group:

If the laity could become more familiar with the ever-accumulating sorrow, damage, despair, confusion, farce, and disaster that each psychopath leaves in his path, organized efforts might be aroused to devise adequate medico-legal means of restraining him in his now virtually unhindered career of destruction.<sup>33</sup>

In the case of the psychopath who is a nuisance rather than dangerous, some kind of community-based supervision and restriction on activity might be desirable. In the case of more dangerous individuals, institutions designed primarily for psychopaths would be ideal. Though expensive, there are those who believe that the cost would be less than that which the psychopath exacts from society today.<sup>34</sup>

For purposes of disposition it is clearly important that an investigating body have the means to distinguish between the 'neurotic who, even when rigid, often begs for help with outstretched hands and is able to profit thereby', from the psychopath who is 'callous, selfish and . . . likely to arouse only negative feelings in us. He most often defies our efforts to approach him. When we make forthright attempts and devote a great deal of time to him, his co-operativeness appears to be only opportunistic, and in the end we find him as we found him at the beginning — callous, selfish, indifferent and entirely unchanged after all our labour.'<sup>35</sup>

The same point could usefully be made about the need to distinguish the psychopath from many other groups of disorder in all of which outward behaviour may appear similar.<sup>36</sup> And the classic *pons asinorum* of

<sup>32</sup> Cleckley, *The Mask of Sanity* (2nd ed. 1950), 586.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> Karpman, *Psychopathy in Scheme of Human Typology* (1946) 103. *Journal of Nervous and Mental Disease* 276, 283.

<sup>36</sup> *Ibid.* See also Cleckley, *Psychopathic States* 269-343. So far as therapy is concerned, few, if any, of the main authorities attach much significance to the usual ameliorative procedures. In analysis, favourable changes appear rapidly, but are evanescent or even illusory, leaving untouched the personality disorganization of the patient. What appears to happen in most cases is that the psychopath enjoys some success in actually manipulating the therapist (particularly if he or she is inexperienced) who is made to experience emotions of expectation, gratification — then intermittent sharp disappointment and ultimate disgust. Where analysis has proved to be successful, a prime factor has been the length of time of treatment in which the real needs of the patient can be separated from his apparent needs, and in which he can be instilled with a better sense of reality and a useful conscience. Bender argues that emotional deprivation in childhood prevents the proper establishment of parent-child relations, which in turn precludes any possibility of *transference* during therapy; for Bender, this explains the notable lack of success in treating psychopaths. Bender, 'Psychopathic Behaviour Disorders in Children' in R. Lindner and R. Seliger *Handbook of Correctional Psychology* (1947), 360.

moral responsibility is a lamentably crude device for making the subtle judgments which are required.<sup>37</sup>

Although it is true that modern formulations of the classic test are in tune with the conceptual scheme of contemporary psychological theory, and for that reason contain enquiries which can meaningfully be made (Wootton to the contrary notwithstanding), nevertheless they are maximally helpful only in their function of identifying blameworthiness or culpability. Again, these formulations are roughly-hewn implements for the utilitarian; although reasonably precise tools for the retributivist. This, of course, has been the point I have laboured throughout this article: if metamorphosis of criminal responsibility is proposed, it cannot be on the ground that it cannot satisfy a society which imputes to its system of criminal justice the aim of identifying wickedness, and punishing it; moral responsibility in its modern forms *can* fulfil the role accorded it by the moralist. If it is said to be misconceived this must be because it has no place in a criminal justice system which is utilitarian or crime-preventive rather than moralistic or retributive; and even then, it is not 'unworkable' or 'unreliable' or 'unscientific' but simply and categorically discordant.<sup>38</sup>

A thorough investigation of an individual's psychopathology at the dispositional stage and the separation of the multifarious criminogenic states may, in all probability, diminish the number of cases in which the appropriate disposition is a punitive one. The number of cases explicable in terms inconsistent with traditional moral responsibility will increase. They may be represented as approaching the behaviourists' norm in which

Greenacre, 'Problems of patient-therapist Relationship in the Treatment of Psychopaths' in R. Lindner and R. Seliger, *Handbook of Correctional Psychology* (1947) 378.

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<sup>37</sup> Precisely because, of course, the determination of criminal responsibility is not intended to fulfil that function. At trial the kind and type of impairment and the precise nature of the disorder in question is not the primary issue; it is simply an evidentiary issue supporting the denial of responsibility. But at the dispositional hearing in a system geared to crime-prevention, the *nature* of the disorder and not merely its control-impairment effect is in question because it goes to the matter of disposition.

<sup>38</sup> If modern formulations of criminal responsibility are in tune with current psychological theories, even more so are those theories harmonious with the conceptual structure of a utilitarian system. It does no violence to the logic of exegeses of psychopathy to deduce conclusions of deterrence and deterrability. Often these conclusions need not be deduced: they are an intrinsic part of the web of diagnostic interpretation. The psychoanalyst can argue that:

if punished, he (the psychopath) not unfrequently regards the punishment as unfair in view of his having behaved so properly, and is in no way deterred from a repetition of the same situation. Greenacre, 'The Conscience of the Psychopath' (1945) 15 *Am. J. of Orthopsychiatry* 495.

And the sociologist can argue that the psychopath cannot see himself as an object in social experience and cannot comprehend external disapproval or see the justice of punishment because this involves perception of his behaviour from a societal standpoint. Gough 'A Sociological Theory of Psychopathy' (1948) 53 *Am. J. of Sociology* 363.

no one is criminally responsible, in an asymptotic curve. This, I think, is the inevitable consequence of the increasing sophistication of the behavioural sciences in which (to state the matter in traditional terms) more compelling *explanations* of human behaviour operate to reduce the size of the residuum of cases in which criminal responsibility may be imputed, to work in Skinner's words, the displacement of autonomous man. This provides, I believe, all the more reason for recognizing the crudity and ultimately the incompatibility of the determination of criminal responsibility with a system of criminal justice which is basically utilitarian in concept. It is the gathering complexity of the task of identifying the causes of criminal behaviour in the individual which ultimately dictates that proper administration of a crime-preventive system of law requires a comprehensive hearing of disposition, in which the appropriate experts, free of the strait-jacket of formal trial procedures, can address themselves to the issues of identifying crime causation and appropriate means to eliminate it. In this system the continued retention of the classic concept of criminal responsibility can be evidence only of vestigial adherence to retributive goals: and whether that is a *reductio ad absurdum* I leave it to others to say.