

PUNISHMENT
and
RESPONSIBILITY

Essays in the Philosophy of Law

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PREFACE

These nine essays, written during the last ten years, are arranged here, not in chronological order, but with some attention to similarity of subject-matter. Chapters I, II and III are each in part concerned with the rationale of the doctrine of *mens rea*, though my main reason for reprinting the essay forming Chapter III is its relevance, in conjunction with the later legal and statistical material added in the Notes, to the discussion of capital punishment which will shortly again be an issue in this country, since the period of abolition secured by the Murder Act 1965 runs out in 1970. Chapters IV, V and VI are each mainly concerned with the analysis of a specific condition of criminal responsibility ('acts of will', intention, and negligence). Chapters VII and VIII confront the claim that the criminal law could and should dispense with mental conditions of responsibility. In Chapter IX, I attempt to distinguish and relate the bewilderingly many meanings of 'responsibility' and 'retribution'.

I have not reprinted here, in spite of some requests, my earliest venture into this field: 'The Ascription of Responsibility and Rights', published in the *Proceedings of the Aristotelian Society* (1948-9). My reason for excluding it is simply that its main contentions no longer seem to me defensible, and that the main criticisms of it made in recent years are justified.¹

I am deeply indebted to Mr. A. J. Baxter who identified and corrected more inaccurate quotations and references, and more infelicities of grammar, punctuation and style, than I care to contemplate. I am responsible for those that remain. I am also grateful to Miss Joan Watson for her assistance in the preparation of the Notes.

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¹ See, for example, P. T. Geach, 'Ascriptivism', *Philosophical Review* (1960), p. 221, and G. Pitcher, 'Hart on Action and Responsibility', *ibid.*, p. 266.

NOTE TO SECOND IMPRESSION

In December 1969 both houses of Parliament passed the resolutions required to prevent the expiry of the Murder Act, 1965. I have taken the opportunity presented by a second impression of these essays to add an Appendix on the main statistical arguments used in the Parliamentary debates, and I have brought the statistics for England and Wales and the U.S.A. up to 1968. I have also corrected a number of minor errors, mainly in the Notes, and accommodated the more important changes in the law since the first impression.

H. L. A. H.

Oxford, January 1970

ACKNOWLEDGEMENTS

With the exception of part of Chapter IX, all the essays in this book have been previously published and are here reprinted with minor alterations. The Notes on pp. 238-67, with the exception of the note on Holmes's theory of objective liability on pp. 242-4 and the note on responsibility on pp. 264-5, have not been previously published.

Chapter I, 'Prolegomenon to the Principles of Punishment', was delivered as the Presidential Address to the Aristotelian Society on 19 October 1959, and is reprinted by permission of the Editor. Chapter II, 'Legal Responsibility and Excuses', from the proceedings of the first annual New York Institute of Philosophy, 9 and 10 February 1957, was published in *Determinism and Freedom* (1958) edited by Sidney Hook, and is reprinted by permission of the publishers, New York University Press. Chapter III, 'Murder and the Principles of Punishment: England and the United States', is reprinted by special permission of the *Northwestern University Law Review*, copyright © 1958 by Northwestern University School of Law, Vol. 52 No. 4. Chapter IV, 'Acts of Will and Responsibility', is reprinted from *The Jubilee Lectures of the Faculty of Law, University of Sheffield* (1960), edited by O. R. Marshall, by permission of the publishers Stevens & Sons and of the Faculty of Law, University of Sheffield. Chapter V, 'Intention and Punishment', is reprinted from the *Oxford Review* No 4, February 1967, by permission of the Editor. Chapter VI, 'Negligence, *Mens Rea* and Criminal Responsibility', is reprinted from *Oxford Essays in Jurisprudence* (1961), edited by A. G. Guest, by permission of the Editor and of the publishers, Oxford University Press. Chapter VII, 'Punishment and the Elimination of Responsibility' was delivered as the Hobhouse Memorial Trust Lecture on 16 May 1961 at King's College, London, and is reprinted by permission of the Athlone Press, who published it in 1962, and of the London School of Economics.

Chapter VIII, 'Changing Conceptions of Responsibility', one of two Lionel Cohen Lectures delivered at the Hebrew University, Jerusalem in 1964, was published in *The Morality of the Criminal Law* (1965) and is reprinted by permission of the Magnes Press and Oxford University Press. The first part of Chapter IX, on Responsibility was published in the *Law Quarterly Review* (1967), Vol 83, and is reprinted by permission of the Editor. The note on pp. 242-4, on Holmes's theory of objective liability, is reprinted from *The New York Review of Books*, copyright © 1963 The New York Review, by permission of the Editor.

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I

PROLEGOMENON TO THE PRINCIPLES OF PUNISHMENT

I. INTRODUCTORY

THE main object of this paper is to provide a framework for the discussion of the mounting perplexities which now surround the institution of criminal punishment, and to show that any morally tolerable account of this institution must exhibit it as a compromise between distinct and partly conflicting principles.

General interest in the topic of punishment has never been greater than it is at present and I doubt if the public discussion of it has ever been more confused. The interest and the confusion are both in part due to relatively modern scepticism about two elements which have figured as essential parts of the traditionally opposed 'theories' of punishment. On the one hand, the old Benthamite confidence in fear of the penalties threatened by the law as a powerful deterrent, has waned with the growing realization that the part played by calculation of any sort in anti-social behaviour has been exaggerated. On the other hand a cloud of doubt has settled over the keystone of 'retributive' theory. Its advocates can no longer speak with the old confidence that statements of the form 'This man who has broken the law could have kept it' had a univocal or agreed meaning; or where scepticism does not attach to the *meaning* of this form of statement, it has shaken the confidence that we are generally able to distinguish the cases where a statement of this form is true from those where it is not.¹

Yet quite apart from the uncertainty engendered by these

¹ See Barbara Wootton *Social Science and Social Pathology* (1959) for a comprehensive modern statement of these doubts.

