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Juridiska Fakulteten
i Uppsala**

17

Essays in Criminal Law

Nils Jareborg

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17

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Essays in Criminal Law

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TO MAARIT

To be sure, there are lawyers, judges, and even law professors who tell us that they have no legal philosophy. In law, as in other things, we shall find that the only difference between a person "without a philosophy" and someone with a philosophy is that the latter knows what his philosophy is, and is, therefore, more able to make clear and justify the premises that are implicit in his statement of the facts of his experience and his judgment about those facts.

F.C.S. NORTHROP

PREFACE

This is a collection of seven reports and lectures written — invariably under time pressure — for international conferences or appearances at foreign universities. One of them stems from the mid-1970's; the others are from the present decade. Their mode of presentation and their style are not such that I am altogether happy to publish them in this way — but if I had the time to write a book in English it would have little in common with this one. There is some overlap between the essays, but rarely at the same level of presentation. I have abstained from italicizing non-English words.

The production of this book is also an experiment in Desk Top Publishing. I thank all who have assisted in this task, especially Maud Rosendal — without her diligent work no book would have materialized.

Helsinki, March 20th, 1988

N.J.

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JUSTIFICATION AND EXCUSE IN SWEDISH CRIMINAL LAW

1. THE CONCEPT OF A CRIME

The structure of the Swedish criminal law system is greatly influenced by German doctrine. Its main author is Thyrén, a leading figure in the circles around von Liszt. This means that the developments in German doctrine since the Second World War have been less influential than the pre-war ones. Ideas of the kind reflected in the *Finale Handlungslehre*, for example, have not had a significant impact in Sweden, though it does not follow that German legal writing is taken lightly nowadays. On the contrary, there is no central dogmatic problem on which any scholar would dare to take a stand without consulting the leading German writing. But despite this some of the inspiration for conceptual changes has come from other sources, primarily British and American philosophy.

It is still common for Swedish lawyers to speak in Thyrén's language: to speak about an "objective" and a "subjective" side of the crime. The terminology is, of course, misleading: we find a lot of "subjective" elements on the "objective" side and the "subjective" side contains a series of judgments of an "objective" character. Furthermore, it is not really appropriate to speak about the "sides" of a crime, as if there were some kind of complete symmetry between the two groups of prerequisites.

This report was prepared for a German-Scandinavian Criminal Law Colloquium, in May 1985, at the Max-Planck-Institut, Freiburg i.Br., Federal Republic of Germany. A German version is published as "Rechtfertigung und Entschuldigung im schwedischen Strafrecht" in *Rechtfertigung und Entschuldigung/Justification and Excuse: Rechtsvergleichende Perspektiven/Comparative Perspectives*, vol. I, ed. by Albin Eser and George P. Fletcher (Beiträge und Materialien aus den Max-Planck-Institut für ausländisches und internationales Strafrecht Freiburg. Band S 7/1), Freiburg i.Br. 1987, pp. 411-436. Part of the report formed the basis for a lecture at the University of Edinburgh, Scotland, in October 1985. Here the report is with permission reprinted from *Scandinavian Studies in Law 1987*, vol. 31, ed. by Anders Victorin, Stockholm 1987, pp. 157-174. A few editorial changes have been made. I am greatly indebted to Professor Andrew von Hirsch for a series of helpful suggestions.

I prefer to represent the structure of a crime in the following manner:¹

I	Criminalized act or omission	=	(a) a specific definition of the prohibited act or omission (b) attempt, preparation, conspiracy (c) complicity
---	---------------------------------	---	---

II	Swedish law is applicable	=	Territorial and similar exclusions do not apply
----	------------------------------	---	--

III	The deed is not justifiable	=	A rule or principle of justification is not applicable
-----	--------------------------------	---	---

I + II + III = UNLAWFUL DEED

IV Intention or Negligence (dolus or culpa)

V An act is not involuntary or — in the case of omissions — the act is not one that the perpetrator cannot possibly perform: Exceptions connected with *actio libera in causa*-considerations (It is probably more convenient to treat this requirement as a part of the *dolus/culpa* problematics on level IV than as a separate prerequisite of a general character)

VI	The deed is not completely excusable	=	A rule or principle of excuse is not applicable
----	--	---	--

IV + V + VI = CULPABILITY

UNLAWFUL DEED + CULPABILITY = CRIME

A crime, then, consists of an unlawful deed performed under circumstances that make the perpetrator personally answerable for the deed. It is not uncommon for lawyers to use the Swedish words directly

corresponding to the German terms *Rechtswidrigkeit* and *Schuld* in referring to the two main groups of general prerequisites.

It should be noted that the exceptional rules under III and VI may be written or unwritten, but that the exceptions must be fairly determinate, "typified". Swedish law does not recognize a general possibility to balance conflicting interests in the concrete case, or a general requirement of "concrete culpability". Thus, we do not have room for a separate concept of *Zumutbarkeit* or *Vorwerfbarkeit*. In fact, Engisch's recommendation of 1930 states the Swedish position well:²

Richtiger ist es also schon, die Vorwerfbarkeit als solche aus der Verbrechensformel zu eliminieren und kurzerhand als Schuldmerkmale diejenigen Bedingungen auszugeben, denen das Verhalten des Täters entsprechen muss, damit es nicht nur als nichtge-sollt, sondern auch als vorwerfbar und damit strafwürdig erscheint.

If someone commits an unlawful deed under circumstances that completely excuse him, he is of course exempted from punishment. But there are other grounds of exemption from punishment that have nothing to do with excuses. The actor has undoubtedly committed a crime, but he cannot legally be punished, e.g. because the crime was committed too long ago (there are some rules of limitations on sanctions).

If it is important to distinguish between

- (a) a deed is criminalized, but not unlawful (because it is justified);
and
- (b) a deed is unlawful, but not a crime (because the actor is excused);

it is even more important to distinguish between

- (1) an unlawful deed is not a crime (because the actor is excused); and
- (2) an unlawful deed is a crime, but the actor cannot legally be punished.

The present Swedish criminal law is peculiar in that it ignores what should be an important excuse — mental incapacity. No perpetrator under 15 can be punished, but even small children can commit crimes. Insanity and similar states are not dealt with within the concept of a crime, but as affecting the appropriate sanction. To my mind, this standpoint of the Swedish Criminal Code (*Brottsbalken*, BrB) of 1962 (in force 1965) is fundamentally wrong.³

2. LEGAL-HISTORICAL BACKGROUND: SWEDISH DOCTRINE

The representation of the concept of a crime clearly reveals that the distinction between justification and excuse nowadays plays a major role in Swedish criminal law dogmatics. The existence and importance of the distinction is generally recognized, even if the grand old man of Swedish criminal law, Ivar Strahl, is somewhat reluctant to stress it and to use words reminding one of *Rechtswidrigkeit* and *Schuld*.⁴ But Ivar Agge, writing a quarter of a century ago and still influential, shows no such reluctance; his doctrines could be characterized as a distillation of a century of German criminal law writing, adapted for Swedish conditions.⁵

Going half a century further back we come to Thyrén, outlining the principles for a revision of the criminal law. As already indicated, he stresses the existence of and the difference between an objective and a subjective side of the crime.⁶ This means that the distinction between justification and excuse is at least indirectly recognized. In the fourth chapter of his (partial) Draft Code of 1916 he presents a mixture of "Grounds that exclude or lessen the criminality", i.e. justifications, complete excuses and partial excuses. There is a common terminology for justifications and complete excuses: their consequence is "freedom from punishment". Thus the difference between (1) not criminal, and (2) criminal, but not punishable, is not kept clear; nor is the difference between justifications and excuses. This lack of precision plagued the language of criminal law for decades. Also Agge speaks about "objective and subjective grounds for freedom of punishment" when he refers to circumstances that, respectively, justify and completely excuse from responsibility. Already in 1950 Nelson protested that the terminology is misleading,⁷ but it was hard work to change the language habits. Nowadays, justifications and complete excuses are usually referred to as "grounds that exclude responsibility".

Completing this hop, step and jump backwards in history we reach another prominent criminal law professor, Hagströmer, writing in the last decades of the 19th century. Hagströmer was our first "modern" criminal law scholar. Also he was much influenced by his German contemporaries, in the field now under consideration most of all perhaps by Binding. In his comprehensive treatment of the general part of the criminal law he recognizes a distinction between *Rechtswidrigkeit* and *Zurechenbarkeit*, but he did not use a concept of *Schuld*. When discussing the general prerequisites of a crime Hagströmer, however, showed little sense for the difference between conceptual and criminal

policy requirements; and like Thyrén later on he did not sufficiently draw the distinction between complete excuses and other grounds for exemption from punishment.⁸ But in respect of the justification-excuse distinction, he at least got the justification side right.

3. SWEDISH LEGISLATION: THE BACKGROUND

For at least a century, then, the distinction between justification and excuse has been an important one in criminal law dogmatics. But what about the legislation?

In the Penal Code of 1864 we find no trace of it. Chapter 5 has the title "On special grounds that exclude, lessen or cancel the punishability". Carlén's commentary characterizes youth, insanity, necessity, self-defence, acting by order, mistake of fact, consent, and other — written or unwritten — grounds that exclude "punishability" as "lack of culpability" (*Zurechenbarkeit*).⁹ (But it is also said that the law reform was guided by the purpose to accomplish a comprehensive code "not less from an objective than from a subjective point of view".¹⁰ This suggests that the distinction between justification and excuse is not totally foreign.)

In 1923 a royal commission presented a Draft Penal Code (General Part). Thyrén was a member of the commission and his ideas permeate the draft code. There is a feeble attempt to let the title of ch. 4 reflect the distinction between someone being "criminal" and being "punishable", but in general the latter word is used also in cases where the former is the appropriate one. The word "unlawful" (*rechtswidrig*) is used in ch. 4, sec. 4, and there are other indications that the authors have had the distinction between justification and excuse in mind. The travaux préparatoires to the draft code leave one in no doubt that this has been the case.¹¹

The proposal of 1923 never led to legislation. The work on a new Criminal Code was reorganized after Thyrén's death a decade later. New provisions on crimes against property came into force in 1942 and were followed by new provisions on crimes against the state and the public in 1949. A proposal for legislation on crimes against the person and general rules concerning the crimes was presented by a royal commission in 1953. After considerable redrafting, ch. 24 of the Criminal Code of 1962 came to contain primarily general provisions concerning justifying circumstances. (Its title — "On Self-Defence and Other Acts of Necessity" — is not very accurate.) General provisions concerning excusing circumstances are more scattered.

The Criminal Code of 1962 is reasonably clear in drawing the general distinction between (1) no crime, and (2) crime, but no punishment. Although there is no doubt that the idea of an "objective" and a "subjective" side of a crime was guiding the drafters,¹² the Code is, however, disappointingly unclear in distinguishing between justification and excuse. The statutory language dealing with exculpatory factors fails to specify with sufficient clarity whether these are intended to be justifying or excusing. To draw this distinction, the Swedish reader needs to look beyond the statute book and to the writings of the scholars.

4. OVERVIEW OF GENERAL RULES CONCERNING JUSTIFICATION OR EXCUSE

If we look at the statutory provisions on exculpation, they can be classified as justifying or excusing, as follows:

Provisions stating justifying circumstances:

- BrB ch. 24, sec. 1 (self-defence);
- BrB ch. 24, sec. 2, and Police Act (1984), secs. 10 and 23 (use of violence or force in performing an official duty);
- BrB ch. 24, sec. 3 (use of violence or force to maintain military discipline);
- Seaman Act (1973), sec. 53 (use of violence or force to maintain discipline on board a ship);
- BrB ch. 24, sec. 4 (necessity);
- BrB ch. 24, sec. 6 (acting by order).

Provisions stating completely excusing circumstances:

- BrB ch. 24, sec. 5, and Seaman Act (1973), sec. 53 (excessive use of violence, force, inflicting of damage, etc., in cases mentioned in BrB ch. 24, secs. 1-4, Police Act and Seaman Act): responsibility is excluded only if the circumstances were such that the actor had difficulty in coming to his senses;
- BrB ch. 23, sec. 5 (an accomplice has been induced to be an accessory to a crime by coercion, deceit or misuse of his youth, lack of comprehension or dependent status): responsibility is excluded only in trifling cases;
- BrB ch. 13, sec. 11, ch. 14, sec. 11, ch. 15, sec. 14, ch. 23, sec. 3, Tax Crime Act (1972), sec. 12, and some other provisions: voluntary retreat or correction. (It need hardly be said that it is a mistake to treat these cases as exemplifying excuses.)

In addition, there is reason to recognize some unwritten general exceptional rules:

Justifying circumstances:

- some cases of consent;
- cases of "permitted" taking of risks;
- some cases of conflict of duties;
- some cases of conditions similar to necessity (e.g. negotiorum gestio);
- some cases of "military necessity" during war or warlike conditions.

Completely excusing circumstances:

- some cases of mistake of law (when mistake of law is irrelevant for the *dolus/culpa* requirement);
- temporary loss — without one's own fault — of the use of one's senses;
- cases of putative excess corresponding to BrB ch. 24, sec. 5, and Seaman Act, sec. 53.

The excusing circumstances mentioned in this section will all have to be placed on level VI in the table depicting the structure of the concept of a crime in section 1 above. But the history of legal dogmatics shows that it is very tempting to speak about the "backside" of levels IV and V as constituting excusing circumstances, i.e. ignorance and mistake relevant for the *dolus/culpa* requirement are seen as excuses and so are (non-culpable) involuntariness and inability to perform a certain act. There is nothing wrong in this, but it is, of course, important to separate excusing circumstances that only negate a positive prerequisite from excusing circumstances that stand on their own feet.

5. EXEMPLIFYING THE DISTINCTION

(1) *Necessity*. According to BrB ch. 24, sec. 4,

A person who in a case other than those referred to previously in this chapter acts out of necessity in order to avert danger to life or health, to save valuable property or for other reasons, shall also be free from punishment if the act must be considered justifiable in view of the nature of the danger, the harm caused to another and the circumstances in general.

(The Swedish original does not say "free from punishment" but "free from responsibility" and it would be more accurate to speak about "distress" than about "necessity".)

The language of ch. 24, sec. 4, clearly treats necessity as a justification only — and not an excuse.¹³ Thus the Dudley-Stephens type case, of the starving person in the life-boat who kills to save his own life, would not be covered by the provision.¹⁴

There is, however, another provision¹⁵ — BrB ch. 24, sec. 5 — that might cover such cases. If someone acting in a state of necessity has used greater force or caused more serious harm than is permissible (i.e. his deed is not justifiable) he has nevertheless not committed a crime, if "the circumstances were such that he had difficulty in coming to his senses". The person in the life-boat would argue that his conduct was excusable, because the circumstances vitiated such self-control.

There is also another doctrine that operates as excuse — and that is where someone acts in an imagined, but not real state of necessity. The general Swedish position is that the requirements of *dolus/culpa* apply to the justification as well as the underlying prohibition. Thus the actor who mistakenly believes justifying circumstances to be present will be exonerated on grounds of lack of the requisite intent, if his act would have been justifiable in case his belief were true. (If negligence is criminalized, he will be exonerated only if his mistake is reasonable.)¹⁶

BrB ch. 24, sec. 5, concerns "real excess"; it presupposes a real state of necessity. If the state of necessity is imagined, there is no corresponding statutory rule. But the commentary to BrB recommends that ch. 24, sec. 5, is applied analogously in such cases of "putative excess".¹⁷

As indicated in the previous section it is probable that the courts would recognize non-statutory necessity, at least in some situations corresponding to what is called *negotiorum gestio* in civil law. But there is no guiding case law. Also in such cases necessity would be a justifying factor. There is no reason to believe that an actor could be completely excused in cases of excess.

(2) *Conflict of duties*. "Legal necessity" means that the actor cannot avoid committing an unlawful deed whatever he does. He is then obliged to choose the lesser evil. Although there is no support from legislation or case law, the theoretical position seems to be quite clear: the state of "legal necessity" justifies the performance of the less harmful deed; responsibility for a *culpa* crime is, however, possible if the position of necessity was due to the actor's carelessness and for a *dolus* crime if he intentionally put himself in a position where he had to commit an unlawful deed.¹⁸

Conflict of duties is a justificatory concept. It gives no opportunity for a complete excuse (except a mistake excluding *dolus/culpa*).

(3) *Acting by order*. The general provision is BrB ch. 24, sec. 6:¹⁹

An act committed by someone by order of the person to whom he owes obedience shall not lead to his punishment if he had to obey the order in view of the nature of the condition of obedience, the character of the act and the circumstances in general.

(Here, too, "responsibility" is translated as "punishment".)

The provision does not say much more than that certain interests are to be balanced. It is primarily applicable in the armed forces, the police and in connection with rescue operations and other situations when a person is duty-bound to obey. When someone acts within a private enterprise there is little scope for justifying a criminalized deed by reference to ch. 24, sec. 6. Even if the travaux préparatoires include some hints that also "subjective" circumstances might be relevant, it can hardly be doubted that the provision indicates the border between right and wrong, and hence is justificatory.

The only connected complete excuse is a mistake excluding *dolus/ culpa*.

To conclude this brief summary of Swedish law: there is no doubt that the distinction between justification and excuse has been recognized in Sweden, although not always as clearly as one might hope. It now remains to consider *why* the distinction should be drawn.

6. THE CONCEPTS OF JUSTIFICATION AND EXCUSE

While English criminal law sticks to its 18th century foundations and does not much care whether a defence concerns a justifying or an excusing factor, we find the most eloquent elucidations of the distinction among English philosophers. Thus J.L. Austin writes:²⁰

In general, the situation is one where someone is *accused* of having done something, or (if that will keep it any cleaner) where someone is *said* to have done something which is bad, wrong, inept, unwelcome, or in some other of the numerous possible ways untoward. Thereupon he, or someone on his behalf, will try to defend his conduct or to get him out of it.

One way of going about this is to admit flatly that he, X, did do that very thing, A, but to argue that it was a good thing, or the right thing or sensible thing, or a permissible thing to do, either in general or at least in the special circumstances of the occasion. To take this line is to *justify* the action, to give reasons for doing it: not to say, to brazen it out, to glory in it, or the like.

A different way of going about it is to admit that it wasn't a good thing to have done, but to argue that it is not quite fair or correct to say *baldly* "X did A". We may say it isn't fair just to say X did it; perhaps he was under somebody's influence, or was nudged. Or, it isn't fair to say baldly he *did* A; it may have been partly accidental, or an unintentional slip. Or, it isn't fair to say he

did simply A — he was really doing something quite different and A was only incidental, or he was looking at the whole thing quite differently. Naturally these arguments can be combined or overlap or run into each other.

... it has always to be remembered that few excuses get us out of it *completely*: the average excuse, in a poor situation, gets us only out of the fire into the frying pan — but still, of course, any frying pan in the fire. If I have broken your dish or your romance, maybe the best defence I can find will be clumsiness.

H.L.A. Hart, after noting that the distinction nowadays lacks legal importance, continues:²¹

But the distinction between these two different ways in which actions may fail to constitute a criminal offence is still of great moral importance. Killing in self-defence is an exception to a general rule making killing punishable; it is admitted because the policy or aims which in general justify the punishment of killing (e.g. protection of human life) do not include cases such as this. In the case of "justification" what is done is regarded as something which the law does not condemn, or even welcomes. But where killing (e.g. accidental) is excused, criminal responsibility is excluded on a different footing. What has been done is something which is deplored, but the psychological state of the agent when he did it exemplified one or more of a variety of conditions which are held to rule out the public condemnation and punishment of individuals.

There is no need to enlarge on this topic. The distinction between justification and excuse is the distinction between

- (a) a deed being not wrong (although it is *prima facie* wrong); and
- (b) a deed being wrong, but the actor not culpable (he is not blameworthy although what he did was wrong).

Little fantasy is needed to see that this is a distinction that any sophisticated morality must respect and make use of in moral teaching. Blame as an automatic response to a wrongful deed is too primitive a reaction. Consideration for other human beings requires that their point of view and their individual circumstances are made relevant. Blaming people for things they could not avoid doing amounts to treating them as something less than a person and this — on any meaningful account of morality — must itself be immoral; the point of morality is to ameliorate "the human predicament" and that cannot be done by refusing to treat

others as choosing persons. On the other hand, to overlook the distinction between justification and excuse is to forget the very point of having a morality or a criminal code. It is pointless to go into questions of personal responsibility, unless there is an underlying distinction between doing right and doing wrong.

7. WHAT PRACTICAL DIFFERENCE?

One might ask what practical difference the distinction makes, since the defendant is exonerated in any case. But there can be a practical difference. One striking instance, in Swedish law, concerns accomplice liability. Consider cases where B abets A in commission of a crime, and then A, the principal, successfully offers a defence. Does B remain liable as an accomplice? That depends on whether A's act is justified or excused. If justified, no unlawful act has occurred at all and B is not liable. If excused, then an unlawful act has occurred, although the principal is exonerated from blame for it. In that event, the accomplice, B, may still be liable if he has the requisite culpability.²² The applicable provision is BrB ch. 23, sec. 4:

Punishment provided in this Code for an act shall be inflicted not only on the one who committed the act but also on anyone who furthered it by advice or deed. A person who is not regarded as the actor shall, if he induced another to commit the act, be punished for instigation of the crime or else for being an accessory to the crime.

Each accomplice shall be judged according to the intent or the carelessness attributable to him. ...

The provision is somewhat cryptic and impossible to interpret without the advice given in the travaux préparatoires. It is, however, fairly evident that an accomplice may commit a crime although the principal does not commit a crime because he lacks *dolus/culpa*. This makes it clear that "the act" in the first sentence cannot refer to a deed amounting to a crime, but something less. In fact, "act" here means "unlawful deed".

The Swedish doctrine of complicity emphasizes a distinction between "circumstances of objective relevance" and "circumstances of subjective relevance". The former affect the possibility of someone being an accomplice, the latter affect the possibility of someone committing a crime (as a principal or an accomplice). As already indicated, an unlawful deed committed by the principal is a circumstance of objective relevance and *dolus/culpa* is a circumstance of subjective relevance.

This means, of course, that all justifying circumstances relating to the principal are circumstances of objective relevance, i.e. they exclude the criminality of all persons involved. And, as should be suspected, all completely excusing circumstances — irrespective of to whom they relate — are circumstances of subjective relevance, i.e. they affect the criminality of no one except the person to whom they relate.

8. THE BASIS FOR THE DISTINCTION

Beyond such practical differences between justification and excuse — which may vary from jurisdiction to jurisdiction — lie fundamental moral and criminal policy reasons for the distinction.

The act of criminalizing any deed is motivated by the need to suppress that kind of deed. The criminalization threatens anyone who commits such a deed with punishment. Thus, if we want to explain any act of criminalization we must refer to ideas of general prevention, encompassing both general deterrence and the creation of habits and consciences. (Of course, it is not totally out of the question to criminalize a type of deed just to express societal disapproval. But the threat of a criminal sanction — with its purposeful infliction of suffering — cannot generally be explained without reference to its preventive effects. Were punishment to have no such effects, the material-deprivation elements in the criminal sanction would involve the infliction of unnecessary suffering. Were moral disapproval the only point of sanction, then the sanction should consist only of formalized censure without the accompanying infliction of suffering.)²³

If we ask for the intentions behind accepting a rule stating a justifying circumstance we must find that exactly the same kinds of considerations apply as when we ask for the intentions behind criminalization generally. When there are justifying circumstances we do not want to suppress the otherwise criminalized behaviour; the balancing of interests and values has resulted in the conclusion that we do not want to discourage people from committing such deeds, we do not want to teach them to refrain from such deeds and we do not want to express disapproval if someone commits such a deed. Instead, we might even want to encourage people to perform an otherwise criminalized act, because it is the "right thing to do". In any case the message is: this is all right, it is not wrong to do this.

(There should be no need to argue for the irrelevance of ideas of special prevention in connection with criminalization.)

Let us ask why we should accept a rule that completely excuses someone from responsibility for a wrongful deed.

Looking closer at the different kinds of excuses we find that any one of them can be seen as a specification of one of two principles:²⁴

(1) *The principle of conformity*: Someone should not be held responsible for an unlawful deed if he could not conform to the law, either because of the force of outside circumstances or because of mental disabilities of his own (including lack of knowledge). The idea underlying this principle is familiar enough: there should be no blame when the actor could not choose to do the right thing.

(2) *The principle of equity*: Although someone who has committed a wrongful deed could conform to the law, to ask for such conformity would be to demand far too much of him. This is the idea that persons should not be censured for failing to act as saints. The starving castaway in the boat may have had a choice not to kill his companion for food, but persons should not be blamed for their understandable preference for their own survival. It is this principle that requires fuller exploration: just what, and why, is "demanding too much"?

It often has been asserted that a doctrine of excuses could be accounted for on preventive grounds. Jeremy Bentham, John Austin, Glanville Williams — and some recent German writers as well²⁵ — have so contended. An example is the following statements by Williams:²⁶

It may be said that any theory of criminal punishment leads to a requirement of some kind of *mens rea*. The deterrent theory is workable only if the culprit has knowledge of the legal sanction; and if a man does not foresee the consequences of his act he cannot appreciate that punishment lies in store for him. ...

Although deterrence is not the sole object of the criminal process, it is assumed that a person convicted of crime belongs to a class of people who are capable of being deterred by the threat of punishment. ...

Owing to our imperfect knowledge we generally cannot tell until after the event whether a threat of punishment will deter a particular person; and having threatened we must carry out (in some measure) if threats are to be effective for the future. It is only in certain classes of case that we can say with reasonable probability that the threat of punishment will not deter. When we can say this, utilitarian theory demands that the threat of punishment be not employed, for it can result only in useless suffering.

H.L.A. Hart has, however, demonstrated that this kind of reasoning involves a fallacy:²⁷

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 since 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.

I am inclined to agree with Knud Waaben when he says, speaking about the excuse of insanity, that considerations of general prevention might give a reason for punishing the insane, but not a reason against punishing the insane.²⁸ If we really want to suppress some kind of behaviour, why not use every possible opportunity to show that a wrongful deed has been committed? (Why not punish the members of the perpetrator's family, as in *Lex Quisquis* of A.D. 397?)

We could, of course, speculate about the population revolting against laws that prescribe punishment for deeds committed without fault. But strict liability has been borne for centuries by millions with little complaint. And in any case, if such protests occur it only shows that something else than utilitarian considerations are seen by ordinary people as relevant (i.e. some moral ideas or principles recognizing excuses).

A quick look at other preventive rationales will show that they have little to add:²⁹

Individual deterrence: it might be most efficient to use the opportunity to frighten someone who has committed a wrongful deed and thus keep

him from doing something wrong in the future; it is not possible to say generally that someone who has done something wrong under excusing circumstances does not "need" a reprimand.

Incapacitation: the fact that the wrongful deed was committed under excusing circumstances does not make a "dangerous" person less dangerous; if incapacitation can ever be justified, it depends on the defendant's social and criminal history; possible exculpatory circumstances of the present act may have little bearing on the offender's dangerousness.

Rehabilitation: similarly it is impossible to argue that someone who commits a wrongful deed under excusing circumstances does not "need" to be rehabilitated; the specific deed does not reveal anything about such a need and it is, of course, always an open question whether someone who does something wrong needs some rehabilitative treatment.

A final preventive argument that might be offered concerns what Andenæs calls punishment's "socio-pedagogical" effects.³⁰ The idea is that punishment can best perform a long-run preventive role — of reinforcing the citizen's own moral inhibitions against crime — when citizens perceive the sanctioning system to be just; and recognition of excuses helps to reinforce respect for law.

Plausible as this may at first sound, there are numerous difficulties.³¹ What evidence is there that punishment prevents crime primarily through such effects on citizens' consciences? What evidence is there that citizens are even aware of the law's treatment of excuses, and hence might accord the system more respect if excuses are recognized? What evidence is there that citizens would be more favourably impressed with a penal system, if excuses are recognized? (In the United States, for example, the law's recognition of some excuses, such as the insanity defence, is a frequent cause of popular dissatisfaction.) Finally, why should the citizens think that recognition of excuses makes a legal system more just? This last question cannot, without circularity, be explained through punishment's pedagogical effects. And if a satisfactory answer cannot be given it, then perhaps the law should abolish excuses — and use its influence on citizen morality to persuade citizens to change their own popular morality so as to ignore excusing circumstances!

The upshot of all this is that we must look elsewhere for the reasons behind rules making excusing circumstances relevant. The obvious place to look for guidance is in *normative ethics* and certainly the relevance of excusing circumstances is to be explained as a legislative response to moral demands on the legal order: only those who are morally blameworthy for their deeds should be punished as criminals, irrespective of whether this will make the legal threat less efficient. This will also be

consistent with the objective of having the criminal justice system work as a means of expressing and distributing blame.

To spell out, in detail, why we should accept the various types of circumstances as excuses is a laborious task. Here, it is enough to emphasize that the reasons for accepting a rule stating a justifying circumstance are not the same as the reasons for accepting a rule stating an excusing circumstance. In both cases we must fall back on value judgments. But in the first case the question is what deeds are objectively "wrong", all things considered; and in the second case the question is to what extent legal repression should be counteracted from a moral point of view also in cases when the first judgment is a sound one.³²

NOTES

¹ See Nils Jareborg, *Handling och uppsåt*, Stockholm 1969, pp. 345 ff., and Nils Jareborg, *Broten. Första häftet*, 2nd ed. Stockholm 1984, pp. 66 ff.

² Karl Engisch, *Untersuchungen über Vorsatz und Fahrlässigkeit im Strafrecht*, Berlin 1930, p. 22. (Italics deleted.)

³ See BrB ch. 33, secs. 1 and 2, and also Jareborg, *Handling och uppsåt* (note 1 above), pp. 340 ff. The present law complicates the processing of cases involving mentally disturbed defendants: *dolus/culpa* must be proved against the defendant.

For citations from the Code, I have used *The Swedish Penal Code*, Stockholm 1984 (The National Council for Crime Prevention, Sweden. Report no. 13).

⁴ See Ivar Strahl, *Allmän straffrätt i vad angår brotten*, Stockholm 1976, e.g. pp. 19 ff., 75 ff., 368 ff. — Professor Strahl died in December 1987.

⁵ See Ivar Agge, *Straffrättens allmänna del. Andra häftet*, Stockholm 1961, and *Tredje häftet*, Stockholm 1964, pp. 244 ff., 325 ff.

⁶ Johan C.W. Thyren, *Principerna för en strafflagsreform. III*, Lund 1914, especially the summary on pp. 155 ff., Johan C.W. Thyren, *Förberedande utkast till strafflag. Kap. I-XIII (Allmänna delen)*, Lund 1916, pp. 27 ff.

⁷ Alvar Nelson, *Rätt och ära*, Uppsala 1950, pp. 101, 110 f.

⁸ Johan Hagströmer, *Svensk straffrätt. Första bandet*, Uppsala 1901-1905, pp. 97 ff., 108 ff., 151 ff., 170 ff.

⁹ Richard Carlén, *Kommentar öfver Strafflagen*, Stockholm 1866, pp. 86 ff.

¹⁰ Carlén, *op.cit.*, p. 1.

¹¹ *Förslag till strafflag allmänna delen...jämte motiv avgivna av strafflagskommissionen*, SOU 1923:9, e.g. pp. 84 ff., 111 ff., 139 ff., 177 f.

¹² See *Nytt juridiskt arkiv, avd. II*, 1962, pp. 16 ff., 341 ff., and section 7. below. The commentary to the Code, written by some of the lawyers primarily responsible for its format, is quite explicit on this point. See *Brotsbalken jämte förklaringar* (edited by Nils Beckman, Carl Holmberg, Bengt Hult, Ivar Strahl), vol. I, 4th ed. Stockholm 1974, pp. 17 f., 23 ff., vol. II, 5th ed. Stockholm 1982, pp. 664 ff., 705 ff.

¹³ *Brotsbalken jämte förklaringar ...* vol. II (note 12 above), pp. 698 ff. The phrase "in order to avert" is not interpreted literally. A person acting in a state of necessity is considered justified even if he himself did not notice the danger and thus in fact did not act "in order to avert" it. This position of the law seems to be motivated by the wish to avoid problems of proof in relation to the existence of a certain purpose in acting. There is also the inclination to see a justification as something inherently "objective".

¹⁴ See Andrew von Hirsch, "Review Essay/Lifeboat Law", *Criminal Justice Ethics*, vol. 4, 1985, pp. 88 ff.

- ¹⁵ *Brottsbalken jämte förklaringar ...* vol. II (note 12 above), pp. 705 ff.
- ¹⁶ This means that absence of a justifying circumstance amounts to a negative prerequisite for an unlawful deed. Not all negative prerequisites are found in rules stating justifying circumstances; many specific crime definitions contain such prerequisites.
- Only a mistake, and not ignorance, can exclude *dolus/culpa* in relation to a negative prerequisite. See e.g. Arthur Kaufmann, *Schuld und Strafe*, Cologne, Berlin, Bonn and Munich 1966, p. 137, Günter Schewe, *Bewusstsein und Vorsatz*, Berlin 1967, p. 27.
- ¹⁷ *Brottsbalken jämte förklaringar ...* vol. II (note 12 above), p. 707.
- ¹⁸ Nils Jareborg, *Förmögenhetsbrotten*, Stockholm 1975, pp. 35 f.
- ¹⁹ *Brottsbalken jämte förklaringar ...* vol. II (note 12 above), pp. 708 ff.
- ²⁰ J.L. Austin, *Philosophical Papers*, Oxford 1961, pp. 123 f. and 125. See also Jareborg, *Handling och uppsåt* (note 1 above), pp. 343 ff.
- ²¹ H.L.A. Hart, *Punishment and Responsibility*, Oxford 1968, pp. 13 f. See also Eric D'Arcy, *Human Acts*, Oxford 1963, pp. 77 ff.
- ²² *Brottsbalken jämte förklaringar ...* vol. II (note 12 above), pp. 644 ff.
- ²³ See Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*, New Brunswick, N.J. 1985, ch. 5.
- ²⁴ See Jareborg, *Handling och uppsåt* (note 1 above), pp. 355 ff., Hart, *op.cit.*, Gary V. Dubin, "Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility", *Stanford Law Review*, vol. 18, 1965-1966, pp. 322 ff., von Hirsch, *op.cit.* note 14 above. See also pp. 00 ff below.
- ²⁵ See e.g. Claus Roxin, "Zur Problematik des Schuldstrafrechts", *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. 96, 1984, pp. 641 ff.
- ²⁶ Glanville Williams, *Criminal Law. The General Part*, 2nd ed. London 1961, pp. 30, 428 and 738.
- ²⁷ Hart, *op.cit.*, note 21 above, p. 43; see also pp. 18 f.
- ²⁸ Knud Waaben, *Utilregnelighed og særbehandling* Copenhagen 1968, pp. 51 f.
- ²⁹ Jareborg, *Handling och uppsåt* (note 1 above), pp. 367 ff., von Hirsch, *op.cit.*, note 23 above, chs. 9 and 11.
- ³⁰ See e.g. Johannes Andenæs, "The Morality of Deterrence", *University of Chicago Law Review*, vol. 37, 1970, pp. 649 ff..
- ³¹ See von Hirsch, *op.cit.*, note 23 above, ch. 3.
- ³² See also addition (1988) to essay V. below (p. 120).

II.

THE TWO FACES OF CULPA

1. INTRODUCTION

1.1. Dolus crimes and culpa crimes

Ch. 1 sec. 2 par. 1 of the Swedish Criminal Code (Brottsbalken, *BrB*, effective in 1965) reads as follows: "Unless otherwise stated, an act described in this Code shall be regarded as a crime only if it is committed intentionally." A minority of the acts criminalized in *BrB* is explicitly punishable when the act is committed through carelessness (sometimes gross) or when the offender has reasonable grounds for assuming that something is this case. Thus the crimes defined in *BrB* form two classes:

- I. Crimes requiring *intention* (dolus, uppsåt, intention, Vorsatz); and
- II. Crimes requiring *carelessness* or *negligence* (culpa, oaktsamhet, imprudence, Fahrlässigkeit).

The Code does not contain definitions of dolus or culpa. It is established that dolus includes dolus eventualis in the hypothetical variant, which is usually ascribed to the German criminalist Reinhard Frank (1890). The content of the concept of culpa has been less clarified by the Supreme Court and in the legal literature.¹

This report was prepared for the XIIth International Congress of Penal Law (Association internationale de droit pénal) in Hamburg, Federal Republic of Germany, in September 1979. It was presented at a Preparatory Colloquium in Moscow, Soviet Union, December 1977, and also at a Finnish-Swedish Symposium in Criminal Law in Turku, Finland, August 1977. The report was published, with some distortions effected by an anonymous editor, in *Revue internationale de droit pénal*, vol. 50, 1979, pp. 307-343. It is here reprinted with corrections, other minor changes and the final section deleted. A somewhat different Swedish version was published as "Två sorters culpa" in *Nordisk Tidsskrift for Kriminalvidenskab*, vol. 65, 1977, pp. 219-248, and also in *Modern strafflagstiftning*, Turku 1977, pp. 7-36. The report represents a first, in part cryptical attempt to come to grips with the problems. A later, more elaborate exposition is found in my *Brotten*, vol. I (2nd ed. 1984) ch. 9 and *Uppsåt och oaktsamhet* (1986). I am indebted to Dr. Per Falk, Mr. Carl Erik Herlitz and Mr. Krister Malmsten for valuable comments.

1.2. The aim of the report

The report will deal with some very general questions of legal doctrines in a rather superficial way. It may be characterized as a conceptual inquiry into some aspects of the bases for the imposition of criminal responsibility for culpa crimes. The primary aim is to show that culpa judgments, in opposition to dolus judgments, take two essentially different shapes. Lack of culpa sometimes means that *the act is justified* (not wrong); sometimes it means that *the actor is excused* from responsibility for a wrongful act (he has no guilt). There will be little room for detailed information on Swedish criminal law.²

1.3. Culpa as fault and culpa as guilt

BrB indicates that culpa is a counterpart to dolus. In Swedish legal writing this is accepted with the proviso that culpa and dolus are essentially totally different. The thesis of this report is that culpa sometimes is not at all a counterpart to dolus (and therefore totally different) and that it sometimes is a counterpart to dolus (and therefore fairly similar in structure). "Culpa" has two meanings. Sometimes it belongs to the dogmatic domain of Fault (Rechtswidrigkeit). Sometimes it belongs to the dogmatic domain of Guilt (Schuld). (Of course, guilt is also a kind of fault according to ordinary understanding, but the terms are here used in their technical senses.) In German legal literature it is currently often noticed that culpa (Fahrlässigkeit) stands with one leg in Rechtswidrigkeit and the other in Schuld (though the adherents to the so-called finale Handlungslehre refer to it in other terms). But the exposition below differs from the German conception, which seems to distinguish between an "objective" and a "subjective" aspect of essentially the same kind of judgment. The exposition also differs from the received Scandinavian views.

Thus, if "culpa" is ambiguous, it can be misleading to talk just about culpa. In English, the terms "carelessness" and "negligence" will be used as technical terms in the following way:

carelessness: culpa as fault, act-orientated culpa, culpa making an action or omission wrong, not allowed, not justified;

negligence: culpa as guilt, actor-orientated culpa, culpa making a person performing an unjustified action or blameworthy omission, not excused, *but* only as far as culpa corresponds to dolus (in 4.9. and 6. some cases will be mentioned where this kind of culpa does not correspond to dolus).

2. CULPA AS FAULT

2.1. Carelessness

To be careless is to do something without regarding the risks. A person, P, may be careless *when* he performs an action A. He may also be careless *by* performing A. In the first case, he does A, e.g. drive his car, without paying attention to certain risks (and their insurances) in the course of doing A. He does A carelessly. In the second case, he is careless by doing A, e.g. overtaking another car before a bend; the action itself, in this case, is an instance of carelessness. To be careless by doing A is not necessarily to do A (e.g. overtake before a bend) carelessly, but it is necessarily to do something else (e.g. drive the car) carelessly.

To be careless is always to be, so to say, careless *in some direction*. The existence of carelessness is dependent on the existence of certain kinds of *risks*, i.e. risks for the realization of certain *results*, which are negatively evaluated.

To ascribe carelessness is to suggest that the agent did not intend to bring about an unwelcome result. In discussing culpa as fault, however, the intentions of the agent are totally left out of consideration. It is therefore possible to say that P acted carelessly when he did A, even if he intended to bring about a result, R, of A, when the risk of R is the reason for calling A careless. The argumentation concerns the question of whether the *action*, *not the person*, is to be characterized as careless.

2.2. Actus reus and carelessness

The catalogue of crimes may be seen as an embodiment of evaluations. The reasons for criminalizing a certain action may, however, vary. Sometimes the action involves the causation of an undesired result (e.g. killing another person). In other cases the only reason for criminalization is that the action can be, at least in some situations, conducive to an undesired result, but nothing is said about this result in the definition of the crime (e.g. carrying a pistol). In still other cases, the crime is defined by creating a danger of the realization of a certain result (e.g. exposing another person to mortal danger).

It does occur that a crime is constructed as doing A carelessly (in some definite direction). But almost always the role of ascription of carelessness is different. There is no point, in legal discussions, in asking whether the actus reus was performed carelessly. We do not ask whether P_1 killed P_2 carelessly. We ask whether P_1 killed P_2 through carelessness. Of course, P_1 can be careless when he kills P_2 . He can, e.g., disregard

the risks for getting caught by the police. He can also show carelessness by killing P₂, e.g. when the killing is apt to have political repercussions.

On the other hand, an action fulfilling the requirements of an actus reus may exhibit carefulness in another direction than the one that is relevant for the creation of the crime. The action then reveals a clash of interests, which can lead to the judgment that the action is justified, although it fulfils the requirements of a certain definition of crime. In such a case the legislature (or maybe the Supreme Court) has to step in and create a rule stating an exception to the criminalization.

The ordinary judge is asked to decide whether P committed the actus reus (from now on shortened as "AR") through carelessness. He is not asked to decide whether P was careless when or by committing the AR. This means that the ascription of carelessness concerns another action than the one that constitutes the AR. This is the case whatever the reasons for criminalizing the AR are. To avoid complicating matters the only example used below will be the AR of killing another person (which obviously exemplifies the method of criminalizing the causation of an undesired result).

"Killing" can for present purposes be defined as "doing something which results in death". This "doing something" can be any action. When discussing carelessness it is, however, important to have a controlled, intentional action as a starting point. Otherwise, there is nothing to which carelessness can be ascribed. (Omissions are at present left out of consideration.) This controlled action must involve a so-called *basic action*, i.e. an action which belongs to the actor's repertoire of primitive movements and consists in using this primitive ability to move parts of the body.³ But to fulfil the requirements of an AR, the actor almost always has to create some results through his basic action or actions, and often this causation has to occur in specific circumstances.

The peg, on which we hang an ascription of carelessness, may be a basic action. But in most cases the actor controls not only his basic actions but also a more or less wide range of results of his basic actions. Almost all verbs refer to something more than a basic action.

On the other hand, if P has conscious control of his action up to the realization of AR, there is, in a way, no room for asking whether he caused R through carelessness. But the reason for this is not that P is not careless, but that any requirement of carelessness is automatically fulfilled.

2.3. Arguments for ascribing carelessness

How can we justify the ascription of carelessness when P causes R by doing A? As indicated above, the primary consideration is that (the actual) doing A is wrong because it involves risks for the realization of R (i.e. results of type R). It is to be noted that the existence of risks is judged from the actor's perspective. A risk is thus not equivalent to a danger; the judgment that a danger exists is not tied to a certain perspective. This difference is, however, of minor importance, since it is required that A has caused R; at some stage in the causal process a risk without danger must change into danger. (But, of course, a danger may be created by P although he acted without carelessness.)

(A) The primary reason for ascribing carelessness to A can be formulated as follows:

- (a) doing A involves taking risks in direction R;
- (b) these risks are such that there are *good reasons* to abstain from doing A, if R is to be avoided (and that R-type results are to be avoided is already politically decided through the criminalization of AR).

In other words: The actual R and the causal chain from A to R must fall within the scope of events, the possible occurrence of which constitutes a good reason for not doing A.

(B) But risks can be avoided, not only by not doing A, but also by taking *precautions* when doing A. This is of special importance in cases where doing A is socially valuable. If P does A without taking precautions, he takes risks which might justify the ascription of carelessness. But it is important to notice that the wrongfulness of the action does not depend so much on doing A as on doing A without doing B, i.e. doing A without doing something to minimize the risks combined with doing A. Doing B is not only to take protective measures in a narrow sense, but also e.g. to acquire relevant know-how or skill.

The most difficult question in this connection is to decide what constitutes "good reasons" for abstaining (or for abstaining when precautions are not taken). The courts have to decide what to allow people to do. Different interests have to be weighed against each other. The outcome of the evaluation will be different in different societies, in different periods, in different contexts and with different kinds of actions (the social value of the kind of action influences the outcome).

For obvious reasons the courts try to "objectivize" this evaluation. They try to create *standards of due care*. Such standards have the status of empirical generalizations concerning the existence of good reasons, but can in practice be handled as legal norms.

Lacking such standards the courts often refer to a pseudo-standard: the behaviour of a normally careful person (earlier: *bonus pater familias*), who has a tendency to merge into the judge himself in his brighter moments.

Candidates for more substantial standards are found in the extensive legislation of a regulative or preventive character. We have many rules aiming at the prevention of injury, damage or loss, e.g. rules concerning road traffic, labour protection, possession and handling of dangerous substances and the management of industrial and other enterprises. Other standards may be brought from technical recipes, i.e. norms for technically correct action in different areas of goal-directed activity.

There is a presumption that P, who caused R by doing A, did this through carelessness, if he deviated from such a norm. This presumption is easily rebutted if it is clear that conformity or non-conformity with the norm has little to do with creating risks in the direction of the relevant R. In German legal literature this is somewhat misleadingly expressed as a requirement of identity (in relevant aspects) of purpose of protection (*Schutzzweck*) of the rule criminalizing the AR and the legal rule of a preventive character which appears as a standard-candidate. Of course, if a preventive rule is created as a device to prevent results of type R_1 , it is often of little value as a device to prevent results of type R_2 . But, on the other hand, the question cannot be decided only by considering the intentions of the rule-creators or some constructed intentions "behind" the rules. It is up to the courts to decide, in every single case, whether a given standard or standard-candidate embodies careful behaviour in the relevant direction.

To repeat: the courts decide whether due care has been exercised. Standards brought in from other legal areas or from outside the law are means of assistance when these decisions are made. For central and usual cases there are good reasons to accept — for the time being — standards of due care. The courts need not use so much energy when problems are solved and the person who tries to conform to the law can have some success. The attractiveness of preventive and regulative norms as standards is easily explained by the fact that they are published in advance.

In German legal literature *culpa* is sometimes explained as a breach of a duty of care (*Sorgfaltspflicht*). This is misleading as far as it suggests that the breach of a legal duty of care is the reason for ascribing *culpa*. *Culpa* (as fault) is identical with breach of a legal duty of care. The legal duty to exhibit care is not to be found anywhere else than in the judgment of the court. Previously existing norms only provide arguments when the content of the duty of care is to be established. But, as has

already been indicated, in some areas the judgment of the courts may be so stabilized that certain norms can be trusted as embodiments of prevailing evaluations.

But even in stabilized areas it is an open question whether the peculiarity of the case prompts a deviation from the accepted standards. Without going into details it will be mentioned that the judgment to some extent is dependent on

(a) *the social role and general ability of the agent*: e.g., professionals are treated somewhat more severely than laymen as long as it concerns activities which are not supposed to be practised only by professionals; the same holds good for the relation normal persons–handicapped persons; and

(b) *the context of the action*; to drive a car carelessly by going too fast is not to deviate from a certain speed limit; the speed which makes the driving careless is dependent on the weather, the condition of the road, light conditions, etc.

The urge to make things easily decidable can lead to the creation of sub-standards which take types of relevant factors of the kinds mentioned into account.

2.4. Some implications

(1) It is important to remember that it is not enough that P has caused R by doing A and that A was a careless action. The carelessness ascribed to A must also be a carelessness in relation to R: the risks for R-type results must be the reason for calling A careless. If P by doing A breaks a traffic rule, it is often true that he was careless by doing A. If he also happens to cause another person's death, it is easy to take the step to concluding that P killed the other person through carelessness. But this conclusion is sometimes not justified, because the ascription of carelessness to A depends on something else than the risks for R-type results.

It is possible to distinguish, as some penalists do, a *quantitative* and a *qualitative* aspect of this relation between controlled action and uncontrolled result. A reason for abstaining from doing A is based on considerations concerning the kinds of involved risks, but also on considerations concerning the degree of risk in some direction. Mostly, the arguments are mixed. The more undesirable a (kind of) result is, the more easily will a certain degree of risk provide a reason for not doing something which can cause the result.

(2) Suppose P is driving a car, first, much too fast during period I, then, with a justifiable speed during period II. P has thus been driving

carelessly during the first period, and not carelessly during the second. Suppose also that P killed a pedestrian during period II and that there is no ground at all for ascription of carelessness during this period. It is obvious that driving too fast is careless because of the risks involved, e.g. for results of the kind realized in the example. It is also obvious that in one sense the pedestrian's death was caused by P's driving too fast; P would have been at another place if he had kept himself within the speed limit all the time. Still, the answer to the question, whether P killed the pedestrian through carelessness, must be negative. When we trace a causal chain back from the death, the object is to find some controlled behaviour to which the quality of carelessness can be ascribed. If we come to a controlled action that does not have this quality, then this causal chain cannot provide us with an actor who is responsible for what has happened.

(3) Some legal scholars have tried to come to similar solutions by requiring that the carelessness (*culpa*) must be a cause of the result. Taken literally, this is nonsense. It is impossible for a legal characterization to be the cause of something in space and time. It is also evident that such a requirement is unnecessary to ensure that the careless action is a cause of the relevant result (this is already required by the AR). It is, however, not impossible that this requirement still has a kernel of truth. As mentioned in 2.3. it is sometimes the case that e.g. a killing is wrong not so much because it was effected in a certain way, but because the risks combined with an action or activity were not minimized through protective measures. The carelessness then primarily consists of an omission to do something. It might be argued that in such cases it is required, that not only the action, but also the omission, is a cause of the result. However, before this question is pursued further (see 2.6. below), something must be said about causation and omission in general.

2.5. Causation and omission

The concept of a *causal chain* is based on the idea of *natural necessity*. A causal chain is an abstraction. It represents a choice among all the things that happen. It is a construction underpinned by our knowledge of laws of nature and how to manipulate parts of the world with physical means. In criminal law the interest is focused on causal chains emanating from human action.

Even natural scientists are sometimes interested in causing or explaining the causation of the absence of an event. And both an event and a non-event can be caused by another event or non-event. This leaves us with four basic kinds of causal nexi, of which only one (event

causing event) is identical with the existence of a causal chain. The other three (event causing non-event, non-event causing event, non-event causing non-event) are merely *causal lines*, which can be established only with the help of arguments referring to *hypothetical causal chains*. To say that not-x caused y is to say that x would have caused something which is not y. In criminal law, non-events are cited as causes only when they constitute human omissions. (The concept of omission, which is a social concept and not identical with non-action, cannot be clarified here.)⁴

Sometimes a crime (e.g. fraud) is defined as causing an action or omission by another person. In such cases the *physical mode* of causation is of minor interest. Instead the *psychical mode* of causation is in focus. This mode is characterized, not by making something happen in accordance with natural necessity, but by making someone believe something and act in accordance with those beliefs. Instead of physical manipulation we have influence on people by providing them with reasons for action (or omission). It is important to notice that in this connection omission works as a cause, as a provider of reasons, in exactly the same way as action. The fundamental difference between action and omission in physical contexts has no counterpart in psychical contexts.

In Swedish criminal law causing harm by influencing other people is most often treated as a case of complicity, even if no one can be held responsible as a principal actor. For this reason, and in order not to complicate matters, the following discussion is restricted to cases of physical causation.

As previously indicated, for social reasons, we sometimes construct a causal line between P's not doing B and a certain event, R. We have reason to find P in some sense responsible for the occurrence of R, if P had control over a causal chain that resulted in R, i.e. he could have interfered with the natural happenings and prevented the occurrence of R.

Some crimes are defined as doings. Others are defined as not-doings (and a few of these as not-doings with specific results). The words used for these definitions naturally restrict the classes of causings which are denoted by the different definitions. But when a crime is defined as a doing there is an additional restriction: only a minor part of the class "causing by omission" (in a way that fits the words used in the definition) is admitted as containing candidates for punishable behaviour. If a crime is described as "killing", then all cases of causing somebody's death through action fall under the definition, but only a few of causing the same result through omission. The device used to ensure such a restriction is to refer to the doctrine of non-genuine crimes of omission:

the person who comes into consideration as an offender must be in the position of a guarantor, either as a protector, i.e. guarantor for the safety of the person or object that is harmed, or as supervisor, i.e. guarantor of the safe conduct of the source — the agent himself, another person, e.g. a child, an animal, a machine, etc. — of a causal chain resulting in R. (For details the reader is referred to Essay III. below.)

The existence of this restriction of the applicability of a definition of a crime makes us prone — for good reasons — to look for actions, not omissions, as relevant causes of the undesired results. Many activities can be represented both as action and as omission and many activities consist of a mixture of action and omission. But if an action and its result fall under the definition of a crime, we do not bother to talk about omissions. In at least some of the cases, where the carelessness consists in not taking precautions (not doing B) when A is performed, and A causes R, it is possible to say that also not doing B causes R and that this causation falls under the definition of the crime.

2.6. Omission and carelessness

Also an omission can be characterized as careless. As A is careless, because doing A involves risks in direction R, the omission of B is careless because it involves risks in direction R. The carelessness of doing A amounts to a good reason for not doing A. The carelessness of omitting to do B amounts to a good reason for doing B (because R-type results can be prevented).

The question now arises, whether it is possible to have a case of carelessness consisting not in omitting to do B, but in something else, as a counterpart to an action being careless because of an omission to take precautions. P is then careless when he omits to do B and thereby causes R, because he omits to do C. This is theoretically possible, if doing C is an alternative to doing B as a means of preventing R. It is also theoretically possible that an omission is judged careless because it is accompanied by a certain action and that an action is judged careless because it is accompanied by a certain action. The only reason we could have to talk in this way seems to be that the first-mentioned behaviour falls under the crime definition and the second does not. A lot of work is needed to find out if there is any merit in letting such strange cases occupy a place in the doctrine of culpa. In the absence of any information to this effect, it seems wise to keep them out of the discussion.

This leaves us with two clean cases:

- (1) An action A, which causes R, is careless because A is performed;

- (2) An omission to do B, which causes R, is careless because B is not performed;
and one hybrid case:
(3) An action A, which causes R, is careless because B is not performed.

In case (3) it may well be that omitting to do B, with R as a result, also belongs to (2). But, as mentioned above the doctrine of non-genuine crimes of omission makes such demands that very often the causation through omission does not fall under an AR.

We have now come back to the question left at the end of section 2.4. In case (3), must not only the action A but also the omission of B be a cause of R? If the answer is negative, then it is possible to say that it is wrong to do A, when

- (a) it is permitted to do A, if B is performed;
- (b) B is not performed;
- (c) B would not have prevented R.

If the answer is affirmative, then (c) must be negated in the following way:

- (c)' B would have prevented R.

There are strong reasons against accepting (c)', i.e. against requiring positive proof that the omission of B caused R. In many cases the maxim in dubio pro reo comes into play and the defendant would have to be acquitted, if there is reasonable doubt whether doing B would have prevented R. (The prevailing view in German judicature seems to be that this consequence is to be accepted, but many voices against it have been heard.) In Swedish literature there is more talk about the "relevance" of such an omission than of its causality. The point seems to be, simply, that the omission of B in case (3) must be either a cause of R or at least careless in direction R. This possibility falls neatly into the picture because (c) can also be negated in the following way:

- (c)'' Not: B would not have prevented R.

With this solution the problematic consequences of the maxim in dubio pro reo are evaded.

In Swedish law the choice is to be made between (c) and (c)''. It is not an easy choice. To choose (c) seems to be rather harsh. To choose (c)'' is to make room for the sometimes very difficult question whether to place the carelessness on the action or on a co-existing omission (which per se may fall outside the AR). To illustrate the point three examples will be mentioned, the first two being famous cases in German judicature.

Example I (Radfahrerfall, BGH 11, 1). P₁, a driver of a lorry, overtakes a drunken cyclist, P₂, who is disturbed by the presence of the

lorry, falls and is killed. P_1 is obviously careless, because he drives with too short a distance between the lorry and P_2 . But it is judged that — with high probability — P_2 would have fallen and got killed, even if P_1 had kept a distance which would not have implied carelessness. It is, of course, easy to say that the carelessness consisted in the omission to keep a safe distance. But this is off the point. A careful look at the causal chain reveals that it is wrong to represent the example as a case of type (3); it is a case of type (1). What would have happened if P_1 had kept the required distance is totally without relevance. P_1 killed P_2 through an action which was careless in relation to a person's death. The fact that he could have killed the same person through a different action, which would not have been careless, is maybe interesting, but can have no legal consequences.

Example II (Ziegenhaarfall, RG 63, 211(213)). An enterpriser, P, lets his employees work with goat-hair which was not disinfected and some of them die from anthrax. It is established that disinfection would not totally have excluded the danger of infection. It might be argued that this, too, is an example of case (1). But on the other hand, here it is far more easy to represent the example as a case of type (3): P is not careless in letting the workers handle goat-hair, but because he has not put the hair through a disinfection process in advance. Thus, in a way, the same action could have been performed without carelessness. So, if the omission to disinfect is not careless in relation to a worker's death, then acceptance of (c)" implies acquittal. (In the real case the omission seems to have been careless.)

Example III. P_1 drives his car too fast. P_2 , walking on a sidewalk, stumbles, falls in front of the car and is killed. It is established with certainty that P_2 would have been killed, even if P_1 had driven with permitted speed. To decide whether this is an example of case (1) or case (3) seems almost impossible. Did he drive carelessly? Or did he drive, carelessly omitting to keep justifiable speed? A certain piece of reality can be represented as careless because P did not abstain from doing A or because he did A without minimizing risks, although the choice between the two representations has hardly any foundation in what actually happens. The deciding factor then is a social evaluation of the action. If doing A is socially valuable in some way, encouraged or at least tolerated then it is more at hand to represent the events as a case of type (3). But in the example we are little helped even by such considerations. Maybe the solution is to be found somewhere else: it might be argued that the result in the example does not fall within the scope of risks which make driving with a certain speed in certain circumstances careless.

Anyhow, it ought now to be clear that the concept of carelessness is a concept with heavily blurred edges.

2.7. The importance of distinguishing between carelessness and negligence

In Swedish legal literature culpa is often defined as deviation from acceptable behaviour. This is not very adequate when culpa corresponds to dolus, but fits culpa in the form of carelessness. In this guise culpa is a device to restrict the application of crime definitions which are too broad; these definitions also hit some acceptable behaviour.

This brings us to an important reason for distinguishing between culpa as fault and culpa as guilt. As is sometimes recognized by German penalists, culpa as fault plays a role not only at crimes requiring culpa but also at crimes requiring dolus. (When the actor acting in dolus has conscious control of the events up to the completion of the AR this requirement is automatically fulfilled.) To be sure, in most cases there occurs a point where the actor acting in dolus is careless in relation to R. But still, sometimes he is to be acquitted because of lack of carelessness. The matter will not be discussed here beyond noting that such cases normally are classified as involving the doctrines of "permitted risk-taking", "lack of adequacy of the causal nexus" or "social adequacy". In Swedish criminal law these borrowed doctrines have the function of providing ad hoc-solutions (the situation might be different in the much more complicated German doctrines). In reality they involve nothing else than a kind of carelessness-evaluation and to refer to them is to unnecessarily complicate and obscure legal reasoning.

3. THE PRINCIPLE OF CONFORMITY

3.1. General

The principle of conformity has a simple message: A person should not be considered responsible for a crime if he could not conform to the law. It is a principle of criminal legal policy, i.e. its primary role is played on the legislative level. But also the courts can sometimes — in the absence of explicit legislation — use it as a weighty argument when questions of criminal liability are to be decided. Here it will be taken for granted that the principle is justified from a moral point of view.

The key word in the formulation of the principle is "could". Even a simple analysis gives us that (a) "could" is either in the *indicative mood* or in the *subjunctive mood* or in both moods, and (b) "can" may in this connection be taken to refer to either *ability* or *opportunity* or both.

There is no reason to exclude any one of the possibilities provided by this analysis; we can therefore divide the principle into four sub-principles:

A person should not be responsible for a crime if he

- (1) did not have ability to conform to the law.
- (2) did not have opportunity to conform to the law.
- (3) would not have had ability to conform to the law, even if ...
- (4) would not have had opportunity to conform to the law, even if ...

3.2. Lack of ability

An actor is unable to conform to the law (given that he knows what to do) if he is unable to control his behaviour (he cannot help deviating from what is prescribed). The reasons for ascribing such inability include

(a) that the relevant *action is involuntary*, i.e. the actor does something while he is unconscious or moves or is moved as a body or an organism, not as a person;

(b) that the *omitted action is impossible to perform* for the actor, e.g. because of lack of know-how, strength, skill, because he is paralyzed, at another place, etc. (this category merges into cases of lack of opportunity); and

(c) that the *actor is mentally abnormal* in a way that affects his ability of control.

The law is created for people with normal abilities. It is pointless to demand what is generally impossible. While lack of opportunity is quite common, lack of ability therefore is rather exceptional. In Swedish criminal law most cases falling under (c) are dealt with outside the concept of crime; e.g. insanity does not per se exclude commission of a crime, but restricts the range of applicable sanctions. The categories (a) and (b) have little importance in practice and they have not been explicitly built into the criminal law system. An exposition of the standpoint of the law in these cases and the remaining cases of category (c) would be fairly complicated. Only some hints can be given in this report. As the rules also refer to elements of knowledge or possible knowledge these remarks are postponed to section 6. below.

3.3. Lack of opportunity

The principal reason why a person, who is able to conform, lacks opportunity to conform to the law is that he *lacks knowledge* about what to do. (In cases of omission more kinds of lack of opportunity are

possible, e.g. lack of position, means, equipment, etc. These are treated together with cases of lack of ability.)

The general view is, however, that an adequate efficiency of the criminal law system will be put in danger if all lack of relevant knowledge is allowed to excuse the actor. So we have a division of error and ignorance into two kinds:

- (1) error and ignorance in relation to what the actor does;
- (2) error and ignorance in relation to whether what he does is unlawful.

In positive terms: the principle of conformity requires (when read in indicative) that the actor must have understood that (1) he did something, which amounts to an AR, and (2) what he did was prohibited by criminal law. But these two kinds of understanding are treated completely differently.

Lack of understanding of the second kind is, in Swedish law, in principle irrelevant, but some cases are made relevant in the following ways:

(a) a range of cases is cut out on a general and early level in the criminal law system, namely by the principle of legality, which e.g. requires that definitions of crimes shall be published in a certain way and prohibits retroactive legislation;

(b) the Supreme Court has laid down fragments of a rule saying that the actor is excused from responsibility if he has been deceived about the content of the law by a policeman, a court or a similar authority.

Lack of understanding of the first kind is equivalent to lack of *dolus*. It is to be noticed that the principle of conformity is not precise enough to give clear guidance for deciding what kinds of understanding are to constitute *dolus*. (For the Swedish position, see 1.1. above and 4.6. below.)

The *dolus* requirement contains the idea that the AR must be "covered" by *dolus*. It is sometimes very difficult to decide what the object of this covering is. We have seen that in the category of understanding what the law says, the principle of conformity has been defeated by efficiency considerations. (It is, by the way, submitted that the Swedish position is based on an exaggeration of the efficiency argument.) But this struggle between fairness (in the guise of the principle of conformity) and efficiency is so to say permanently continued at the front between the two categories of lack of understanding. Conceptual considerations have little influence on the exact position of the front-line. The question concerns legal policy and is decided by the courts.

4. CULPA AS GUILT

4.1. The principle of conformity and negligence

"Negligence" is here used to denote the alternative to *dolus* as a form of guilt. While *dolus* has its base in the indicative mode of the principle of conformity, negligence has its base in the subjective mode of the principle. (This statement will be modified in 4.6., where recklessness will be brought into the picture.) This means that

- (i) negligence indicates absence of *dolus*;
- (ii) it is taken for granted that the actor had ability to conform;
- (iii) it is taken for granted that the actor understood what the law demands (because this falls outside the scope of the *dolus* requirement, it also falls outside the scope of the negligence requirement; another thing is, that it is possible to make a negligence-argument in this area too, but if this is done it can be totally unrelated to the distinction between *dolus* crimes and *culpa* crimes);
- (iv) it is taken for granted that the actor has done something which amounts to an AR (including exhibition of carelessness when this is relevant); and
- (v) the idea that *dolus* must cover the AR has a counterpart in that negligence must cover the AR.

In simple terms, use of the restricted opportunity part of the principle of conformity in the subjunctive mode leaves us with the requirement that it must be the case that the actor *would have understood that he did AR, if...* What kind of understanding is required will be left unanswered for the moment (see 4.5.).

The next step to take is to complete the "if"-clause. Negligence is a kind of guilt, which means that we must be justified in blaming the negligent actor, although he did not understand what he did. His defence: "I did not understand, therefore I could not conform" can only be defeated by: "You would have understood, if you had done what you ought to have done". The actor can then put up other defences: "I could not (indicative) do what I ought to have done" and "I did not understand that I ought to do that". The truth of the first of these assertions excuses him from blame, the truth of the second often does not (more will be said about this later).

The upshot is that P is negligent in relation to the AR, if he would have understood that he did the AR, if he had done X, which he had ability and opportunity to do and which he ought to have done.

4.2. The causal element

The first task in ascribing negligence is to find an X and to establish a contrafactual causal line between this X and a certain cognition, i.e. to establish that the actor could have found out that he was doing or was going to do the AR. The X we are looking for is normally something quite simple; in general terms: *a use of the brains*. Of course, people can use their brains in different ways: by thinking, paying attention, exercising self-control, getting information, getting help to get information, putting oneself into position to be able to have information at hand (e.g. by taking notes, book-keeping), etc.

All causal investigations to some extent rely on general knowledge. But this must not lead us to use fictions. The X we are looking for has to be something that the actor, in his individual set-up, with all his peculiarities, in the factual stream of events, in fact could (indicative) have done and which would have produced a certain cognition of his actions. This means that the *personal capacity* of the individual is relevant. If *he* could not have come to understand that he was doing or was going to do the AR, whatever he had done, we must find him not negligent. Sometimes things happen very quickly and people have no time to think or they panic and lose the ability to think; then they are not negligent unless we can tie the ascription to an earlier stage.

4.3. Blame as a foundation for punishment

The difference between *dolus* crimes and *culpa* crimes depends on a difference in the degree of guilt. Guilt is the basis for blame. Thus we have more reason to blame a person who acts in *dolus* than a negligent person.

The purpose of the criminal law system is to influence people. The citizens are threatened: if you do not obey the law, you will be punished. In many areas the system is not very efficient, partly because the ordinary citizen has rather foggy ideas of what he is permitted to do. But, as already mentioned, such ignorance is normally no excuse. Even if the actor does not know that the act is against the law, we find us entitled to put blame on him, if he acts with *dolus*. The blame is then based on the fact that he is a person who wants or knows that he is to do something, which is in fact wrong. This means that he is a person who is "careless" in the sense that he at least does not care, is indifferent to, whether he realizes what is an AR. Because this indifference is the primary reason for blame, it is not unreasonable to include *dolus eventualis* cases in the top category of guilt.

Punishing indifference is supposed to frighten or educate people (including the punished persons) and make them behave according to law.

It may well be so that a negligent actor is as indifferent to the realization of an AR as an actor acting in *dolus*. His guilt may be the same. But the law always gives him the benefit of doubt. It is presumed that the negligent actor always is less guilty. This presumption has good grounds. It is difficult to prove indifference, if the person has not shown it, and there is a risk that previous convictions will be the deciding factor.

Some penalist have found it unjust to criminalize *culpa* crimes, because negligence does not constitute a genuine *mens rea*. But the purpose of punishing the negligent actor is the same as the purpose of punishing the actor who acts in *dolus*, namely to make the citizens behave in a certain way, and it can hardly be doubted that this is a realistic purpose. And also the negligent actor is punished for a kind of indifference: he is at least indifferent to whether there are risks for his realizing an AR. We blame him because he — given that he does not want to perform an AR — has not used his capacities to prevent his doing an AR. If we return to the language of carelessness used in section 2., the negligent actor can be characterized as careless in the following way: he omits to use his brains without attending to the risk that he will do something that he does not want to do, namely, commit an AR. And through this carelessness he causes that he does not understand that he is committing an AR. (This kind of carelessness has of course nothing to do with the legal category of carelessness, as outlined in section 2.)

All the same, the difference in indifference is substantial. The demands on the citizens are much heavier, if we criminalize negligence. We then demand that people are considerate, cautious, prudent. In criminalizing *dolus* crimes we demand that they are not callous. (But this principal difference can be obliterated by criminalizing acts which in fact do not endanger the interests which are to be protected.)

If thus the negligent actor is definitely less anti-social, there are also reasons to be reluctant to criminalize *culpa* crimes. The principle of conformity tells us when it is not unfair to use blame: it does not tell us when we ought to use blame (and certainly not when we ought to use blame in the form of punishment). The use of criminal law is a cheap but very unkind way of governing a society. To criminalize negligence is, in principle, advisable in two classes of cases:

(a) as an alternative (with a more lenient latitude of punishment) to criminalization of *dolus*: when the interest threatened or harmed is especially important;

(b) together with criminalization of *dolus*: when the crime is a minor offence (the punishment normally is a fine) and a *dolus* requirement would make the criminalization inefficient.

4.4. The element of blame

If we find an X fitting into the causal formula presented in 4.1. and 4.2., it remains to be shown that the omission of this X is something for which we can blame the actor. We have already touched upon the requirement that the actor must have had ability and opportunity to do X. If we disqualify an X for this reason, we can often continue to look for another X, omitted at an earlier stage. If someone enters an enterprise which requires special knowledge or is the object of special legislation, it may be that during the execution he does something which amounts to an AR without being able or having opportunity to do what he ought to do: we can then take a step back and investigate whether he was negligent in entering the enterprise.

With some fantasy we can almost always find some X that would have caused the relevant cognition. But the X must also be something that the actor ought to do. This is the most difficult part of the ascription of negligence and, in practice, the only one that keeps the courts occupied.

That the actor ought to do X is equivalent to that he had good reasons to do X. What is to constitute good reasons is often an open question. In general little more can be said than that the risks for his unwittingly doing an AR, judged out of his perspective, must have been so substantial that we can reasonably demand of him that he used his brains. Also in this area the courts try to use *standards*. Some thoughtfulness, some efforts to use the brains, some readiness to cope with different situations, some caution in life is demanded of everyone. But the demands differ in different contexts and for people in different roles. If someone enters an enterprise which requires special knowledge of fact or law we normally demand that he acquires such knowledge (in German: *Einlassungsfahrlässigkeit*). We demand more from professionals than from laymen in things concerning the profession. Such context-dependent standards of caution or prudence can seldom be brought from outside criminal law (an exception is the duty of the taxpayer to keep notes, etc., concerning his income and costs).

So far, the negligence evaluation follows the pattern of the carelessness evaluation indicated in 2.3., although the involved factors are different. If we stop here we get a concept of *impersonal* negligence; it depends on what can reasonably be demanded of normal persons in different, rather broadly characterized, types of situations. But the

prevailing view is that the law uses a concept of *personal* negligence. (It can be doubted whether it is possible to have a purely individual evaluation, but in any case we get a much more detailed categorization.) The idea is that consideration shall be paid to the actor's specific deficiencies (but not his specific superior powers); e.g. deficient physical strength (though seldom relevant), sight, hearing, skill, knowledge, education, experience, intelligence, and also things like mental illness, nervous disposition (but hardly bad temper) and temporary states like being scared, confused, consternated, dazed, or exhausted.

If one X is disqualified as relevant for an ascription of negligence it is always possible to look for another. If P is found not negligent because he was so tired when he omitted to use his wits, it may well be the case that we can find him negligent because he was not prudent enough when he started to feel tired.

Personal culpa is often talked about in terms of personal carelessness. It is submitted that this is a misleading way of talking about personal negligence. It is asked whether we can reasonably demand of this specific person that he conform to the standards of due care. But it is hard to find an authoritative case in which this question does not boil down to a question of whether the agent used his brains, paid attention, etc., to a degree that we can reasonably demand of him.

Suppose the actor protests: "I did not and/or could not know what was reasonably demanded by me". We then answer: "We still blame you for your anti-social behaviour (your indifference)". The reason for stopping here is partially the same reason that makes us unwilling to accept ignorance of the law as an excuse. But there is also some similarity to cases of *dolus*, in which we do not allow a person to excuse himself with: "I cannot help that I am indifferent and anti-social". To permit such defences to be relevant is to put questions of justice on a metaphysical level and might force us to abandon the use of criminal law as an instrument of government. This might be a good idea, provided that it can lead to improved social conditions, but the expectations for this are not great. (The reader is referred to the discussion in Essay IV. below.)

In cases of *voluntary intoxication* the standpoint of Swedish law is that the state of intoxication shall be treated as non-existent when it is decided whether the agent was negligent.

4.5. The element of understanding

When negligence (as opposed to carelessness) is explicitly mentioned in legal provisions, the standard expression that is used is: "had reasonable grounds to assume". This suggests that it is not necessary that the agent

would have known, been convinced or had *dolus*, if he had done X (etc.). Analysis of the judicature gives the same impression. It is enough that the agent would have seen the substantial possibility for the realization of what is an AR (or would have earnestly suspected ...), if he had done X (etc.). This may seem illogical, but it will soon be shown why it is not.

4.6. Recklessness

"Recklessness" (*luxuria*, *medveten oaktsamhet*, *bewusste Fahrlässigkeit*) is taken here to mean that the substantial possibility of the completion of an AR is seen by the actor, but he is not indifferent to this result (i.e. he is not in *dolus eventualis*). Even if he hopes that all will go well, he is still indifferent to the risks for realization of what is an AR. He is thus less to blame than a person acting in *dolus*, but generally more to blame than a negligent person (who is only indifferent to whether there are risks). The reckless person is normally more anti-social than the negligent person. His mental status is more like *dolus* than negligence. But recklessness is classified as *culpa*.

We thus have a somewhat confusing picture:

- I. Two kinds of guilt: *dolus* — *culpa*.
- II. Three kinds of anti-sociality: *dolus* — *luxuria* — *negligentia*.
- III. Two kinds of "could" in the principle of conformity: indicative — subjunctive.

The problem is easily solved by considering two facts.

First, the principle of conformity gives a frame for when it is fair to blame people for doing something wrong, it does not say how this blame is to be administered or conceptualized. In Swedish law, as in most legal systems, a division of guilt into two forms has been found to be the best solution. And to the top form of guilt are referred only cases in which at least indifference to the completion of an AR has been shown. The wisdom of this move is reflected in the fact that while the anxious person sees risks everywhere, the lighthearted one sees no risks.

Secondly, while recklessness is placed in the guilt form of *culpa*, it still has its foundation in the formulation in indicative mode of the principle of conformity. The actor who suspects that he is doing or will do something, which is an AR, has opportunity to conform (given that he knows what he is permitted to do). Admittedly, he does not have complete information, he acts in uncertainty. But if he wants to conform, he knows that he ought to abstain from certain behaviour. This is also the reason why it is enough to require for negligence, that the actor had reasonable grounds to assume that ... (see 4.5.).

If we find a person reckless in relation to an AR, we need not concern ourselves with the negligence judgment. The culpa guilt is established.

Up to now "negligence" has been used to refer to culpa as a counterpart to dolus. This is, of course, inadequate since such culpa includes recklessness and recklessness is definitely not a kind of negligence (as this concept has been explained above). But negligence and recklessness have the same legal consequences and for the rest of this report "negligence" will be used instead of "negligence and recklessness", unless the context indicates otherwise.

4.7. The object of negligence

The question what has to be covered by negligence is, in principle, not different from the question what has to be covered by dolus. As stated above, such questions are answered by the outcome of a struggle between considerations of justice and considerations of efficiency. But normally the issue is more easily resolved in cases of negligence. Here we do not have to investigate factual cognition. We can, at least to start with, operate with a "safe" description of the AR and ask if P would have understood (in the relevant sense) that such a description were to be fulfilled, if he had done X (etc.).

The relation between negligence and carelessness is somewhat problematic. Must the negligence cover the carelessness? The answer is a guarded "Yes", if we think of the risks in direction R. (In fact, it is the causal nexus, and not the carelessness, that is to be covered.) Very often, the courts do not even discuss this point. It is more or less taken for granted that if P is careless he has also seen the risks or at least been negligent in relation to the existence of the risks.

But sometimes it is also said, that the actor must be negligent in relation to the breach of a duty of care, i.e. the negligence must also cover the existence of a certain standard of due care and that this standard is violated (either by doing A or by omitting B or by doing A without doing B). It is submitted that such negligence is necessary only when it has a logical bearing on negligence in relation to the relevant risks. It may well be the case that the actor has mistaken beliefs about the risks involved, because he has mistaken beliefs about what one has to do to exhibit reasonable care in a certain direction. In other cases it is a question of legal policy how far we can admit reasonable error in relation to the violation of standards of due care as a defence. The question is of the same nature as is the question of what kinds of error of law are relevant for the dolus requirement.

4.8. Excusable error and ignorance

The courts often motivate their finding that the actor was not negligent by saying that he was in error (or was ignorant) and this error (or ignorance) was excusable. It is established that P had not thought of the possibility that an AR was to be completed or that he mistakenly believed that the AR was not to be completed. When the courts say that such ignorance or error is excusable they mean that P did not have good grounds to believe in the substantial risk of the completion of the AR (he did not have reasonable grounds to assume that the AR was to be the case). It is important to notice that such a judgment can be made too quickly. Even if it is understandable and normal that P is ignorant or has a mistaken belief in a certain situation, it is quite possible that we can reasonably demand that he does something to become better informed.

In this connection the so-called *principle of confidence* (Vertrauensgrundsatz) can be mentioned. We base our beliefs about what will happen on presumptions of rationality. We therefore trust that people will behave rationally (e.g. not perform stupid or prohibited actions) unless we have special reason to doubt this. The completion of an AR often depends on the unexpected behaviour of people other than the actor. The actor normally has good reason to believe that such behaviour will not occur. Therefore we cannot consider him negligent unless we can demand that he use his brains to find out that the other person probably was not going to behave or did not behave rationally (from some point of view).

Another complication is that some kinds of mistaken beliefs that the AR will not occur are logically compatible with a suspicion that the AR will occur. It is logically possible that the actor is reckless in relation to the AR, although he erroneously believes that the AR will not occur. But shades of belief are not suitable objects of legal proof; normally we have to take mistaken belief to be mistaken conviction.

4.9. Culpa as blameworthiness

Culpa as guilt is not exhausted by negligence (including recklessness). An agent can be deemed not worthy of blame, although he could have conformed to the law. This is the case when we say that it is not reasonable to demand that he conform although he could conform. (Such cases are, however, seldom talked about in terms of "culpa".) In Swedish criminal law there is no general excuse (from all responsibility) of this nature, but a few specific ones, the most important being:

BrB 23:5: inducement to be an accessory to a crime and the case is trifling.

BrB 24:5: use of greater force or causation of more serious harm than is permitted in cases of self-defence, necessity, execution of official duty, etc., and the circumstances are such that the actor could hardly have stopped to think. (Sometimes this state coincides with lack of negligence.)

5. DEGREES OF CULPA

Some definitions of crimes require gross culpa while others (outside *BrB*) exclude minor culpa. The legislation thus operates with a division of the culpability of culpa into three classes: gross culpa, "ordinary" culpa and minor culpa. One step below minor culpa we can place the category of "some" culpa which is of importance only in private law.

A requirement of gross culpa or an exclusion of minor culpa has a bearing on both carelessness and negligence (including recklessness). The evaluation of the degree of carelessness has to do with the degree of deviation from acceptable behaviour, the degree of risks created and the value of the threatened object. The evaluation of the degree of negligence and recklessness has to do with the evaluation of the degree of guilt. As the blameworthiness of recklessness in general is greater than the blameworthiness of negligence, recklessness will normally be placed in the category of gross culpa.

If we suppose that all cases of culpa can be ordered by the degree of culpability, nothing says that a certain proportion of these must belong to each category. Considerations of legal policy can motivate us to e.g. let gross culpa encompass a majority of the cases.

The choice between criminalizing gross culpa and criminalizing *dolus* and gross culpa is not without legal consequences. In the former case only gross carelessness implies a fault also in *dolus* cases, in the second all degrees of carelessness imply a fault in *dolus* cases.

Culpa is a blunt legal instrument. To use degrees of culpa does not make things easier to master, if one wants to serve the goddess of justice. For the judge the words "gross culpa" mean little more than "Remember: this must be something extra!" and an exclusion of minor culpa means little more than "Be merciful! Think twice before you convict!"

6. A NOTE ON INABILITY TO CONFORM

If an actor lacks ability to conform to the law, e.g. because his action is involuntary or his omitted action is impossible for him to perform, the principle of conformity entitles us to blame him, if he could have avoided this state of inability by doing Y, which he could (indicative) do and

ought to have done. (Cp. the old doctrine of *actio (omissio) libera in causa*.) The good reasons he must have had to do Y amounts to that the risks for getting into the state of inability were such that he can be characterized as careless in relation to such a state.

In cases of the mentioned kind, the guilt is tied to the time of a preceding state, when the actor had control. Therefore, we can justify blame for a *dolus* crime only if also the opportunity to conform was at hand at this moment. The actor must then not only have had *dolus* in relation to the subsequently fulfilled AR, but also in relation to the way of fulfilling the AR, i.e. in a state of inability to conform. (The actor uses himself as an instrument to commit the crime.) For *culpa* crimes the reasoning must follow the same pattern. The object of recklessness or negligence corresponds to the object of *dolus*. The recklessness must occur in the preceding free state and the negligence judgment must end in the conclusion that the actor would have understood (etc.), during the free state, if he had done X (etc.).

NOTES

¹ In recent years, however, three important works have been published: Gillis Erenius, *Oaktsamhet*. Stockholm 1971, Gillis Erenius, *Criminal Negligence and Individuality*. Stockholm 1976, Ivar Strahl, *Allmän straffrätt i vad angår brotten*. Stockholm 1976 (this is a treatise of the general part of criminal law as far as it concerns the crimes; *culpa* is dealt with primarily on pp. 168-211).

² The exposition has partly a background in conceptual investigations carried out in Nils Jareborg, *Handling och uppsåt*, Stockholm 1969. This is especially the case with the exposition of the conformity principle (see section 3. below). For further details and the justification of the principle the reader is referred to J.L. Austin, "Ifs and Cans", *Philosophical Papers*, Oxford 1961, pp. 153-180, Gary V. Dubin, "Mens Rea Reconsidered: a Plea for a Due Process Concept of Criminal Responsibility", *Stanford Law Review*, vol. 18, 1965-1966, pp. 322-395, H.L.A. Hart, *Punishment and Responsibility*. Oxford 1968. Philosophical investigations of the concept of *culpa* are also to be found in Alan R. White, *Attention*. Oxford 1964.

³ See further, Essay III. below, p. 55.

⁴ See Essay III. below, pp. 57-59.

III.

CRIMINAL LIABILITY FOR OMISSIONS

The purpose of this report is to indicate in a general way the Swedish solutions on one of the most intriguing problem areas in dogmatic criminal law: to what extent is doing by omission a criminal deed? The main part of the report deals with (1) the distinction between act and omission and different ways of committing a crime by omission, and (2) the special circumstances in which an omission legally counts as physically causing a certain consequence. In section (3) a few other dogmatic problems are briefly considered or mentioned. Questions relating to penalties are not included. There is practically no space for discussion of criminal policy matters.

It is only fair to warn the reader that the text is compressed and difficult to read. It is also difficult to understand for anyone who is not acquainted with German doctrines on omission; as in many other parts of fundamental criminal law dogmatics, the Swedish solutions are influenced primarily by German law.¹

N.B. The Criminal Code of Sweden (1962, in force 1965) is called *Brottsbalken*.² E.g. "Brottsbalken chapter 1 section 1" is abbreviated "BrB 1:1". The word "he" is normally to be read as "he or she".

1. ACT AND OMISSION IN CRIMINAL LAW

1.1. Introduction

In criminal law emphasis is put on something that has occurred — the crime. A legal intervention is not, as e.g. in social law, dependent on a prediction of future behaviour, need of care, etc. The crime always

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consists in a human doing (a deed), not in e.g. a state or a quality which cannot be controlled. In Swedish law, a juridical person cannot commit a crime. But crimes can be committed by children and insane, although a child under 15 cannot be sentenced and only some criminal sanctions can be used against a mentally abnormal person.

A deed that amounts to a crime must have a physical character: it must intervene in the course of events in time and space. (The intervention can take the form of letting something happen by abstaining from action.) Thus, decisions, intentions and beliefs are not in themselves criminalized. They must at least have been given some kind of physical expression. Even if some persons could be considered socially dangerous, because they have certain intentions or convictions, the difficulties of proof are so considerable that any application of criminal provisions criminalizing such things would be arbitrary and unfair.

The definitions of the different crimes normally deal with single deeds, but sometimes they describe a series of deeds which constitute a way of living (e.g. "lives extravagantly" in BrB 11:3), an activity (e.g. "conducts activities designed to acquire information" in BrB 19:10) or a controlled state (e.g. "possesses narcotic drugs" in Narcotic Offences Act (1968) art. 1). Repeated, habitual or business-like criminality is considered more serious than occasional criminality, but it is rare that such an attribute is made a defining criterion of a crime (see e.g. BrB 9:6 par. 2 on receiving goods supposed to be obtained by crime).

To be sentenced for a crime is to be liable for one's own deeds. Vicarious liability could have a deterring function, but it is at odds with elementary principles of justice.

Deed is here used as a "super-concept", incorporating act and omission. The out-dated and confusing vocabulary of "positive acts", "negative acts" and "acts of omission" is not used.

There is reason to hold that an omission is in general less worthy of punishment than an act. The number of crime definitions directly requiring an omission is small in BrB, which is meant to be the primary "list of sins". A demand puts in principle more pressure on people than a prohibition: the former cuts off all act alternatives except one, while the latter cuts off only one act alternative. (The normal way of making someone do something is, in impersonal relationships, to offer payment or some other advantage. Such "positive sanctions" are normally not used to prevent someone from doing something.)

1.2. The concept of an act

Act and bodily movement. The concepts of act and bodily movement represent two different aspects of human behaviour. The first one is social, the second physical (mechanical); compare e.g. that A moves his arm and that A's arm moves. The difference is like the difference between seeing a page as a meaningful text and seeing it as a pattern of irregular dots. An act always has a corresponding movement, but many movements (e.g. the beating of the heart) lack corresponding acts.

A bodily movement is as such completely explainable in anatomical and physiological (physical and chemical) terms. An act is explained in quite different terms. It is subject to the *control* of the agent and thus dependent on the latter's reasons, motives, intentions, beliefs, inclinations, wishes, etc. Act and movement belong to two different types of reality. Our inability to understand the relation between these two realities is reflected in the endless philosophical discussions on the freedom of the will and the mind-body problem. (See Essay IV. below.)

Basic acts. An act is ascribed to a person as the performer of the act. He causes the act; the act is not something that just happens to him. We all have a bigger or smaller repertoire of movements that we can perform in a controlled way. When this basic power is exercised there is hardly any possibility to distinguish act and bodily movement: we do what happens. In such a case the act is basic, i.e. the act can not be performed by doing something else. I can raise my hat by raising my arm. Thus the act is not basic. But I cannot raise my arm (I refer to the ordinary case in which the arm is raised without help) by doing something else, e.g. moving some muscles; on the contrary I move the muscles by raising the arm. Thus this act is basic.

Act, consequence and circumstance. The basic acts are of little interest from a social point of view. The majority of all action-verbs refer to courses of events which apart from basic acts include more or less distant consequences of basic acts. The distinction between an act and its consequence(s) is quite arbitrary. As soon as an act is not basic it can be divided into another act, which might be basic, and a consequence caused by this act. This so-called accordion-effect can be illustrated by these simple examples: killing = striking somebody on the head + the victim dies; striking somebody on the head = swinging a hammer + the hammer hits somebody's head.

The distinction between act and circumstance is equally conventional. What is part of an act and what counts as being outside the act is a function of the act-term chosen to denote the act. Just as a certain act-term can be replaced by another act-term and a consequence-term, any

act-term, which does not directly refer to a basic act, can be replaced by another act-term and a description of the relevant circumstances (e.g. vote = deliver a voting paper under circumstances that according to valid rules constitute an election).

Behaviour crimes and consequence crimes. Traditionally legal scholars have tried to distinguish between pure behaviour crimes (e.g. defamation) and consequence (or effect) crimes (e.g. murder). The relevant difference is supposed to be found in whether the crime presupposes not only an act or an omission, but also a certain consequence (or effect, or result) thereof. The distinction has no formal support in the definitions of crimes (compare e.g. "kills" in BrB 3:3 and "causes someone's death" in BrB 3:7). And it follows from what has just been said about the relation between act and consequence that such a distinction is theoretically impossible to make, unless the crimes of pure behaviour would be crimes constituted by basic acts — and there are no such crimes. To assert that certain crime definitions presuppose consequences that are separated in time and space from the act itself, while others do not, is to transform differences in degree into a difference of type.

Acts in a strict sense and acts in a wide sense. Acts consisting in or having a kernel of basic acts are acts in a strict sense. But not only these are of interest in criminal law. Exceptionally criminal liability is possible although the agent was permanently or temporarily unable to control the movements of his body. Such is the case when the agent foresees (sometimes: ought to have foreseen) that he will later be in a situation in which he will lack control and in consequence cause a certain result. By extending the concept of an act to such *involuntary* acts we include all movements at which the act-vocabulary is in principle applicable. Examples of involuntary acts are acts performed by sleeping or unconscious agents, reflex movements, spasms, convulsions and movements due to an overwhelming physical-mechanical force.

Involuntary acts are to be distinguished from *unintentional* acts (the agent does not realize or believe that he performs the act) and *not voluntary* acts (the agent performs the act under coercion, i.e. under psychical pressure created by external circumstances or the doings of other persons).

If we choose "do" as the counterpart of "act" the concept of an act becomes still wider, even if we restrict ourselves to human doings. It is no longer possible to uphold the requirement of a bodily movement. To decide, to think and to listen are, e.g., to be classified as acts (mental acts). Possible self-control in general replaces bodily control as act-

criterion. In criminal law there is, however, no need to extend the concept of an act to things that do not involve a bodily movement. All criminalizing provisions refer to acts that at least partly involve bodily movement or to omissions of such acts. To say something (to perform a speech act) is an act in the strict sense.

1.3. The concept of an omission

General description. The concept of an omission is social: there is nothing purely physical that corresponds to an omission. The concept is parasitic on the concept of an act: an omission is always an omission to do something. This parasitism is also shown in the fact that there must be special reasons to speak about an omission or about an omission as a part of an activity.

An omission is not the same as passivity or inactivity. What someone actually does has no bearing on whether he omits to do X (with the obvious exception of doing X). If someone omits to post a letter at a certain time it does not matter whether he is passive (e.g. asleep) or active (e.g. drowning cats).

In the widest sense of "act" an omission is an act, because to omit to do something is to do something.

Omission and non-act. Every case of not doing X is not a case of omitting to do X. Otherwise everyone would all the time be omitting an infinite number of acts (e.g. to put a bar of candy into the left nostril of the local mayor). Our concepts are created for practical reasons. We need to talk about non-acts primarily when there is reason to expect that a certain act is performed (generally, or by a certain person). Thus, A has omitted to do X, if (1) he did not do X, and (2) he ought to have done X. The latter expression is, however, ambiguous. It can mean (a) that A according to his own opinion had good reasons to do X, (b) that there actually were good reasons for A to do X, or (c) that there actually were good reasons to believe that A would do X. The *basis of expectation* may thus consist in e.g. the existence of social or individual rules, customs, manners, habits or routines, demands or orders (see e.g. BrB 16:3 and 21:5), instructions (see e.g. BrB 21:11), judgments concerning the best course of action, predictions, etc.

An imprecise summary of the main cases: an omission presupposes a background of rules or regularities.

Omission to perform an impossible act. The concept of an omission does not presuppose that an omitted act is possible to perform. But as far as general impossibility is concerned there is no reason to talk about

omissions as there is no reason to expect that the acts will be performed. A legal rule requiring the generally impossible is irrational. On the other hand, if the act is impossible to perform in the special circumstances — e.g. by a certain person or by all persons — there may be reason to talk about an omission, because criminal liability is not excluded. The relevant rules are the same as in the case of an offence committed by an involuntary act. Normally the actor is excused from responsibility. But if the impossibility is "covered" by a preceding intent, belief or negligence and he foresaw or — when negligence is enough — should have foreseen a possibility to avoid the state in which the demanded act became impossible to perform, then he will not be acquitted because of the impossibility to act.

Omission and consequences. An omission cannot cause anything in the same way as a physical act. It is impossible to relate an omission and a consequence thereof by direct use of knowledge on laws of nature or other knowledge reflecting generative mechanisms. This does not mean that omissions cannot have consequences. Many consequences ascribed to acts must be established with the help of indirect use of knowledge on laws of nature, etc. The arguments establishing the causal relation must then rely on *hypothetical causal chains*. The same is the case when consequences are ascribed to omissions. This is the truth behind the not unusual view that it is a tremendous mistake to punish people for causing something by omission, i.e. for "doing nothing" and "causing nothing". But this truth is irrelevant for the question whether there is reason to hold someone responsible for an event (or non-event). When human doings are in focus the concept of causation is social, not scientific. (By the way: also in science there is sometimes interest in the absence of certain events and such explanations must make use of arguments concerning hypothetical causal chains.) There is reason to hold people responsible for some things they *let happen*, when they are able to intervene in the natural course of events. It should be noted that also responsibility for acts of prevention of the occurrence of something good presupposes argumentation relying on hypothetical causal chains.

It might be impossible to construct a causal relation between an omission and a certain event, because it must be assumed that also someone else would omit to do something. It seems, however, reasonable to rule that no one should be allowed to refer to such an omission in order to avoid responsibility, if also the other one could refer to the omission of the first one with the same effect. The situation is equivalent to the situation when two persons together do what is needed to start a causal chain, but the contribution of each one is insufficient.

Mental causality must, for all practical purposes, be considered as a special species of causation. It does not involve natural necessity. A causes that B does X by giving him reasons for doing X. B does X, because he believes that p, and A has seen to it that B believes that p. This kind of causation — making someone do something — is the important one at crimes like instigation, fraud and extortion. A's causing B's deed occurs via B's cognition of the past, present or future state of the world and B has this cognition because A has or has not said something or otherwise done or not done something. An important thing to notice is that there is no difference between A's act and A's omission as causal factor (in physical causation only an act can be a "real" cause). The (alleged) fact that A does not do X may be a reason for B's doing Y in the same way as the (alleged) fact that A does X. The mechanism of causation is identical in the two cases.

Concerning the relations between omission, consequence and circumstance what has been said above about the relations between act, consequence and circumstance is valid, *ceteris paribus*.

1.4. Act-crimes and omission-crimes

A division of crimes into act-crimes (*delicta commissionis*) and omission-crimes (*delicta omissionis*) concerns crimes in an abstract sense (types of crime), not actually committed crimes (concrete deeds). To find out whether a crime is an act-crime or an omission-crime only the legal provision has to be consulted.

Usually the division is based on the formal distinction between prohibition and demand, i.e. whether a definition of a crime is to be rendered in the formula "Do not do X!" or in the formula "Do X!". The obvious objection to this criterion is that definitions using the word "omit" ("Do not omit to do X!") will be classified as defining act-crimes. There is more promise in the less formal criterion of whether the criminalization is meant to function as activity-repression or activity-demand, at least as far as omission-crimes are concerned.

At an omission-crime a person is held responsible, if and only if he *has not performed a certain act*, which he should have performed. The basis of expectation need not consist in more than the fact that a certain non-act is criminalized. It does not matter if the omission can be denoted by a seemingly positive verb. E.g. concealing the truth is identical with omitting to tell the truth (in e.g. BrB 11:1, 15:1 and 15:10), remaining is identical with not leaving (in BrB 4:6) and staying away is identical with not appearing (in BrB 21:7). A pure omission-crime is found in BrB 10:8

(failure to return lost property). Sometimes the term "omit" is directly used as defining verb (e.g. in BrB 13:10, 15:9, 16:3, 21:5, 21:13 and 23:6).

If we tried to use the idea of activity-repression in demarcating the act-crimes, i.e. an act-crime would be a crime that must be committed by an act, we would end up with three categories instead of two: between act-crimes and omission-crimes we would have to place the majority of the crimes of BrB, because normally a crime can in theory be committed by an act or by an omission. Since it is more practical to have only two categories — there is really no need to talk about the category of crimes that must be committed by an act and it is very difficult to say with certainty that a certain crime cannot be committed by omission — act-crimes can conveniently be defined as *crimes that are not omission-crimes*. It is left open whether the crime can be committed by omission. Crimes defined with the help of verbs like "disregard" and "neglect" (e.g. BrB 10:1 and 5, 17:13 and 21:14) are classified as act-crimes.

1.5. Genuine and non-genuine omission-crimes

Traditionally also the distinction between genuine and non-genuine omission-crimes has been taken to concern crimes in the abstract sense. In that case the category of genuine omission-crimes coincides with the category of omission-crimes and the category of non-genuine omission-crimes coincides with the category of act-crimes that can be committed by an act or by an omission. This concept formation is, however, of little value and the terminology is peculiar: "non-genuine act-crime" would be more adequate than "non-genuine omission-crime".

According to another view, the definition of a genuine omission-crime focuses on the omission and disregards its consequences, while a non-genuine omission-crime is characterized by the fact that causing a certain result is criminalized, including causation by omission. But as there are omission-crimes, which presuppose causing a result (e.g. BrB 23:6 par. 2), we would get the hardly acceptable situation that some crimes must be committed by omission but still be classified as non-genuine omission-crimes.

A third solution is guided by the idea that what makes the crimes non-genuine is the lack of an explicit restriction of possible offenders (by omission). The category of non-genuine omission-crimes will then coincide with the category of crimes where the so-called guarantor doctrine is applicable (see 2. below). Also this solution has disadvantages. It may lead to and has led to that the requirement of a guarantor position is given too much scope (cp. 1.6. below) or that some kinds of omission (see 1.6. (1) and (2)) are wrongly considered as actions. There

is also a possibility that the guarantor doctrine should be used at omission-crimes.

The solution to restrict the category of non-genuine omission-crimes to coincide with or make part of the category of consequence-crimes can, of course, be rejected simply because the latter category cannot be demarcated (see 1.2. above).

There is much more use for a distinction between genuine and non-genuine omission-crimes if it is located on the level of concrete crimes. A genuine omission-crime will then consist in a contravention of an omission-crime (*delicta omissionis per omissionem*) and a non-genuine omission-crime will be a contravention of an act-crime by omission (*delicta commissionis per omissionem*). Of the remaining two theoretical possibilities — *delicta commissionis per omissionem* ("act-crime" in another sense) and *delicta omissionis per commissionem* — the last one is redundant: from the definition of an omission-crime it follows that there can be no omission-crime committed only by act.

1.6. Committing an act-crime by omission

Most act-crimes can be committed by omission. For a small group there is, however, a requirement of personal action. Here we find cases where the criminalization refers to a way of living or an activity rather than a single act (see 1.1 above). Most sexual crimes must in practice be committed by personal action, but it is theoretically possible to commit at least some of them by omission to avert another's action against oneself. Bigamy (BrB 7:1) is often cited as a crime that requires personal action. But suppose that A during a wedding ceremony in some way acquires knowledge that the divorce he got in a foreign country is not valid. If A omits to interrupt the ceremony — in which he himself has nothing more to say — he commits bigamy.

An act-crime can be committed by omission in three different ways, which means that there are three different kinds of non-genuine omission-crimes.

(1) Omitting to do X may, under certain circumstances, be identical with doing Y. No questions about causation need to be raised. In many cases the omission has a symbolic function. Omitting to greet someone may, e.g., be identical with insulting him (BrB 5:3). Omitting to do X may be identical with disregarding a duty to do X and thereby constitute e.g. embezzlement (BrB 10:1).

(2) Omitting to do X may mentally influence another person who reacts by doing Y or omitting to do Z. This is the normal way of com-

mitting fraud (BrB 9:1), extortion (BrB 9:4) or instigation (BrB 23:4) by omission.

(3) Omitting to do X may be considered as a way of physically causing a certain consequence. In this case there is a need to restrict the circle of possible perpetrators: (a) for practical reasons: the number of persons omitting to do X may be very large, (b) for reasons of "equity": the burden on the individual might be very heavy if the law demands that he shall try to prevent the realization of all kinds of risks, and (c) for reasons of justice: every case of causing by omission is not comparable in respect of blameworthiness to causing by act (a person who is merely indifferent to what happens without his involvement normally represents a less dangerous "source of harm" than a person who acts without caring about the consequences).

At the third type of non-genuine omission-crimes, then, criminal liability is considered to presuppose that the omitting person had a special reason to intervene. The basis of expectation must be of a qualified nature, which nowadays is expressed in the legal literature by saying that the perpetrator must be in a *guarantor position*.

Suppose that B, who cannot swim, falls into the water and drowns. A, who knows that B cannot swim, stands on the quay looking at the accident. A could have saved B by reaching out his hand or throwing out a life-buoy, but he did not do it. Medically the explanation of B's death is simple: he suffocated because his lungs were filled by water. Morally and legally there is need for another type of explanation: Did a person cause B's death? There is no causing by act. A was the only spectator and the question remains whether he caused B's death by omission. Nothing prevented A from intervening. From a moral point of view it seems obvious that A omitted to intervene, thereby omitted to save B and thus caused B's death. From the point of view of criminal law it is now that the real problems begin. A has in some sense caused B's death, but has he "taken the life of another" in the sense intended in the definition of murder (BrB 3:1)? If the interpretation of the words of the code does not exclude the view that A has committed murder, is he still to be acquitted because there was no *special* reason for him to intervene?

2. THE GUARANTOR DOCTRINE

2.1. Introduction

The function of the guarantor doctrine is to restrict the circle of persons who can commit a crime, when a deed is performed by physical causing by omission. The reasons for the need of such a restriction have been indicated in 1.6. The problems arise from the social character of the

verbs used in crime definitions. The paradigmatic cases of deeds falling thereunder are acts, but the verbs also refer to omissions. The only way to accomplish a more precise legal language seems to be, not to use other verbs, but to add phrases like "by act", "by act or omission" and "by act or omission, and in the latter case only if ...".

It is often asserted that the crime definitions lack a crime prerequisite, when the guarantor doctrine is applicable. This view is connected with the thought that at act-crimes omission is not at all explicitly criminalized. But in fact the crime definitions say nothing about act or omission. The guarantor doctrine has wrongly been associated with the view that liability for causing by omission is, at least often, imposed by use of argumentation by analogy. This, of course, involves a conflict with the principle of legality, but has been seen as pragmatically necessary and defensible. It cannot be excluded that the courts sometimes have used the guarantor doctrine in a way that implies a violation of the principle of legality, but the important thing is to realize that this is not necessary for the application of the guarantor doctrine.

What is lacking in the crime definitions is in fact only a restricting clause describing the categories to one of which the offender must belong if he is to be held liable for physically causing something by omission. His deed must, in other words, fall within the scope of the crime definition, interpreted in an unstrained way. (That A omits to give his child food and thereby causes its death is a paradigmatic case of murder.) When the guarantor doctrine is applied the methodological device used is in principle not argumentation by analogy, but argumentation leading to reduction of the area of applicability of the crime definitions.

A first question of interpretation, then, is whether a certain causing by omission is at all "covered" by the words of a crime definition. If the answer is positive, we have to ask if the causer is to be acquitted because he was not in a guarantor position. A second question of interpretation is, therefore, what the guarantor doctrine looks like, and it should be noticed that the answer could be different at different crimes.

Swedish prosecutors seem to be exaggeratedly reluctant to prosecute in cases concerning causing by omission. In printed case-law we find a concentration on cases on causing death or bodily harm and fraud and a few cases on arson and cruelty to animals. Even if there is reason to believe that causing by omission is rather infrequent in many areas of criminal law, many more cases ought to be discovered (e.g. in cases of creating danger to another and inflicting damage). A restraining factor might be that the guarantor doctrine is in need of clarification. It is often difficult to know whether someone who omits to do something commits a

crime. As will be seen in 2.3. the legislators have done their lot to obscure the picture.

There is a tradition to describe the guarantor position in terms of the legal basis of expectation: legal rules (e.g. private law rules), official decrees, contracts and official duties (the legal duty doctrine). Problems have arisen e.g. in cases of alleged responsibility for one's own prior behaviour (see 2.2.). The offered solution has been to denote the relevant duty as following from "legal custom". But this involves a logical circle: the only existing custom is the custom to convict and the talk about a pre-existing legal duty can only be misleading.

Nowadays it is beyond doubt that a legal basis of expectation of action is little more than an indication that there is a question to ask. A (non-criminal) legal duty to act is neither sufficient nor necessary for liability. At all types of guarantor position the non-legal situation is as relevant as the legal situation. Any legal duty must be strengthened by a criminal policy reason: the duty must be so prominent that someone who does not act in accordance with it is to be considered blameworthy to the same degree as someone who causes the same result by an act. As an imprecise summary it could be said that liability for physical causing by omission is actualized only if the omission is as blameworthy as a comparable act (but it should be noticed that such a comparison is not to be undertaken in concrete cases).

Those who are in a guarantor position can be divided into two groups:

- (I) those in a supervising guarantor position (here called *supervisors*) and who are responsible for certain sources of danger and have to avert risks created by these; and
- (II) those in a protecting guarantor position (here called *protectors*) and who are responsible for certain persons or property and have to avert all kinds of risks threatening the persons or the property.

What is said in the next four sections should be regarded as an imprecise description of the guarantor doctrine. There is at present no unambiguous basis for asserting that the law is such-and-such. The doctrine has primarily been developed by legal scholars, not by legislators or judges. The sources of law give too little guidance. The case-law is scanty. Practically none of the printed cases clarifies the border between crime and non-crime. Thus, the following picture might be in need of substantial additions and/or restrictions. In particular, it is at present impossible to determine whether the guarantor doctrine is a general doctrine or if it is to be constructed differently at different types of crime.

2.2. Supervisor of one's own behaviour

While there has been no hesitation in making people criminally liable for omission to avert risks emanating from other persons or e.g. animals or machines, the Swedish legal literature shows a curious reluctance (due to the doctrine of legal duty) to accept a principle of obligation to avert risks created by oneself. On the contrary, it seems that this should be the most obvious case of responsibility for omission. (Responsibility for one's own acts could be seen as the paradigmatic case of liability as a supervisor.)

The conditions of liability for causing by omission are in this case the following:

- (1) The person A has initiated a causal chain leading to the consequence C;
- (2) The chain of events is covered by a crime definition;
- (3) A's causing C is not criminal because the requirements for personal responsibility (intention or negligence, etc) are not fulfilled;
- (4) A has acquired relevant intention, knowledge or negligence, etc after the initiation of the causal chain, but before the occurrence of C;
- (5) A then omits to prevent the occurrence of C; and
- (6) Also the omission and its consequence is covered by the crime definition (otherwise the whole set-up would only amount to accepting *dolus* or *culpa subsequens*).

It is to be stressed that A is not responsible because of the initiation of the causal chain, but for the subsequent omission.

As there is no limit to the construction of causal chains it is out of the question to let every initiation of a causal chain be a basis for a guarantor position. One way to achieve a restriction is to claim that the formulation of condition (3) presupposes that the initiation of the causal chain is a criminally unlawful act. In that case there is no liability in a situation like this: B attacks A, who has a right of self-defence including a right to kill B. A injures B severely and then omits to get help to prevent B's death. A is not considered responsible for B's death, although there was no right to self-defence at the time of the omission. — If the example is changed so that A has no right to kill but only to harm, the omission will constitute a kind of homicide.

The initiation of the causal chain may be lawful because the controlled behaviour of A does not create a noteworthy risk in relation to C. A possible solution of the task to determine the conditions of liability is to restrict the requirement of unlawfulness to exclude only acts that do not

create a noteworthy risk in relation to the relevant consequence. Liability would then not be excluded, when the act is lawful because it is allowed by an exceptional rule like the rule on lawful self-defence (unless the rule is still applicable at the time of the omission). But liability would still be excluded in cases like these: A lights a fire in the garden. B, cycling on the road, is fascinated by the fire, lets his attention slip, runs into the ditch and hurts himself badly. A does not do anything to prevent that B bleeds to death. — A gives B liquor. B gets drunk, falls and is injured. A does not do anything to get B under medical care and thereby prevent that the harm is aggravated.

There is need to consider liability for omission, only if the perpetrator is not liable for an act of the same legal quality (cp. negligence at the act and intention at the omission: responsibility for the omission should be chosen).

2.3. Supervisor of another person's behaviour

There is a rather old tradition to see an omission to break a causal chain initiated by some other person as equivalent to causing by one's own act, if the public has reason to rely on that one neutralizes risks emanating from that person.

The conditions for blameworthiness can be summarized in the following way:

- (1) the rule on liability for one's own behaviour would be applicable if the supervisor replaces the other person; and
- (2) there is a supervisor position, based on a legal duty to supervise, a command position or something very similar (e.g. parent-child, foster parent-foster child, guardian-ward, military officer, police officer or naval officer-subordinate, teacher-pupil, prison warder-inmate, mental hospital warder-patient, but not husband-wife).

The duty to intervene may be restricted in space and time. A school-teacher has no duty to intervene out of school. A policeman, who is put to guard a lunatic and omits to prevent that the latter escapes, is not responsible for manslaughter if the escaped kills another person (except in the rare case in which the escape in itself can be characterized as creating a noteworthy risk in relation to another person's death).

It is unclear to what extent this kind of guarantor position is acknowledged in Swedish law. The confusing factor is the existence of BrB 23:6:

If a person omits in time to report or otherwise reveal a crime that is occurring, when this can be done without danger to himself or any of his next of kin, he shall, in cases where this has been

covered by special provisions, be sentenced for failure to reveal the crime as provided for a person who has been an accessory to the crime only to a small degree; however, in no case may a heavier punishment than imprisonment for two years be imposed. In the cases covered by special provisions, punishment for failure to reveal a crime as just stated shall also be imposed on one who has not but should have realized that crime was being committed.

If, when it can be done without danger to themselves or their next of kin and without reporting to some authority, parents or other preceptors or guardians, in cases other than those mentioned in the first paragraph, fail to prevent one who is in their care or under their control from committing a crime, punishment for failure to prevent the crime shall be imposed as provided in the first paragraph.

Failure to reveal or prevent a crime is not punishable unless the act being committed has progressed so far that punishment can follow.

Failure to reveal a crime is criminalized only in relation to a small group of very serious crimes, but failure to prevent a crime is generally criminalized (relevant relations not explicitly mentioned are foster parent-foster child and — sometimes — teacher-pupil; a private law duty must always be supplemented by a factual relation of guardianship).

Compared with a general rule on liability for supervisors, it is evident that BrB 23:6 par. 2 functions in a restrictive way: (a) the offender is not considered to be principal actor of the crime, and (b) the offender is sometimes not held responsible when he would be responsible according to general rules (note especially: "without reporting to some authority").

It would, of course, be a great advantage if it were possible to say that BrB 23:6 par. 2 exclusively regulates the question of a supervisor's liability for another's deeds. But there is a strong reason against such a view. BrB 23:6 cannot be applied if no "crime" is committed by the other person and "crime" means that all requirements for criminal responsibility must be fulfilled. Suppose that A sees that his little child puts some poison into a glass of liquor and does nothing to prevent that B drinks and dies. A is punishable according to 23:6 par. 2, only if the child commits a crime, i.e. it must e.g. understand that it will cause another's death (among small children the question of negligence can hardly be raised). If the child does not foresee B's death, A would not be considered criminal, and this consequence can hardly be accepted.

It seems reasonable to assume, that Swedish law contains a general rule on liability for another's behaviour in analogy with the rule on liability for one's own behaviour and that BrB 23:6 contains a lex

specialis within this area. But it must be remembered that there is no question of vicarious responsibility: the omission to prevent the consequence of the other person's behaviour must itself be covered by the crime definition. There is also reason to remind of the regulation in BrB 23:5:

If someone has been induced to be an accessory to a crime by coercion, deceit or misuse of his youth, lack of comprehension or dependent status or has been an accessory only to a small degree, the punishment imposed may be milder than that otherwise established for the crime; in trifling cases no punishment shall be imposed. ...

This provision is always applicable when more than one person has contributed to the commission of a crime and can also be used for someone who is considered to be the main actor.

One way to determine the class of relevant relationships of supervision would be to rely on the regulation in BrB 23:6 par. 2, but this seems unduly restrictive.

2.4. Supervisor of other sources of danger

Also in other types of cases there is special reason to rely on that a responsible person sees to it that causing harm is prevented. The owner or possessor of animals, machines, buildings and other sources of danger normally have to compensate harm attributed to their omission to supervise such sources of danger or to take adequate precautionary steps. Also criminal liability is seen as motivated. Normally the provisions on causing another's death (BrB 3:7) and causing bodily injury or illness (BrB 3:8) are actualized. But intentional physical harming of persons or property is not negligible; the same is valid for other types of crime, especially when the source of danger is an animal (e.g. omission to prevent a dog or a monkey to appropriate a thing might be theft; BrB 8:1).

To reach an adequate restriction it must be required that if the state of the source of danger had been a controlled result of a conscious action, this would have implied a noteworthy risktaking in relation to the consequence caused by the omission.

The duty of supervision may be underpinned by a prescription by statute or official decree; such a prescription gives a presumption of liability. Ready examples are given by the legislation on supervision of dogs and other animals, on safety measures concerning vehicles used for road traffic, air traffic and seafaring and on labour protection. Any one

who according to a statute, an instruction, a plan on work distribution, a contract or sometimes even "general opinion" is responsible for the proper functioning or order or condition of something, is normally obligated to correct a deficiency or at least to warn of existing risks. Criminal liability may thus be imposed for causing harm by omission to, e.g., sand an icy pavement, remove snow from a roof, see to it that weapons, ammunition or explosives are kept under lock, keep a light-house in function, keep an elevator or a stair-case in proper condition or keep light in a stair-case. Houses, rooms, restaurants, gardens, etc. are not in themselves sources of danger: no one has in the capacity of being responsible for them to prevent what happens in them.

2.5. Protector

While the supervisor is obligated to avert risks emanating from a certain source of danger, the protector is, in principle, obligated to avert all risks threatening someone or something; but the obligation may be restricted to some types of risks or some types of situations.

With certainty little more can be said than that there exists an obligation for some protectors to protect another's life and limb. It is not quite clear whether omission to protect property or a state of some kind can be criminal. Here the need for criminalization is not prominent. Several provisions on property crimes can be used without reliance on the guarantor doctrine (e.g. BrB 10:1 on embezzlement and BrB 10:5 on disloyalty on principal). But if one wants to convict, e.g., a night-watchman for participation by omission in theft, when he does not do anything to prevent a theft, it is necessary to rely on the guarantor doctrine.

Position as a protector presupposes either a relation of dependence or a situation such that someone, trusting that someone else will intervene if necessary, has exposed himself to a risk or abstained from taking alternative precautionary steps. Position as a protector normally has its basis in:

(a) *near community of life*, including near kinship. It is difficult to give a precise description, because a legal relation is neither sufficient nor necessary. Examples: the relation to one's own child (normally) or parent (exceptionally), husband, wife or to another family member or other person who is living in the same household (especially a person who needs care) and also the relation between persons in a special community of danger (e.g. the members of a scientific expedition or other dangerous mission), but hardly the relation of engagement, when the couple is not living together.

(b) *voluntary undertaking*. The important thing is not whether there is a valid contract but whether someone in fact has placed himself in a position as a protector. A contract or something similar is still relevant because it makes it easier to determine what kinds of risk the protector has undertaken to avert. Examples: an experienced alpinist taking a group of tourists on a mountain trip, a physician who has consented to treat a patient, a midwife, a swimming-teacher or swimming-guard, a nurse (in relation to children taken care of) or someone who has consented to take care of another's animal. Position as a protector hardly follows from taking possession of another's property or a promise to bring aid to someone in a situation of distress.

(c) *special professional obligation*, e.g. as a consequence of an official duty or public position. The obligation must concern a certain person, certain property, etc. If a policeman in breach of his duty omits to prevent a crime, he is not to be considered as an accomplice by omission. For the same reason a physician or a hospital-nurse who happens to encounter someone who is ill or injured and omits to help him, is not committing assault by omission. But a policeman or a warder who is given the task to guard a lunatic could be held responsible for omission to prevent a suicide (murder, manslaughter or causing another's death).

When the omission consists in an omitted protection against a crime, the offender may benefit from the rule in BrB 23:5 (see 2.3. above).

2.6. The area of application of the guarantor doctrine

The guarantor doctrine can be irrelevant for two reasons:

- (a) as already mentioned in 1.6. some crimes presuppose personal action;
- (b) some crimes can be committed by omission, but the doctrine is irrelevant because only omission in the sense indicated in 1.6. (1) and/or (2) is relevant.

The second group includes what could be called guarantor crimes — such as embezzlement (BrB 10:1) and misuse of office (BrB 20:1) — because the class of possible offenders is already by definition restricted to persons in some kind of guarantor position.

The guarantor doctrine can sometimes be only partly relevant. One possible restriction is that only position as supervisor of one's own behaviour is relevant (e.g. disorderly conduct — BrB 16:16). Of course, also several other restrictions are possible, but there is at present no investigation undertaken which makes it possible to say anything more on the subject.

It cannot be excluded that the doctrine could be relevant at omission-crimes. There might be reason to restrict the class of possible offenders also at such crimes, although the statutory provisions do not support such a restriction. To find an actual example in Swedish law is, however, not easy.

Many legal systems contain a general criminalization of *omission to aid a person in distress* (especially a person in danger to life). During the preparation of BrB the matter was discussed but the introduction of such a general provision was rejected. The existing order was judged to be satisfactory. This includes:

- (1) criminalization of commission by omission in adherence to the guarantor doctrine; and
- (2) the following special crimes:
 - (a) Act of Road Traffic Crimes (1951), art. 5: omission to remain at the place of a road traffic accident;
 - (b) Emergency Act (1986) art. 39: omission to intervene in special ways in cases of (danger of) fire or other dangerous accidents;
 - (c) Maritime Act (1891) art. 327: omission by commander (etc.) to assist someone in peril on the sea (etc.);
 - (d) Maritime Act (1891) art. 328: omission to react in an adequate way, e.g. by taking care of an injured person or a person in peril; and
 - (e) Sailors' Act (1973) art. 73: omission by commander (etc.) to attend to a sick or injured sailor's need of medical care.

The crimes under (a) and (d) can be committed only by someone who has, with or without guilt, become involved in an accident.

A later attempt to introduce a general provision was rejected by the Parliament in 1972.

It could be maintained that the public opinion would approve of the introduction of a general obligation to aid a person in distress. But this would in itself only lead to an extension of the criminalized area. All those who now can be punished for act-crimes (by omission) against life and health, would still have to be punished for the same crimes, unless a special device is invented, which restricts the application of BrB ch. 3 in cases of causing by omission even more than the guarantor doctrine does.

3. OTHER DOGMATIC QUESTIONS

3.1. Omission and carelessness

The combination of act and omission dealt with in 2.2. must not be confused with another: A causes C by an act and this act is careless (it involves taking a noteworthy risk), because A omits to do something else, normally to take precautions of some kind or give warning or instruction. This kind of dogmatic construction presupposes that the act in itself is judged as being not careless because it is socially valuable.

An omission constituting carelessness is often such that it would have been a relevant causing omission, if the consequence had not been caused by act. It is often a matter of coincidence whether a careless person has himself performed an act that leads to the unwanted consequence or has just neglected to intervene to prevent that the consequence is caused by a source of danger that he has to supervise.

For a further, though fairly superficial, discussion of carelessness constituted by omission and of careless omission the reader is referred to Essay II. above (pp. 32 and 37-39).

3.2. Vicarious liability

In Swedish law there is a considerable amount of provisions that seemingly admit that one person — a manager, entrepreneur, master, guardian, owner or possessor — is punished for an offence committed by someone else. But in fact this vicarious liability is only *apparent*. All provisions could be rewritten in a way that makes it clear that the offender is held responsible for an omission to prevent that someone else commits a crime (normally a petty crime). The only peculiarity worth mentioning in this connection is that sometimes the burden of proof is reversed in regard to matters of carelessness and negligence.

3.3. Special rules of exception?

As a peculiarity of crimes of omission is often mentioned that the offender cannot be held responsible, when the act was physically impossible to perform. This question has been summarily touched upon in 1.3. above. In addition, it is not unusual to hear that it must be unreasonable to demand that someone does his utmost: he should not be liable if he has done what in the light of the circumstances reasonably could be demanded of him. In BrB we find a few omission-crimes with crime prerequisites of this kind: BrB 13:10 (neglect to avert public

danger), BrB 15:9 (neglect to avert judicial error) and BrB 23:6 (cited in 2.3. above).

It seems, however, to be wrong to assert that in the last-mentioned respect there generally are special rules for crimes of omission. Part of what is meant seems to be taken care of within the prerequisites of *dolus* and *culpa*. More important is that no one seems to have noticed the relevance of the rule on necessity (BrB 24:4): the offender is not liable if he omitted by necessity, i.e. the act would imply danger to his life or health, etc. Also the rules on justification in cases of superior order (BrB 24:6) and, exceptionally, self-defence (BrB 24:1) are of interest.

A situation of necessity may have a legal nature: the offender cannot avoid to commit a crime whatever he does. Normally he will be justified if he chooses to commit the lesser crime (but not if he is responsible for being in legal distress). Also for this type of situation no special rule is needed. Often a crime of omission is a lesser crime than a crime of action.

There is reason to maintain that there are special rules of exception for crimes of omission, only when there is explicit statutory support for such rules. It is submitted that in the above-mentioned examples such support can be found only in BrB 23:6.

3.4. Remaining questions

The superficial character of this report underlines the complexity and recalcitrance of the discussed topic. It is fitting to conclude by giving a list of problems not dealt with because of lack of space:

- (1) To what extent is it possible to attempt (BrB 23:1), prepare or conspire (BrB 23:2) to commit a crime by omission and what would voluntary abandonment (BrB 23:3) mean in connection with such a crime?
- (2) To what extent is it possible to participate (BrB 23:4) by omission?
- (3) To what extent is it criminal to participate at crimes of omission?
- (4) Under what circumstances is an omission intentional?
- (5) Does the *dolus/culpa* requirement refer to the existence of a guarantor position (or is this a question for the doctrine of — normally irrelevant — mistake of law)?
- (6) Who is to be designated as *the* offender when a crime of omission has been committed within an enterprise, organization or administrative authority?

NOTES

¹ The modern legal literature on the subject includes Ivar Agge, *Straffrättens allmänna del*, vol. 2, Stockholm 1961, pp. 305-322, Ivar Strahl, *Allmän straffrätt i vad angår brotten*, Stockholm 1976, pp. 290-352, Nils Jareborg, *Brotten*, vol. I, 2nd ed., Stockholm 1984, pp. 113-122, 211-224, 230-233, and *Brotten*, vol. II, 2nd ed., Stockholm 1986, pp. 195-200.

² The Code is here cited from *The Swedish Penal Code 1986* (The National Council for Crime Prevention. Report 1986:2), Stockholm 1986.

IV.

DETERMINISM AND CRIMINAL RESPONSIBILITY

... from the use of the word *free-will*, no liberty can be inferred of the will, desire or inclination, but the liberty of the man; which consisteth in this, that he finds no stop, in doing what he has the will, desire, or inclination to do.

T. HOBBS

It is necessary to renounce a freedom that does not exist and to recognize a dependence of which we are not personally conscious.

L. TOLSTOY

The freedom of the will consists in the fact that future actions cannot be known now.

L. WITTGENSTEIN

1. INTRODUCTION

Criminal law is peculiar. It consists in institutionalized use of power and violence, and sometimes institutionalized brutality. But it is also maybe the most important testing ground for philosophical ideas. Let me remind you that these are fundamental criminal law concepts: action, omission, voluntariness, intention, knowledge, mistake, negligence, culpability, consciousness, volition, impossibility, harm, causality, risk-taking, responsibility, punishment, blame, blameworthiness and justice.

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What in philosophy sometimes is a matter of brain-storming or idiosyncrasy or, more generally, fairly irresponsible theorizing, is in criminal law often a matter — if not of life and death — at least of liberty or imprisonment. For criminal law, philosophy is vital, but all good lawyers are not, of course, good philosophers.

One area is especially delicate. On the first page of William Golding's novel *Free Fall* we can read: "Free-will cannot be debated but only experienced, like a colour or the taste of potatoes." But if anything has been debated, it is the problem of free will. And for lawyers it is so embarrassing that few dare to look into its eyes — but, of course, in practice we all presuppose, at least unconsciously, a solution or an ideology. The reason why the matter is so important is that if there is no free will, or if the universe is deterministic, there seems to be no place for moral responsibility and, in consequence, no place for just — deserved — punishment. Criminal law were then based on an illusion.

The answer to one of the perennial and most intricate philosophical questions seems, in other words, to be of direct importance for the question whether it is politically defensible to retain a criminal justice system. In this article, I want to try to show that there is some truth in what Golding says and that, in any case, the lawyer may let the free will problem rest in peace. Another, somewhat paradoxical conclusion is that a deterministic view may be necessary for a more human attitude to criminals.

2. PUNISHMENT

Legal punishment is a kind of suffering intentionally inflicted on a person in a "detached" way on behalf of the state in response to wrongdoing; it characteristically involves blame but also more than blame. (As a definition this is too broad. What counts as legal punishment is partly a matter of tradition and stipulation in different jurisdictions.) To criminalize an act is to create a rule saying that if someone commits this act, he will be punished in a certain way. (For brevity of presentation, the special problems connected with responsibility for omissions and vicarious responsibility will not be dealt with.) At present fines and imprisonment are the most popular forms of punishment; they make it possible to inflict fairly "objective" units of suffering.

Legal punishment is, of course, an ancient phenomenon. But the kind of criminal law for which criminalization is constitutive is less than 200 years old. The main characteristics of this "modern" criminal law are:

- (1) A class of acts can be considered as criminal, only if it is criminalized, i.e., a promulgated valid legal rule prescribes that commission of such an act shall or may be punished.

- (2) The point of criminalization is to induce people to abstain from some kinds of acts.
- (3) This general threat is credible, only if it is — at least sometimes — realized in cases of commission of a prohibited act.
- (4) At least the general threat of punishment is graded in relation to a valuation of the harmfulness and wickedness of the act.

It is the purpose of criminalization to prevent certain acts. (Its purpose cannot be to prevent "crime", because without criminalization there is no crime.) The principal method is "general deterrence". But criminalization normally entails, not only a threat, but also a suggestion that the prohibited class of acts is socially reprehensible. Partly because punishment is the only legal sanction that is designed to be essentially repressive, criminalization is the state's most eloquent means to tell people that certain behaviour is irreconcilable with a desirable social order. In practice, however, criminalization is often misused, because it is the least expensive type of formal social control.

Criminalization is thus not only a threat to cause suffering, it is a threat to cause reprobative suffering. Criminalization cannot be justified as retribution or redemption. Proposed aims of punishment, such as rehabilitation, reformation, incapacitation, or deterrence of the offender, have nothing to do with criminalization. If you, e.g., want to rehabilitate someone, then you cannot reasonably reach this goal by trying to keep him from doing what is necessary for setting in rehabilitative treatment. Criminalization is, however, indirectly connected with internalization of social norms and thus it plays a role among the forces that create social habits and consciences, which sometimes make people act morally more or less automatically. But it would be a gross exaggeration to suggest that criminalization is an especially appropriate means to such ends.

When we move to the level of infliction of punishment (sentencing and execution), it is obvious that the activities that constitute punishing can be performed in many different ways and serve a variety of ends: rehabilitation, reformation, incapacitation, special deterrence, emotional satisfaction for the victim, restoration of the offender's self-respect, and so on. But no such aim can justify the very infliction of punishment. The rationale is purely retributive and is vindicated by a simple reference to the relevant legal provisions. Someone is punished because he has committed a crime. Given that the threat of the law is not to be an idle one, no further justification is needed. (In many cases punishment is not inflicted when it is justified in this sense. Many legal rules have the function to sever the connection crime—punishment. Most important are rules granting prosecutors discretion to prosecute or not to prosecute. The threat of criminalization is, of course, interpreted by the

citizens in the light of such "filtering" and the use of, e.g., suspended sentences and probation as substitutes for unconditional imprisonment.)

If we ask why we at all have such a primitive and ungenerous device for social control as a criminal justice system, the answers given are

— that it is necessary for the protection of the community and the prevention of the dissolution of the state;

— that it is necessary for making anyone's life in a community endurable (here we can include the peripheral argument that it is necessary for satisfaction of demands of "justice" and prevention of "lynch law" and institutionalized revenge); and

— that from a moral point of view wrongdoing can appropriately be met only by a reaction that entails blame.

The validity of these reasons is questionable. But no modern state has dared to abolish criminal justice and the recourse to criminalization is increasing both nationally and in international law. We know that the efficacy of criminal justice systems is not very impressive. Many persons have foggy ideas about what the law prohibits. The resources for combatting crime are restricted and the risk of detection is often negligible. But perhaps we should not be too unhappy about these deficiencies. Maybe a system that works in a half-bad way is preferable, paradoxically because it is essentially cruel. There is a limit to the amount of repression a society can tolerate. All proposed serious alternatives to the criminal justice system as a whole seem to be sheer nightmares, at least if they are designed to be highly efficacious. (This is, of course, no defence for abstaining from attempts to find more decent methods for social control.)

There is a lot to say, also in very general terms, about when and how to criminalize. In this context it is only possible to dwell a while on the question when someone, who has committed a prohibited act, should not be considered to have committed a crime and accordingly should not be punished. Like this one the following section is meant to provide a sketchy background of fairly uncontroversial criminal law theory.¹

3. EXCUSES

In daily life we excuse people from responsibility for wrongdoing in a variety of cases: "He did not mean to do it", "He did not understand that it would happen", "He could not possibly have known that", "It was an accident", "It was not his fault", "He is too young to understand such things", "He was not himself", "He was intoxicated", "He is imbecile", "He is mad". All criminal law systems contain a doctrine explaining the conditions for personal responsibility. The stipulations for what is a

"guilty mind" vary, but the basic notions are common. Here it is sufficient to give a general idea of these basic notions.

Practically all relevant excuses can be derived from a particular principle, the principle of conformity. Its message is: a person should not be considered responsible for a crime if he could not conform to the law. It is a principle of legal policy, i.e., it has its primary relevance on the legislative level. But also the courts can, at least in the absence of explicit legislation, use it as a weighty argument. A minor group of excuses — including, e.g., coercion and provocation — are not derivable from the principle of conformity, the rationale being: although the agent could have conformed to the law, it is not reasonable — it is asking too much — to demand that he should do it. (In this kind of cases the act can be characterized as not or not fully "voluntary".)

It must be emphasized that it is not possible to justify excuses of any kind by recourse to the justification for having a criminal justice system or the rationale of criminalization or the different aims of inflicting punishment. "Utilitarian" considerations are not sufficient to establish the institutionalization of excuses. An attempt to tell what is sufficient would, however, take us far afield.

The key word in the formulation of the principle of conformity is "could". Even a simple analysis gives us that "could" is either in the indicative mood or in the subjunctive mood or in both moods, and "can" may in this connection be taken to refer to either ability or opportunity or both. There is no reason to exclude any one of the possibilities provided by this analysis; we can transform the principle into four sub-principles:

A person should not be considered responsible for a crime if he

- (1) did not have ability to conform to the law.
 - (2) did not have opportunity to conform to the law.
 - (3) would not have had ability to conform to the law, even if ...
 - (4) would not have had opportunity to conform to the law, even if ...
- (A few hints about how the conditional clause is to be completed are given below.)

An agent is unable to conform to the law (given that he knows what to do) if he is unable to control his behaviour; then he, in a sense, cannot help deviating from what is prescribed. The reasons for ascribing such inability include that the relevant act is involunatry (i.e., the agent does something while he is unconscious or moves or is moved as a body or an organism, not as an agent) and that the agent is mentally abnormal in a way that affects his ability of control.

The main reason why a person, who is able to conform, lacks opportunity to conform to the law is that he lacks knowledge about what

to do. The general view is, however, that an adequate efficiency of the criminal law system will be endangered if all lack of relevant knowledge is allowed to excuse the agent. So we have a division of error and ignorance into two kinds: (i) error and ignorance in relation to what the agent does; and (ii) error and ignorance in relation to whether what he does is illegal. In positive terms: the principle of conformity requires, when read in indicative, that the agent must have understood that (i) he did something (which happens to be prohibited); and (ii) what he did was prohibited by criminal law. But these two kinds of understanding are treated completely differently. Lack of understanding of the latter kind is normally no excuse.

Most jurisdictions distinguish between different categories of guilt. It is commonly understood that there is a significant difference between the degree of guilt involved in intentional action and the one involved in negligent action. (For brevity of presentation, the category of reckless action is not considered here.) The relation between the principle of conformity and intention/negligence is to be explained as follows: given that an agent, who has committed a prohibited act, had ability to conform to the law and understood what the law demands, absence of intention (including knowledge or foresight) is correlated with "indicative" lack of opportunity. An agent was negligent in relation to an act *x*, if and only if (a) he would have understood that he did *x*, if he had done *y*; (b) he had (indicative) ability and opportunity to do *y*, and (c) he ought to have done *y* (in the sense that it could reasonably be demanded that he — with all his individual deficiencies — did *y*). The relevant act *y* is normally something quite simple: e.g., to think, check, pay attention, get information, get help to get information, exercise self-control, put oneself into position to be able to have information, e.g., by taking notes or book-keeping. (It should be noted, however, that many jurisdictions use cruder negligence-concepts than the one outlined.)

In order not to get caught in all the problems involved in analysing negligence let us move to the question why a wrongdoer acting intentionally can be seen as more culpable than a negligent wrongdoer. Suppose the agent does not know what the law says (in many jurisdictions even lack of negligence in this respect is normally no excuse). The guilt of the intentionally acting wrongdoer is then based on the fact that he is a person such that he wants to do (or knows that he is doing) something which is in fact wrong. He is a person such that he does not care whether he realizes what is a prohibited act.

The guilt of a negligent agent may be the same as the guilt of an agent acting intentionally, because also he may be quite indifferent to what harm he causes, and so on. But we always presume that the negligent

agent is less guilty. This presumption is justified because it is difficult to prove indifference, if the agent has not shown it, and there is a risk that previous conviction(s) will be the deciding factor. So when we look for the basis for blaming the negligent agent we assume that he does not want to perform what in fact is a prohibited act.

Also the negligent agent is to be blamed for some kind of indifference: at least he does not care whether there are risks for his realizing what in fact is a prohibited act; he has not used his capacities to avoid such an act.

From the fact that also a negligent wrongdoer is at fault and therefore blameworthy it does not follow that negligent wrongdoing should be criminalized to the same extent as intentional wrongdoing. Additional justification is always needed, because the negligent wrongdoer is definitely less anti-social. In criminalizing negligent acts we demand that people behave considerately, cautiously, prudently. In criminalizing intentional acts we only demand that they do not behave callously.

The upshot of all this is that we in a sense punish people for being indifferent in one way or another. Even if we allow a wrongdoer to be excused when he did not know or could not have known that the act was prohibited, we certainly do not take seriously, in ascription of negligence, a retort that the agent could not have known what was reasonably demanded of him. And in any case, we do not take seriously the complaint "I cannot help that I am indifferent and anti-social".

But if someone cannot help being what he is and being what he is is the cause of what he does, then his act is determined by something he does not control. Such a lack of control suggests that he is not really an agent at all, maybe not even a "person", and that there is no reason to hold him responsible for anything he "does"; the concept of blame is inappropriate and punishment can never be justified. Such a line of thought seems to snatch away the floor on which the whole construction of criminal law dogmatics with all its nice distinctions is erected: the presupposition that the agent has some basic, "free" control over what he does.

The purpose of this article is to find out if this kind of thinking is plausible and to see where it leads. The nature of the questions involved will, of course, allow only a superficial account.²

4. DETERMINISM

Determinism in the form of a thesis that every event is an instance of a law, a regularity, is not a necessary presupposition of science. Such a conception makes it possible to defend indeterminism by relying on that

quantum mechanics gets along without it, that the sciences of human behaviour have established practically no universal causal laws, as distinguished from tendency-laws, and that most proposed laws of human behaviour can be refuted if someone decides to do so. And determinism in the shape of a general proposition, saying that every event has a cause, seems to be metaphysical in a bad sense: it can hardly be falsified. So it is not surprising that many philosophers have expressed doubt whether determinism can be rationally entertained. To be of value, a thesis of determinism must be presented as an empirical thesis, as something that can become increasingly plausible with the progress of science.

Somewhat misleadingly the expression "psychological determinism" is sometimes used when no more is meant than that acts or bodily movements are caused by mental states or events, such as decisions or choices and, one step further removed, wants or beliefs. It has been objected that decisions, choices, wants or desires cannot be separately identified (because there is a logical connection between them and the acts they lead to) and that wants, desires and beliefs are not events or even genuine states. But logic connects statements, not events, and the relation between statements about desires and statements about acts is paralleled by the notion of a cause logically presupposing the notion of an effect. And acquiring a belief or a desire is an event obviously different from another event: the act. More important is the objection that a free action need not be preceded by any mental event and acts are governed by reasons, not causes (the laws of practical reasoning are not causal laws). But many philosophers are convinced that reasons are or can be causes and some believe that act-explanations in terms of reasons have the same structure as act-explanations in terms of causes and that it is in principle possible to represent actual instances of practical reasoning as a causal process.

Discussions on psychological determinism seem to be of little help for the solution of our problem. Some form of psychological determinism seems to be presupposed by the freedom needed for responsibility: "we" must cause our own acts. If we stress "determinism" more than "psychological" we must ask in what sense the agent is free to want, desire or believe, in what sense are such phenomena caused. But explanations in terms of reasons come quickly to an end and there is no real support for an answer from psychological or psychoanalytic theories. All attempts to state the causal conditions of intentional action in "mentalistic" terms seem to have failed. When we want to trace psychological causal antecedents to action we soon find ourselves in darkness. So we must move to another level of explanation.

A workable empirical thesis of determinism, which can make trouble for our ideas of responsibility, can at present probably be presented only in terms of neurophysiological determinism. The main ingredients of such a thesis (hereafter called "DT") are three:

- neural states are caused by other physical states, including neural states;
- neural states are causes of other physical states, including neural states and bodily movements (acts); and
- some neural states are correlated with mental states.

For our purposes, there is no need to explain what is meant by 'neural state' (a neural state may be a brain state but this is not necessary); 'state' should be read as 'state or event'.

The arguments of DT do not presuppose that it is possible to describe or locate a relevant neural state. "A" neural state may be a disjunctive set of states, but the possibility of many mental states correlated with one particular neural state is excluded.

The concept of cause presupposed is the ordinary one of antecedent sufficient cause. In practice we have to select causes and distinguish them from a background of stable conditions, the circumstances of the causal strand in which we are interested. But this does not change the fact that causality is the same as sufficiency to produce the result in accordance with some regularity (natural necessity).

A physical state is such that it can conceptually be completely described without use of descriptions of consciousness.

DT can be stated in the following way: Neural states are necessitated by other neural states or other purely physical states. Neural states necessitate, e.g., the physical position of the movable parts of the human body (when movement is not prevented by external physical causes). Neural states are correlated with human consciousness in such a way that any particular description of a state of consciousness is true of an individual if and only if his neural system is in one particular state (or sequence of states).³

We do not know if DT is true. On the other hand, we do not know if it is false. But all neurophysiological evidence points in the direction of its truth and we all share the conviction that consciousness is generally correlated with the existence of a functioning brain. Modern computer technology has opened areas of "mechanical" problem-solving of equal complexity as the problem-solving associated with human consciousness.

DT may be false because some events are not necessitated but occur by chance. (It is at present impossible to tell whether our indeterministic quantum mechanics will be replaced by a deterministic theory or whether the indeterminacies at the level of quantum mechanics are

ironed out statistically in the larger structures that constitute neural states.) Here it suffices to note that the indeterminacy of randomness cannot help to restore the basic control sought for. (The interesting question what would happen to our concepts of freedom and responsibility if some kind of chance indeterminism were true is not pursued in this essay.)

We do not have to decide whether DT is true. What is important is that it is plausible enough to be taken seriously. Since DT seems to threaten the very foundation for responsibility, taking it seriously must mean taking it to be true; in criminal proceedings we are used to give the accused the benefit of doubt. The purpose of the following inquiry is to see if or to what extent the truth of DT is incompatible with our notions of consciousness, agency, rationality, personhood, freedom, responsibility, desert and punishment.

For some philosophers such a journey appears unnecessary. They are satisfied with the fact that necessitation to act is compatible with power to act otherwise. According to them all that is needed for criminal responsibility and for freedom is power to act otherwise and opportunity to exercise this power. In other words: the established way of excusing people from responsibility, indicated in section 3. above, is in order and thus there is nothing to worry about.⁴

Power, ability, and similar concepts are inherently general and "iffy". Someone has the ability to cause *x*, when his intrinsic nature (which need not be known) is such that *x* will or is likely to occur, if some conditions *c* are fulfilled. The conditions *c* must be represented as an open disjunction of external or internal "circumstances" and "stimulus conditions".⁵ It is easy to see that there is no conflict between necessitation and ability to act otherwise. If someone has the ability to act otherwise, it is always possible that he does not exercise his ability, e.g., because he does not want to, and if so we have to ask whether he had power to want otherwise; but power to want otherwise is exercised only under certain circumstances and in the presence of certain stimuli.⁶

I find it difficult to take seriously a view that is content with responsibility being ascribed as soon as it is clear that the agent could have acted otherwise, in the sense that he had ability and opportunity to act otherwise. It seems to ignore the plausibility of necessitation. And it is not possible to say that necessitation is not a problem since there are no general laws linking physiological states and psychological states and thus prediction is impossible on the psychological level. If someone's acts are necessitated, it does not matter on which level they are necessitated.

5. MIND

The phenomenon of consciousness is as mysterious as that of life itself. The most elementary form of consciousness is probably awareness of pain and other sensations, but even that normally implies a certain kind of self-consciousness, awareness of something that is part of oneself. The characteristically human form of consciousness implies a much more sophisticated kind of self-consciousness: awareness of oneself as an identity continuing through time, distinct from other selves of the same sort.

A normal human being is able to believe, think, calculate, want, desire, wish, hope, intend, decide, choose, feel, perceive, be angry, happy, resentful or interested. Such capacities and many, many more are conceptually related to consciousness and the existence of a mind.

Some think that the truth of determinism would make "mentalistic" concepts (M-concepts) inappropriate. But DT only says that every discriminable mental state is correlated with a particular neural state. Every description using M-concepts is correlated with a particular description using purely physical concepts. It does not follow that one description is more important, "real", or appropriate than the other. There is in fact a whole series of "languages" or "concept-families" possible to use in characterization of human beings and their behaviour. Descriptions in neurological terms and descriptions in M-terms are but two of many different and compatible kinds of description. Each kind picks out a particular aspect, but one aspect is, of course, never the whole truth.

In practice, we move rather freely between different kinds of description. We regard ourselves as psycho-physical mixes. Although we make a distinction between mind and body (i.e., the sum of physical aspects of the human being), we naturally regard the state of the mind responsible for bodily happenings and vice versa. Ignorance and drunkenness are given the same status when it comes to explaining a failure to exercise a certain capacity.

M-predicates are supervenient on some physical predicates (B-predicates; 'B' stands for 'body') in the sense that there cannot be two situations agreeing in all neural respects but with different psychological content. This is all that is required by DT and it is not more peculiar than that two paintings cannot agree in all physical respects but be of different aesthetic value. DT is also compatible with a taxonomic priority of M-predicates over B-predicates. A scientific inquiry on the B-level must be guided by M-descriptions. Even if no element of the pattern of

human behaviour is left out in a physical description, the pattern itself is not included.

Supervenience is not to be confused with reduction. There are two important types of reducibility: nomological and semantical. Nomological reducibility presupposes empirical laws that make it possible to translate M-descriptions into B-descriptions. Semantical reducibility presupposes that such translations will leave the meaning of M-descriptions intact. Whatever the possibilities of nomological reduction will be in the future, semantical reduction just is not possible. The language required for describing neural states is totally unsuitable for conveying the meaning of descriptions in M-terms. The almost infinite number of distinctions and discriminations built into the M-language will get lost completely when we enter the level or aspect of neural descriptions. In an important sense, it is impossible to know anything about the mind even if you know "everything" about the body. This should not be more surprising than that the beauty of a painting cannot be analysed in terms of chemistry or physics or that a description in terms of quantum mechanics is impotent to catch what we see around us.

The semantical irreducibility of M-predicates suggests that it would be misleading to interpret DT as implying that the mind is an illusion. Still, it is not easy to see what it does imply as a solution or solutions to the perennial mind-body problem. Like other metaphysical questions this one has yielded a confusing number of -isms.

First, there is a series of dualistic positions, i.e., mind and body are seen to be different "things" or to belong to different "worlds". DT in principle excludes mentalism (one-way causal relation mind-body) and interactionism (two-way causal relation mind-body, body-mind), but not epiphenomenalism (one-way causal relation body-mind) or parallelism (no causal relation mind-body). But all dualistic positions are problematic. They make it difficult to account for the unity and "ownership" of the mind ("mental substance" seems to be describable and identifiable only through the mental states that belong to it), for the apparent causal interaction between mental and bodily events and for our knowledge of other minds. These problems do not seem to be insoluble if we adopt a monistic position (i.e., mind and body are in some sense "the same thing").

DT is incompatible with a "mentalistic" (panpsychist or idealistic) monism, because neural necessitation of what a person does would not be real. But a "physicalistic" or "materialistic" monism is, of course, compatible with DT. The problems of the unity of the mind and whose mind a mind is can be solved by establishing a connection between mental states and a certain body. (It seems that at least a loose location

of a mind in a body is necessary for individuation of mental states: how could we otherwise decide whether a sensation felt by two persons is one or two sensations?) The "sameness" of mind and body also explains how mind can influence body and vice versa (the transcategorical influence) and why other minds are in principle publicly accessible. But on these two points we must tread carefully. There are enormous difficulties in establishing strict identity (what a conscious being introspects is literally identical with the neural state which a scientist regards as the cause of the behaviour connected with the mental state). The categorization of states as mental or physical is closely connected with cultural contingencies; our treatment of the intentional and the phenomenal (something whose being is exhausted by a single property) under one hat as "the mental" and in contradistinction to "the physical" is simply a historical fact, not an ontological necessity. "Our" concept of mind is a legacy of seventeenth century philosophy.

Consciousness is a natural phenomenon. States of consciousness are less accessible than behaviour, but though they cannot be verified by others in a straightforward perceptual manner, they are certainly more accessible than neural states. The introspective awareness we have of some mental states is no illusion. Such facts must be respected by any plausible theory of the mind-body relation. Materialism must not be simplified to behaviourism (the mind is really nothing but the overt behaviour of the body) or a physicalism, that squarely refuses to accept the existence of mental states or regards M-descriptions as semantically reducible to B-descriptions. It is also of little help to look for a third kind of thing or substance of which mind and body would be aspects. We do not have to postulate a third thing when we characterize lightning and electrical discharge as the same, or as different aspects of the same thing. A plausible materialism must be a materialism without a strict mind-body identity, a stratified monism. We arrive in the vicinity of epiphenomenalism and the very distinction between dualism and monism loses most of its interest.

It has been said, that the moral of the analogies between computers and people is that there cannot be any problems about the relation between mind and body.⁷ But coming out of an ontological trap we are confronted with an epistemological problem: how to account for our inner life and our empirically privileged access to private entities such as thoughts and sensations. Fortunately, we do not have to pursue such an account here. DT is not involved.

6. AGENCY

An agent is able to control his performances and adjust them to match his intentions or plans, or social rules. Agents are also able to make anticipatory and retrospective commentaries, they have a general linguistic power to handle symbols and are perpetually confronted with alternatives: they have to make true what will happen. Agency, the power to perform intentional actions, is deeply connected with the agent's self: if I do something, *I* do it, not someone (or something) inside me. The belief that we are agents is a basic or primitive one, in the sense that it cannot be tested. Only agents can perform tests. (Agency is a pre-supposition of science.) It is logically possible that we are not agents, but we cannot stop behaving as agents that interfere with the world. And from the point of view of the agent an intentional act is not caused by something or someone else than the agent himself.

Acts are described or characterized in M-terms. Concepts such as purpose, intention, motive, belief, emotion, desire, decision, want and choice fit with act, action and activity, but not with bodily movement. Acts are explained in terms of reasons and movements in terms of other causes. There is no hope of establishing a science of behaviour whose generalizations would correlate what people do with the kind of stimuli to which they are responding.

The same movement can constitute many different acts and the same act can be performed through many different movements. Most action-terms are social. They presuppose a language, a common society and non-physical, "idealistic", conceptualizations and institutions, including legal ones. Think of how complicated it is to describe all that is implied in the simple act of writing one's name (not to speak of forging a check)!

Agency is associated with a certain confidence that some things will not happen unless the agent makes them happen, i.e., with a belief in a certain power to interfere with the world and in the ontological contingency of some changes.

Given that these scattered remarks are accepted as true, would any shadow be thrown on DT? I believe not. The whole M-aspect of man is left untouched by DT. Semantical irreducibility is all that is needed to make the agent's perspective compatible with the perspective of the human being as part of physical nature. An agent's power to discriminate, to process information and to monitor his interference with the world (including communication with others), as well as his power of introspective awareness of his own thinking and acting might be explainable by the machinery (intrinsic nature) of his physiological constitution.

Some may still want to argue that DT destroys our common notion of agency. Some intentional acts, "basic" acts like raising the arm, are apparently identical with a simple movement. But there is an enormous difference between my raising my arm and the rising of my arm, and the only reasonable explanation is that the movement, but not the act, is physically caused. The act may be caused, but if so only by reasons or only by mental events or states. But DT says that also acts such as raising the arm are necessitated by neural states. Thus the fundamental distinction between act and pure movement collapses.

Such an argument is not convincing. To be sure, DT asserts that all bodily movements are physically caused and that all acts (to the extent that they are constituted by movements) are physically caused. Some movements *are* acts. In our basic acts we are simply doing what happens. In seemingly similar cases, we are not doing what happens; the movement is not an act. The difference is found in typically different ways of causation. *Some* ways of causation destroy agency. Suppose a movement is caused by a short circuit in the nervous system. Such a reflex movement is caused in a way that makes no room for M-concepts commonly associated with acts and thus no room for causation via neural states correlated with beliefs, intentions, and so on. Suppose then that a movement is caused by a scientist operating electrodes applied to the brain. In this case it is possible that the manipulation results in neural states correlated with specific beliefs, intentions, and so on. The agent may thus believe that he is acting. But he will certainly drop that belief if he is presented with the facts of manipulation. A movement is "his" act, only his neural system is left alone. If someone can in principle observe how a movement of his body is caused, he is not acting, he does not make things happen, but lets them happen.

In a way, agency is possible because the agent cannot observe how his actions are caused by neural states and because he is ignorant of the ontological necessities. In any case, interpretation of movements as actions does not imply the availability of "genuine" alternatives of action. Ontological necessity is compatible with epistemological certainty of ontological contingency — any agent's conviction that the future has to be created through a choice among alternatives.

DT asserts that overt acts are movements caused by neural states and that these are correlated with some kinds of mental states and in their turn caused by neural and other purely physical states. It does not, of course, assert e.g., that acts are "nothing but" movement or that acts can be individuated or identified without recourse to more than movements and their preceding neural states.

7. RATIONALITY

If every act is necessitated, although it is performed because the agent has certain reasons, then the existence of reasons can only explain the act, not justify it! And what happens when we move from action to belief? DT must imply that acquiring and having beliefs is necessitated in a similar way as action, i.e. such mental states are correlated with particular neural states which are caused by other purely physical states. Whatever we believe — e.g., that DT is true — we are caused to believe. Of course, as in the case of action, the belief must not be caused in an inappropriate way, e.g., by a tumour on the brain. Belief must be allowed to be the outcome of inquiry or deliberation and of endorsement on the basis of conformity with other beliefs. But still: the operative reasons can only explain the belief, not justify it. Belief in DT even seems to be self-defeating, since also this belief must be causally explained. All disagreement is a matter for causal explanation, not of rational solution. What is a "good" reason is always a matter of causation. Since our beliefs about good or relevant evidence are necessitated, we are unable to distinguish "finally" between a rational and an irrational belief. Anything goes: there is nothing to do about conceptual relativism, and in practice commitment to a faith or other arbitrary system of beliefs will govern what one takes to be true. Rationality, truth, knowledge, validity and justification are either non-existent or unattainable.

The most such a load of complaints can show is that DT cannot rationally be entertained; it cannot show that DT is not true. But the argument fails, because it presupposes that if belief is not caused in the way indicated by DT, then we have some special access to Truth, Justification, Validity, and so on. Such Platonic entities are notoriously evanescent. Anyone's present thinking is intrinsically transparent: the answers to "Do I believe that p?" and "Is it the case that p?" cannot be distinguished. There is no other way to find out what is the case than to find out what one has reason to believe. If someone discovers that a certain belief of his is induced by manipulation of his neural system or influenced by his own wishes, he sees that his belief is caused in an inappropriate way and abandons it, if there are no real reasons for believing it to be true. The possibility that some or many of our beliefs are caused in an inappropriate way has no other status than the possibility (or even certainty) that many of our beliefs are irrational: it gives us no reason to abandon any particular beliefs. That a belief is caused does not entail that the belief would have been caused even if it had not been true (or that nobody could have told that it was not true if it had not been true). So, the belief that, hopefully, a lot of our beliefs are caused in the peculiar way that reflects the niceties of rational reasoning is quite

incapable of making us abandon any belief, e.g., the belief that we are able to reason rationally.

To clench the argument it only has to be noted that what has been said about the transparency of one's own thinking also applies when the objects of belief are standards of justification or rationality.

Rationality is, like agency, a range of capacities and skills, e.g., capacity for abstract reasoning, generalization, explanation and prediction, and skill to construct justificatory arguments and master a language (and thus being able to grasp universals and relate to the non-existent). What is rational is like any other question open to debate; but as in all debates something must be taken for granted. The search for The One Truth is vain. Theoretical reasons may be seen as related to one world and thus in principle consistent (although an infinite number of perspectives may be used on this one world). But in practical (or pragmatic) reasoning we encounter unsolvable conflicts between short-term and long-term reasons, egoistic and other-regarding reasons, and reasons for the individual man⁸ and reasons for mankind. And what is generally rational must be dependent on the (changable?) nature of man. What follows is, briefly, that theoretical reason in the end is measured by its ability to serve us in attaining survival under relatively pleasant circumstances. In this sense, pragmatic reason is primary, but, of course, any adequate account of reason must convey a dialectics of the theoretical and the pragmatic. There is no need for universal consensus in science: the search for better theories and more revealing perspectives is of value for mankind. There is need for a universal consensus on efficient methods to avoid the self-destruction of mankind and to reduce the barbaric devastation of the earth and its inhabitants, but a realistic hope for universal consensus stays with relatively unimportant matters.

DT does not endanger the distinction between explanation of action and belief (which is characteristically "individual" or "private") and justification of action and belief (which is characteristically "public"). Explaining and justifying are simply two different kinds of action; the appropriate reasons, and thus also causes, for providing an explanation are not the same as for providing a justification. We can certainly regret that man is not more rational than he is, but the truth of DT does not make him less (or more) rational or deprive him an otherwise available route to Truth.

8. PERSONHOOD

To be a person a body must possess

- (1) consciousness (in the strong sense of including awareness of one's own continuing identity);
- (2) agency (ability to act intentionally for reasons and ability to monitor one's own acting intentionally); and
- (3) rationality (ability to deliberate in terms of reasons and to master a language.)

These three characteristics have been dealt with in the preceding sections. So far, personhood is compatible with DT. But complete personhood entails more:⁹

- (4) capacity for personal relations, such as love and reciprocal co-operation, which presupposes (partial) identification with someone else or his interests;
- (5) moral status, as a moral patient, liable to suffering, or as a moral agent, capable of compassion and susceptible to moral injunctions; and
- (6) personality or individuality, in the sense that the mind-body complex constituting the person exhibits a certain characteristic, relatively permanent, uniqueness (character-traits, habits, standing inclinations, looks, and so on).

These additional characteristics provide no difficulties for DT. The mentioned capacities, liabilities and regularities, which constitute part of the nature of the individual, are compatible with a deterministic account of the workings of the body, supplemented by a thesis of correlation between mental and bodily states and a recognition of the semantical irreducibility of mental states.

Not every human being is a person in the indicated sense and every person need not be a human being. Some non-persons — e.g., infants and "higher" animals — are person-like, and it might be illuminating to sketch what personlikeness minimally entails:

- (1) restricted self-consciousness (awareness of one's sensations);
- (2) restricted agency (acts performed in response to needs, desires and pre-linguistic beliefs);
- (3) restricted rationality (capacity to learn to select means to ends);
- (4) restricted capacity for personal relations (capacity to put trust in others and to receive love);
- (5) restricted moral status (a moral patient, liable to suffering); and

- (6) restricted personality or individuality (questionable or at least "shallow" uniqueness).

Obviously, someone can be "less than a person" in one or a few respects or for a shorter period of time. At least some forms of mental illness are associated with deficiencies that exclude complete personhood.

It has been argued that a concept of a person that is compatible with DT must be to some extent "hollowed" in that it does not make room for a series of characteristically human reactive attitudes: gratitude, anger, resentment, love, hate, forgiveness, hurt feelings, remorse, compassion, indifference, respect, contempt, and so on. At best, this is an overstatement. Many human reactive attitudes certainly do not conceptually depend on an ascription of powers incompatible with DT. Examples are love, compassion and forgiveness. But is it not plausible that a few attitudes presuppose a belief in responsibility or individual explanation, or a power to do otherwise, that conflicts with the thesis that acts are necessitated? If so, the obvious candidates seem to be resentment and gratitude, the correspondingly detached attitudes (moral) indignation and admiration and the correspondingly self-reactive attitudes remorse and pride.

I do not think that these concepts presuppose absence of necessitation. Resentment is appropriate if the person acted voluntarily, and intentionally or negligently. The reactive attitude is motivated by the fact that the person is such that he manifests and realizes a negative value or a range of negative values. Maybe the "logical grammar" of resentment, etc. has been blunted by the recognition of the progress of science and the increased plausibility of DT and by the decline of theological propaganda about freedom of the will (which, however, always has had difficulties with the simultaneous contradictory assertion that God is omnipotent, omniscient and unchanging). If I am wrong in that DT does not conflict with appropriate resentment, etc., the acceptance of DT forces us to blunt our concepts a bit more. This will not make them superfluous and it might make us a bit more tolerant and a bit less prone to worship.

Different aspects of a person or a person-like being can be emphasized:

(A) The physical perspective. Explanations and characterizations are given in mechanistic terms, e.g. physiological. If the system is very complex, this kind of explanation mostly occurs in connection with malfunctions.

(B) The machine perspective. The person is regarded as a machine, i.e. as something that is designed to fulfil certain functions or exercise certain powers. The point of the design can never be explained on level

(A). On level (B) absence of malfunction is assumed. Man is not, like ordinary machines, designed by man, but by "Nature". But human beings are not closed deterministic structures. The design of individual persons is somewhat changed all the time and most persons have the ability to change themselves (e.g. by redescribing themselves). Persons are such that identity over time is compatible with considerable changes of their nature.

(C) The rational perspective. Here the existence of (restricted) consciousness, agency and rationality is appreciated, but the remaining characteristics for someone being a person (or person-like) are realized only in

(D) The individual perspective.

(The normal way of coping with other persons is to presuppose a certain degree of rationality or a certain type of individuality and then adjust our views when we learn to know them and their peculiarities and deficiencies better. The only way to cope with sophisticated computers is to adopt the rational perspective; this, of course, does not make them person-like.)

There is no way to design a system that can be guaranteed to react appropriately under *all* environmental circumstances. Man has an enormously complex design, but as we know he is far from perfect in rationality. The implausibility of all simple mechanistic explanations of man does not disqualify DT. And in cases of break-down, mechanistic explanations ("He cannot remember because he was hit on the head") are generally accepted.

We can talk about Mechanistic Man, Machine Man, or Rational Man, and thus select aspects of the Person. Behind much of the fear for DT lies the thought that, if DT is true, man is "nothing but" e.g. a machine. The fear of being "nothing but" a machine or a puppet is understandable, but such a view is a distortion of both DT and of a plausible conception of man.

Much of the discussion concerning resentment and related reactive attitudes has focused on the question what would be rational to do if determinism were true. (It is then assumed that there is no logical obstacle for resentment, if determinism is true.) Here it suffices to note that it is obvious that the truth of DT plays no role whatever in a choice between adopting one perspective on man rather than another and that we have probably no reason at all to try to view people generally as something less than persons or try to make ourselves being something less than persons. It may not even be practically possible to do such a thing, but if it were possible: why should we want to isolate ourselves

from all other human beings or why should we want to create a world of human brutes (in this respect we are quite well off as it is)?

When we adopt a certain perspective of man we do not do it *because* DT is (thought to be) true. Such a stance must be justified by other reasons. To some extent and for some purposes we are justified to adopt the machine perspective when we deal with infants and insane.

9. FREEDOM

Some libertarians stress the importance of our feelings of freedom (forgetting our feelings of unfreedom). It is not even easy to tell what a feeling of freedom is. We acknowledge a choice, an act or a belief as ours; it has not been pressed upon us, and there is no obstacle to arriving at the choice or belief or to performing the act. If all there is to it is what we feel when we act or believe spontaneously, voluntarily, and/or for good reasons, then we may note that this has nothing to do with a categorical ability to act or believe otherwise. And we certainly feel freer, when we are convinced that we in a sense have no choice at all because all the reasons point in one direction, than when we know that we might as well have done another thing (because the choice is arbitrary, we decide on inadequate grounds or by tossing a coin). Did Luther feel free or unfree, when he said "Here I stand and cannot do otherwise"? Moreover, subjective interpretation of experience can easily be mistaken; our feeling free can be explained as the result of centuries of indoctrination. Can we really tell when we feel free? Which of the cigarettes a habitual smoker smokes are smoked freely? And is it even possible to imagine a feeling of contra-causal freedom: does it not presuppose that all causes might be observed? We must conclude that feelings of freedom do not prove the existence of categorical freedom.

Persons are curiously immune to certain sorts of predictions concerning their future behavior. Rational Man constitutes an information system and no information system can carry a complete time representation of itself. Another person might have the needed information, but he cannot communicate it without changing the system and thus making it incomplete is a new respect. For persons the future is not fixed. Epistemologically the future is necessarily open, even if it is ontologically fixed. Nothing is epistemologically determined until it is ontologically caused. There is no non-epistemological access to the ontological. DT excludes ontological alternatives, but not epistemological, and since as persons we have to treat ontological certainties and possibilities in terms of epistemological certainties and possibilities our freedom as agents is not threatened. As agents, we simply cannot make sense of a fixed

future. In science we are free to redescribe the world over and over again and this freedom is inescapable because a transcendental notion of Truth has no connection whatever with our practices of justification. And even if prediction is in principle possible on the level of Machine Man, the semantical irreducibility of M-states will preserve epistemological freedom: even if it can be predicted what noises a person will make it cannot be predicted what he will mean with the noises.

DT is thus compatible with feeling free, with epistemological freedom and with freedom from complete prediction. It is, of course, also compatible with a long series of traditional interpretations of "freedom of action": freedom from physical or external psychical compulsion or constraint, freedom from internal psychical compulsion, freedom to act for reasons or conscious purposes, freedom to do something no one has done before, freedom as self-expression (expression of an individual character, an ego-ideal, a mind, a self, or mental activity that is not reducible to matter), freedom to do what is morally right, freedom as power to act otherwise, freedom as ability to control one's own action and freedom in the sense that not only unconscious parts of one's mind are really causally relevant. DT is also compatible with the existence of a metaphysical self as an idle spectator.

DT is not compatible with some other interpretations of "freedom of action": e.g. freedom to "make worlds", freedom as ultimate control of one's values, personality, beliefs and actions, freedom as expression of a transcendental character, which is determined only by its own previous decisions or which is a power-centre able to overcome the greatest obstacles, freedom as the workings of a non-causal agency (the Creative Self) or a metaphysical self or an unmoved mover (inside the person?) or freedom as creation of all determinants of an act. DT is also incompatible with freedom as chance or randomness, but — as noted in section 4. above — such a freedom does not appease a libertarian.

If we try to avoid ascribing god-like properties to man, the search for freedom seems to amount to a want for an ascription of "pure agency". A genuinely free person is someone in whom a causal chain terminates (if it is traced backwards). He is initiator of his acts, he operates on a causal chain, but is not himself determined by antecedent conditions. A genuinely free person has genuine alternatives (the world is not ontologically fixed) and even if some reasons are (correlated with) causes, not all are. Actions are causally underdetermined and still interpretable in terms of practical reason or intelligibility (randomness is not wanted). Absence of causal influence by, e.g., character and extrinsic circumstances is not necessary, but absence of necessitation is necessary.

The quest for categorical freedom seems to lead to nothing else than a mere refusal to accept DT. The pure agent postulated is indeed a very peculiar entity. How could we ever know when we exercise this genuine freedom and when not? Feeling free is of no help when we want to find out whether an act is underdetermined in this special sense. How could we test the existence of such freedom? Only by finding a case when someone does *x* and at the same time does not do *x*, i.e., history has to repeat itself, what has happened may be undone. Is it not incoherent to demand that the self should be able to make itself different from what it is at the moment when it should make itself different? How does the pure agent make contact with the empirical world? If he acts for reasons, how is it possible to avoid these being causally related to the acts? If an act is underdetermined, how can it not exhibit randomness? Until we have seen an acceptable positive account of categorical freedom and "the pure agent", a world picture compatible with DT is much more intelligible.

Is life absurd and meaningless if we do not have categorical freedom? To be sure, we are not free to do or believe what we wish, but we are to a great extent free to do and believe what we choose. Necessitation is not identical with fatalism: the future is *not* fixed whatever we want or try to do or actually do. DT is compatible with the fact that agents create the future — with the help of their reason and power to act. One could say that we are determined to create the future, to choose and to decide; therefore adoption of DT does not justify reactions such as "The future is fixed, so we can as well stop doing things; we can as well stop working politically and enjoy ourselves instead!"

One side of the coin of necessitation is that when the agent did *x* he had to to *x*. The other side is that he would do the same thing again, if he got another chance and if things were *exactly* the same again. Perhaps this side is less frightening?

10. RESPONSIBILITY

There are different responsibility-concepts. The only one of interest in this context is a sophisticated concept of "attributive" responsibility, entailing

- (1) the agent is a person (a "responsible" agent, able to give reasons for and against alternatives and to choose between them and able to understand the notion of responsibility and why something is right or wrong);
- (2) the agent did *x* (causation); and
- (3) the agent cannot be excused for doing *x* (see section 3. above).

This concept ensures that a person is responsible only for doings that "belong" to him. The actions for which he is responsible have another kind of causal ancestry than the ones for which he is not responsible. (The most difficult border-line cases are those in which non-rational interference alters the agent's beliefs and desires, and thus his actions: hypnotism, brain-washing, subliminal suggestion and some forms of psychotherapy, especially those involving drugs.)

Why should we insist on finding only (practically) complete persons (morally) responsible for their acts? Only persons are equipped with ability to feel compassion and to reason rationally, and are thus liable to be influenced by admonitions and expressions of moral criticism. Only persons are able to be influenced by the normative force of moral description. Moreover, the moral agent can be influenced by the normative force of moral description, only if an act to be performed is "his". To attach moral wrongness to acts or aspects of acts not controlled by the agent would be inappropriate; it could not influence him. (It does not follow that it would be idle to punish someone who is not responsible. The deterrent effect of punishing also some who are not morally responsible for their acts may be considerable. As I remarked in section 3. above, in criminal law the institution of excuses must be justified separately. Such a task is not even commenced in this article.¹⁰)

What has been said indicates that what would make ascription of moral responsibility futile is not necessitation, but necessitation independently of the agent's awareness of right and wrong. A ready retort from a libertarian is, of course, that a moral obligation implies that the agent can do *x* and need not do *x*; an act that could not have been avoided, i.e., that is necessitated, is not culpable. It is one thing to be *held* responsible for an act and another to *be* responsible. The fact that the act does not conflict with the person's True Personality is, when we talk about *being* responsible, of as little interest as the fact that in some countries people are punished although they are not even negligent (strict liability). An agent is responsible for an act only if it is irreducibly individual (i.e. only if not all aspects of it can in principle be scientifically explained). — We are again confronted with the quest for categorical freedom, of which it is so difficult to make sense. Its only content is the denial of necessitation.

11. BLAME AND PUNISHMENT

I suggested above — in section 8. — that the adequacy of motives and emotions such as resentment, indignation, remorse, gratitude, admiration, and pride, is not impaired, if there is no such thing as categorical

freedom. The natural expression of the first three attitudes is blame, and the natural expression of the other three is praise. All these concepts are connected with responsibility. I will confine my remarks to the relation between blame and responsibility.

To be subjected to blame is unpleasant. The social institution of blaming has, as the institution of punishment, utilitarian pay-offs. Distribution of blame (expressing resentment or indignation) is a way of improving the moral quality of future actions. Now, it seems that an act is "blameable", or, in principle, "blameworthy", only if the agent is responsible for the act. (This does not mean that every agent should be blamed for every blameworthy act.) Thus, there is a logical connection between responsibility and blame. Try to "blame" a small child, or a lunatic, or a cat! You will find that you are doing something else.

It is often asserted that infliction of punishment has an element of blame or condemnation. This is hardly true in cases of strict liability or when small fines are enjoined, but let us leave that aside. The important question is if there is — because punishing is a kind of blaming — a logical connection between moral responsibility and punishment. To be sure, many philosophers seem to think that if we can establish responsibility, then it is "all right" to punish.¹¹ If they are right, moral responsibility provides a justification for punishment. But this is making logic out of contingencies. Even if moral responsibility entails blameworthiness — which, of course, is debatable and another question than blameworthiness entailing responsibility — it does not entail worthiness of everything that entails blame. Unpleasantness does not entail suffering. Punishing is the expression of blame *within* a criminal justice system, and to arrive at a justification inside such a system the only thing you have to do is to cite its criminalizations. "Punishmentworthiness" is derived from the criminal justice system, not from "blameworthiness" or "moral responsibility". Since the existence of a criminal justice system as a whole is primarily justified in utilitarian terms (see section 2. above), the main role of moral responsibility is restrictive: a requirement that punishment is inflicted only when the offender is morally blameworthy functions as a limitation of the operation of the system of distribution of suffering. Even if blameworthiness helps to justify the reprobative character of criminalization and sentencing and thus helps to explain the nature of a criminal justice system, it is not by itself able to justify the existence of a criminal justice system. If the operation of a criminal justice system is totally inefficient, the only rational thing to do would be to abandon it and resort to other ways of expressing blame.

12. DESERT AND PUNISHMENT

The conclusion so far is this: Necessitation does not preclude acting freely in the sense of rationally or spontaneously expressing one's own unique personality in choice and intentional action. It does not preclude ascription of responsibility or blameworthiness. But there is no other basis for a move from responsibility to punishment than the contingent existence of a system of criminalizations and its consistent punishings. And the reasonable justifications for such a system invoke general deterrence, symbolic expression of reprehension and internalization of norms.

It is hard to avoid the further conclusion: if every commission of a crime is necessitated, the offender is simply used or exploited by the criminal justice system. We may recall Justice Oliver Wendell Holmes's famous comparison of a prisoner sentenced to death with a soldier dying for his country. It is easy to understand why this conclusion upsets people. To put it mildly: it does not seem to be fair to subject persons to suffering, sometimes amounting to personal catastrophies, simply because it is needed to keep a pretty inefficient system of repression in action. But doesn't Justice Holmes miss an important thing: the soldier does not *deserve* suffering, but the criminal does deserve it?

The concept of desert is on a general level reasonably clear: some facts give a basis for holding that someone has something "coming to him" and there must be a reasonable proportionality between the basis of desert and what is deserved. When we want to be more specific we get into trouble, unless we take refuge in rules, systems of expressed valuations and more or less arbitrary conventions of comparison. Thus it is possible to manage the concept of desert within a criminal justice system, if you are satisfied with gross approximations of what is deserved.

But our present problem has nothing to do with such "internal", system-dependent, desert. We are looking for an "external" basis of desert. How can the fact that someone is responsible for a harmful act be linked with justified punishment, without recourse to the justifications of a criminal justice system? It might be that a responsible wrongdoer is blameworthy. But this means only that he is "punishmentworthy" to the extent punishment constitutes blame. It does not follow that he is "worthy of suffering". What we look for is something that would make criminal justice systems justified irrespective of utilitarian considerations.

In the light of DT this search for a justification of old-fashioned retributivism does not make sense, for the same reason that it does not

make sense to say that since A has good character-traits and B has bad character-traits, A really deserves a better fate than B.

At this point the libertarian's insistence on the existence of categorical freedom becomes fully understandable. Categorical freedom is the missing link. But is it? Waiving all the difficulties of making categorical freedom comprehensible, I cannot see its relevance for our problem. The important thing seems to be, not questions of agency, rationality or responsibility, but simply where the causal chain stops (or rather if it stops inside a person) when it is traced backwards. But we blame and punish persons, not causal chains. If the agent in a special sense is master of his future and does something that is morally wrong, how could that in itself be a justification for others to make the agent suffer? Can only an uncaused causer be "genuinely" disobedient?

Categorical freedom cannot provide the required justification. The reason is, of course, that no particular ascription of desert is possible unless you presuppose a specific system of valuations. Old-fashioned retributivism has to presuppose, e.g., a Kantian or Hegelian system or a code given by a Superior Being. In my view, such systems are either mere stipulations or idealizations of human barbarism. Such systems may stipulate that categorical freedom is a prerequisite for responsibility and punishment, but that does not make them less arbitrary. (It is, of course, not necessary to presuppose a superior system giving sense to attributions of desert. The fact that all prices presuppose a price system does not entail that there is a price system that regulates all prices.)

I submit that we have to accept that when someone commits a crime, he cannot, in the sense explained by DT, avoid doing what he does. But this does not make it necessary to change our views of ourselves as persons, agents with a mind, capable of thinking and acting rationally and of being responsible for what we do. (A general acceptance of DT would probably be much less revolutionary than the victory of darwinism was.) What is incompatible with DT is only a mysterious categorical freedom, experienced by a transcendental self-creating agent, at the same time being and not being part of the world.

When a person is punished, he is used to give credibility to the threat built into criminalization. In a way, a criminal that is punished is a victim. Like the soldier he is caught in a machinery, because he is the person he is, but there are, of course, obvious differences between criminals and soldiers and their fates. (There is e.g. no utility in a soldier dying.) Justice Holmes's comparison is seductive rather than instructive.

13. CONCLUSION

It may be that formalized social blame must be given the form of punishment, i.e. that a criminal justice system is necessary for maintaining tolerable conditions for human life. Given that unnecessary suffering is immoral and that a criminal justice system should not operate in an immoral way, we then must — to the extent compatible with a reasonable efficaciousness of the system as a whole —

- (1) restrict the operation of the criminal justice system, without making way for even more harmful solutions;
- (2) give criminals "another chance", forego prosecution, give suspended or conditional sentences, and so on; and
- (3) lower the level of inflicted punishment.

(If I have been right in denying that the existence of categorical freedom would justify a link between responsibility and punishment outside a criminal justice system, the validity of this criminal policy program does not depend on DT being accepted.)

Even the most progressive of contemporary criminal justice systems sin in the third respect. They have reached the present level of punishment through repeated subtractions from previous atrocities, not by experimenting in order to find out what is the most reasonable level of repression. Legislators have highly unrealistic views on what is needed to keep criminality at a certain level and heavily overrate the consequences of raising or lowering the scale of punishment for a type of crime.

It is hard to deny that fear, stupidity, cruelty and dishonesty have governed a major part of human life on earth. Criminal justice systems constitute no exception. On the contrary, many such systems provide brilliant illustrations of the worst qualities of man. The readiness to regard a deviating pigmentation, language, upbringing, faith, and even less important forms of coincidence, as a justification for treating people as something less than persons, as some person-like, inferior beings, is one source of cruelty. Another source of cruelty, more visible in the operation of criminal justice systems, is the readiness to regard people as something more than persons, as semi-gods who create their own fates and their own happiness or unhappiness. Maybe only the adoption of a determinist thesis will provide the basis needed for striking a balance between underrating and overrating the powers and nature of man.

Finally, there is reason to repeat that DT does not justify that people be treated as something less than persons. Of course, with the progress of science we are continuously provided with new means to change

people without appealing to their rationality (e.g., brain surgery, subliminal advertising, drugs, and psychotherapy). It is tempting to use such means on a person when it can be rationalized as being for his own good. It is especially tempting to use such means on criminals (naturally for their own good!). Notwithstanding the good intentions, such thoughts are dangerous. We can all commit crimes (of one sort or another), if the circumstances are the "right" ones. It is often rational to commit a crime. Few criminals are characteristically criminal; the time used on crime compared with other activities is negligible for most criminals. To commit a crime is not to exhibit symptoms of insanity or "moral illness". If it is objected that criminal law exploits criminals, it is still a merit of criminal law that it treats criminals as persons, not as machines or organisms or something else, that can be mended, or re-designed to behave better. Such treatment is utterly humiliating and signifies lack of respect and moral recognition. It may also encourage crime, because it may give the criminal the (maybe desired) impression that he cannot stop himself committing crimes. Self-criticism and self-control are seen as empty notions and he is excused in advance: all things are in a way permissible. Like fatalism this is an invalid inference from DT.

NOTES

¹ I refer the reader to essay V. below and essays I. and II. above for a somewhat more detailed discussion of questions dealt with in sections 2. and 3.

² It has taken a long time to arrive at the position defended in this essay. I am not able to give credit to all those from whom I have learnt something important. The bibliography lists work that have been especially useful at the stage of writing. It also lists three books that would have influenced the form of presentation, if I had read them at that stage: Dennett (1969), Dennett (1985) and Nagel (1986).

³ DT is further developed by Honderich (1978).

⁴ See e.g. Kenny (1978) ch. 2.

⁵ See e.g. Harré & Madden (1975) ch. 5.

⁶ Ordinarily, we use 'can' in a way that presupposes alternatives. This "general" use can be contrasted with a "particular" use, according to which only the actual is possible: if a person's act is necessitated, he can only do what he does, he cannot do anything else.

⁷ See Putnam (1975) pp. 362 ff.

⁸ In writings on criminal law 'man' always means 'man or woman' and 'he' always 'he or she'. One reason for this is that women are much more law-abiding than men.

⁹ See especially Quinton (1973) pp. 103-105.

¹⁰ See Jareborg (1969) pp. 361-376.

¹¹ See e.g. Kleinig (1973) p. 67: "The principle that the wrongdoer deserves to suffer seems to accord with our deepest intuitions concerning justice."

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THE COHERENCE OF THE PENAL SYSTEM

1. INTRODUCTION

The Swedish criminal law of the 1980's contains four main penal sanctions: imprisonment (for a fixed time), fines, conditional sentence, and probation. The indeterminate custodial sanctions — youth imprisonment and internment — have been abolished. Conditional sentence and probation may be used when imprisonment is prescribed, alone or together with fines. Very serious crimes cannot be sanctioned by using conditional sentence or probation.

The attempts to find new alternatives to imprisonment have not been very successful. A development with decreasing use of imprisonment seems to have to rely on either an increased use of fines or an increased use of conditional sentence and probation.

In this article I present an outline of the purposes and justification of punishment. Much of the philosophical discussion of this topic has overlooked the complexity of the issues. It is not understood that the many solutions offered not necessarily provide answers to the same question(s). Even the elementary distinction between the purposes of criminalization and the purposes of sentencing is often overlooked.¹ My own view is that we have enough answers, but too few questions. To solve the problems of justifying punishment we have to combine three different distinctions:

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- (1) the difference between reasons within the penal system and reasons concerning the system as a whole;
- (2) the difference between different levels within the penal system (criminalization — sentencing — execution); and
- (3) the difference between why-questions and how-questions.

Almost nothing will be said about alternatives to custodial sentences. But the discussion is, indeed, of primary relevance for that topic.

I want to argue that it is important to use punishment as an expression of a degree of reprehensibleness (of a crime or a type of crime). If this is true it is easy to see why imprisonment and fines so persistently are used as sanctions: the sentence will always have a quantitative aspect which is associated with a level of reprobation. On the other hand, conditional sentence and probation in our present form admit no expression of various degrees of reprobation. To a certain extent this could be ameliorated by giving the courts the possibility to differentiate periods of supervision and probationary periods. But even so, these sanctions could not really compete with imprisonment as the expression of the same amount of reprobation as a certain period of deprivation of liberty.

2. THE STRUCTURE OF THE PENAL SYSTEM

Legal punishment is suffering or loss imposed, in a detached manner on behalf of the state, upon someone because he has committed an unlawful deed. This general characterization will not do as a definition. What is considered as punishment is in the end a matter of stipulation and tradition in different jurisdictions. (In Swedish law, fines and imprisonment are called "penalties" or "punishment", probation and conditional sentence are called "other penal sanctions". I will stick to this terminology.)

A penalty ensues upon a crime. What is a crime depends on what is criminalized. The criminalization logically creates the possibility to commit a crime and it contains a general threat: if anyone does X, he will suffer.

A penalty is administered when someone has committed a crime. It must in the individual case be established that a certain person has done something unlawful. An administered penalty realizes the general threat: the threat was not empty words. But sentencing is not enough; the sentence must also be executed.

So we find a structure of three levels: criminalization and threatened punishment — adjudication of punishment — execution of punishment. In modern criminal justice systems different authorities are responsible

for different levels: legislators — courts — prison administration and related authorities.

Here, we have no reason to care about the historical development of the criminal law. It is e.g. primarily the courts that have developed doctrines on what the general threat of punishment should be like. But that must not prevent us from locating them on the right level, on the level of criminalization.

What authority is responsible for a certain level is also irrelevant. We must keep the levels apart, even if there were only one authority, legislating, adjudicating and executing sentences, simply because we have to do with three different kinds of action.

To threaten with, adjudicate and execute punishment are acts performed by physical or "fictitious" (legal) persons acting in the roles of legislators, judges and correctional administrators. If we ask *why* someone performs such an act, it is, of course, always possible to find individual explanations varying from case to case and from person to person. But what interests us here is the *schematic (institutionalized)* answer: the answer that is, so to say, built into the role of the actor within the penal system. In our countries, today, the answers are fairly obvious:

Criminalization: to suppress certain types of action or omission (general prevention)²;

Sentence: because the person has committed a crime (retribution);

Execution: because the person has been sentenced to undergo punishment.

We see immediately the role played by the idea of general prevention within the penal system. It comes in on the level of criminalization. The very point of threatening with punishment would be lost if one did not presuppose that the threat has some preventive effect. How much preventive effect it has is immaterial, as long as the system, as a whole or in part, has some preventive effect.³ A finding that "general prevention does not seem to work so well" might be interesting, but it could never constitute a reason for constructing the penal system in a way that gives other utilitarian considerations (e.g. special prevention) the prime role. If one has a penal system of the kind we have had in Europe for almost a couple of centuries — as long as the principle of legality has been respected — then it is impossible to "abolish" general prevention as a basic idea. It is conceptually built into the system since the basis of the system is the conditional general threat of punishment. General prevention is inextricably connected with seriously meant criminalization.

We can also see how retribution fits in. When a penalty is imposed, it must have been established that a certain person has committed a crime:

this is, in principle, enough to justify the sentence. But this means that one evil (the crime) is met by another evil (the penalty). Such a retribution is not at all peculiar: it is prescribed by the criminal provision. Within the frame of the criminal provision, the relation between crime and punishment is conceptual. The system is designed to make adjudication entail retribution. A judge might want to escape with saying that he sentences someone to be punished because he has a duty to obey the law. This explanation is all right as far as it takes us, but it does not take us far enough: in fact, the law enjoins retribution at least in a general sense of the word. Correspondingly, it is unavoidable that execution of punishment entails retribution — but not retribution beyond the one inherent in the imposed penalty.

It is of utmost importance to be clear about on which level one moves. Theories of retribution have little success when they are adduced on the level of criminalization. I think it can safely be said that also the most sophisticated attempts to provide a prelegal link between deed and penalty have failed. It cannot be established that a wrongdoer as such *deserves* punishment. A wrongdoer might deserve censure or blame. But that is quite different from deserving punishment. Blame does not entail suffering or loss. Retribution can do as a reason for criminalization only if a "higher" criminalization is presupposed, be it one of a god or of "the law of nature". Personally, I find the latter suppositions implausible.

Can general prevention be an appropriate sentencing purpose? Not for a particular sentence in a particular case. Each individual sentence is only one among thousands, and has no general preventive effect per se. Reference to general prevention, therefore, must refer not to particular sentences; at most, it might be a reason for setting a *policy* of imposing a certain level of severity upon cases of a certain type. (Whether this purpose is morally appropriate is a matter which I touch upon in the next section. See p. 110.) A certain general preventive effect can be ascribed to the totality of sentences, because it reveals the real nature of the general threat of punishment. To administer a so-called exemplary sentence, i.e. to punish more severely than usual, is sensible only as a signal of a change in sentencing policy.

3. THE DESIGN OF THE PENAL SYSTEM

If the questions *why* are not very difficult to answer, it is another story with the questions *how*: How should the legislator criminalize? How should the judge sentence? How should punishment be executed?

The historical development of the institution of punishment is closely connected with the activities of the courts. This could be one reason why

the question "How should we punish?" often has been taken to be identical with the question, how the judge should treat the individual who has just been proven guilty of a crime. Since we expect the judge to act reasonably, the gate is opened for proposing different theories of special prevention: this person is going to be punished and is it not reasonable to determine the amount of punishment so that the sanction contributes to preventing that the offender commits new crimes? Several methods are available. One is to prevent repeated criminality physically, e.g. by incarceration or capital punishment. Another is to frighten the offender, impress upon him that the legal threat was seriously meant. A third method is to change his personality or circumstances of life in such a way that he no longer wants or needs to commit new crimes. We recognize the ideas of incapacitation, special deterrence and rehabilitation.

But we must not forget that the act of the judge entails retribution. The amount of retribution should thus be determined by the need for incapacitation, chastisement, or care, treatment or some other rehabilitative measure. If we look at imprisonment we find that it is in principle feasible to adjust the length of the prison term to the realization of any one of these purposes. With fines one can deter, and maybe sometimes incapacitate, but hardly cure. This might make us suspect that maybe it is not at all necessary to try to realize purposes connected with the personality and situation of the individual offender. But so far in the discussion we have not yet found another basis for determining the amount of punishment. I said earlier that it is not fruitful to argue, on the level of criminalization, that a certain type of action in itself deserves punishment. For similar reasons, it is not fruitful to argue, on the level of sentencing, that a certain action in itself warrants a certain amount of punishment.

Let us move to the level of criminalization. It would be bizarre to propose that the general threat of punishment should be modelled according to the need for incapacitation, special deterrence or rehabilitation. Reasoning about special prevention presupposes that offenders are identified. But the very point of criminalization is to make people abstain from doing what is criminalized. It is thus contrary to the aims of criminalization to have people identified as criminals, and in any case, it is impossible to know in advance what types of person will commit what types of crime. The relation between levels and theories of prevention can be illustrated in the following way:

	GENERAL PREVENTION	SPECIAL PREVENTION
CRIMINALIZATION	Built into the legal threat of punishment	(Contributes to form people's perception of the nature of the legal threat)
SENTENCE	(Each sentence helps to make the legal threat to punish credible)	Proposes possible methods to determine how much to punish (= the amount of retribution)

On the level of criminalization, the following questions are the most important, when we want to decide how the legal threat of punishment is to be modelled:

- (1) What types of action or omission should be criminalized?
- (2) Against whom should the legal threat be directed?
- (3) Should the threat be differentiated, and if so, how?

The first question will not be dealt with here. It has little to do with the basic features of the penal system.

The second question could be answered in many ways. One main alternative is to threaten every human being, including small children and lunatics. Anyone who has committed an unlawful deed can then be punished. Another main alternative is to restrict the threat to persons who are — generally and in the individual case — morally responsible for their deeds. Those who do not have capacity or opportunity to conform to the law are thus excluded.⁴

If the first part of the third question is answered affirmatively — the threat should be differentiated — we have at least three models to consider.

- (a) The severity of the prescribed penalties should be related to the need for general deterrence (or prevention) by the type of crime in question. This model is not to be taken seriously, for the simple reason that a type of crime is created by legislators. Since there are no natural borders between types of crime and the number of types of crime that cover a certain area of conduct is arbitrary, it is possible to create at one's pleasure certain "needs" of a certain level of punishment.

- (b) The severity of the prescribed penalties should be related to qualities such as the offender's sex, age or pigmentation. One such factor — status in the criminal record — will be touched upon in section 5. below.
- (c) The severity of the prescribed penalties should be related to the importance of the value or interest that is infringed by the deed. There is no doubt that this model is practicable, even if one has to restrict oneself to fairly unsophisticated rankings and gradings. In fact, I do not know of any modern criminal code that does not rely on it to some extent. In what follows I assume that this model is the main alternative to letting the legal threat be undifferentiated.

What happens on the level of criminalization is connected with what happens on the level of sentencing, and vice versa. This makes the picture more obscure. The judge is bound by the legislation. (The sometimes discussed problem, whether a judge could sentence an innocent person for reasons of general prevention, reflects fundamental confusion.) The judge's actions can also be influenced by what he knows happen on the level of execution. The regulation of parole can affect the amount of punishment adjudicated, irrespective of what kind of sentencing theory the judge accepts. The same is the case with the conditions inside the prisons.

The opinion of the public on the "dangerousness" of the legislative threat is affected by what people know or think they know about risks of detection, the courts' sentencing policy and what happens inside a prison.

To keep the levels apart becomes tricky when we look at what the legislators do. When an act or an omission has been criminalized the legislators could leave to the courts and executing authorities to act as rationally as possible. But in modern societies they regulate sentencing and execution and restrict the scope of action for judges and executing authorities. But this does not mean that we do not have to care about the levels, because now everything is regulated by law, i.e. on one level, the legislative level of criminalization. The fact that the legislators answer e.g. questions concerning what is rational or reasonable to do in sentencing, does not, of course, mean that the questions have been transformed into questions concerning what is rational or reasonable to do in the initial legislative function of criminalization. — Space does not allow that I say something about different models for execution of punishment. Not only the ideas of special prevention, but also many other considerations are relevant.

4. THE PENAL SYSTEM AS A WHOLE

One reason why the legislators should regulate sentencing and execution is that it might be necessary if one wants to make the system coherent. But legislative measures do not guarantee coherence. The shape of a penal system is the result of a historical development. Few law reforms concern the totality of the system. We have, in fact, little reason to expect the system to express one coherent policy or general view.

On the different levels, we meet questions concerning what someone, acting in a certain role, in principle should do. If we look at the system as a whole, the corresponding questions will be:

- (1) Should we keep a penal system and if so, why? (Normally we only have to give reasons for a change, and not for not making a change — and whether to bring a penal system into use is not our problem.)
- (2) Should the system be made more coherent and if so, how?

The first question is seldom taken seriously. Even if one may doubt that a penal system is more than a barely adequate response to social problems, it seems to be practically impossible to find an alternative that hasn't even greater disadvantages. To direct people's behaviour by threat of punishment is a "method of government" that is seen as necessary for the preservation of the state, protection of the public and securing the citizens a fairly decent life. (Another thing is that there may be reason to restrict the operation of the system.)

The second question is more controversial. If we look at the form of modern penal codes, we everywhere find that the threat of punishment in principle (1) is aimed at persons who are judged to be morally responsible for their unlawful deeds; and (2) is differentiated so that the penal provisions express a valuation of the (relative) reprehensibility of the type of deed in question (abstract penal value).

This means that the threat of punishment is not only a conditional threat of a painful sanction. It is also an official expression of *how* negatively different kinds of action or omission are judged. It also follows that anyone who commits a crime may be blamed (since he is morally responsible for the crime). The message of the criminalization reveals itself as graded reprobation of criminals. We might here speak of the symbolic function of the criminalization — a function that is secondary to the function of general prevention, but still essential.

This form of the penal system creates a possibility of tension. The need for general prevention is always a sufficient reason for a criminalization. Assume that we can show that a certain criminalization has no preventive effect at all, but that there is no reason to retract the official reprobation of that type of act. Should we decriminalize or not? I think it

is a common reaction to want to keep the criminalization — there is still a "need" to express reprobation. It is much more doubtful whether one should criminalize a type of act, when one knows that the criminalization will have no utilitarian pay-offs and will only serve as an expression of official reprobation.⁵ Again we encounter the asymmetry between reasons for changing and reasons for not changing.

Now, a rational judge could reason as follows: "The message from the legislation is that different deeds have a different penal value (i.e. differ in degree of reprehensibility). Since all criminals are morally responsible for their deeds, they are worthy of blame. Different expressions of blame can be graded and so can punishment. So why shouldn't the sentence be an expression of graded blame?" Yes, why not? The amount of retribution will then show the degree of reprehensibility of the concrete crime, and this depends in part on how culpable the offender was (i.e. we must assess his reasons for doing what he did from the moral point of view). Now we have an alternative to the theories of special prevention, viz. the idea the penalty (retribution) should be proportional to the seriousness of the crime (concrete penal value). This doctrine is not without problems, but they are not insurmountable.⁶ Here, I only add that criteria for judging the seriousness of a concrete crime must not be directly related to the indignation some persons experience, but much more "objective". (Neither will I say anything about the reasons why we sometimes punish people less than they deserve — their "worthiness of punishment" may be less than what would be appropriate if only the seriousness of the crime were taken into consideration. Examples of relevant factors are "unfair" cumulation of sanctions, "natural punishment", bad health, age and voluntary correction.)

In this way both the sentence and the general threat of punishment will show, not only *that* the deed is reprehensible, but also *how* reprehensible it is. If considerations of special prevention are decisive, the sentence could express only *that* the deed is reprehensible, and this would create a tension between the levels. Why should the general threat of punishment be differentiated so as to express a degree of reprehensibility, and the sentence not? (The fact that the legislative maxima will restrict the distribution of punishment cannot ameliorate the situation and indeed underlines that the system speaks with two tongues.)

Let us instead take our starting point in ideas of special prevention on the level of sentencing. If we make them decisive for the form of the general threat of punishment, the only coherent solution seems to be to make the general threat undifferentiated. The criminalization will still mean that some deeds are reprehensible and that some persons who

perform them are blameworthy. Also the sentence will express reprobation. But in both cases what is expressed is only *that*, and not *how much*.

Another solution could be to keep a general threat, differentiated with respect to harmfulness (penal value), but abolish culpability as a prerequisite for punishment. This will deprive us of the possibility to blame the offender. And in such a situation there seems to be little interest of being able to express how negatively a deed is valued, neither on the level of criminalization nor — especially — on the sentencing level. The fact that this alternative has some historical importance doesn't change this judgment. Punishment without guilt is a remainder of antiquated moral doctrines or barbaric criminal justice systems.

A further step could be taken by abolishing both differentiation with respect to harmfulness and culpability as a crime prerequisite. On the level of criminalization we get a threat aimed at all persons, and on the level of sentencing liberty to do what is judged best to discourage the offender from future offences. But such a system is so tyrannical and sacrifices people so arbitrarily that it wouldn't be tolerated for long. A possible development could be a restriction to persons who are "dangerous" or "habitual offenders". Anyhow, it would not be especially important any more to announce in advance what is prohibited. A serious conditional threat can only be aimed at persons capable of controlling (monitoring) their behaviour. The threat is pointless, unless the addressee can influence whether it is realized or not. In any case, the threat will be more than a threat, namely oppression. (The distinction between a criminal and a dangerous lunatic would probably disappear.) Such a system shows such lack of respect for human beings that no more needs to be said to remove it from our discussion.

When unacceptable alternatives have been removed and some things have been simplified, our problematics can be summarized in this figure:

	WHY?	HOW?
CRIMINALIZATION	General prevention	General threat aimed at persons who are morally responsible for their deeds
		----- (a) Differentiation with respect to the importance of the infringed value(s) (abstract penal value) (b) no differentiation
SENTENCE	Retribution	(a) in proportion to the seriousness of the concrete crime committed (concrete penal value) (b) special prevention

THE PENAL SYSTEM AS A WHOLE	Necessary for maintaining social order and personal safety	Offenders are blameworthy
		----- (a)(a) (a)(b) (b)(a) (b)(b)

Our present task is to select the most reasonable of the alternatives (a)(a), (a)(b), (b)(a) and (b)(b). I have already more or less accepted (a)(a), but something must be said against the other solutions.

The easiest one to handle is alternative (b)(a): the combination of an undifferentiated general threat of punishment and sentencing in proportion to the seriousness of the concrete crime. It is not obviously incoherent, but it means that the legislator abstains from taking a stand on ordinal proportionality (the relative seriousness of different crime types). The criminalization does not indicate anything about the degree of reprehensibleness of different offences. This is in itself a weakness, but it also reveals an unwanted distribution of power: the legislators place too much in the hands of the judges (the only choice left to the legislators

would be the choice of the general maximum: capital punishment, imprisonment for life or, say, imprisonment for 20 years).

If we next compare (a)(a) with (b)(b), our main problem is to decide whether we want to express, both *that* a type of offence or a concrete offence is reprehensible (and the offender blameworthy) and *how* reprehensible it is, or express only *that* it is reprehensible. Of course, we must also investigate whether ideas of special prevention have such plausibility — from a utilitarian or from a moral point of view — that they can provide sufficient reason for having an undifferentiated general threat. Personally, I am convinced that such a system as (b)(b) would be an invitation to arbitrary sentencing. But I don't think it is necessary to substantiate this view to be able to remove (b)(b) from serious discussion. The didactic advantages of using the (a) variant on the level of criminalization are obviously so great that using an undifferentiated general threat simply isn't a viable alternative. So the two main alternatives are (a)(a) and (a)(b).

I believe that (a)(b) can be repudiated for reasons of principle. It is not necessary to take a stand on whether ideas of special prevention are ethically tolerable or whether special prevention works, because the combination of a general threat, differentiated with respect to the reprehensibleness of the offence, and sentencing in accordance with ideas of special prevention, simply is incoherent. The message of the criminalization is, if not always counteracted, at least opposed. Someone might argue that life is full of compromises, so why make an affair of an incoherence within the penal system? A short answer is that there is a difference between necessary and unnecessary compromises. To let the legislator and the judge speak different languages is not necessarily intolerable, but pretty soon the law will lose in credibility. It is therefore satisfying to notice that in Sweden the (a)-variant has — also when theories of rehabilitation were at the peak of popularity — dominated sentencing as far as penalties (in the strict sense) are involved: ideas of special prevention have had restricted or no impact on the length of prison terms and the number of day-fines. This couldn't be said about, e.g., U.S.A.

Some say, that since it is not possible to determine exactly how much a crime deserves as penalty — which is true — we should fall back on considerations of special prevention to help us determine the amount of punishment within the range indicated by the principle of desert.⁷ Some also seem to want to defend random distribution of punishment within this range. The argument is not convincing. It conflates absolute and relative (cardinal and ordinal) proportionality. We can agree that there is no telling whether a specific crime is worth, say, 6 or 7 or 8 years of

imprisonment. But whatever term we enjoin — and for humanitarian reasons the most lenient one should be chosen — all who deserve the same penalty should have the same penalty. One should not give some 6, others 7, and still others 8 years of imprisonment for offences with approximately the same degree of reprehensibleness. The design of the penal system makes it unavoidable that the enjoined amount of punishment implies an expression of blame. And no one could believe that a sentence of 6 years expresses the same amount of blame as a sentence of 8 years, i.e. that in this connection 6 is equivalent to 8.

(A last defence for the solution (a)(b) is that one wants to divert the criminality from serious to less serious. This is a very weak argument. We know little or nothing about the generally preventive effects of differentiated maxima. And the argument presupposes that the offender in advance knows what amount of punishment is due to him from the special prevention point of view, that he knows what the maximum penalties are and that the penalty that is appropriate from the special prevention point of view exceeds the prescribed maximum for one type of offence, but not for another.)

The upshot of the discussion is that if we want to have a coherent penal system, considerations of special prevention should have no relevance when the court determines the appropriate amount of punishment. The seriousness of the concrete offence should be the decisive factor — a reduction could possibly be prompted by reasons of "equity". — Another question is whether considerations of special prevention are relevant on the level of execution of a sentence of imprisonment. The law threatens with deprivation of liberty, the court enjoins a certain amount thereof, and execution of this implies a corresponding actual loss of liberty, but not that the time spent in prison should be spent for no good purpose. Parole and deduction for good behaviour are, however, problematic institutions, at least if release is not obligatory.

5. FROM A SYSTEM OF PENALTIES TO A SYSTEM OF PENAL SANCTIONS

What I have said implies that indeterminate deprivation of liberty must not be used as a penal sanction. But what about probation and conditional (or suspended) sentence as alternatives to penalties (in the strict sense used here)? If we look back at the history of these sanctions, there is no doubt that they were adopted because theories of special prevention were found convincing. But one can keep something for other reasons than those which made one get it. The use of such sanctions can

be seen as a further step in the series: the police abstaining from reporting an offence — the prosecutor foregoing prosecution — prosecutorial discretion dependent on the type of offence — the court's complete discharge (although the offender is convicted). A general threat of punishment may be credible, even if it is not always literally realized whenever it could be. We can afford to show a certain amount of tolerance, a certain understanding for human frailty. An offender could be given one or more chances to show that what happened was uncharacteristic, before the threat is realized with full strength. (If the offence is really serious — has a high penal value, absolutely or relatively — such tolerance is not warranted.) After it has become common knowledge that the negative effects of imprisonment seldom limit themselves to the deprivation of liberty and that it is unrealistic to hope for positive effects, we have a further reason to use a less severe sanction than imprisonment the first time or times. A standardized leniency could threaten the generally preventive effect of the criminalization, although we have no evidence for this. Anyhow, unlike sentencing based on ideas of special prevention, such leniency doesn't blatantly oppose the message of the criminalization.

For similar reasons recidivism is relevant in sentencing, but only negatively.⁸ When the offender gets the penalty he deserves, prior criminality drops out of the picture. To go on increasing the penalty for each new crime, might be justified from the point of view of special prevention. But then we stumble back into the incoherence within the penal system which I mentioned earlier: it is unavoidable that the sentence expresses a certain amount of blame. And I have seen no convincing explanation of why the fact that the offender has been sentenced before makes the present offence more serious. If it really does, then it would be more decent to make "demonstrated disrespect for the law" a crime *sui generis*.

Further, it can be questioned whether a practice to repeatedly raise the penalty when an offender returns to crime has anything to do with special prevention. Is there any genuine investigation conducted in order to find out what is "needed" to incapacitate, chastise or rehabilitate the offender? If all that happens is that the penalty is raised in a standardized way, the kind of prevention involved is not special prevention, but general prevention. The general threat of punishment is differentiated, not only with respect to the seriousness of the crime, but also with respect to the citizen's criminal record. The severity of the threat varies with different groups in the society.⁹ Such a differentiation can be combined with others and also with no other. It must be admitted that the system is coherent, but its design is hard to accept. The conscious

policy is to rely — to some extent — on stigmatization and inequality before the law. There is no reason to believe that such a design is necessary for the protection of the society and the safety of the individual.

6. POSSIBLE FORMS OF DEVELOPMENT

Despite the widely spread insight that penal systems are primitive forms of government and that they cause human tragedies and vast suffering, there is no decrease in the popularity of the criminal law, neither nationally nor internationally. Preventive measures can be crudely divided into physical and psychical, and general and individual. To use threat of punishment as a device of government is to use general psychical measures. Such are certainly both the least efficient and the least expensive. Efficient individual measures — be they physical or psychical — are so expensive and invade the personal integrity to such an extent that they can be used only in a few areas. General physical crime preventive measures have recently become more important, but phantasy, care and financial resources are scarce.

The penal system is indeed antiquated and overburdened. But it has a strength: it respects some elementary moral demands. It is important to make sure that this value isn't lost through illusory reforms. The criminal law can be abolished by abolishing the word "punishment". By this we would gain nothing, but we could loose the association with guilt and thus with ethical appreciation. The criminal law can be abolished by abolishing the characteristic that makes it different from other coercive intervention, i.e. by consciously removing this ethical assessment of the offender. Could any one reasonably want such a development? The criminal law can be abolished by revolution: the present legislation is abolished and nothing replaces it. No responsible politicians would dare to do this. So criminal law could hardly be just "abolished". It is another matter that there might be good reason to counteract its increased use and to promote the use of other methods of social control. Here we might foster a dream of a "revisionistic" abolishment. The Swedish experiences of replacing penalties and other penal sanctions with administratively handled punitive economic sanctions do not occasion optimism: it is of little service to the citizens to have the label "fines" replaced by the label "charge" at the price of decreased legal security.

ADDITION (1988)

It might be illuminating to enlarge a part of the figure on p. 115 above, viz. the "box" which deals with CRIMINALIZATION — HOW? The added details show the different ways of differentiating the general threat of punishment, and — more importantly — how the distinction between justification and excuse, elucidated in essay I. above, works on the level of criminalization.

HOW?

What acts/omissions are worthy of criminalization?
Balancing of values/JUSTIFICATIONS

At whom should the threat be directed?

All persons can be punished

Only culpable
(blameworthy)
persons can be
punished/EXCUSES

Differentiated threat in relation to

Undifferentiated
threat

Need of
suppression

Individual
characteristic(s)

Importance of
infringed
value(s)
(abstract
penal value)

NOTES

¹ In later decades, however, an apparent improvement has occurred, thanks to H.L.A. Hart's influential essays on penal philosophy (*Punishment and Responsibility*, Oxford 1968, especially chs. 1, 7 and 9).

Hart emphasizes the distinction between "General Justifying Aim" and "Distribution of Punishment". He argues that the general justifying aim can be explained with reference to utilitarian considerations (general prevention), notwithstanding that punishment is distributed according to the offender's deserts (retribution). But it is hard to believe that the idea of general prevention could fully justify the existence of a penal system of the kind we are familiar with. And the relation between the purposes of criminalization and the justification of a penal system remains unexplained.

² It should be mentioned that general prevention is not identical with general deterrence; it has also to do with people's "internalization" of the norms of the criminal law.

³ See pp. 112-113 below concerning a conflict between the function of general prevention and the "symbolic" function of punishment.

⁴ See pp. 40-42 above (the principle of conformity).

⁵ Especially in Finland there has been a discussion of the advantages of spreading the criminalizations and penalties across all social classes. This might be one reason for keeping — and maybe also for introducing — an ineffective criminalization. See e.g. Inkeri Anttila & Patrik Törnudd, *Kriminologi i ett kriminalpolitiskt perspektiv*, Stockholm 1973, pp. 138-140.

⁶ See e.g. Andrew von Hirsch, "Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale", *Journal of Criminal Law and Criminology*, vol. 74, 1983, pp. 209-248.

⁷ See e.g. Norval Morris, *Madness and the Criminal Law*, Chicago & London 1983, pp. 179-209.

⁸ See Andrew von Hirsch "Desert and Previous Convictions in Sentencing", *Minnesota Law Review*, vol. 65, 1981, pp. 591-634.

⁹ See Franklin E. Zimring & Gordon J. Hawkins, *Deterrence*, Chicago 1973, p. 74.

VI.

DISPARITY IN SENTENCING

SOME GENERAL OBSERVATIONS

I.

1. A thorough discussion of disparity in sentencing should address the following questions:

- (1) What is disparity?
- (2) What is wrong with disparity?
- (3) Does disparity exist?
- (4) How is disparity to be explained?
- (5) How is disparity to be reduced?

Part I consists of the Introductory Report and Part II of my oral presentation of this report to the 8th Criminological Colloquium of the Council of Europe, Strasbourg, France, November 1987, where I acted as general rapporteur. The topic of the colloquium was "Disparities in sentencing: causes and solutions" and the terms of reference were as follows:

"To consider disparities in sentencing, particularly the use of unconditional imprisonment, for a limited number of well-defined crimes:

- a. Sentencing and sentencing disparities in several member states.
- b. The explanation from a criminological and socio-psychological point of view for these differences.
- c. Ways and means to reduce the differences which cannot be explained either by the person of the accused or the case involved: what has already been done in several member states. What instruments and techniques are available in order to obtain further harmonisation."

With some hesitation I have chosen to keep the original text of the report, despite its "parochialism". The other reports referred to are:

Andrew Ashworth: "Techniques for Reducing Subjective Disparity in Sentencing"; Marc Robert: "Inequalities in Sentencing"; and Petrus C. van Duyne: "Backgrounds of Disparity in the Administration of Criminal Law".

The complete proceedings of the colloquium, including i.a. the reports mentioned and my general report, will be published by the Council of Europe in 1988. I am greatly indebted to the reporters, Dr. Andrew Ashworth, Mr. Marc Robert and Dr. Petrus van Duyne, the chairman of the colloquium, Professor David Rottman, and Miss Aglaia Tsitsoura, of the Council of Europe, and Professor Andrew von Hirsch for valuable comments and suggestions. I am also indebted to Mr. Erik Harramoes, Director of Legal Affairs, the Council of Europe, for granting permission to publish the report in this collection of essays.

In this introduction to the colloquium the discussion is focused on the first two questions. But also the last question will be dealt with — against the background of one possible answer to the fourth question.

2. DISPARITY means (AN EXAMPLE OF) (UNDESIRED) DIFFERENCE or INEQUALITY. Disparity in sentencing is a lack of formal justice. Similar cases are not treated alike and/or different cases are not treated differently.

The terms of reference suggest that disparity in sentencing has to do with differences which cannot be explained either by the person of the accused or the case involved. This seems to imply that disparity exists e.g. when the sentence is due to

— chance;

— the judge's personality, emotional state, idiosyncratic views, etc.;

— popular sentiment, mass media propaganda, wishes entertained by victims and other parties, and so on.

Such a distinction between disparate and nondisparate sentences is, however, only apparent. There is no real difference between factors which do and do not relate to the person of the accused or the case involved. Suppose that a certain judge always adds one month of imprisonment when the offender exhibits a disrespectful attitude in court. This might seem inappropriate as an emotional response by the judge. But one could equally well explain the judge's practice as based on "the person of the accused" (i.e. the accused's lack of deference for authority).

So we have to be a little more careful in spelling out the distinction between wanted and unwanted differences.

3. Since disparity is a notion of formal justice, it presupposes a distinction between relevant and irrelevant factors. This distinction requires substantive criteria about what is relevant and irrelevant. What is lacking in most discussions of "disparity" is specification of these criteria. Often, "disparity" is mixed up with "(unexplained) variation", which can be very confusing.

The idea of disparity suggested by the terms of reference is related to a global look at what is relevant and irrelevant. It is quite clear that in no jurisdiction of member states things such as the judge's personality or idiosyncracies, external pressure or popular sentiment, or pure chance, are relevant for deciding the sentence. Taken as a whole one could say that the legal systems of the member states make characteristics of the

crime and its context and the personality and moral quality of the offender decisive for the sentence. But this does not help us at all when we want to explore disparity in any given jurisdiction. For several reasons disparity cannot be related to some common traits of a group of legal systems. One — sufficient — reason is that the sentencing policy of one state may contradict the sentencing policy of another state.

4. Let us call the "right" distribution of sentences in a certain jurisdiction *the ideal sentencing pattern* (= no disparity exists).

Let us next explore, first, the idea that relevance is a function of existing patterns. Such an *empirical* stance to the disparity problem would involve the following steps:

- (a) analyse prevailing sentencing habits with statistical methods;
- (b) find out what factors best explain the existing pattern;
- (c) declare decisions not in harmony with this general pattern as exhibiting disparities;
- (d) reduce disparity through efforts to make courts adjust their decisions to the general pattern revealed by social scientists.

This model, much favoured by social scientists, makes fact into norm, without mediation. What is, is right. Whether the sentencing pattern reflects a considered policy or whether the revealed policy is coherent or warranted is totally irrelevant. Still, remaining differences would, probably, be attributable largely either to "the person of the accused or the case involved".

Would anything be wrong with this kind of disparity? An answer to this question cannot be given without a value judgement. But if the notion of disparity doesn't recognize policy — i.e. material justice — as relevant, there is not much left on which to base a value judgment.

Disparity reduction — in the sense just discussed — is nothing but increased consistency in relation to a pattern that reflects past sentencing habits. Increased consistency may, however, not lead to increased foreseeability, and may, therefore, not be a merit at all. When the ideal sentencing pattern is provided by social science, the relevant factors are often such that lie outside the control of the citizen. And even if they are under the citizen's control, he or she will almost certainly lack the needed information, because the relevant factors have no connection with what people think is or should be relevant in sentencing — and few have access to and understand the principles and rules of calculation that are to be used to place the decision into the ideal sentencing pattern.

So, increased consistency cannot be relied upon to provide increased foreseeability. But worse: the consistent pattern may be objectionable,

irrational, unfounded; i.e. if we do recognize material justice (policy) there may be nothing wrong with "disparity". If anything is wrong will depend on what policy is accepted, what values are (or should be) pursued by the state in sentencing criminals.

5. We must conclude that it is not very helpful for a discussion of disparity in sentencing to take an exclusively empirical stance to the ideal pattern of sentencing. Empirical analyses of existing patterns may be interesting and helpful, but are neither sufficient nor necessary for establishing a rational sentencing pattern. If sentencing is to be rational it must be based on relevant values — and consistency is in itself no relevant value.

We have to take a *normative* stance to the ideal pattern of sentencing. Let us begin with a quick look at the structure of a modern criminal justice system.

We can easily detect three levels: criminalization, sentencing, and execution of sentences. Different authorities have different tasks. Criminalization is an act performed by the legislator and it consists of a general threat: if you do X, you will be punished. The penalty scales attached to the criminalization reveal — in their prescribed maximum and minimum penalties — a seriousness ranking of the described classes of acts or omissions. All sentencing of caught offenders and all execution of sentences occur against this background of criminalization. The point of sentencing is to render the general threat some credibility (i.e. the threat must be realized with a frequency and in a way that prevent the law to appear to be empty words).

If we ask *why* someone should be sentenced the answer is radically different from the answer to the question *why* a class of acts is criminalized. The last answer must — in the Western world — evoke some reference to general prevention: people in general must be deterred or taught to abstain from committing such acts. But the first answer is complete if it refers to the fact that there is a law requiring that the court sentences the offender.

A sentencing policy is not an answer to the question *why* an offender should be punished. It is an answer to the question *how much* an offender should be punished. Today we have to take seriously five different kinds of sentencing policy:

- (1) individual deterrence;
- (2) incapacitation;
- (3) (re)habilitation, cure, and so on;
- (4) just desert (seriousness of the crime, including the culpability of the offender, and similar judgments); and

(5) general prevention.

(General prevention is especially tricky to handle on the sentencing level. A sentencing argument evoking general prevention might be just desert in disguise. It might also confuse the — negligible — effect of the individual sentence on the public with the effect on the public of a certain level of punishment for a certain type of acts — the individual sentence is then exemplifying a repression policy. Finally, class of acts-related calculation of appropriate levels of repression is inherently arbitrary since there is no natural division of classes of criminal acts.)

6. Consider a penal system with *no penal policy*! It contains criminalizations, with attached penalty scales, and a general mandat for the courts to sentence within the prescribed ranges, but no sentencing principles. No criterion of rightness is thus available and there can be no (normative) disparity.

7. In many countries we find a penal system with an *incoherent penal policy*. The three main types of policy considerations — general prevention, individual prevention and just desert — are obviously conflicting: one type of consideration may easily result in a sentence drastically different from what another type of consideration would prompt. The same goes for the internal relations of the three main forms of individual prevention — deterrence, incapacitation, and rehabilitation. So, any jurisdiction which relies interchangeably upon two or more of these considerations has an incoherent policy. In fact, it is normal that any one of the mentioned types of policy is seen as sufficient for justifying a sentence. Like cases are then certainly treated differently, but they are also treated alike — in relation to the disjunction of relevant policies. Disparity occurs only when the sentence depends on factors clearly irrelevant according to all of the accepted sentencing policies.

There are several problems with this deplorably common state of affairs. First of all, it is enormously difficult to detect disparity. Almost any type of factor could have *some* relevance according to *one* of the alternative sentencing policies. It wouldn't be hard to justify the relevance of e.g., sex, age, employment, personal attitude, or whatever else as bearing on one or more of the varying possible sentencing aims.

Secondly, when several conflicting policies are pursued simultaneously, the sentencing practice may frustrate them all. The practice may, for example, permit too much reliance on non-culpability factors to satisfy desert; and yet fail to use special-preventive factors systematically enough to have any chance of success as a preventive strategy. When the

penal policies are in conflict as they are, doing a little of each may achieve no purpose at all.

Thirdly, when conflicting goals are simultaneously pursued, the citizens will almost certainly experience the system as exhibiting disparity. People presuppose that the penal system should be coherent; probably also that the sentences should reflect some common sense version of just desert: the severity of the sentence should reflect the seriousness of the crime. When offenders who have committed comparable criminal acts receive substantially different punishments, this tends to be seen as disparity by ordinary men and women, even if there are some identifiable differences in the persons of the accused.

In an incoherent system, therefore, "disparity" is not the real problem: it is the system itself. Unless the system is redesigned, it will not even be possible to identify any interesting cases of disparity in the normative sense.

8. A system with a *coherent penal policy* can be brought about in many ways:

- (a) only one type of consideration — e.g. incapacitation or just desert — is relevant; (this might involve some decisions on the equivalence of penalties of different types);
- (b) different types of policy considerations have different areas of application, e.g.
 - different types of crimes;
 - different types of penalties;
 - choice of penalty type v. choice of severity within a certain penalty type;
- (c) different types of policy considerations are ranked.

(Ranking in order of importance is not enough to create a coherent system: one policy consideration must be "exhausted" before another comes into play. Here it is to be noted that just desert considerations might exclude the operation of certain other types of considerations at a lower rank, because these other considerations would call for unequal punishment of equally serious and culpable conduct.)

Coherence is no guarantee for efficient operation (lack of policy-frustration) of the penal system. Nor does it make the system warranted. Coherence is necessary for a good system, but never sufficient.

What is wrong with disparity in a coherent system? Disparity is a violation of policy, and provided the policy is warranted no more needs to be said. But this does not in itself make discussion of disparity easier. It might still be very difficult to detect whether the policy is violated.

9. No one can with certainty answer the question whether *disparity exists*, unless he knows what sentencing pattern is the right one and whether a certain sentence deviates from that pattern. So one could take the line of denying that disparity exists: given the present shape of the penal systems (normally they are incoherent) and the fact that no individual and no case is a copy of another one, no two sentences need to be identical. On the other hand, some experiments with different judges sentencing the same offender (although existing only on paper) suggest that there must be disparity, even if it is impossible to tell what the right sentence should be.

The van Duyne report makes it clear that there are striking regional (statistical) differences in sentencing. This report also reveals the actual decision-making of sentencers as surprisingly unsophisticated. There is no doubt that there are significant variations in sentencing and that these make the public uneasy, because the *variations* are not understandable. I want to stress again, however, that such variations are no conclusive evidence of disparity. In a system with no penal policy there cannot be any disparity. In a system with an incoherent penal policy enormous variations are allowed. Of course, one could maintain that the reasoning of the sentencers in such a system occurs with no conscious connection to any of the conflicting policy aims. But to prove disparity one has to prove that sentences are in fact not supported by any of these aims, irrespective of the actual reasoning in the courts: the important thing is whether the sentence is allowed, or objectively warranted, not how it is reached.

10. Were a jurisdiction to adopt a coherent penal policy — that is, an overriding penal aim or ranking of aims — would that eliminate disparity? Not necessarily. We then would — at least in theory — have criteria for what differences in sentencing are appropriate or inappropriate. But the *extent of knowledge* concerning the chosen penal aims or policies would become crucial. The less that is known about how the preferred policies can be achieved, the more difficult it will be to eliminate unwarranted differences.

11. When the policy involved has to do with *general or individual prevention* the sentence is forward-looking and supposed to be based on a prediction of some kind. To make such a prediction *empirical knowledge* of different kinds is needed. It is to be stressed that we are not moving back to an empirical stance to sentencing. An analysis of existing sentencing habits may be a good starting-point for reflection on

the (normatively) ideal sentencing pattern, but not more. What we are now discussing is the need for empirical knowledge depending on a certain policy being adopted.

The last decades have created a crisis for "positivistic" sentencing: there is a growing insight that predictions tend to be based more on guesses than on knowledge and there is little hope that there will be sufficient knowledge available within a foreseeable future. One may question also how well judges are qualified to make predictions and how feasible it is to make such legally-trained persons qualified.

There is some more knowledge on one kind of preventive strategy: incapacitation. But this may not be very helpful either. First, research on incapacitation has to deal with large classes of persons and findings are normally too "weak" to provide sufficient reasons for sentencing a certain individual in a specific way. Second, serious crime is much more difficult to predict than relapse in non-serious crime, and there are ethical and practical problems with using incapacitative measures for "nuisance", but not for "danger". Third, incapacitation presupposes that it is possible to predict when a certain individual will leave his criminal career.

To the extent a jurisdiction relies on preventive sentencing policies, therefore, lack of knowledge of the relevant preventive effects may make disparity extremely difficult to alleviate.

12. The growing interest in a *just desert* model of sentencing is certainly connected with the loss of credibility of "positivistic" sentencing theory. Even if some commentators object to returning to what they despicingly call "retribution", most citizens are much more at ease with a criminal justice system that makes punishment a function of the seriousness of the crime, including the culpability of the offender.

For our purposes, the main difference between "positivistic" and "retributive" sentencing is to be found in the kind of knowledge needed. The second type of sentencing presupposes, apart from fairly easily accessible information about the crime and the offender, *normative knowledge*: knowledge about what is (morally) good and bad, better and worse, and the relative importance of different values and interests. How does this differ from "positivistic" sentencing? Mainly in this respect: the legislator can *provide* the courts with normative knowledge, but not with empirical knowledge. Discussion of what is relevant from a moral point of view and ranking of values and interests can be transformed into legal rules and/or guidelines for sentencing. This can be done in many different ways. (Even such a simple device as to enumerate some aggravating and mitigating circumstances is valuable, because it draws attention to factors that should be object of argumentation in the courts.)

The argument here is that to the extent a just desert perspective is utilized, relevant knowledge can be provided and disparity can effectively be assessed. Nothing of this does in itself justify a just desert theory. The fact that the acceptance of a theory could help identify and reduce disparity is no reason for accepting the theory — unless it can be justified on the merits. One possible defence of a just desert theory of sentencing is that it fits with the message contained in criminalization (that criminal behaviour is reprehensible and that different types of criminal behaviour differ in degree of reprehensibility), and that punishment has to do with blaming and wrongdoing. However, this is not the place to try to settle which conception of sentencing is preferable.

13. The existence of disparity raises questions of the relevance of the *principle of legality* — the rule of law — in sentencing. This principle has today no real importance in the sentencing area, except as to exclude forms of punishment not prescribed. "Crime?" is an either-or question; "Punishment?" is not. For a convicted offender, the fact of being punished has little significance compared to how much punishment he will receive and in what form he will receive it. Increased foreseeability seems to presuppose the creation of detailed legal standards on sentencing. Even if one has selected a particular policy, the question then remains whether such standards should be attempted and what form they should take. This question is addressed in the Ashworth report.

Foreseeability is important. But creating more visible uniformity in sentencing does not necessarily reduce disparity. Even less is, as noted above, increased consistency of value — it implies neither increased foreseeability nor reduced disparity.

For many, the solution of "the disparity problem" lies in promoting foreseeability, by making the reasoning in the sentencing process more uniform. The van Duyne report provides an outline of the psychology of problem solving. The Ashworth report primarily deals with techniques for guiding such problem solving and thereby increasing uniformity — this is why the title of the report contains the expression "subjective disparity".

Promoting foreseeability is better than nothing, but in a system with an incoherent penal policy it does not amount to more than treating the symptoms instead of the disease. The Ashworth report concurs in this judgment and it also makes it clear that "subjective" disparity is not all there is. Thus, e.g. promoting foreseeability — even in a system with a coherent penal policy — may well lead to a kind of disparity that is not "subjective" (sentencer-dependent): Fixed penalty systems or presump-

tive sentencing systems may treat cases as alike although they should be treated differently if all relevant considerations were allowed to be operative.

In short, promoting foreseeability is not necessarily the solution of the disparity problem, but a good solution will certainly promote foreseeability.

14. Lack of knowledge can be a result also of *procedural deficiencies*. Questions that ought to be discussed include:

- What should pretrial reports of different kinds contain?
- How should evidence of facts — and general knowledge — relevant on the sentencing stage be handled at the trial or sentencing hearing?
- To what extent should appeal be possible?
- How and to what extent should the reasons for a sentence be documented and be made known to the offender?

15. Sentencing is one stage among many in the handling of criminal cases. Some critics of efforts to reduce disparity argue that such endeavours are of no use without similar ones undertaken in other areas: prosecutorial discretion must be reduced, as well as e.g. the competence of administrative agencies to grant parole (the so-called erosion on the execution stage must be counteracted). It is sometimes asserted that decreased disparity in sentencing would necessarily lead to increased discretion on other stages. But this does not sound more plausible than the opposite view: that increased control of sentencing will "spill over" into surrounding stages, at least in the form of people getting used to scrutinize the reasons for any disposition.

While it is true that the disparity of *penal sanctions* cannot be fully investigated without consideration of things like prosecutorial powers and parole, the topic of the colloquium is disparity in *sentencing*. The reporters are commendable for having paid attention also to the other stages. Nevertheless, I suggest that these be kept in the background in the discussion. Otherwise we run the risk of moving around in circles without making progress on any point.

16. In rough outline Western penal systems are alike: a core area of custodial sentences, one area devoted to pecuniary punishment, and another comprising different forms of alternative to a custodial sentence (e.g. probation). Any sentence will then involve

(1) a choice of area; and (2) a choice of sanction within an area. For example, a sentence of one year's imprisonment presupposes not only (2) a selection of an appropriate prison term, but also (1) a rejection of other types of sanction as appropriate.

Some attention should be paid to whether (1)-questions or (2)-questions are more important when disparity is discussed. Is the IN-OUT question the main disparity issue?

II.

One of my predecessors in Uppsala, professor Strahl, had a standing examination question: Soon you will start to work in a court. How will you then find out what is the appropriate sentence for an offender? The students, knowing that their professor was a leading international figure in the Social Defence Movement, tried everything about special prevention, and then everything about general prevention, and then whatever other theories they could remember. Everything was wrong. In the end the professor had to provide the right answer: You ask an older colleague!

The moral of this little story is that sentencing is regarded as something very different from application of law in general, and as something much less rational. Traditions, customs, even local practices, keep policies, principles, and rules in the background.

Another striking thing is that criminologists, politicians, and so-called ordinary citizens all regard sentencing as something that really takes no expertise. Everybody is supposed to be able to have not only an opinion, but what is much more: an opinion worthy of consideration, on sentencing questions. In a way this is intriguing, considering all talk about crime prevention: mustn't the revelation of such complex causal connections and tendencies be left to experts? I think that the explanation is not very difficult to find. In most people's mind the criminal justice system is modelled on the parent-child relation. So everyone knows about prevention. Add to this, that the idea of prevention has never erased the idea of justice or fairness as important for sentencing. And surely, everyone is an expert on justice. You just have to consult your feelings, or intuition, or heart, and so on.

In other words, "This is how we do it" and "This is what people think you should do" are taken to be satisfactory answers to the question "What is the best or right thing to do?" This is credible, only if the law of sentencing is radically different from other law. I don't think it is, and if I had the time I should try to tell you why. Sentencing should be guided by coherent policies, principles and rules, arrived at through a process of

rational deliberation. The detection of reasons for and against different solutions is difficult and time-consuming. This can explain but not excuse the refusal to acknowledge the existence of reasons.

Rational reasoning requires conceptual clarity. This colloquium is going to discuss disparities in sentencing. Disparity may be a matter of empirical uncertainty or lack of material justice. In any case, disappointment is involved. Nothing is easier than to erect another Tower of Bable. No fruitful communication will be possible, unless we take care to avoid conceptual confusion. That is why most of my simple introductory report is dedicated to the task of elucidating a concept of disparity.

The starting-point is that "disparity" is a word with negative associations; by definition there is something wrong with disparity. Disparity is not only a kind of difference, or inequality. It is an undesired difference. When it comes to sentencing, the obvious deficiency of a difference is that it is at odds with the accepted sentencing policy. The sentencing policy of a state determines what factors are relevant and irrelevant in reasoning about appropriate sentences for particular offenders.

Disparity is thus a relative concept in the sense that it entails a comparison. So is the concept of variation. A variation exists when a similarity is matched by a difference. A disparity is always a variation, but a variation is not necessarily a disparity. If two persons who have committed theft get different sentences, you have a variation, but not necessarily a disparity, because there may be some policy-relevant factor that is responsible for the difference in sentences. Not even an undesired variation has to be a disparity. If there is something wrong with the sentencing policy, the lack of disparity will in fact entail an undesired variation.

In order to throw some light on this concept of disparity in sentencing, I would like to compare it with some others.

Recently, The Canadian Sentencing Commission released its Report on Sentencing Reform. I find this document admirable in many respects. It represents real progress. But its discussion of disparity is slightly ambiguous. Let me quote some key passages:

Whether disparity in sentences exists depends on one's theory of sentencing. In order to identify which sentences are unwarranted, and in order to do something about disparity, one needs to have a theory about how sentencing *should* take place, and what the *correct* sentence really should be. If one accepts the view that all sentences handed down for a given offence should not be the same, one needs a "theory" or set of principles to determine how the variability in sentences should be governed. Assuming that such a coherent theory were to exist, one could begin to examine

the evidence for unwarranted variation in sentences and the different ways in which unacceptable variation in sentences can appear within the Canadian criminal justice system.¹...

The problem with the current situation is that two judges suggesting different sentences for an identical case might both be "right" (or, for that matter wrong) if one accepts the legitimacy of different priorities being given to different purposes or principles of sentences. Unwarranted variation, then, would appear to be almost inevitable.²...

As stated above, until one has a coherent theory of sentencing, it is impossible to determine whether variation in sentences handed down for a given offence (or a number of different offences) is appropriate. How, then, in the absence of such a theory can one determine whether there is unwarranted variation? The answer is reasonably straightforward: one can look at sentencing practice as well as the perceptions of those who have direct experience with the criminal justice system.³

... The findings that the sentence is closely associated with the particular sentencing philosophy of the judge supports the suggestion made earlier that the primary difficulty with sentencing as it exists at the moment is that there is no consensus on how sentencing should be approached.⁴

What I find slightly objectionable here is the almost unnoticable sliding, first, between disparity as relative to a theory (or policy) of sentencing and disparity as relative to a coherent theory of sentencing, and second, between disparity as impossible to prove, unless there is a coherent theory of sentencing, and disparity as a more or less certain consequence of there being no coherent theory. In short: disparity is taken to be identical with unwarranted variation, and the picture is blurred because the commission doesn't distinguish between different reasons for a variation being unwarranted. Since the commission is primarily interested in creating a coherent system, in the end the problem of disparity (or unwarranted variation) is taken to be identical with the problem of the system being incoherent. This is understandable in the context, but in fact there is no place for a discussion of the impact of relevant and irrelevant factors within an incoherent system.

Hoping to achieve complete comprehension of the distinctions involved, I would like to refer to another discussion. In his well-known work *Principles of Sentencing*, D.A. Thomas mentions a case, Chapman (1975), where two men with substantial criminal records were sentenced for a series of burglaries. One of them got five years' imprisonment, the other

a probation order, although he was older and possibly had a worse record. Thomas comments: "In appropriate circumstances the sentencer may deal with one offender by means of an individualized measure, while following tariff principles in sentencing his co-defendants; as different approaches have been adopted, no question of disparity arises in such a case."⁵ In his book *Consumerist Criminology*, Leslie Wilkins ridicules Thomas's statement. He says: "This seems to say that where the disparity occurs due to disparity between philosophies of sentencing, there is no disparity in the (act of) sentencing!"⁶

The sentencing system of England and Wales is a good example of an incoherent system, and Wilkins's criticism, of course, leaves Thomas untouched, because Wilkins puts all kinds of unwarranted variation in the same bag. To repeat: a variation may be unwarranted because the policy it reflects is unwarranted; a variation may also be unwarranted because it reflects a deviation from policy. The first type of unwarranted variation may be the more serious one, but it is the second one that I call disparity. This choice of terminology may not be altogether happy, but I have preferred it to talking about Disparity I and Disparity II. I should add, and underline, that both types of undesired variation are covered by the terms of reference. If two judges follow different policies, there must be differences in sentences that cannot be *explained* by the particulars of the case or the accused.

In 1983, an American National Research Council Panel released a report on Research on Sentencing. The panel defines "disparity" as "when 'like cases' with respect to case attributes — regardless of their legitimacy — are sentenced differently".⁷ It finds it useful to distinguish four types of disparity: (1) disparity that is only seeming disparity, (2) disparity deliberately introduced as a matter of social policy, (3) inter-jurisdictional disparity, and (4) disparity related to individual judges.⁸

It is obvious that the panel equals disparity and variation. Whether a disparity in this sense is desirable, or not, is always an open question, and the panel is not even willing to see something wrong with different judges pursuing different, though legitimate policies. I conclude that the panel's discussion does not promote conceptual clarity. On the other hand, its evaluation of empirical research is both important and revealing.⁹ The conclusion is that very little is really known about the causes of detected variations.

NOTES

- ¹ *Sentencing Reform: A Canadian Approach*. Report of The Canadian Sentencing Commission. Ottawa 1987, p. 72.
- ² *Op.cit.* p. 73.
- ³ *Op.cit.* p. 74.
- ⁴ *Op.cit.* p. 77.
- ⁵ D.A. Thomas, *Principles of Sentencing*. Second edition. London 1979, p. 65.
- ⁶ L.T. Wilkins, *Consumerist Criminology*. London 1984, pp. 18-19.
- ⁷ *Research on Sentencing: The Search for Reform. Volume I*. Alfred Blumstein, Jacqueline Cohen, Susan E. Martin, and Michael H. Tonry, Editors. Panel on Sentencing Research. National Research Council. Washington, D.C. 1983, p. 72.
- ⁸ *Op.cit.* pp. 74-75.
- ⁹ *Op.cit.* pp. 88-125.

THE ROLE OF THE PROSECUTOR IN SWEDISH LAW

1. BACKGROUND

A public prosecutor with the task to convince a court that someone has committed a crime is unthinkable unless two steps in legal development have taken place. First, the state must claim not only the right to punish but also the right to decide whether something should be done in order to bring a perpetrator to justice. Secondly, the purposes of doing this must be judged to be in principle better served by an accusatorial than by an inquisitorial method, i.e., the courts are no longer responsible for preliminary investigation and the decision to bring a case to trial.

In Sweden the inquisitorial method was very seldom used so that courts *ex officio* took up cases for trial; normally a complaint was lodged by a private person. As early as the 17th century we find crown officials prosecuting and in the 18th century the office of Attorney General was created. (The Attorney General remained the highest prosecutor of the realm up to 1948.) These conditions in fact prevented a rational organization of the state's prosecuting activities until the beginning of this century. But there was no temptation to use the English system in which an advocate is commissioned to prosecute. The Napoleonic system with a hierarchially organized corps of state officials was the ideal.

The present organization is in principle a product of the massive procedural reforms of 1949, when the Code of Procedure of 1734 was replaced by the Code of Procedure of 1942 (the code covers both civil and criminal procedure). But until 1965 the prosecutors were also chiefs of police and the state and the municipalities had a shared responsibility

This lecture has not been previously published. It was read at the Jagellonian University, Krakow, Poland, in October 1980, and revised for a seminar at the University of Edinburgh, Scotland, in October 1985. I have later added a few references to new literature and — prompted by new legislation (1988) — somewhat changed the part dealing with arrest and detention. I have also used the latest statistical figures available. I am indebted to Professor John H. Langbein and Mr. Adrian Lynch for many valuable suggestions.

for their budgets. Since then the public prosecutors form an independent state organ under the Ministry of Justice. General instructions for the prosecutors are issued by the Cabinet.

I do hope that the following survey is understandable for those who are not acquainted with a continental system of criminal justice and criminal procedure. (A few general features of the procedure are presented at the end of section 3.)¹

To avoid misunderstanding, it might be added that according to Swedish legal terminology a "crime" is any offence punishable with a fine or imprisonment; thus offences of a trivial nature are also crimes.

2. ORGANIZATION AND COMPETENCE

The *Chief State Prosecutor* is the supreme prosecutor under the Cabinet; he is also appointed by the Cabinet. He is responsible for, and the leader of, the public prosecutors. In this capacity he supervises the activities of the prosecutors (e.g. through inspections) and gives instructions, information and advice. The Office of the Chief State Prosecutor includes an Assistant Chief State Prosecutor, an Administrative Department, a Supervision Department and three Assistant Prosecutors who are active in criminal litigation. From 1985 the Chief Public Prosecutor has to consult an Advisory Board (six members appointed by the Cabinet) before he makes a decision of greater importance.

On the next level we find the *state prosecutors*, who are also appointed by the Cabinet. These are:

- (1) The first prosecutors in the three biggest cities (Stockholm, Gothenburg and Malmö) and in 13 regions; these are leaders of, and responsible for, the prosecutors within the district.
- (2) One specialized first prosecutor (in Stockholm) who deals with economic and organized crime with the whole nation as a region.
- (3) Additional state prosecutors and district prosecutors attached to the office of a first prosecutor of a region.

In all offices there are assisting prosecutors.

On the third level we find the *district prosecutors*:

- (1) In the 13 regions there are 83 districts with a chief prosecutor in charge. In addition, we there find other district prosecutors and assisting prosecutors.
- (2) In the three biggest cities the organization is different. Under the above-mentioned first prosecutor there is a number of prosecution chambers with a chief prosecutor in charge and in addition a number of chamber prosecutors and assisting prosecutors.

Finally, the Chief State Prosecutor may appoint *special prosecutors* for particular cases.

All in all, the organization includes approximately 1400 persons, of whom a little more than half are lawyers, the other half support personnel.

It takes at least eight years to get started in the career of a public prosecutor. The first step is to pass the LL.M. in one of the three law faculties (Uppsala, Lund, Stockholm); the scheduled time is four years and a half, but most students need at least another year. (Admittance to studies in law is in principle dependent on having passed high school with some success.) The second step is two and a half years of apprenticeship at a district court which gives competence as a judge, which is a legal qualification for higher legal careers including the judiciary and the prosecutorial corps. The third and last step includes taking a special course (nine months) in prosecuting and serving an apprenticeship as a prosecutor. In general, movement from prosecutor to other legal positions is not possible, although it has for some years been possible to move from prosecutor to judge. Service in the Office of the Chief State Prosecutor lies outside the normal career. (Some appointments there as Assistant Prosecutors are in practice reserved for persons in the career of a judge and rank equal to service as "reporter judge" in the Supreme Court.)

The state prosecutors and the district prosecutors are prosecutors at the district courts and the courts of appeal. The Chief State Prosecutor is the prosecutor at the Supreme Court (although he never appears in person, but only through Assistant Prosecutors). This simple picture needs, however, correction in three respects:

— the Chief State Prosecutor is also exclusive prosecutor at the courts of appeal with regard to crimes committed by judges during the exercise of their duties;

— the Chief State Prosecutor may assume an assignment that would otherwise be the responsibility of a subordinate prosecutor (*the principle of devolution*); and

— when a criminal case is appealed to the Supreme Court solely by a private party, the Chief State Prosecutor may assign a subordinate prosecutor to appear on his behalf (*the principle of substitution*).

The relation between state prosecutors and district prosecutors is more complicated. On the one hand there is a relation of subordination: the principles of devolution and substitution apply fully. On the other hand, they have in principle the same kinds of work to do: both appear in the districts courts and the courts of appeal. The division of tasks is

not formal, but guided by vague material criteria (e.g. "especially demanding cases"). I will not go into details in this respect.

In addition to the so-called *general prosecutors* there are a few *exceptional prosecutors*: the Parliamentary Ombudsmen and the Attorney General.²

In what follows, the exceptional prosecutors will be left out of the picture. I will thus speak about the general prosecutors with the Chief State Prosecutor at the top. I will also speak about *the* prosecutor without paying heed to the jurisdiction of different kinds of general prosecutors.³

The crimes defined in the Criminal Code and other statutes can in principle be divided into two kinds:

- crimes falling within the domain of public prosecution; and
- crimes falling outside the domain of public prosecution.

The main problem with this distinction is that the last category is almost empty: only criminal insults against private persons are included. Some other crimes — e.g., most crimes of defamation — fall within the domain of public prosecution, but the harmed person or some other person has equal power to prosecute. Leaving the marginal cases aside we can concentrate on a much more important distinction, namely between

- crimes unconditionally falling within the domain of public prosecution; and
- crimes conditionally falling within the domain of public prosecution.

Thus, at some crimes no prosecution can proceed unless another party makes a formal complaint. Sometimes this complaint must take the form of permission by an authority, e.g., the Cabinet or the Chief State Prosecutor (e.g., in some cases when the crime is committed abroad) or the National Bank (currency crimes). In other cases an accusation by the harmed person is required, although normally some room is left for the prosecutor to prosecute in the absence of an accusation if there are special reasons. (See section 3.) The main practical importance of conditions for public prosecution is that the requirement of accusation keeps out of the machinery of justice many cases of molestation in private places, trespassing and negligent causation of bodily harm or illness.

A condition of a different kind is that the rules on limitations of sanctions are not applicable (the general rules are found in Ch. 35 of the Criminal Code). Here I shall only mention that there is a rule on absolute limitation, saying that in no case may a sanction be imposed when 30 years or, for less serious crimes, 15 years have elapsed. This

means, e.g., that war crimes committed during the Second World War no longer can be prosecuted in Sweden.

The fact that almost all crimes fall within the domain of public prosecution does not exclude the harmed person from prosecuting, but his right to prosecute is subordinate: it can be exercised only if the prosecutor has formally decided not to prosecute or decided to withdraw an instituted prosecution. The subordinate right to prosecute is primarily motivated by the control function (the citizens can themselves test whether the prosecutors perform their duties) and to some extent by the need of the harmed person to get redress. The number of cases of private prosecution is very small: approximately 75 per year, i.e. less than one per thousand cases lodged in the district courts. This means that some problems of principle connected with private prosecution (e.g., in cases where public prosecution is foregone for personal or social reasons; see below) can be neglected.

3. THE PROSECUTING PROSECUTOR

When someone is suspected of having committed a crime the prosecutor has to make a formal decision as to whether to prosecute or not and, in the former case, to take the case to court and try to get a conviction. The general rule is that prosecution is *obligatory*: if the prosecutor has what is called "sufficient reasons for prosecution" (i.e., he can with reason expect that the facts will lead to a conviction), he must prosecute, or else he is neglecting his duty. This does not, of course, mean that discretion is not involved. It may be uncertain whether the act that can be proven is criminal and it may be uncertain whether the evidence is "sufficient"; both questions can sometimes be answered differently by different persons although it can not be said that one of them is acting wrongfully.

But the prosecutor also has to use discretion for other reasons. The main rule is subject to far-reaching *exceptions*. They relate to criteria concerning either the crime committed or the criminal.

The *first group* consists of rules relating to particular offences, in the Criminal Code or elsewhere, stating that public prosecution may occur only if prosecution is required by public interest or only if prosecution is for special reasons required by public interest. These formulas obviously give little guidance and the preparatory works do not do much to repair this deficiency. Examples of crimes requiring these kinds of so-called suitability inquiry (simple and qualified) are, respectively, some types of fraudulent behaviour (departing without payment) and unlawful appropriation of goods bought on credit.

A requirement of suitability inquiry is often combined with a condition for prosecution, namely accusation by the harmed person, so that either accusation or inquiry is needed (see section 2.). Out of the four logically possible variations three are used:

- accusation or simple suitability inquiry (e.g., most property offences committed against relatives);
- accusation and simple suitability inquiry (e.g., most cases of negligently causing bodily harm or illness); and
- accusation and qualified suitability inquiry (e.g., most cases of defamation).

There are no statistics on the number of cases.

The *second group* of exceptions to the main rule primarily use criteria relating to the criminal (i.e., an inquiry based on social or personal indicators is required). While the first group of exceptions states conditions for prosecution, the second group renders opportunities to forego prosecution. The total number of group two cases in 1986 was 21 618 (35 000 crimes). The statistical figures should be assessed against the background of around 70 000 cases taken to court (there is an acquittal in 4200 cases) and a population of 8.4 million inhabitants.

The rules in the second group in principle require that it is proven that the suspect committed the crime. They relate to eight categories of suspects. In the first five it is required that no important public or private interest is infringed.

- (1) Where it may be assumed that prosecution would lead to nothing but a fine. In 1986 there were 6 488 cases, mainly concerned with first time offenders committing property crimes, traffic crimes and narcotics crimes.
- (2) Where the sanction probably will be a conditional sentence and there are special reasons for foregoing prosecution. (This provision was introduced in 1985.) In 1986 there were 137 cases.
- (3) When the offender has committed another crime and the sanction for that crime can be considered as an adequate sanction for both crimes. (In 1985 this provision replaced a more restricted rule.) In 1986 there were 9 510 cases, mostly concerning property crimes, illegal driving, other traffic crimes and narcotics crimes.
- (4) Where it is plain that the offence was committed under the influence of serious mental abnormality and that adequate confinement will occur without proceedings. (In Swedish law, mental abnormality does not excuse criminal liability, but it restricts the applicable sanctions.) In 1986 there were 418 cases, mostly concerning property crimes.

- (5) Special rules provide for persons committing crimes under the age of 18, but over the age of 15: prosecution may be foregone if the crime obviously was committed "out of mischief or rashness" or if the offender according to a report from the child welfare bodies is in need of care or treatment and such arrangements are deemed to be appropriate for his readjustment to society. In 1986 there were 4 693 cases, mostly concerning property crimes.
- (6) Prosecution may also be foregone, if it — for special reasons — is obvious that no sanction is needed to refrain the offender from further criminality and if the circumstances are such that prosecution is not required for other reasons. (This provision is new (1985) and its impact is difficult to foresee.) In 1986 there were 10 cases.
- (7) The prosecutor may also abstain from prosecuting a youth that is object of compulsory social welfare care. In 1986, there were 344 cases.
- (8) There is a similar rule concerning persons subjected to compulsory treatment for drug or alcohol abuse (in this case the maximum penalty for the crime must be one year's imprisonment or less). In 1986, there were only 18 cases.

A decision to forego prosecution is never final; if sufficient cause for the decision ceases to exist it may be withdrawn (unless a rule of limitation of sanctions applies).

During the last decades the exceptions to the main rule of obligatory prosecution have become increasingly significant. In fact, for minor offences (excluding traffic and smuggling offences) the principle of obligatory prosecution can hardly be said to be valid any more. It could be objected that such exceptions prepare the way for corruption of prosecutors and of the people and on the whole are unjust, because some criminals get off without paying for their crimes. On the other hand one could defend the exceptions by pointing to the criminological fact that it is on the whole better to keep people out of the criminal justice system, and the facts that the law may come into disrepute if it is not handled with tact, that the number of criminalized acts and omissions increases all the time, and also that it is financially and administratively impossible to enforce the law in all cases. I will not review all the arguments. The prosecutors themselves are much in favour of the trend of increased discretion, but my personal opinion is that at least in some respects too much power has been put in the hands of the prosecutors. The device to let the prosecutors decide on the merits of the case without having any real guidance by the law has been misused as a substitute for decriminalization and it has been an aid to avoid the required hard work when the crimes are to be defined. The result is that some types of acts are

undoubtedly defined as crimes, but in practice never prosecuted (e.g. unlawful appropriation of goods bought on credit). Only in a few cases could this order be reasonably defended by the argument that availability of private prosecution is the appropriate arrangement.

To facilitate the implementation of the rules and to counteract disparity, the Chief State Prosecutor has issued recommendations to all subordinate prosecutors.⁴

A disadvantage with the present system is that the offender often gets the impression that he is in some sense acquitted when the prosecutor decides that prosecution is not to be instituted. It would not be difficult to couple foregoing of prosecution with a formal warning.⁵

The prosecutor is a state official and has in some sense to represent the state's claim to punish. On the other hand, all his activities are guided by a *principle of objectivity*. It is his duty to promote fair decisions. Everything that points in favour of a suspect is to be taken into consideration and evidence of that character must be preserved. Indeed prosecutors do appeal against convictions they consider to be wrong or sentences they find too harsh (the Chief State Prosecutor, e.g., keeps an eye on all prison sentences administered to persons under the age of 18).

The trial proceedings in court have an accusatorial character. The prosecutor acts as a party on the same footing as the defendant. But the principle of objectivity is still in play and there are many rules designed to protect the accused.

The court may not start a trial on its own initiative, unless the crime is committed in the court room. The court is bound by the prosecutor's description of the act or omission under prosecution, but not by his legal qualification of the deed, nor by his suggestion as to sanction (such a suggestion is not obligatory). Remnants of an inquisitorial system are found in provisions concerning evidence. Thus the court can demand additional evidence, dismiss evidence that a party wants to present and take over the interrogation of witnesses, etc. (The Swedish legislation is similar to that of West Germany, but in practice the Swedish system exhibits real adversariness, i.e., the judges leave to the prosecutor and the defence counsel to present the case and the evidence.) The court also has power to dismiss and appoint defence counsel. The accused is not free to dispose of his case; confession must be corroborated by other evidence. The accused cannot give evidence under oath. Since he cannot plead guilty plea-bargaining is logically impossible and there is nothing at all like plea-bargaining in cases that come before a court. (But see section 4.) Those who see a common law jury trial as a paradigm of a trial will be at a loss at a Swedish trial: it is more like a board meeting.

4. THE INVESTIGATING PROSECUTOR

The public prosecutors and the police form two organizationally distinct bodies. Still, the prosecutor has some tasks of a police nature.

According to the Code of Procedure the main rule is that a *preliminary investigation* shall be initiated as soon as there is cause to believe that a crime falling within the domain of public prosecution has been committed. If accusation by a harmed person is a condition for prosecution, preliminary investigation may still be initiated, if risks attend waiting for the accusation. For petty offences preliminary investigation is replaced by a simple police investigation. The absolute duty to start a preliminary investigation has been criticized; it has been said to lead to inefficient use of resources and to diversion of resources away from serious and complicated crimes to the solution of simple, less serious offences. A recent amendment makes it possible to abstain from a preliminary investigation when it is probable that prosecution is to be forgone and also — which is more remarkable — when it is probable that the penalty will be only a fine and the costs for the investigation will be out of proportion to the importance of the case.

The object of the preliminary investigation is to find out who may be suspected of the crime and if there is sufficient cause for his prosecution and to prepare the case so that the evidence can be brought forward at the main trial in an uninterrupted sequence.

A preliminary investigation may be initiated by a police authority or by the prosecutor. If the former is the case and the matter is not of a simple nature, the prosecutor shall take over the direction of the investigation as soon as there is someone who is reasonably suspected of the offence. The prosecutor can also take over the direction in other cases, if there are special reasons. He is entitled to issue instructions if the investigation stays with the police authority.

There is thus a similarity between the Swedish prosecutor and a so-called investigating judge (*juge d'instruction*). This does not mean that the prosecutor really investigates the crimes. He directs the investigation, he is a decision-maker, but the real investigation is taken care of by policemen under his direct order. At most he leads the final interrogation with the suspect. In most cases the subordinate interrogation leader works on his own.

In certain respects the prosecutor can delegate the decision-making, but there are three kinds of decisions that he must make himself:

- whether to prosecute or not;
- concerning collaboration with other authorities than the local police authority; and

— concerning the use of coercive measures during the investigation (see below).

The investigation is, of course, of an inquisitorial character, although the above-mentioned principle of objectivity applies and the suspect is protected in a number of ways (e.g., if the suspect needs a public defence counsel the investigating authority shall notify the court thereof). There are, however, some traits of an accusatorial character, which restrict the activities of the prosecutor in that he must appear before the court as a party. It is not a crime to lie to a policeman or a prosecutor during the preliminary investigation or to refuse to talk. But the prosecutor can go to court and have a witness (who is not a suspect) interrogated under oath during the preliminary investigation. He may also request the court to appoint an expert, to issue a directive for the production of documentary evidence or inspection of an object, or to take evidence (at the court) which may be difficult or impossible to obtain at the time of trial. Finally, if the prosecutor concludes the investigation and has refused to comply with a request from the suspect that the investigation should be supplemented in some way, the latter can go to court and request that the court enables the evidence to be obtained.

More important than these rules concerning evidence, is the division between the court and the prosecutor in respect of competence to decide on the use of *coercive measures*. This matter is heavily regulated. It is impossible for me to do more than give some hints on the roles of the prosecutor, the court, and the police.

In respect of measures restricting personal freedom a policeman (and in some cases anyone) has power to apprehend some criminals. The police are also empowered to take someone found on the scene of a crime for examination, fetch someone who has been directed to appear for examination, take fingerprints, photographs, blood samples, samples for expiration analysis, etc. Arrest is not the same as apprehension. The decision to arrest a person, apprehended or at liberty, must be taken by the prosecutor or the leader of the preliminary investigation. But the suspect cannot be held long without permission by the court. The day after the arrest has been effected, the arresting authority must release the arrested person or submit to the court an application for a detention order. (If there are extraordinary reasons, the time limit may be extended to up to the third day.) The court has then to hold a hearing on the detention issue as soon as possible, normally the same day or next, and not later than four days after the apprehension or effected arrest. At this hearing the prosecutor appears as a party — normally in the presence of the suspect and always in the presence of his defence

counsel — and has to convince the court that the suspect should be detained. After the hearing the court immediately pronounces its decision. If the detained person is not prosecuted within a certain time limit, the case must be reviewed or the suspect released.⁶

In 1986, 26 172 persons were arrested; in 32 % of these cases the prosecutor applied for a detention order. The daily average was 115 apprehended or arrested, and 621 detained. (The average number of persons in prison was 3 511.)

Some other kinds of coercive measures lie within the competence of both the prosecutor (and the investigation leader) and the court:

— travel prohibition, i.e., the suspect is forbidden to leave the place of residence;

— seizure of objects, closing off a building or a room, prohibiting admission to a specific area, prohibiting removal of a specific object, and similar measures (sometimes these measures can be initiated without a formal decision, but must then be confirmed immediately by a competent authority); and

— search of premises (with some exceptions), personal search and bodily search (in these matters a policeman has restricted competence).

A postal or telegraphic communication, an account book, or any other private document, which is seized or found during the search of premises, may not be examined more closely, nor may a letter or any other closed document be opened except by the prosecutor, the investigation leader, the court or a person instructed by any one of them to examine the item.

The court has exclusive competence to decide questions concerning:

— provisional attachment of personal property;

— seizure of dispatches received at a post office, telegraph office, railway office, or any other office of conveyance;

— wire-tapping; and

— large scale and some other forms of search of premises.

(The use of so called bugs and similar electronic listening devices is prohibited.)

After the institution of prosecution the court may ex officio or on request of the harmed person consider the use of a coercive measure under its competence. In other cases the courts decide only at the request of the prosecutor or investigation leader.

5. THE SENTENCING PROSECUTOR

The picture of the prosecutor is still misleadingly incomplete. Let us look at some figures. In 1986 the number of crimes reported to the

police or known by the police was more than 1 million (1 095 000), not counting (unregistered) reports of minor offences (mostly traffic offences). Of these approximately one third were solved in one way or another. In 5 % of the reported cases it can be concluded that no crime was committed and in a similar amount of cases that the crimes are committed by persons under 15 years of age who cannot be sentenced. In 182 915 cases (minor traffic and smuggling offences) the reaction of the authorities consisted in a *summary imposition of a breach-of-regulation fine* (these are not included in the million crimes "reported to the police"). I have mentioned that the prosecutor takes around 70 000 cases (= 227 000 crimes) to court and foregoes prosecution for personal or social reasons in nearly 22 000 cases. We do not know in how many cases the prosecutor drops the case because of lack of proof or lack of public interest or because a condition for prosecution is not fulfilled. But allowing for this and for the fact that the cases taken to court often include multiple criminality, there is still something to account for.

The explanation is found in the fact that the prosecutor has an alternative to prosecution, when he has found that someone ought to be prosecuted. He can issue an *order of summary punishment by fine*. In 1986, in 75 820 cases the prosecutor sentenced someone to a fine. (In probably 10 000 more cases the suspect refused to consent to the terms of such an order.) This is to be compared with the courts sentencing 65 841 persons (of which 29 773 were sentenced to a fine).⁷

Summary punishment by fine is a very simple arrangement. On the basis of a police report the prosecutor states on a printed form a description of the crime he thinks the suspect has committed and the fine he finds appropriate. The form is delivered to the suspect who has, within a certain time limit, to choose between accepting the prosecutor's suggestion and thereby avoid prosecution or to deny his guilt or the adequacy of the punishment, in which case he will be prosecuted. The consent must thus include a confession and an acceptance of the punishment. Normally, payment of the fine fulfills the same function as formal consent. It might be added that when forfeiture of property or a similar specially prescribed sanction is appropriate, this shall also be submitted for consent. The suspect has to accept all submitted sanctions if he wants to avoid prosecution.

An order of summary punishment may not be issued if the order does not include all of the suspect's supposed offences which the prosecutor knows are under consideration. The same applies if the harmed person has declared that he intends to institute a private claim for damages or has requested prosecution.

Orders consented to by the suspect have the same effect as a court sentence which has become conclusive. It cannot be changed by the prosecutor if he finds that he was wrong, but the consenting suspect can in some cases go to court and get things corrected.

The applicability of summary punishment by fine is further restricted in two ways, but before mentioning these restrictions, it might be useful if something is said about the Swedish system of *finer*. Apart from one or two cases where fines are determined by reference to special computation there are two kinds of fines. So-called ordinary fines are assessed directly in a lump sum from a minimum of 10 to a maximum of 1000 SwCr (or, if the sentence refers to more than one offence, 2000 SwCr). This kind of fine is used only as a sanction for petty offences. Usually fines are imposed in the form of day-fines. The court determines a fixed number of fine-units from 1 to 120 (or 180, if more than one crime is to be punished), and then specifies the amount of each fine-unit, in the range of 10 to 1000 SwCr. The basis for the determination of the number of fine-units is the seriousness of the crime and the basis for the amount of each fine-unit is the offender's capacity to pay. Such a system is obviously more just than a system with only ordinary fines.

Let us return to the restrictions of the applicability of summary punishment. First, there is a restriction as to kind of crime: it must be punishable by (1) ordinary fines, (2) day-fines, or (3) day-fines or imprisonment for a term not exceeding six months. Thus e.g. petty theft, but not ordinary theft, can be punished through summary punishment. Secondly, the maximum penalty allowed in an order for summary punishment is 100 day-fines. If the prosecutor finds this penalty too lenient, he must prosecute.

Further regulations on when and how to impose summary punishment have been issued by the Chief State Prosecutor. They include detailed instructions for assessing the adequate amount of a day-fine and standard punishments for a great number of offences.⁸ These norms are also to some extent used by the courts to avoid the risk that some people refuse to consent to an order of summary punishment because the courts are perceived to be more lenient.

Summary punishment is in some respects similar to plea-bargaining in a system which makes a guilty plea decisive for conviction. But it should be noticed that the Swedish prosecutor offers no reduction of penalty or no charge on a lower level of seriousness. In fact, the courts tend to be more lenient than the prosecutors.

Summary punishment has a clearly inquisitorial character. But it is intended not to apply to cases that are difficult to assess. It is never obligatory and if the case is doubtful in some respect the prosecutor

should not try to use it in the hope that the suspect consents. As the basis for an order normally is rather scanty — there is no real preliminary investigation — in fact many orders are wrong and, probably, in many cases an innocent suspect consents rather than risk the inconveniences of a court trial. This deficiency is more than compensated for by the advantages, economic and others, and on the whole the system is a success. In conclusion, I would, however, like to point to a disadvantage that is not easily remedied: a very large proportion of the adjudication in criminal cases is kept out of public observation. The fact that no deeply felt complaints against the system have been noticed can, to my mind, only be explained by the high level of education, good discipline and humane attitude of the Swedish prosecutors.

NOTES

¹ The legislation dealt with in the text is primarily the following chapters in the Code of Procedure (1942): Ch. 7 (Public prosecutors and police authorities), Ch. 20 (Right to prosecute; harmed persons), Ch. 23 (Preliminary investigation), Ch. 24 (Arrest and detention), Ch. 25 (Travel prohibition), Ch. 26 (Provisional attachment), Ch. 27 (Seizure), Ch. 28 (Search of premises and search and examinations of persons), and Ch. 48 (Summary punishment by fine and summary imposition of breach-of-regulation fine).

See further *The Swedish Code of Judicial Procedure*. Revised edition ed. by Anders Bruzelius and Krister Thelin. Introduction and Translation of First edition by Anders Bruzelius and Ruth Bader Ginsburg. Littleton, Colorado & London 1979. (The American Series of Foreign Penal Codes. 24.) A more recent version is *The Swedish Code of Judicial Procedure*. (The National Council for Crime Prevention. Sweden. Report No 16) Stockholm 1985.

Useful information on Swedish criminal law and criminal procedure is found in the chapters written by Alvar Nelson and Per Henrik Lindblom in *Introduction to Swedish Law*. 2nd edition ed. by Stig Strömholm. Stockholm 1988.

The statistical information is taken from *Yearbook of Judicial Statistics 1987*. Official Statistics of Sweden. National Central Bureau of Statistics. Stockholm 1987.

For a description of the role of the prosecutor in another continental legal system, The Federal Republic of Germany, see John H. Langbein, *Comparative Criminal Procedure: Germany*. St. Paul, Minnesota 1977 (American Casebook Series).

² The exceptional prosecutors prosecute state officials for crimes committed in the exercise of their duty and the Attorney General is the sole prosecutor in cases concerning misuse of the freedom of speech in print or in radio. The exceptional prosecutors may, like the Chief State Prosecutor, institute a criminal prosecution or lodge a criminal appeal in the Supreme Court. They may also commission a general prosecutor to institute a prosecution or to assist in another way.

³ However, one point should be noted which follows from the fact that a superior prosecutor is the leader of a subordinate prosecutor. When a prosecutor has decided to prosecute or not to prosecute, anyone may without time limit lodge a complaint in the office of the superior prosecutor, who has to decide on the matter. This means that it is in principle possible to get a criminal case considered on the merits six times: three times informally by a district prosecutor, a state prosecutor, and the Chief State Prosecutor, and three times formally by a district court, a court of appeal, and the Supreme Court. In addition, complaints can be lodged in the offices of the Parliamentary Ombudsmen and the Attorney General.

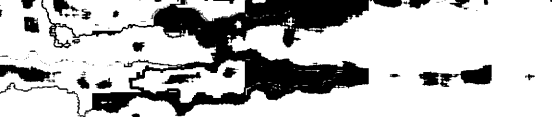
⁴ A general presentation of these guidelines is given by Uno Hagelberg, "Guidelines for the Waiving of Prosecution", *Non-Prosecution in Europe*. Report of the European Seminar held in Helsinki, Finland, 22-24 March 1986. (Helsinki Institute for Crime Prevention and Control, affiliated with the United Nations. Publication Series. No. 9) Helsinki 1986, pp. 114-123.

⁵ To complete the picture it should be mentioned that the police are empowered to abstain from reporting (to the prosecutor) only some trivial offences: If the penalty for the offence obviously would be a fine and the offence is under the circumstances negligible, the police officer may drop the matter and just admonish the offender.

⁶ In 1975 approximately 70 000 persons were apprehended, fetched for, or taken to, examination; 26 700 were arrested and 6 700 detained. More than 50 % were detained for more than 25 days. Two thirds of them were suspected for property crimes and one-seventh for crimes of violence. Of the detained, practically all were prosecuted; of the arrested who were not detained, only one out of two was prosecuted.

⁷ Thus, if we look at quantities, the prosecutor is in his sentencing capacity more important than the court. But on the same reasoning the policeman is more important than the prosecutor, because 182 915 persons consented to follow his order to pay a breach-of-regulation fine (minor traffic offences — 175 757 — and smuggling offences — 7 158).

⁸ The Chief State Prosecutor has also the task of choosing the offences to which breach-of-regulation fines shall be made and to prescribe the amount to be imposed by a policeman in each type of case.





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by

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