Revisiting the Hart/Wootton debate on responsibility

Matt Matravers & Arina Cocoru[[1]](#footnote-1)\*

Abstract

Both H. L. A. Hart and Barbara Wootton often wrote on responsibility and its application in the criminal law. On occasion they did so in direct response to one another; at other times it seems as if they each had the other in mind as a target (whether explicitly acknowledged or not). In writing about one another’s views, both were complimentary and respectful. And yet it is impossible to miss in their interactions a sense of mutual frustration. Both regarded themselves as progressive liberals and the other as someone who failed to see what such a position entailed for criminal justice in general and for criminal responsibility in particular.

This chapter seeks to reconstruct the debate between Hart and Wootton. The aim is not merely to address and assess the philosophical issues between them, but also to do something by way of reconstituting the optimistic post-War promise of a reformed criminal law system. It does so by setting out the debate examining first Wootton’s radical revisionist prescription for the criminal law before, second, considering Hart’s response to it. The third section is given to a critical evaluation of the different positions with particular attention paid both to Hart’s account (which is usually taken to have decisively defeated Wootton’s) and to what might have survived in Wootton’s. The chapter then goes on to consider this debate in light of recent developments in criminal justice.

1. Wootton

Barbara Wootton—Baroness Wootton of Abinger—was, in the words of a recent biography, ‘a public intellectual who applied her searching intellect to many of the important questions which faced Britain from the 1930s to 1980s’. Critical to understanding her views was that ‘she did so from the perspective of a social scientist…. She had no time for social or economic theory… Instead she wished to use the techniques of empirical social science research to identify evidence-based solutions to policy problems’.[[2]](#footnote-2) Her views on the criminal law, and in particular on criminal responsibility, did not stem in the main from theoretical, conceptual, or philosophical commitments so much as from her commitment to social science and the evidence that (she believed) it produced.

This empiricist commitment gave rise to two arguments that one can find in Wootton of direct relevance to Hart. First, on the overall purpose of criminal justice, which Wootton (like Hart) took to be non-retributive. Second, on the nature of responsibility in the criminal law.

# 1.1 Wootton and the purpose of criminal justice

Wootton believed that if only society could get over its commitment to retributivism and punishment, and understand criminal justice to be a social policy like any other with the aim of reducing future offending, then it would be apparent that ‘when written into the *definition* of a crime, it [*mens rea*] is wrongly placed before, instead of after a breach of the law has been proved’.[[3]](#footnote-3) That is, if the point of criminal justice is to reduce the occurrence of certain kinds of bad things happening, then in characterising those bad things it is not at all obvious why the mental state of the agents performing them should matter,[[4]](#footnote-4) but those mental states may be relevant in deciding how best to respond to the offender so as to deter, reform or, if necessary, incapacitate him and thus reduce the likelihood of his performing the same (or similar) act(s) again. Thus, for Wootton, the default mode of the criminal law ought to be that of ‘strict liability’; the role of the trial that of establishing what happened and why; and the role of the sentence that of responding as best one can to reduce the likelihood of recidivism given uncertainty about what would actually achieve that.[[5]](#footnote-5)

That is, for all she discusses and critiques the idea of criminal responsibility, for Wootton a rational criminal justice policy, and criminal law, would render issues around criminal responsibility in the usual sense redundant. As one contemporary critic, Alf Ross, puts it, for Wootton ‘the concept of mental responsibility—whether or not it is meaningful or practically applicable—is in any case irrelevant for a rational criminal policy. [Wootton] thinks we can… leave the concept of mental responsibility in suspense as something which is of no concern, at least to criminologists’.[[6]](#footnote-6)

The focus below will be on Hart’s response to Wootton and on Hart’s own account of the place of responsibility in criminal justice, but it worth noting Ross’s critique of Wootton as it will be relevant to the argument below. Ross argues first that Wootton’s distinction between retributivism and prevention is mistaken because the denunciation of the offender inherent in retributive punishment itself contributes to prevention.[[7]](#footnote-7) Second, he claims (in an echo of Hart) that the fact that the overall purpose of criminal justice is *preventive* does not show that responsibility is irrelevant as considerations around responsibility can—and should—act as a side-constraint on the pursuit of that overall purpose. For Ross, both justice and the practicalities of criminal justice demand that (at least in the main) intention remains critical in the definition of offences and operates as a side-constraint on the pursuit of the social policy of the prevention of harms in a ‘mixed’ theory of punishment.[[8]](#footnote-8)

# 1.2 Wootton and responsibility in criminal justice

To understand Wootton’s position on responsibility it is worth starting not with her famous Hamlyn Lectures, *Crime and the Criminal Law*, but rather with a lecture given as The Winchester Address to the British Medical Association. In that lecture, Wootton outlines ‘three distinct roles’ for the medical profession ‘in relation to the diagnosis and treatment of social deviants’:

###### ‘First, within the framework of the criminal law the doctor is called upon for evidence on the mental state of accused persons, and in particular on the degree in which they are to be held responsible (and therefore punishable) for their actions. Second, some of those who are found guilty of criminal offences may be deemed suitable for medical rather than penal treatment; and, third, outside the ambit of the criminal law altogether, doctors—and more especially psychiatrists—today find themselves increasingly concerned with both the diagnosis and the treatment of types of mental disorder which are associated with socially unacceptable behaviour’.[[9]](#footnote-9)

We will return to the third of these roles—and the reasons—for Wootton’s disquiet at its development later in the chapter, but in the meantime it is worth briefly considering the second before turning to the first, which is for present purposes the most important.

The second role identified by Wootton emerged in the main because of Section 60 of the Mental Health Act 1959, ‘Powers of courts to order hospital admission or guardianship’, which allowed a court to divert to a hospital an offender who could otherwise be imprisoned if that offender was deemed ‘on the written or oral evidence of two medical practitioners’ to be suffering from ‘mental illness, psychopathic disorder, subnormality or severe sub-normality’ and it was thought that such a diversion was the ‘most suitable method of disposing of the case’ (and a hospital was willing and able to receive the offender).

Wootton makes two interrelated points about the consequences of this provision of the Mental Health Act for the medical profession. First, that the medical profession—and indeed the courts—ought to be clear about what it is that is being treated and what would be the signs of a ‘cure’ (or at least of some treatment success). The danger she identifies is that the criminality itself might be taken to be the ‘disease’ and the cure thus the return of the offender/patient to a law abiding state (a danger that is evident, for example, in the then crime and ‘disease’ of homosexuality). Moreover, disease and criminality can come apart as in her imaged case of a thief who is also severely depressed. In the context of a criminal justice system that had diverted such an offender for treatment would (either) a depressed honest citizen or a happy thief constitute a cure?[[10]](#footnote-10)

Wootton’s point is not to answer that question, but to emphasize two things, the first of which is important to her overall project. First, mental disorders are in some cases not like other ‘illnesses’ in that their diagnosis merely reflects the behaviour of the patient and the prevailing norms of the society. To be, in modern parlance, ‘anti-social’ is to behave in ways that violate social norms. To have ‘anti-social personality disorder’ is a matter of persistent behaviour of a certain kind.

Second, it is a consequence of the Act that ‘the doctor... who undertakes the psychiatric treatment of offenders is not quite like a doctor, or even a psychiatrist, elsewhere. His function is not just that of attending to the mental and physical illnesses of people who happen to be inside, in the same way as those same people would expect to be attended to outside. He has in effect become an agent of the State-part of the machinery of law enforcement’.[[11]](#footnote-11) This is significant in itself, but in addition needs to be considered in the light of the difficulties of defining (mental) disorder and illness and the (related) difficulties in securing robust evidence as to the effectiveness of psychiatric interventions.

These worries might seem surprising given Wootton’s reputation for favouring treatment models over penal ones and we will return to them below. However, before that it is important to consider the first role she describes as it speaks directly to (the development of) her views of criminal responsibility.

Recall, the role in question is that doctors will be called upon to give evidence as to ‘the degree in which they [‘social deviants’] are to be held responsible (and therefore punishable) for their actions’. This clearly requires that it is possible to distinguish between those who are responsible and those who are not. This is precisely what Wootton denies: ‘the crux of the whole matter’, she writes, ‘lies in the inherent impossibility of making valid decisions about other people’s responsibility… the inherent impossibility of maintaining a reliable distinction between the wicked and the weak-minded’.[[12]](#footnote-12)

The origins of Wootton’s view that it is impossible to make valid, reliable, distinctions between those responsible and those not responsible lie in an earlier analysis she had undertaken of cases involving the plea of ‘diminished responsibility’.[[13]](#footnote-13) As set out in the Homicide Act 1957,

###### Where a person kills or is party to a killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.[[14]](#footnote-14)

Wootton’s analysis is primarily legal, but the point she wishes to make is additionally a conceptual one. In making it, she uses the case of *R v Byrne*. Byrne was a sexual psychopath who murdered a young woman at a youth hostel before committing ‘horrifying mutilations on her dead body’. In allowing an appeal of diminished responsibility, the court defined abnormality of mind as

###### a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind’s activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise willpower to control physical acts in accordance with that rational judgment.

Byrne, it was held, suffered from ‘violent perverted sexual desires which he finds it difficult or impossible to control’. When not in the grip of these desires he could be normal, but the Court accepted that at the time of the killing he was in such a state as to find it irresistible or, at least, abnormally difficult to resist. The evidence for this was *in part* the ‘revolting circumstances of the killing and the subsequent mutilations’ as well as Byrne’s ‘previous sexual history’. That is, the extent of Byrne’s ‘depravity’ was itself taken as evidence of his lack of responsibility. As Wootton comments,

###### When, in Byrne’s case, Mr. Justice Stable understandably complained that what he found so difficult was the distinction between depravity and loss of control he only got the answer from the expert medical witness that ‘it was extremely difficult to draw the line.’ And when the learned judge went on to ask whether the upshot of the doctrine of diminished responsibility would not be that ‘the worse the act—the more vicious and utterly depraved the act—the nicer the name we call it by’, he was answered in the affirmative.[[15]](#footnote-15)

At appeal, the Court did not dispute that, ‘where the abnormality of mind is one which affects the accused’s self control, the step between ‘he did not resist his impulse’ and ‘he could not resist his impulse is … one which is incapable of scientific proof,’ or that ‘there is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulses’. Such ‘scientifically insoluble’ issues, the Court held, could only be left to the ‘common sense’ of the jury.

I have spent time on the case of Byrne[[16]](#footnote-16) as it amply demonstrates—and Wootton clearly took it to do so—the composite claim that Wootton took to undermine the distinction between those who are and those who are not legally responsible. This composite claim consists first in the argument that, for some offenders, their lack of responsibility for their anti-social behaviour is attributed to a mental disorder the only, or main, observable symptom of which is the anti-social behaviour itself.[[17]](#footnote-17) Second, distinguishing between the mentally well and the mentally unwell with the precision needed to determine legal responsibility is impossible; requiring as it does that one move away from the mere fact that some persistent behaviour was present and into inevitably subjective judgements about the cognitive and volitional capacities of the particular offender. Although the origins of Wootton’s argument here lay in a study of a specific and unusual set of cases, she took the conceptual claim above to generalise. Having ‘let in’ abnormality of mind (as against the stricter M’Naghten Rules), the law had, in Wootton’s view, to admit that such abnormalities stretched along a continuum.

Thus, Wootton offers two interconnected arguments, each sufficient to dislodge *mens rea* from the definition of criminal offences. One offers a vision of scientifically based social policy designed simply to ‘prevent the occurrence of socially damaging actions’.[[18]](#footnote-18) The other backs up this vision by arguing that the idea of responsibility as traditionally understood is incoherent. ‘The time has come’, she writes,

###### for the concept of legal guilt to be dissolved into a wider concept of responsibility or at least accountability, in which there is room for negligence as well as purposeful wrong doing; and for the significance of a conviction to be reinterpreted merely as evidence that a prohibited act has been committed, questions of motivation being relevant only in so far as they bear upon the probability of such acts being repeated.[[19]](#footnote-19)

*Mens rea*, she thought, should be allowed to ‘wither away’.[[20]](#footnote-20) What, then, is Hart’s response?

2. Hart

Hart places Wootton’s account within a larger trend of proposals for reform of the institution of punishment.[[21]](#footnote-21) He notes that the extreme difficulties which the Anglo-American legal system had with the problem of insanity and the operation—and indeed rationalisation—of the M’Naghten rules, provided a continuous incentive for legal philosophers and practitioners alike to advance criticisms of the way the system dealt with mentally abnormal offenders. However, the worries focused on this particular class had, according to Hart, paved the way for more radical proposals targeting the criminal law system in general and, more specifically, the continued relevance attached to the doctrine of *mens rea*. The fact that Hart identifies Wootton as one of the more careful and thoughtful advocates for overhauling the institution of punishment and consequently proceeded to rebut each argument advanced by her and her supporters shows that he did not take them lightly.[[22]](#footnote-22) He acknowledges the attractiveness of a system of reform if one is interested in a rational, civilized approach to crime and he offers his middle (or ‘moderate’) position vis-à-vis the issue of punishment as a better substantiated counterproposal.

Before delving into Hart’s replies to Wootton, it is however worth noting that from at least two distinct points of view, her ideas are not as radical as they might at first look. Firstly, although Hart calls the Woottonian proposals ‘the extreme form’[[23]](#footnote-23) of the wider theory on the abolition of responsibility, what she advances is not akin to a system of social hygiene. In such a system, administered by a variety of specialists trained in the diagnosis and treatment of social ills, reform measures would be applied to individuals based solely on the likelihood that they will be involved in the commission of an offence, without waiting for the offence to occur. Crucially, what Wootton has in mind is not such a dystopian proactive system; rather, she calls for the state of mind of the accused at the time when the crime was committed not to be determinative at the conviction stage. That the *actus reus* would have occurred is, however, a necessary condition. In this sense, Wootton’s proposals renounce *one* of the two *backward-looking* features mentioned by Hart in his discussion of ‘traditional punishment’[[24]](#footnote-24): the feature of responsibility (at least in its traditional sense), but retains the use of information on the offender’s past (including the potential presence of *mens rea* when the crime took place) for sentencing purposes. This differs from the approach taken in pure social hygiene, and the latter is outwith the limits of the discussion between Hart and Wootton. That said, it is important to be aware of the theoretical possibility of moving from Wootton’s own account towards a policy of proactive social hygiene as part of Hart’s motivation—and certainly that of his successors—may be a cautious avoidance of taking the first step on this particular slippery slope.[[25]](#footnote-25)

Wootton’s proposals are not extreme from yet another perspective, which Hart himself notes in his lecture on ‘Changing Conceptions of Responsibility’.[[26]](#footnote-26) A programme to abolish responsibility can sound alarming if the meaning of the term *responsibility* is not clarified, but Wootton’s ideas are not meant to eliminate legal accountability altogether, but rather (as we have seen) to move enquiries into the mental state of the offender to the sentencing stage, where the focus would be—among other things—on determining whether (s)he was *responsible* in the sense of having the capacity to control his or her actions and to conform to the law. To use Hart’s terminology (which he developed in response to criticisms of his own discussions of responsibility), Wootton does not advance a program for the abolition of Liability-Responsibility—indeed such responsibility would be easier to demonstrate under her system—but for dissociating it from Role-Responsibility and Capacity-Responsibility, which in the current system have a stake in determining liability.[[27]](#footnote-27)

Having noted these two aspects of Wootton’s position, let us turn to Hart’s response. Wootton, it should be recalled, advances two separate arguments in support of her vision of how the criminal justice system should function. One is inspired by her experience on the Bench, focusing on the practical difficulties of drawing lines between mentally normal and abnormal offenders, and the other, a theoretical one, inspired by the specific aims that the criminal justice system should achieve in relation to society. Hart identifies these two lines of attack and brings forward an arsenal of ‘practical considerations’,[[28]](#footnote-28) ‘reinterpretations of notions’, ‘general’, ‘universal’ or ‘underlying’ principles and ‘some very good sense’,[[29]](#footnote-29) all entangled in an account partly based on counterfactual arguments and partly meant to give way to his own positive theory on criminal responsibility. Underlying these particular arguments is also a general concern to rebut the claim that the doctrine of *mens rea* makes sense ‘only within the framework of a theory which sees punishment in a retributive or denunciatory light’.[[30]](#footnote-30) That is, given that Hart himself was not a retributivist, he was concerned to decouple retributivism and the centrality of *mens rea*. With that in mind, let us turn to the details of Hart’s arguments (both against Wootton and in favour of his own preferred understanding of criminal justice and responsibility).

# 2.1 Hart’s understanding of criminal justice and the place of responsibility within it.

Early in *Punishment and Responsibility*, Hart asks, ‘Why are certain kinds of action forbidden by law and so made crimes or offences?’. He then answers the question emphatically: ‘to announce to society that these actions are not to be done and to secure that fewer of them are done’.[[31]](#footnote-31) However, the pursuit of this aim is constrained by various side constraints the most important of which (for both Hart and the present argument) is the retention of *mens rea* in the definition of offenses (at least in the main) together with a corresponding set of excuses based on its absence. That is, criminal punishment must be reserved for the guilty, which is to say reserved for those who ‘had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities’.[[32]](#footnote-32)

Hart’s defence of this side constraint is not in any sense retributive. As John Gardner puts it, the ‘guilt of the guilty does not count in favour of punishing them; it merely eliminates an objection to punishing them’ (although Gardner then argues persuasively that Hart cannot entirely avoid retributivism if he is to offer a justification of what he (Hart) takes punishment to be).[[33]](#footnote-33) Rather, it depends on a liberal idea that voluntary choice ought to be central to the State’s relationship with its citizens. In respecting this, criminal punishment becomes a ‘method of social control which maximizes individual freedom within the coercive framework of law’.[[34]](#footnote-34)

In particular, Hart makes three claims each of which has a positive and a negative form: (1) by retaining *mens rea* ‘we maximize the individual’s power at any time to predict the likelihood that the sanctions of the criminal law will be applied to him’ whereas to remove it would mean ‘our power of predicting what will happen to us will be immeasurably diminished’[[35]](#footnote-35); (2) ‘we introduce the individual’s choice as one of the operative factors determining whether or not these sanctions shall be applied to him. He can weigh the cost to him of obeying the law—and of sacrificing some satisfaction in order to obey—against obtaining that satisfaction at the cost of paying “the penalty”’ whereas otherwise ‘our choice would condition what befalls us to a lesser extent’; (3) ‘by adopting this system of attaching excusing conditions we provide that, if the sanctions of the criminal law are applied, the pains of punishment will for each individual represent the price of some satisfaction obtained from breach of law’ whereas otherwise ‘we should suffer sanctions without having obtained any satisfactions’.[[36]](#footnote-36)

The broad outline of Hart’s account is clear. Given the general justifying aim of criminal law, punishment must be inflicted in ways that respect individual choice and maximise individual freedom. That said, the language of weighing the costs, obtaining satisfactions, and price, is somewhat surprising here from an author who elsewhere declares that we ought to ‘distinguish a punishment in the form of a fine from a tax on a course of conduct’ and Hart himself admits that it ‘can sound like a very cold, if not immoral attitude toward the criminal law’.[[37]](#footnote-37)

Hart’s immediate defence of his language is the curious one that we ought to think not only of decent systems of criminal law, but also of awful and repressive ones (‘in South Africa, Nazi Germany, Soviet Russia’) and in such cases ‘we might be thankful to have their badness mitigated by the fact that they fall only on those who have obtained a satisfaction from knowingly doing what they forbid’.[[38]](#footnote-38) This is curious as, for example, it would hard to think in terms of ‘thankfulness’ were it the case that the law that imposed criminal sanctions on Jews in Nazi Germany who failed to register with the authorities fell only on those who ‘obtained a satisfaction from knowingly’ not doing so and not on those who failed merely through negligence.

The better explanation of Hart’s language comes earlier when he calls on ‘a mercantile analogy’ and as it serves as a fitting summation of his views it is worth quoting in full:

###### Consider the law not as a system of stimuli but as what might be termed a *choosing* system, in which individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways. This done, let us ask what value this system would have in social life and why we should regret its absence. I do not of course mean to suggest that it is a matter of indifference whether we obey the law or break it and pay the penalty. Punishment is different from a mere ‘tax on a course of conduct’. What I do mean is that the conception of the law simply as goading individuals into desired courses of behaviour is inadequate and misleading; what a legal system that makes liability generally depend on excusing conditions does is to guide individuals’ choices as to behaviour by presenting them with reasons for exercising choice in the direction of obedience, but leaving them to choose.[[39]](#footnote-39)

Hart’s emphasis then is on autonomy and freedom as liberal values. These may in part be forward looking—a system that encourages people to take responsibility for their behaviour may combat recidivism and thinking that one is not responsible for one’s behaviour (confabulation and false justification) can underlie criminal conduct—but they primarily act as side constraints on the overall forward looking purpose of punishment, which is to secure that fewer of the actions that society has declared not to be done get done.

3. Hart and Wootton

Hart’s general justifying aim of criminal law, then, is non-retributive and focussed on reducing the number of future actions that society has declared ought not to be done. In the distribution of criminal sanctions, he puts voluntary choice at the centre of his account and rejects strict liability as ‘odious’ even if sometimes tolerated ‘with reluctance’.[[40]](#footnote-40) The question then arises as to why and how Hart thinks these arguments superior to the Woottonian alternative.

# 3.1 Hart and Wootton on the overall purpose and nature of criminal law and the implications for mens rea

As we saw above, there is a (somewhat implicit) argument in Wootton to the effect that a rational social policy concerned with reducing the future occurrence of certain kinds of actions (primarily, harms) would not be concerned with intention or its absence other than in deciding how best to ‘treat’ the offender to ensure future compliance with the law. Hart marshals three arguments against this position the first two of which we have encountered above in Ross’s critique of Wootton. These are that the social policy of reducing future harms can be subject to a side constraint of justice; that Wootton’s proposal leaves out something of the denunciatory and so deterring character of penal sanctions; and finally that Wootton’s proposal cannot accommodate certain crimes that we would surely wish to retain. Let us consider these in order.

Hart thinks that Wootton misses the possibility of pursuing the social policy goal of reducing future offending, but only subject to doing so in accordance with principles of justice—in this case, in accordance with the demand that penal liability attach only to those ‘who at the time of their offence had the capacity and fair opportunity or chance to obey the law’—because she mistakenly compares her favoured account only with a crude retributive one.[[41]](#footnote-41)

In short, Wootton and her supporters seem to be drawing hasty conclusions about the possible implications of criminal punishment: on one side they place the retributive system, in which penalties represent a manner of ‘payback’ for past wickedness, which is ‘measured’ or detectable via *mens rea*.[[42]](#footnote-42) On the other side lies the preventive system, which aims to minimise the level of crimes and views their occurrence as potential ‘signs’ of a ‘social ill’ that should be diagnosed and possibly cured. Whilst sharing with Wootton a rejection of retributivism, and in general of any arguments identifying punitive suffering as intrinsically good, Hart rejects this binary distinction. For him, *mens rea* represents a measure of voluntariness or choice; as we have seen, it provides an answer to the question whether the offender ‘at the time of the offence had the capacity and a fair opportunity or chance to obey the law’.

Hart believes Wootton goes wrong in identifying responsibility with proof of wickedness.[[43]](#footnote-43) Rather, for Hart, its relevance is that it speaks to the fact that the offender acted as a result of a conscious and informed decision. In this, Hart’s view follows the spirit in which decisions are made in court, focusing on the defendant’s liability only for that which (s)he has *chosen* to bring about; that is, (s)he intended/was reckless/had knowledge as to whether all the elements of the offence (results and circumstances) should obtain. As the court reiterated in *Cunningham* in relation to negligence ‘in any statutory definition of a crime malice must be taken not in the old vague sense of ‘wickedness’ in general [...] It is neither limited to, nor does it indeed require, any ill-will towards the person injured’.[[44]](#footnote-44) In this sense, Hart takes an non-moral, pragmatic view, that it is only if the accused had so *chosen* to act that he could be fairly held responsible.

Hart’s second argument, familiar from Ross above, concerns the ‘odium of society’ expressed for the conduct of those who break the law.[[45]](#footnote-45) Such odium currently attaches to conviction and sentence but were Wootton successful in replacing punishment with treatment—or at least in eradicating the distinction between them—it would not. Some punishment theorists would think this an intrinsic loss—for them, punishment is rightly and importantly characterized as condemning and stigmatising—but it is far from clear that Hart falls into this camp (and, indeed, given Hart’s comments about penal sanctions being the price paid for obtaining the satisfactions of non-compliance, this is not surprising). Rather, like Ross, he appeals to the instrumental argument that ‘the law will lose an important element in its authority and deterrent force’.[[46]](#footnote-46)

Finally, Hart points to the inability of Wootton’s system to incorporate certain crimes. There are two important points here: first, a system in which reference is not made to intention or some other mental element in the definition of offences cannot, for example, include an offence of ‘demanding money with menaces’ or many such similar offences. Second, such a system is going to struggle with *attempts*. As Hart writes, ‘it is obviously desirable that persons who attempt crimes, even if they fail, should be brought before courts for punishment or treatment; yet what distinguishes an attempt which fails from an innocent activity is, in many cases, just the fact that it is a step taken with the intention of bringing about some harmful consequence’.[[47]](#footnote-47)

Hart does not press this point, leaving if as if it is a matter of it being difficult for Wootton to codify attempts as crimes without appealing to *mens rea*, but the criticism cuts deep. If one wants to prevent crimes—as Wootton does—then one would want also to prevent attempts at crimes. However, if Wootton accepts this premise, then she seems to be pushed towards either retaining some elements of *mens rea* in the offence definition or to the extreme social hygiene system in relation to attempts, and as we have seen, this is not her intention.

Putting aside the second argument—which is in the main a (still unresolved) empirical matter[[48]](#footnote-48)—Hart offers two powerful critiques of Wootton’s proposed scheme underpinned by an equally powerful normative commitment. Freedom matters and can be made compatible with the coercive force of the criminal law only if only those who, at the time of acting, ‘had the capacity and a fair opportunity or chance to obey the law’ are subject to its sanctions.

Yet, of course, Wootton’s second—and some would say, main—argument is that it is impossible to distinguish those who possess such a capacity from those who do not; impossible, that is, to pick out the responsible agent from the non-responsible consequence of various causes. How, then, does Hart respond to this?

# 3.2 Hart and Wootton on the possibility of distinguishing those who are and those who are not properly (criminally) responsible

Recall, Wootton’s composite claim that, for some offenders, the evidence of their having some mental disorder at the time of the offence is just the behaviour manifested in the offence itself and that distinguishing between those who, for example, choose to act and who act because impelled to do so is not a scientific matter and is in principle and in practice impossible.

Interestingly, although Wootton clearly regards this as her main argument—’the crux of the whole matter’ and Hart, too, regards it as ‘the most important argument’ in favour of relinquishing the doctrine of *mens rea* and ushering in an extensive scheme of strict liability—Hart does not spend as long on it as he does in advancing the criticisms above, which perhaps reflects his larger concern with carving out a non-retributive space within an overall preventive scheme for the centrality of intention. Nevertheless, it is possible to discern one line of response to each of the elements of the composite claim above and, in addition, to consider an important concession that Hart makes to Wootton.

First, in response to the claim that evidence of mental disorder and its relation to the crime is always ‘circular’ (the nature of the crime being used as evidence for a disorder, which in turn explains the crime), Hart writes that whilst Wootton’s critics, ‘would admit that it is at any rate in part *through* studying a man’s crimes that we may discern his incapacity to control his actions’...

###### Nonetheless the evidence for this conclusion is not merely the bare fact that he committed these crimes repeatedly, but the manner and the circumstances and the psychological state in which he did this. Secondly in forming any conclusion about a man’s ability to control his action much more than his repeated crimes are taken into account. Anti-social behaviour is not just used to explain and excuse itself, even in the case of the psychopath, the definition of whose disorder presents great problems.[[49]](#footnote-49)

In response to the claim that the distinction between the responsible and the non-responsible is incapable of scientific proof, Hart concedes *that*, but retains a belief in the ability of the court to construct an overall picture such that we can use ‘very good sense’ in relation to an offender’s history in order to arrive at plausible, reasonable judgements about his actions and impulses.[[50]](#footnote-50) More generally, Hart produces repeated examples of voluntary and involuntary behaviour in several essays to demonstrate that we recognise (in familiar everyday situations) a difference between them.

Given this, it might be expected that Hart would endorse the Court of Appeal’s comment in *Byrne* that questions of insanity or diminished responsibility—*when they arise*—should be left to the ‘common sense’ of the jury once it has been informed of the legal standards and has had the benefit of expert testimony. However, he does not. Despite the above quotation, Hart acknowledges the origins of Wootton’s criticisms—her actual experience on the Bench—and the difficulties that may arise from putting the theoretical arguments into practice. That said, the precise nature of his worries are a little hard to pin down. He writes,

###### the forensic debate before judge and jury of the question whether a mentally disordered person could have controlled his action or whether his capacity to do this was or was not ‘substantially impaired’ seems to me very often very unreal. The evidence tendered is not only often conflicting, but seems to relate to the specific issue of the accused’s power or capacity for control on a specific past occasion only very remotely.

######

Because of this, it seems Hart has little faith that the common sense of the jury will be enabled. Rather, he says, he ‘can scarcely believe that on this, the supposed issue, anything coherent penetrates to the minds of the jury’[[51]](#footnote-51) although whether this is an empirical claim about the difficulties of evaluating evidence or a conceptual one about the difficulties of evaluating responsibility is unclear.

As a result, Hart offers a ‘moderate’ alternative to the criminal system’s treatment of mentally abnormal offenders.[[52]](#footnote-52) Instead of barring any evidence on the defendant’s state of mind at the conviction stage, as a Wootton-inspired scheme would, Hart recommends blocking the possibility of adducing evidence relevant to his or her mental abnormality at this stage: ‘the question of his mental abnormality would under this scheme be investigated only after conviction and would be primarily concerned with his present rather than his past mental state. His past mental state at the time of his crime would only be relevant so far as it provided ancillary evidence of the nature of his abnormality and indicated the appropriate treatment’.[[53]](#footnote-53)

In light of the arguments that Hart develops to justify the practice of punishment and the values and criteria at work in its implementation, this ‘moderate’ compromise granted to Wootton is striking.[[54]](#footnote-54) This can be appreciated from at least two different points of view. First, note that Hart defines liability to punishment[[55]](#footnote-55) in a negative form: ‘the individual is not liable to punishment if at the time of his doing what would otherwise be a punishable act he was unconscious, mistaken about the physical consequences of his bodily movements or the nature or qualities of the thing or persons affected by them, or in some cases, if he was subjected to threats or other gross forms of coercion or *was the victim of certain types of mental disease*’.[[56]](#footnote-56) Responsibility is thus tied to legal excuses (among them mental insanity) on the basis of certain principles of justice. In other words, these excuses represent the ‘cash value’ of *mens rea* and they consider both the volitional and the cognitive aspects of the offender’s actions. Second, Hart defends to great lengths his chosen criterion for distinguishing between the guilty and the innocent for the purpose of distributing punishment and attaching criminal liability: ‘those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities’.[[57]](#footnote-57) This is connected with his justification for legal excuses, as the latter target precisely ‘the normal capacity’ and the ‘fair opportunity’ aspects of the offender’s actions, and from this point of view, it is surprising that Hart would recommend a scheme—even if aimed at a particular class of offenders—that would not definitively determine before conviction the voluntary nature of the acts under scrutiny (or, indeed, that was applicable even though the offender did not, in fact, act voluntarily). Finally, Wasserstrom observes that the ‘moderate’ system suggested by Hart is in one respect event more extreme than is Wootton’s version. This is because ‘there is no question but that [on Hart’s moderate view] persons who may subsequently be found to have been and to be suffering from some complete mental abnormality will nonetheless be convicted and adjudged guilty’ and, while the consequence for the Court is that it will deal not in punishment, but in compulsory medical treatment, ‘the damage will doubtless already have been done. The community may know nothing about where the accused was sent for treatment although it will often know that he was convicted’.[[58]](#footnote-58)

4. Assessing the debate and its relevance today

Why should any of this be of interest to us, today? Our goal in this final section is not to assess the strength of each of the arguments offered above, but to ask why it is that we ought to be interested in the kind of debate in which Hart and Wootton were involved and the kind of positions that each (took the other to) exemplified. This might seems quixotic in that it would be fair to say that the consensus is that, insofar as there is a ‘Hart/Wootton’ debate to accompany Hart’s more famous engagements with Fuller and Devlin, Hart emerged the victor. Hart’s views on responsibility—in addition, of course, to his important contribution to legal positivism—continue to be influential whereas if Wootton is read today it is largely as a historical curiosity.

This judgement is right all things considered. Other than by buying in to an incompatibilist account of responsibility—or more accurately, of the impossibility of responsibility—Wootton cannot adequately defend her claim that it is generally true that the law cannot distinguish the responsible from the non-responsible. However, as we have seen, that is not all there was to the debate. In what follows we point first to some distinctly Woottonian developments in the criminal law before turning to broader discussions in which the Hart/Wootton debate continues to resonate.

*4.1 Some Woottonian developments (or continuities)*

As Wootton herself noted in 1978, the ‘horror’ that greeted her Hamlyn Lectures, in which she called for the expansion of strict liability offences, and the prediction that any such expansion would result in the criminal law being regarded ‘with contempt’, had hardly been borne out by experience.[[59]](#footnote-59) Strict liability had, and continues to, expand in the criminal law. In England and Wales, there is an increased use of such offences by Parliament in the regulatory sector, mostly triable in the magistrate’s court or on indictment. That said, many instances of strict liability occur in statutes regulating the sale of food or drugs, the management of industrial activities or the conduct of licenced premises and the courts have repeatedly emphasised that strict liability offences ‘do not offend the ordinary man’s sense of justice’ (Warner v Metropolitan Police Comr [1969] 2 AC 256), are not ‘truly criminal in character’ (London Borough of Harrow v Shah [2000] Crim LR 692) and ‘carry with them no real social disgrace or infamy’ (Lambert [2002] AC 545). Yet insofar as some strict liability regulations target activities in which citizens generally engage such as driving, Wootton’s perspective proves particularly relevant.

Some developments in the treatment of young offenders in the UK are also reminiscent of the preventive system suggested by Wootton. The principal aim of the youth criminal justice system is ‘to prevent offending’ (Crime and Disorder Act 1998, s.37(1)) and ‘in dealing with a child or young person’ courts need to ‘have regard to [his] welfare’ and ‘take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training’ (Children and Young Persons Act 1933, s.44(1)). Similarly, the growth of drug courts and of ‘therapeutic jurisprudence’ in the USA has a decidedly Woottonian flavour.[[60]](#footnote-60)

Of course, these examples (and many others like them) simply point to the continuing relevance of preventive measures in the criminal law. They can be associated with Wootton, but there is no reason to regard them as specifically Woottonian. That said, insofar as one does not wish simply to say ‘so much the worse for them!’ in favour of some kind of desert or retributive model, the issues that divided Hart and Wootton still require attention.

Aside from pointing to continuing preventive measures and to ongoing debates about the compatibility or otherwise of such measures and a retributive or desert based system of punishment, there is a deeper reason why the Hart/Wootton debate continues to matter. This deeper reasons flows directly from the Hartian insight that we want our application of punishment to be *fair* and to reflect our choices rather than mere circumstance. As Wootton knew, Hart’s—and our—commitment to choice sits uneasily with the ways in which our actions interact with luck, with social meanings, and with our understanding of the world. Take each of these in turn.

# 4.1 Choice and luck

It is a familiar thought that the gravity of an offence may in some cases reflect, not the mental state of the offender, but the result of the offending. To steal a small sum is generally less grave than to steal a larger one. However, both are (in the usual instance) theft and involve the same mental elements (voluntariness, the intention to remove the item permanently, etc.). In some cases, however, the seriousness of the outcome seems to change the nature of the offence *and* in so-doing the presumed mental state of the offender. Wootton recalls ‘a case in which a car driver knocked down an elderly man on a pedestrian crossing, and a month later the victim died in hospital after an operation, his death being, one must suppose, in spite, rather than because, of this. Thereupon the charge, which had originally been booked by the police as careless, not even dangerous, driving was upgraded to causing death by dangerous driving’.[[61]](#footnote-61)

Or consider the Consider the English and Welsh offence of Gross Negligence Manslaughter. This involves the following elements: (1) the defendant owed a duty to the deceased to take care; (2) the defendant breached this duty; (3) the breach caused the death of the deceased; and (4) the defendant’s negligence was gross, that is, it showed such a disregard for the life and safety of others as to amount to a crime and deserve punishment.

The critical element, for our purposes, is (4), which is circular: the jury may only convict the accused of a crime if they find that the accused’s behaviour was ‘criminal’. Although it has been used more widely, this offence is usually applied to those who occupy and certain role or possess a certain skill. The result for the accused is serious. In 2014, a Sheffield caretaker on a housing estate was convicted of this offence and sentenced to four years in prison. He was, by all accounts, hard working and conscientious, but was also overstretched due to staff cutbacks. On the day in question, he removed a broken pane of glass from the fourth floor of a block of flats and, tragically, failed to board over the resulting gap. A small girl later fell through the gap whilst playing and died. Had no-one fallen through the gap and been killed this act of carelessness would never have come to the attention of the criminal law. It is the seriousness of the result—the death of a child—not the mental state of the offender that makes the difference.[[62]](#footnote-62)

These examples, and many others, are examples of when the idea that punishment falls fairly only when it reflects choice and not circumstance runs up against what philosophers call the problem of ‘moral luck’.[[63]](#footnote-63) Wootton did not know the problem by that name, but as her example shows, she was acutely sensitive to it. The conclusion she drew, as we have seen, was that intention and choice did not matter; what mattered was the harm done. We, like Hart, demur, but then the onus falls on us to explain how a choice centred account can accommodate the sometimes cruel hand of fate.

*4.2 Choice and Social Meanings*

In the above examples, it is the harm done that seems to threaten the centrality of choice. In other cases, it is our understanding of the harm—or of the circumstances in which it occurs—that does the work. Consider, for example, an abused wife who after many years of abuse—and despite the existence of ‘safe houses’ and other welfare state arrangements—waits for her drunken abuser to fall asleep, goes to fetch her largest kitchen knife, and kills her husband whilst he still sleeps. Given that she does not meet the conditions for a defence of self-defence or provocation, has she chosen to enjoy the satisfaction of non-compliance with the law and should she then pay the ‘price’? Many people think not and have reached for a mental disorder—‘battered woman syndrome’—or for ‘loss of self-control’ under provisions designed precisely for slow-burn cases to avoid just this outcome. Conversely, as we have seen in the case of *Byrne*, there are instances where ‘the worse the act—the more vicious and utterly depraved the act—the nicer the name we call it by’. In such cases we may think the act and the actor are inextricably linked.[[64]](#footnote-64) But, if in these cases, then why not in others?

*4.3 Choice, (social) science, and causality*

Finally, it is worth pointing out that the Wootton/Hart debate falls into a long line of debates between scientists of various kinds and lawyers and legal theorists. In the late Nineteenth Century, the English jurist James Fitzjames Stephen expressed his exasperation with those in the emerging field of psychiatry for their attempts to foist upon the law a psychiatric rather than a legal conception of responsibility. In turn, as Stephen recognised, those enthused by the new science thought the law unable to break free from “cruelty, ignorance, and prejudice” (Stephen 1883, 124-5) in its failing to recognise the causes of criminality and its holding fast to notions of individual desert. Fast forward roughly a hundred years to the mid Twentieth Century and to the Hart/Wootton debate. The place of the psychiatrist has been supplemented by emerging social science findings, but the mutual incomprehension remains. Now, at the beginning of the Twenty-First Century, psychiatry and social science has been powerfully supplemented by neuroscience, and the debate has reignited. On the one hand, there are those who insist that the new findings of neuroscience—findings that, for example, link poor impulse control or aggressiveness to particular sites in the brain that can be more or less developed—will, or ought to, transform criminal justice. On the other, just as in the past, are those who insist that the law, and its associated understanding of responsibility is immune to scientific explanations of behaviour.[[65]](#footnote-65)

# **5. Conclusion**

There is of course far more that could, and has, been said about all three debates mentioned above and the philosophical and legal theory has moved on significantly from Wootton’s rather crude characterisations of the issues. That said, for all the reasons given above the debate still resonates. Moreover, the ways in which responsibility and outcomes interact point us to something that can be gleaned from the debate between Hart and Wootton and from taking a more sympathetic view than is commonly done today of Wootton’s concerns. Wootton wrote from the perspective of a practicing magistrate. She was confronted on a daily basis by people accused of crimes and by the consequences not only of *their* actions, but of *her decisions*. Should she send this person to prison, or that one to fulfil a community sentence? Would satisfying the clamour for denunciation or retribution further the reform of the offender or the reduction in the likelihood of his reoffending? That is to say that she was engaged in the social practice of *holding* people criminally liable (or not) and that social practice is not as clean cut as criminal law theorists—including Hart—like to make out.[[66]](#footnote-66)

Of course, that is not to say that there should be no principles, or that theorists should stop trying to resolve these conflicts between principles—and amongst such theorists, Hart stands with the very best—but it is to point to the need to appreciate that precisely the concerns of fairness and justice that motivate Hart may sometimes also motivate us to depart from the kind of account of the centrality of responsibility to the criminal law that he so profoundly advocates.

**Bibliography**

Hart, H. L. A. (1965). 'Review of Crime and the Criminal Law.' *The Yale Law Journal* **74**: 1325-31.

Hart, H. L. A. (2008). *Punishment and Responsibility: essays in the philosophy of law*. Oxford, Oxford University Press.

Kadish, S. (1994). 'The Criminal Law and the Luck of the Draw.' *Journal of Criminal Law and Criminology* **84**: 679-90.

Law Commission (1996). *Legislating the Criminal Code: Involuntary Manslaughter*. Law Com No. 237. Available at http://lawcommission.justice.gov.uk/docs/lc237\_Legislating\_the\_Criminal\_Code\_Involuntary\_Manslaughter.pdf

Loughnan, A. (2012). *Manifest Madness: Mental Incapacity in Criminal Law*. Oxford, Oxford University Press.

Matravers, M. (2007). *Responsibility and Justice*. Cambridge, Polity Press.

Matravers, M. (2011). Reassurance, Reinforcement, and Legitimacy. *Handbook of Crime and Criminal Justice*. M. Tonry. New York, Oxford University Press.

Mullock, P. (1964). Responsibility, Propensity and Choice. *Mercer Law Review*, 16(1), 1-11.

Oakley, A. (2011). *A critical woman: Barbara Wootton, social science and public policy in the twentieth century*. London, Bloomsbury Academic.

Pifferi, M. (2012). ‘Individualization of Punishment and the Rule of Law: Reshaping the Legality in the United States and Europe between the 19th and the 20th Century.’ *American Journal of Legal History* **52**: 325-76.

Ross, A. (1970). 'The Campaign Against Punishment.' *Scandanavian Studies in Law* **109**: 111-48.

Stephen, S. J. F. (1883). *A History of the Criminal Law of England*. London, Macmillan.

Wasserstrom, R. A. (1967). 'H. L. A. Hart and the Doctrines of Mens Rea and Criminal Responsibility.' *The University of Chicago Law Review* **35**(1): 92-126.

Wexler, D. B. (1995). 'Reflections on the Scope of Therapeutic Jurisprudence.' *Psychology, Public Policy, and Law* **1**(1): 230-36.

Winick, B. (1997). 'The Jurisprudence of Therapeutic Jurisprudence.' *Psychology, Public Policy, and Law* **3**(1): 184-206.

Wootton, B. (1960). 'Diminished Responsibility: A Layman's View.' *Law Quarterly Review* **76**(302 (April)): 224-.

Wootton, B. (1963). *Crime and the Criminal Law: Reflections of a Magistrate and Social Scientist*. London, Stevens & Sons.

Wootton, B. (1963). 'The Law, The Doctor, And The Deviant.' *The British Medical Journal* **2**(5351): 197-202.

Wootton, B. (1978). *Crime and Penal Policy: Reflections on Fifty Years' Experience*. London, George Allen & Unwin.

Wootton, B. (1981). *Crime and the Criminal Law: Reflections of a Magistrate and Social Scientist*. London, Stevens & Sons.

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2. (Oakley 2011, xii) [↑](#footnote-ref-2)
3. (Wootton 1978, 224). Wootton’s exasperation with those who clung on to what she thought cruel and outdated ideas about punishment is clear throughout her writing. ‘Even Professor Hart’ she writes, ‘seems to be incurably obsessed with the notion of punishment, which haunts his text’ (Wootton 1981, 45-6). [↑](#footnote-ref-3)
4. In a passage written towards the end of her life, Wootton glosses this as ‘as an action does not become innocuous because its author meant no harm. From the point of view of the victim, it makes no difference whether the loss or injury that he has suffered was accidental or deliberately inflicted—except perhaps psychologically… A man is equally dead and his relatives equally bereaved, whether he was deliberately stabbed, or was run over by a drunken or an incompetent motorist. Even the inconvenience caused by the loss of one’s bicycle is not affected by the presence or absence of an intention to put it back on the part of the youth who removed it’ (Wootton 1978, 223). [↑](#footnote-ref-4)
5. Wootton focuses on individual rather than general deterrence. This is not for theoretical reasons, but rather stems from her scepticism about the evidence when it comes to general deterrence. [↑](#footnote-ref-5)
6. (Ross 1970, 122) [↑](#footnote-ref-6)
7. Ross—who was at the University of Copenhagen and a leading Scandinavian Realist—is following a mid-Century Swedish and German criminological tradition here (for discussion, see Matravers 2011). Wootton responds sceptically in (1978, 221-2). [↑](#footnote-ref-7)
8. (Ross 1970, 127-8) [↑](#footnote-ref-8)
9. (Wootton 1963, 197) [↑](#footnote-ref-9)
10. (Wootton 1963, 199) [↑](#footnote-ref-10)
11. (Wootton 1963, 200) [↑](#footnote-ref-11)
12. (Wootton 1963, 197) [↑](#footnote-ref-12)
13. (Wootton 1960) [↑](#footnote-ref-13)
14. Amended by the 2009 Coroners and Justice Act. [↑](#footnote-ref-14)
15. (Wootton 1963, 198) [↑](#footnote-ref-15)
16. And indeed have discussed it elsewhere (Matravers 2007) [↑](#footnote-ref-16)
17. A detailed analysis by Mullock (1964) shows that, from a strictly logical point of view, this Woottonian argument does not stand. He investigates the two different ways in which ‘circularity’ could be interpreted—as an unsatisfactory definition or as a *petitio principii*—and concludes that the most which could be carried forward by Wootton is the claim that ‘if all we know is the fact of repeated crimes and the legitimate inference from that fact viz. likely to repeat, this is not a good explanation of or excuse for crime’ (p.7), which is a logically much weaker point. Whether Mullock’s approach is the right one in reading Wootton is (at least) arguable. [↑](#footnote-ref-17)
18. (Wootton 1981, 47) [↑](#footnote-ref-18)
19. (Wootton 1981, 50-51) [↑](#footnote-ref-19)
20. (Wootton 1981, 71) [↑](#footnote-ref-20)
21. (Hart, 2008) [↑](#footnote-ref-21)
22. (Hart, 1965) [↑](#footnote-ref-22)
23. (Hart, 2008: 195) [↑](#footnote-ref-23)
24. (Hart 2008, 160) [↑](#footnote-ref-24)
25. Indeed, it is unclear on Wootton’s own account why we should wait until a crime has been committed before we consider whether someone should be incarcerated for public protection, etc. In her later reflections, she seems to think the main reasons are practical—to avoid ‘an impossible burden of extra work’—and evidential (the crime is the best indicator that preventive intervention is needed) (Wootton 1978, 224-5). [↑](#footnote-ref-25)
26. (Hart 2008: 197) [↑](#footnote-ref-26)
27. (Hart 2008, chIX) [↑](#footnote-ref-27)
28. (Hart, 1965) [↑](#footnote-ref-28)
29. (Hart, 2008) [↑](#footnote-ref-29)
30. (Hart, 2008, 180) [↑](#footnote-ref-30)
31. (Hart 2008, 6) [↑](#footnote-ref-31)
32. (Hart 2008, 152) [↑](#footnote-ref-32)
33. See Gardner 2008, xiii-liii [↑](#footnote-ref-33)
34. (Hart 2008, 23) [↑](#footnote-ref-34)
35. Given that we cannot predict with any accuracy when we will, for example, do something by mistake or by accident. Or, as Hart puts it: ‘we can have very little ground for confidence that during a particular period we will not do something unintentionally, accidentally, etc.; whereas from their own knowledge of themselves many can say with justified confidence that for some period ahead they are not likely to engage intentionally in crime and can plan their lives from point to point in confidence that they will be left free during that period’ (Hart 2008, 24) [↑](#footnote-ref-35)
36. (all quotations from Hart 2008, 47-8) [↑](#footnote-ref-36)
37. (Hart 2008, 6-7), (Hart 2008, 48) Christopher Pulman’s remark—in commenting on the chapter—is instructive: Hart’s remark that taxes on conduct is expressed as follows: ‘If you do X, you’ll pay Y’; whereas criminal prohibitions are phrased: ‘Don’t do X; otherwise you’ll have to pay Y’. This is really no difference at all, unless one packs a lot into the prohibition section of criminal laws. But this would seem to involve introducing a denunciatory element into punishment, and this is an element that Hart (deliberately) omits from his definition of punishment. [↑](#footnote-ref-37)
38. (Hart 2008, 48) [↑](#footnote-ref-38)
39. (Hart 2008, 44) [↑](#footnote-ref-39)
40. (Hart 2008, 140); In *Punishment and Responsibility*, Hart uses the strong term ‘odious’ in relation to strict liability on no fewer than four occasions. See 34, 132, 140, 152. He uses the same term in his review of Wootton’s *Crime and the Criminal Law* (Hart 1965, 1325) [↑](#footnote-ref-40)
41. (Hart 1965, 1329). Of course, whether Hart is right in identifying autonomy as a principle of justice is moot. Wootton clearly would not have done so. [↑](#footnote-ref-41)
42. (Hart 1965, 1329) [↑](#footnote-ref-42)
43. Hart is right about this. Consider, for example, the following passage: ‘traditionally, the requirement of the guilty mind is written into the actual definition of a crime. No guilty intention, no crime, is the rule. Obviously this makes sense if the law’s concern is with wickedness: where there is no guilty intention, there can be no wickedness. But it is equally obvious, on the other hand, that an action does not become innocuous merely because whoever performed it meant no harm. If the object of the criminal law is to prevent the occurrence of socially damaging actions, it would be absurd to turn a blind eye to those which were due to carelessness, negligence or even accident. The question of motivation is in the first instance irrelevant’ (Wootton 1981, 47). [↑](#footnote-ref-43)
44. (*R*. v. *Cunningham* (1957) 2 QB. 396) [↑](#footnote-ref-44)
45. (Hart 1965, 1330) [↑](#footnote-ref-45)
46. (Hart 1965, 1330). It is somewhat characteristic of their writing styles and intellectual approaches that Hart offers no evidence for this claim other than the unreferenced armchair reflection that ‘some would say this element is more important as a deterrent than the actual punishment administered’ (Hart 1965, 1330). Whereas (replying to the identical point made by Ross), Wootton writes ‘I can only say that such faith in the omnipotence of the deterrent effect of social disapprobriation strikes me as extremely naïve, and as certainly not borne out by the facts’ and refers back to a detailed empirical chapter in the same work (Wootton 1978, 222). [↑](#footnote-ref-46)
47. (Hart 1965, 1330-31) [↑](#footnote-ref-47)
48. It is not entirely empirical as Hart notes that insofar as odium continues to be associated with penal sanctions, it is a requirement of justice that such odium fall only on those had the capacity and a fair opportunity or chance to obey the law. [↑](#footnote-ref-48)
49. (Hart 2008, 204) [↑](#footnote-ref-49)
50. (Hart 2008, 203) [↑](#footnote-ref-50)
51. (Hart 2008, 204) [↑](#footnote-ref-51)
52. (Hart 2008, 205) [↑](#footnote-ref-52)
53. (Hart 2008, 205) [↑](#footnote-ref-53)
54. Wasserstrom (1967, 124) thinks ‘it evident that Hart has virtually gone over to Lady Wootton’s camp. [↑](#footnote-ref-54)
55. One could observe that Hart refers here to liability to punishment and not legal responsibility, and that the difference in scope between the two terms renders the point irrelevant. However, Hart himself notes in the Postscript to the second edition of ‘Punishment and Responsibility’ that he has sometimes employed various concepts—including the two under discussion—’without any full-scale discussion’ and proceeds to rectify the situation by characterising them in more detail. Based on the way ‘liability’ and ‘responsibility’ are defined in this characterisation, it seems fair to assume that he meant to define ‘legal responsibility’ negatively in the paragraph quoted. [↑](#footnote-ref-55)
56. (Hart 2008, 28, emphasis added) [↑](#footnote-ref-56)
57. (Hart 2008, 152) [↑](#footnote-ref-57)
58. (Wasserstrom 1967, 124-5) [↑](#footnote-ref-58)
59. (Wootton 1978, 223-26) [↑](#footnote-ref-59)
60. On therapeutic jurisprudence, see (Wexler 1995, Winick 1997) [↑](#footnote-ref-60)
61. (Wootton 1963, 49-50) [↑](#footnote-ref-61)
62. Partly due to this point the Law Commission recommended that the criminal law be revised so as to hold a person responsible for unintentionally causing death only when she unreasonably and inadvertently took a risk or when an inadvertent risk taking was culpable (Law Commission, 1996: 40-41). It also emphasised that the seriousness of the result should not ‘cloud the judgment’ on the defendant’s culpability. However, these recommendations have not been implemented. [↑](#footnote-ref-62)
63. (See, among many other things, Kadish 1994) [↑](#footnote-ref-63)
64. (cf. Loughnan 2012) [↑](#footnote-ref-64)
65. For an engaging history of the ways in which the United States and Europe responded to individualized sentencing, see Pifferi 2012. [↑](#footnote-ref-65)
66. This applies as much to sentencing as it does to broader questions of responsibility. Whatever the logic of separating questions of the general justifying aim of punishment from its distribution, ‘every sentencer’, as Wootton puts it, ‘is... faced with the choice between two fundamentally different principles on which to base his decision. Should he look to the past or to the future? Each of these principles is moreover further complicated by inherent unresolved conflicts [between] the social damage caused by a criminal [and] the wickedness of his intention. Reductivist sentencing…is caught on the dilemma of having to discourage both the offender and his potential imitators from further criminal activity; and these two objectives are only too likely to be in conflict. What appears to be the most hopeful treatment of the former may involve a serious risk of regrettable reactions on the part of the latter’ (Wootton 1978, 38). Of course, in many jurisdictions sentencing guidelines have displaced judicial discretion. [↑](#footnote-ref-66)