CHANGING CONCEPTIONS OF RESPONSIBILITY

I

THIS LECTURE is concerned wholly with criminal responsibility and I have chosen to lecture on this subject here because both English and Israeli law have inherited from the past virtually the same doctrine concerning the criminal responsibility of the mentally abnormal and both have found this inheritance embarrassing. I refer of course to the McNaughten rules of 1843. In Israel the Supreme Court has found it possible to supplement these exceedingly narrow rules by use of the doctrine incorporated in s. 11 of the Criminal Code Ordinance of 1936 that an "exercise of the will" is necessary for responsibility. This is the effect of the famous case of *Mandelbrot* v. *Attorney General* [1] and the subsequent cases which have embedded Agranat J's construction of s. 11 in Israeli law. English lawyers though they may admire this bold step cannot use as an escape route from the confines of the McNaughten rules the similar doctrine that for any criminal liability there must be a "voluntary act" which many authorities have said is a fundamental requirement of English criminal law. For this doctrine has always been understood merely to exclude cases where the muscular movements are involuntary as in sleep-walking or "automatism" or reflex action. [2] Nonetheless there have been changes in England; after a period of frozen immobility the hardened mass of our substantive criminal law is at points softening and yielding to its critics. But both the recent changes and the current criticisms of the law in this matter of criminal responsibility have taken a different direction from development in Israel and for this reason may be of some interest to Israeli lawyers.

1 (1956) 10 P.D. 281.

2 See Edwards, "Automatism and Responsibility" (1958) 21 *M.L.R.* 375 and Hart, "Acts of Will and Responsibility" in *The Jubilee Lectures of the Faculty of Law, Sheffield University* (London, 1960). The doctrine as now formulated descends from Austin, *Lectures in Jurisprudence*, Lecture XVIII.

THE ENFORCEMENT OF MORALITY

I.

IT IS SOMETIMES said that the English have no philosophy of law. I do not myself believe this to be true: it is, however, possible to identify two things which have given rise to this misconception. One of these things is relatively unimportant; the other is important. The unimportant thing is that the expression "philosophy of law" has never become domesticated in England even among philosophers. And English lawyers, even academic ones, are very shy of using it perhaps because the word "philosophy", mentioned in conjunction with law, suggests deep and dark metaphysics derived from Kant or Hegel, or some systematic *Weltanschauung* which has little to do with the lawyers' concerns. Of course if English lawyers do think in this way, they are more than a little out of date, because in English philosophy of the last forty years there has not been much metaphysics or systematic *Weltanschauung*.

None the less it is quite clear that even if English lawyers still shudder at the expression "philosophy of law" we certainly have the thing for which the expression stands. But in part the belief that we do not have it has, I think, been prompted by the important fact that the philosophy which has dominated English thought about law has scarcely ever been shared by the few English judges who have articulated general views about law. The English philosophers who have had most to say about law are Jeremy Bentham and John Stuart Mill. Bentham elaborated on the basis of his philosophy of utilitarianism detailed criticisms of English law and governmental institutions which gave an immense impetus to reform in the 19th century, and John Stuart Mill added to Bentham's philosophy a special emphasis on the value of individual liberty. The thoughts of these two great philosophers are still very much alive in the criticism of English law, and one of the most important implications of their philosophy concerns the criminal law. These thinkers held that the use of the