Criminal Responsibility

Charles Arthur Mercier

CRIMINAL RESPONSIBILITY

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CHARLES MERCIER, M.B.

F.R.C.P., F.R.C.S.

LECTURER ON INSANITY AT THE WESTMINSTER HOSPITAL MEDICAL SCHOOL AND AT THE MEDICAL SCHOOL OF THE ROYAL FREE HOSPITAL;

AUTHOR OF 'THE NERVOUS SYSTEM AND THE MIND'; 'SANITY AND INSANITY' 'LUNATIC ASYLUMS, THEIR CONSTRUCTION AND MANAGEMENT'; 'LUNACY LAW FOR MEDICAL MEN'; 'PSYCHOLOGY, NORMAL AND MORBID'; 'A TEXTBOOK OF INSANITY'; ETC., ETC.

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PREFACE

'In homicide, as in all other crimes, the definition consists of two parts,—the outward act, and the state of mind which accompanies it.' This dictum of one of our greatest jurists indicates clearly that all crime is, in part, a problem in psychology. The outward act which enters into the composition of crime is the subject of innumerable statutes and innumerable judicial decisions. Criminal acts have been classified and considered with the utmost minuteness and the most discriminating subtlety, as to their kinds, their effects, their degrees, their stages, their circumstances, and I know not what beside. The other ingredient in crime—the state of mind which accompanies the outward act—is much more obscure; and, though it has received much attention at the hands of very eminent men, it has not arrived at a stage of such settled determination as has the first ingredient. The reasons are manifest. Our knowledge of the constitution of mind has lagged far behind our knowledge of the constitution of acts. States of mind are not, as acts are, directly observable, but are matters of inference, often of very uncertain and speculative inference. The discovery of the state of mind that accompanies an act, no more than the discovery of the geological constitution of a stone, can be effected by the unaided common sense of the uninstructed. It demands a knowledge of the constituents of mind, and of the laws of operation of mind: and the inability of even an acute intellect, if uninformed, to deal with the subject successfully, is shown by the complete failure of Jeremy Bentham's elaborate analysis to command assent,—I might say, even attention.

Although, therefore, the subject of criminal responsibility has been considered and treated exhaustively, by Sir FitzJames Stephen, from the point of view of the professional lawyer who was in psychology an amateur, it seems that its treatment is not complete until it has been considered anew by a professional psychologist. Sir FitzJames Stephen was hampered by an insufficient knowledge of the working of the mind in health and disease. That he was so hampered he formally admits, and the admission is no disparagement to him. He made the best use of the knowledge of his time, and he obtained a singular degree of mastery over the knowledge of insanity that was then available. But in twenty years our knowledge has advanced; and I think the time is ripe to complement his work by another, written from the complementary point of view.

This is the task that I have essayed. My preparation for it has been a long study of the subject in its various aspects. The working of the normal mind has been the favourite study of my life, and my views with respect to it are embodied in my book *Psychology, Normal and Morbid*. With the peculiarities of the insane, I am familiar by daily acquaintance. Cases of crime in which the plea of insanity is raised I have collected, analysed, and reported in the *Journal of Mental Science*, with critical observations, for many years; and I have had enough experience, as a witness in such cases, to gain a general knowledge of the main classes of criminals that are tried in our courts. Under these circumstances, I trust I shall not be considered presumptuous in reopening a subject, which has been treated, with such full knowledge and ripe experience, by such a very learned Judge.

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CHAPTER I

RESPONSIBILITY

THE first requisite in dealing with such a term as Responsibility, a term which has been used in very different senses by writers who have dealt with it, is to state with precision the sense in which it is to be used in the discussion that follows; and to adhere to the same sense throughout the discussion. It must be admitted that jurists are much less open to criticism for laxity, in the definition and use of the terms of their art, than are medical men or psychologists; although even the greatest jurists are by no means free from blame in this respect, and, when using terms belonging to branches of knowledge other than law, are not much better than other people. When each of two parties in the discussion of a subject uses one of its fundamental terms in a sense different from that of the other party, nothing but confusion can result. The legal sense of the term responsibility is, I suppose, beyond doubt. Sir FitzJames Stephen says that 'judges when directing juries have to do exclusively with this question,—Is this person responsible, in the sense of being liable, by the law of England as it is, to be punished for the act which he has done?' And he goes on to say, 'Medical writers, for the most part, use the word "responsible" as if it had some definite meaning other than and apart from this. Dr. Maudsley does so, for instance, . . . but he never explains precisely what he means by responsibility. I suppose he

means justly responsible, liable to punishment by the law which ought to be in force, but if this is his meaning, he confounds "is" and "ought to be," which is the pitfall into which nearly every critic of the law who is not a lawyer is sure to fall.'

This pitfall I shall try to avoid, but I do not think its avoidance need compel me to confine myself exclusively to the legal sense of the term responsibility. Admitting that this sense of the term is strictly defined in the quoted words of Sir FitzJames Stephen, the admission at once places that sense outside the purview of the present inquiry. Responsibility then becomes a strictly legal question, and one with which no one but a lawyer is competent to deal. The sense which I attach, throughout the following discussion, to the term 'responsible' is 'Rightly liable to punishment,' and responsibility becomes the quality of being rightly liable to punishment. To clarify the concept, it is necessary to explain what is meant by 'rightly,' and what is meant by 'punishment.'

When I speak of a person or an act as being rightly liable to punishment, I exclude from consideration all reference to law. I discard 'is,' and consider 'ought to be' alone. This attitude is, it must be admitted, of considerable temerity. The law, the accumulated wisdom, the concentrated common sense, of many generations, sets up one standard of responsibility, and who am I, that I should set up another? The question would be crushing were it not that law is eminently modifiable; that it is continually being altered to bring it into accordance with the altering moods of the populace subject to its ministrations; and that in this matter I speak, not as an isolated individual, but as in some sort representing, or at any rate according with, the body of opinion, as to what is right and what is wrong, which is now prevalent

in my own country and generation. The law is modifiable; it is plastic; it undergoes alteration under the pressure of opinion; but it changes slowly. It is right that its changes should be slow, for it would be intolerable to live under a law that fluctuated widely and rapidly. But still, its changes are slow, and it is necessarily always somewhat, often a long way, behind the opinion of the age to which it ministers. The mere expression of opinion by any individual that the law is faulty, and should be altered in this or that direction, is entitled to very little consideration; but if reasons can be given for change, or for maintaining the law as it is, if the principles which underlie any law can be investigated, and the law shown to be in harmony or in discord with them; then I think the reasoning is entitled to consideration, apart from the person who may conduct the inquiry.

By *rightly* liable to punishment I mean, then, liable to punishment on grounds that appear fair and just to the ordinary man when they are explained to him—grounds that commend themselves as equitable and right, not to the faddist, the pedant, or the enthusiast, but to the common sense of the common man of this time and this country. If I fail to gauge his temperament with accuracy, so much the worse for my argument. Again we are confronted by a difficulty. Who is to be considered the ordinary man? How shall we recognize him? by what test is he to be known? You, my reader, are, I take it, by no means an ordinary or common man. Your taste and intelligence are proved to be far above the common, *ipso facto* by your perusal of these pages. But, failing an appeal to the actual judge, I must place you vicariously in his place, and in this I do my argument no wrong, though I place myself at a disadvantage. It is the ordinary man whose verdict must ultimately decide

the matter; but it is you that must first be convinced. I would not for the world have him know it; but the ordinary man will adopt that view that you tell him to adopt. If, then, I can convince your trained intelligence, and stand the test of your critical acumen, I have no fear that my arguments will be lost upon the man in the street; who will have the arguments put before him, not in the crude and imperfect form in which they are here embodied, but refined and enlightened by passing through your mind.

Next, what is here meant by punishment? The nature of punishment cannot be determined without previous determination of its aim; for it is manifest that not only the mode of punishment, which I do not propose to consider, but our concept of what punishment is, must vary according to the aim sought by means of punishment. This aim is usually stated to be threefold,—Retribution, Determent, and Reform. We punish, it is said, him who has done wrong, partly to satisfy the craving that exists in our minds that those who have done wrong shall suffer pain; partly to deter that and other wrong-doers from the doing of such wrongs; and partly so to influence the mind of the wrong-doer that he shall cease to desire to do wrong. Of these three ends, the first, in my opinion, preponderates immensely over the other two. These are but secondary effects of punishment; desirable, indeed, if they can be attained without interference with the first, and often, when punishments are discussed academically, and without reference to any particular instance of crime, declared to be primary. Bentham, indeed, regards determent of others, or example, as the most important end of punishment, and reformation as next in order. Retribution he calls 'a kind of collateral end,' and admits that, as far as it can be answered gratis, it is a beneficial one,

but says that no punishment ought to be allotted merely to this purpose, because the pleasure, that it produces in the mind of the injured person and the spectators, to witness the suffering of the criminal, can never be equivalent to that pain. For my own part, I am unable to estimate any equivalence between pleasure and pain, still less between the pleasure of one person or set of persons and the pain of another, a task which Bentham performs with such ease and certainty. If there be any such equivalence, I feel no certainty that the aggregate of multitudinous satisfactions, felt by millions of right thinking people at the execution of a very atrocious murderer, may not be 'equivalent' to the pain felt by that single murderer in contemplating his impending execution. It is unnecessary to strike the balance, however, for the state of affairs contemplated by Bentham,—a state in which pleasure is avowedly the primary aim of conduct,—is one which does not exist and never has existed.

The inquiry in which we are engaged is twofold. We are to determine what are in fact the aims intended by punishment, and what they ought to be. As to the first branch of the inquiry, it will be admitted, I think, that the reform of the criminal does not occupy the first place in any scheme of punishments now existing. No scheme of punishment is primarily adapted to that end. It is, so far as our punishments are concerned, an afterthought, and one of recent introduction. In an early stage of society, nay, until very lately, no opportunity was given to the prisoner to reform, for his career was cut short as soon as he had been convicted of any crime except one of the most trifling character. The only scheme of punishment, in which reform of the criminal occupies a prominent position, is that of Elmira; and it is felt by the spectator that it is a misnomer to apply the term

punishment to the treatment which is there meted to the criminal. As Sir Edward Fry has acutely pointed out, if the sole aim of punishment were reformation, then no attempt would be made to punish the criminal who shows himself to be incorrigible. He would be left unpunished after conviction.

The primary aim of punishment is then, either Retribution on the criminal or Determent of him and of others from committing like crimes. If Determent of others, or Example, is, as Bentham contends, the primary aim of punishment, then it seems that the severity of punishment should be proportional to the diffusion of the inclination to commit the crime; that is to say, the severest punishment should be visited upon those crimes which every one is under temptation to commit; while crimes which allure a single perpetrator only, and have no attraction for any one else, may go unpunished, so long as the perpetrator is prevented from repeating them. On this principle, Jack the Ripper, if he had been caught and convicted, would have been sentenced to detention merely. So, too, if Determent is the chief aim of punishment, the fact of punishment should be widely published, as is actually done when determent is important. Railway companies, which have a great interest in deterring passengers from defrauding them in easy ways, are accustomed to post up in their stations lists of convictions and punishments that have been awarded for such offences. But, in fact, a large number of crimes are tried, and the criminals sentenced, if not in secrecy, yet with all practicable diminution of publicity. No one but the officials in a certain government department, and the delvers in blue books, knows anything of the number of persons annually convicted and punished for unnatural offences. If determent were the sole aim of

punishment, either these convictions and punishments would be widely published, or, if it were thought, as it is thought, inexpedient to give publicity to them, no punishment would be inflicted; for a punishment which is concealed cannot be deterrent to any one but the punishee.

By a process of exclusion, then, we are driven to allow that Retribution is one of the main aims of punishment; and, if we follow out the same mode of reasoning, we must admit that it takes precedence, not only in time, but in importance, of both the others. We have seen that there are crimes which would not be punished at all, or would be punished with what we feel irresistibly would be inadequate severity, if Reformation or Determent were the only aims of punishment. There is no explanation for the feeling of injustice and inadequacy with which we regard such treatment of crime, except in the imperative desire that those who do wrong should be made to suffer. 'Here' says Sir Edward Fry 'we seem to be near a fundamental fact of human nature, a moral element incapable of further analysis (so far at least as my chemistry goes),—the fact that there is a fitness of suffering to sin, that the two things, injustice and pain, which are both contrary to our nature, ought to go together, and that in consequence we naturally desire to bring about an association of the two where it does not already exist. . . . Punishment, in short, is an effort of man to find a more exact relation between sin and suffering than the world affords us. . . . In a word, then, it seems to me that men have a sense of the fitness of suffering to sin, of a fitness both in the gross and in proportion; that so far as the world is arranged to realize in fact this fitness in thought, it is right; and that so far as it fails of such arrangement, it is wrong, except so far as it is a place of trial or probation; and consequently

that a duty is laid upon us to make this relationship of sin to suffering as real and as actual and as exact in proportion as it is possible to be made. This is the moral root of the whole doctrine of punishment.'

If we seek the origin of punishment in history, instead of in the moral nature of man, we are compelled to the same conclusion. In the history of mankind, the function of law is to supersede war. The glimpses that we have, into the earliest state of races of men that are now civilized, show a state in which war, war between individuals, or rather between families, was the general rule; and law, in its beginning, was striving to mitigate the ferocity of war by the gradual introduction of voluntary arbitration. Law, in so far as it existed—incipient law—had no power to interfere of right between the injured and the injurer; but the resulting blood-feud was so disastrous to both parties, that an alternative perforce suggested itself. Incipient law appealed from the vindictiveness of man to his cupidity. It suggested a payment in different kind. Instead of an eye for an eye and a tooth for a tooth, it suggested an ox for an eye and a sheep for a tooth. If the parties chose to accept this mode of settling their differences, the affair was at an end. But there was no compulsion on them to accept it. There was no authority to enforce compulsion. Long, long after authority was established, and compulsion was become possible, the injured retained the right to reject the demand for compensation and to demand the primitive mode of trial by battle; and this right was not formally abolished until a time within the memory of some now living. When civilization had progressed so far that courts of law were established, they still had no power to enforce their decrees. If the litigants had agreed to abide by the decision of the court, the king's

officer, who sat, not as a judge, but as the king's representative to receive the king's share of the fine, would enforce the doom if he could; but if a litigant had not agreed to abide by the decision of the court, all that the court could do was to pronounce him an outlaw. The earliest function of the courts was not to suppress the blood-feud, but gradually to supersede it, by providing an alternative which would be acceptable. It was necessary that it should be acceptable, because it could not be enforced. Mr. Maitland says of Ethelred's laws, that 'they were many, for he had to say the same thing over and over again, and we see on their face that they were ineffectual. He begs and prays men to keep the peace and desist from crime; he must beg and pray, for he cannot command and punish.' As the king became stronger, and as it became more and more manifestly to his interest that private war should cease and the peace be kept, his officer took more and more a leading part in the proceedings of the court. Little by little he grew from assessor to president of the court, ousting the local Thingman, who was not sorry to be relieved of a duty, which was burdensome from the time it occupied and the friction with neighbours that it created. More and more the law tended to compel the acceptance of wergild as an alternative to blood-feud, but if the wergild were beyond the means of the homicide, the law left him to be slain; and, as the court gained more and more authority and power, it took the function of slaying upon itself. Throughout the early history of criminal law, we recognize its weakness, and the necessity it is under to conciliate the goodwill of the injured, in order to gain from him the concession of being allowed to inflict punishment, instead of leaving it to be inflicted by him. To gain this concession, the law must make its punishment conformable