

MENTAL DISORDER AND THE CRIMINAL LAW

A STUDY IN
MEDICO-SOCIOLOGICAL JURISPRUDENCE
WITH AN APPENDIX OF STATE LEGISLATION
AND INTERPRETIVE DECISIONS

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Purposes, Desiderata, and Difficulties. — With these preliminary observations, we may now attempt to outline what we conceive to be the social purpose expressed in the criminal law (especially the law of insanity), the desiderata in this field, and the difficulties that stand in the way of their achievement.

Responsibility. — We cannot escape some further dealing with the metaphysical specter of responsibility. Elsewhere³ we have already expressed the opinion that the question of freedom of will may be entirely disregarded, for the purposes of the criminal law; that the problem of moral responsibility or social accountability⁴ is rather concerned with those practical matters, — such as, on the one hand, the safety of the group, and, on the other, the mental condition (as well as other factors contributory to delinquency) of the individual offender. The metaphysical argument that freedom of will is essential to moral agency, virtue, vice, reward, punishment, must in practice result in absurd conclusions. For example, even practical, keen minded, but sentimentally altruistic lawyers, such as Clarence Darrow, arrive at absurd conclusions by treading the *via dolorosa* of "necessity", or "determinism." This capable advocate and humanitarian, steeped in the dogma of mechanistic psychology, informs us at the outset of a recent work on "Crime, Its Causes and Treatment",⁵ that his

¹ Cf. George Ives, "A History of Penal Methods" (1914), and Louis N. Robinson, "Penology in the United States" (1921).

² See note 3, pp. 20, 21.

³ Pp. 92, *et seq.*

⁴ Saleilles, "The Individualization of Punishment", pp. 137-219, shows that we are dealing primarily with a social or cultural phenomenon in responsibility.

⁵ Thos. Y. Crowell, N. Y. (1923).

"main effort is to show that the laws that control human behavior are as fixed and certain as those that control the physical world. In fact, that the manifestations of the mind and the actions of men are a part of the physical world."¹ With commendable consistency, but absurd results, he therefore concludes that "the criminal" is morally blameless. He tells us that "crime" and "criminal" are "associated with the idea of uncaused and voluntary actions. The whole field is part of human behavior and should not be separated from the other manifestations of life." Now the use of the expression "*the criminal*" together with this supermechanistic and materialistic psychology, indicates that this author proceeds upon the wrong premise elsewhere criticized, that, because there are many evidences of mechanistic causation in the physical world, it necessarily follows that the human mind has not even an iota of power of creative adaptation to environmental demands and that, consequently, all human conduct is accidental; further, his view implies that we can speak of "*the criminal*," the *homo delinquente* of Lombroso, disregarding the very obvious evidence of the multiplicity and complexity of causation of criminal, as of noncriminal behavior, in the individual case. What does Mr. Darrow propose to do with all these *criminals*? If all has already been written in the book of fate, then all his penological and humanitarian preventive efforts are doomed to miscarriage. No criminals can be reformed, nor can potential criminality be prevented; and it is, moreover, immoral and unjustifiable to restrain any offenders, if we accept the view that they were just pushed upon life's stage and had no power to depart from the literal statement of their rôles, which were written millions of years ago. As Professor Conklin long ago pointed out, the fundamental flaw of this whole deterministic-mechanistic position is its extreme one-sidedness, its eager jumping at conclusions that biological science itself does not warrant.² The presence of mechanism does not mean that human

¹ *Op. cit.*, pp. vii and viii.

² "In both ontogeny and phylogeny there has been development of freedom. The reactions of germ cells and of the lowest organisms are relatively fixed. In more complex organisms reactions become modifiable through conflicting stimuli, intelligence, inhibitions. Freedom is the more or less limited capacity of the highest organisms to inhibit instinctive and non-rational acts by intellectual and rational stimuli and to regulate behavior in the light of past experience. Such freedom is not uncaused activity, but freedom from the mechanical responses to external or instinctive stimuli, through the intervention of internal stimuli due to experience and intelligence." "Heredity and Environment", pp. 330, 331.

beings have not some spark of capacity for consciously and creatively guiding their conduct in conformity with legal sanctions. Professor Conklin well says: "We need to think of the possibilities of development as well as of the limitations of heredity. Chance, heredity, environment have settled many things for us; we are hedged about by bounds we can not pass; but those bounds are not so narrow as we are sometimes taught, and within them we have a considerable degree of freedom and responsibility."¹ If the problem of freedom of will must be discussed as a basis for moral responsibility, then we know of no better disposition of it than that made by Professor Conklin. But, as we have repeatedly said, it is our belief that praise and blame, the urge to hurt in retaliation, the instinct to self-protection,—these are all concepts that have their tangible illustration and sanction in the psychology of human nature; and, similarly, society's right to self-protection is found in group psychology, in the primitive urge of the group to maintain itself against those inimical acts of individuals that threaten its very existence. This *psychological* basis of responsibility is primary; the rest is mere addition, refinement, sublimation, and rationalization.

Granting the right of society to take every reasonable measure for its self-protection, responsibility really means *educability*; i.e., if the offender's life history and mental examination disclose that he was able to profit by experience to a more or less normal degree, then he is responsible both morally and to the group, for violating the laws of the group wherein he finds himself. The concept of educability has two chief implications and looks in two directions: First, that punishment here carries with it the *stigma of criminality* and the penal-sociological régime of a *prison*, and this looks back upon the past offense. Secondly, since it has been shown that the mental condition of such a prisoner is such as to make it likely that he has the capacity to profit by future experiences, his educability means that he will be sent to a *prison* (instead of a hospital for the mentally ill), where he will be given the opportunity of education and reform and other character-building experiences; and this looks into the future. It must again be pointed out that such ability to profit by experience (hence, to that extent, responsibility), carries with it the more

¹ Presidential Address, American Society of Naturalists, Cleveland. *Science*, Jan. 10, 1913.