

LEGAL RESPONSIBILITY FOR CRIMINAL ACTS

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In the last few years we seem to have been afflicted by a large and increasing number of unnatural and revolting crimes, the details of which, as flaunted before the public by the sensational press, have shocked society. Many ignorant persons have clamored for lynching; the law has demanded full retribution in the regular course; while many learned individuals have asserted, and some have testified, that such actors should be relieved from the penalties imposed by law, for the apparent reason that they were doing the best they could, that angels could do no more, and, although not asserting they were within the angelic category, if that best was the commission of heinous crimes the law should not punish, even though the actor was keenly and often super-intelligently conscious of the fact that he was breaking the law and subjecting himself to its penalties. To phrase it differently, if an act was the seemingly inevitable result of heredity, environment or history—one or all—the actor should not be held to be legally responsible, however conscious he may have been of the fact that he was breaking the law and of the difference between right and wrong.

At the Buffalo meeting of the American Bar Association last August, Dr. William A. White, of Washington, D. C., admirably stated the foregoing theory in an address before the section on Criminology relative to what he considered to be the misconceptions of the law concerning mental disease in connection with legal responsibility for criminal acts.¹ The doctor, a psychiatrist of note, doubtless well expressed the thoughts of his class, and his conclusions are entitled to respectful consideration, but his theories, judged by all rules of social necessity, seem to pass beyond the non-moral almost to the point of an intellectual immorality. He objects to the customary tests of the law as being antiquated and, from the scientific point of view, he considers

¹*Need for Cooperation Between Lawyers and Psychiatrists in Dealing With Crime*, (1927) 13 A. B. A. J. 551; 52 A. B. A. REP. 497.

questions relative to the actor's sense of responsibility or ability to distinguish between right and wrong as being almost humorous. The gist of the objection is to be found in the following quotation from his address:

"The common factor that runs through the whole problem of crime and its various manifestations is the psychology of the individual offender, and the law, with its emphasis upon the act rather than the actor, he feels has failed to give this factor adequate consideration."

The statement is doubtless correct from the psychiatrists' point of view, and "that factor" must be given full consideration in the treatment of the actor in a psychopathic ward, but cannot be given the emphasis which the doctor desires when a person guilty of a criminal act stands before the bar of justice to receive the judgment of organized society. To give the indicated effect to the "psychology of the individual" is merely to excuse the offender for his act because of heredity, history or environment, although he may be fully conscious of the fact that his act offends against the law, and is contrary to accepted notions of right and wrong. The doctor's test confuses moral responsibility with legal responsibility; the former may be applied by God when the actor is judged before a Heavenly Tribunal, but cannot safely be applied by man in the regulation of human society.

This attack upon the established rules of law has a real and present importance for the reason that it is the exact claim which has been advanced as an excuse for the commission of some of the most atrocious of recent crimes, and in one of the most notorious cases has received favorable consideration by the trial judge.

As a problem in ethics, it is always interesting to apply this test; admitting a conscious breach of the law, to what extent is this murderer, burglar or forger morally guilty? We may state at the start that without a predisposing heredity, or a preparatory history and environment, with the natural psychic processes resulting therefrom, no man passes from a consistently virtuous life to crime. The moral and conventional restraints of society must,

in some way, be broken down before, to paraphrase "The Pirates of Penzance," the enterprising burglar goes a-burgling or the criminal becomes occupied with crime. There is a psychic history, be it short or long, which precedes the commission of every crime and which may excuse in morals but which the safety of society demands must not be recognized at law. This is unfortunate, but there are many unfortunate psychic factors at work in civilization, not the least of which is that known to the law as criminal intent. "*Salus populi lex suprema est*" must be applied as the rule—the formal expression of that which results in the greatest good for the greatest number.

Probably the experience of every lawyer whose practice has extended over a considerable period of years, negatives the propriety of recognizing the "psychology of the individual" as an indulgence for crime unless or until it passes beyond the bounds of that sanity which is able to distinguish between right and wrong. It is difficult to ascertain the psychic processes of the individual accused of crime who denies the commission of the alleged act. In spite of what appears to be overwhelming evidence, and in the face of a verdict of guilty, there is always the possibility that the individual—man or woman—is telling the truth and is absolutely innocent. This is one of the chief arguments against capital punishment and is another thing which God only knows—as in the case of Sacco and Vanzetti. However, with the man who confesses his guilt to his lawyer, if to no one else, whether in civil or criminal cases, an entirely different situation arises. The majority of persons accused of wrongdoing will, in confidence, confess the act. Most of these, but far from all of them, with retribution impending, will be sorry that they committed that particular act. It is nevertheless most unusual, almost unknown, to find such a one without an excuse which absolves him or her from all moral guilt, and the more seemingly inexcusable the act the more inclined are they to defend its commission as either morally right or justifiable. That is a form of the "psychology of the individual" which, in the absence of that insanity known to the law, as such, falls very far from relieving the actor from legal responsibility for his act. Some cases of

this kind are simple, and even a learned psychiatrist would not attempt to relieve the actor from legal responsibility, but basically the excuses are all the same; that is, a reason which satisfies the conscience of the actor in knowingly breaking the law and, phrase it as one may, that is the very psychic state, glossed or unglossed, which the psychiatrists assert as a sufficient cause for relieving from the penalties of guilt.

Let me refer to three situations which occur to me out of recent practice.

In the first, a witness during the course of a trial denied repeatedly the existence of a particular act. This fact, although of materiality under the rules of evidence, could not actually have any bearing upon the result of the trial and was of itself perfectly innocent. The situation was a peculiar one, and, in the heat of the trial, I assumed that the witness was being "framed" in an inconsequential matter, for jury effect, and I was properly indignant. Later, the witness came to me and stated that a foreign attorney, on whose integrity and judgment the witness relied, had advised, long before the trial, that if the particular question was asked he was to deny the existence of the fact because, although the fact existed, it was "none of the business" of the other side. Here we have a person of little experience and fair intelligence who relied upon a person of large experience and superior understanding. The "psychology of the individual" in this case was such that there was doubtless absolutely no moral guilt, but the law certainly could not recognize that excuse in a prosecution for perjury.

Take another situation in which the psychic factors are somewhat more complicated. Two cases arose which were practically identical, each involving a trusted employe of a large corporation. The individuals were working upon small salaries but handled large sums of money. In the first instance, they were thoroughly honest—so far as that could be learned. The officers of the corporation were lax in attending to business, lived extravagantly, and used large sums of money for their families, the source of which was not known to the employes. This was the subject of brooding, and a sense of personal wrong, coupled

with a suspicion of the integrity of their superiors, arose. First a few dollars were taken for what seemed to be necessities; this was repaid and conscience salved itself; more money was taken—first for relative necessities, then for simple amusements, finally for gross extravagance and dissipation. The individuals were hard-working, and inclined to be loyal to their families, and when the defalcations, amounting to several thousand dollars, were discovered the “psychology of the individuals” had reached a point where, although unquestionably able to distinguish between right and wrong, they were seemingly convinced that the surrounding circumstances absolved them from all moral guilt, and they were vigorous in defending what they had done, from the moral point of view, while fully conscious at all times that they were breaking the law.

We will now take a longer jump. An illegitimate boy, raised in an asylum with a severe regimen, was, upon leaving, soon committed to an industrial school for some trifling offense. Conviction followed conviction; as soon as he was released from one penal institution, he was under suspicion and promptly sent to another. Sometimes offenses for which he was not responsible were shifted to him as a likely subject. He served time when he was guilty and when he was not guilty. At the age of thirty-eight he had been an inmate of penal or quasi-penal institutions three-quarters of his life. He was convinced that he was persecuted, that the hand of society was against him, and he fought back as a weakling against a powerful foe. Caught in the act of passing one-dollar bills which had been raised to high denominations, he was convinced that he was right, although judged by accepted legal standards he was quite able to distinguish between right and wrong, and he knew that he was breaking the law, but it was the law enacted by his enemy. He was arraigned before a kindly and experienced United States District Judge. The United States Attorney honestly believed that if he pleaded guilty he would be treated with leniency, and so, unofficially, advised. He entered his plea and told his story. The reaction was unexpected. The judge was of the opinion that imprisonment for a long term would afford the sole means for reformation. A

maximum sentence was imposed, and then, off the record, the judge spoke kindly, as man to man—he knew the officer in charge of this Federal prison, he was a high-type man, he would be a friend to the unfortunate one and teach him that society was not his enemy. The judge went further—if at the end of two years the prisoner would write to him that his point of view had changed the judge would investigate and, if true, he would personally recommend and insist upon a pardon. The man went to prison. Within six months the kindly judge died. Shortly thereafter a new United States Attorney was named in that district, then the war came, and every one forgot the unfortunate prisoner. He served his full term, and, at last accounts, was at large more convinced than ever that so-called crime was nothing but fighting his old-time enemy—society.

Here again the “psychology of the individual” justified the crime in the eyes of the criminal; conscious of the difference between right and wrong, as such, his conscience, in his particular activities, absolved him from moral guilt. He knew that he had broken the law of his enemy, and that, in the opinion of that enemy, he was guilty of a crime involving moral turpitude, for he was really an intelligent person.

These are three simple cases, selected because they are typical and quite devoid of sensationalism. The maudlin crimes, of an almost unbelievable nature, with which the papers have been recently filled, have purposely been excluded—they will at once occur to the reader and it is unnecessary to further perpetuate their stories, but it may be said with confidence that in each case the “psychology of the individual,” as developed by the evidence, was similar in form and identical in kind to the cases above noted.

What has the psychiatrist to suggest, either in the trial or the punishment, or, if “punishment” be too crude a word, let us say for the treatment of the actor and the protection of society?

This brings us directly to the question as to whether or not legal responsibility and moral responsibility can, in any proper sense, be treated as identical. The religions, the philosophies and the laws of our Western Civilization are largely based upon the doctrine of free will. In the religions, men are free to sin; in the

philosophies, to err; in the laws, to commit wrong. For these acts, the religions impose or believe in a spiritual sanction; the philosophies a moral sanction, or, speaking as an evolutionist, the penalties imposed in the struggle for existence and survival of the fittest; the laws carry with them a social or legal sanction. The religious sanction is that penalty which an omniscient being determines for the purification of the Life Everlasting; the philosophies know only a sanction which, as a result, necessarily follows the weakness and failure of error, as such; but the laws impose a sanction, primarily, for the protection and purification of human society. The sanction of religion is postponed to some time in the unknown future and rests with God; the sanction of philosophy follows from the maladjustment of the individual in his environment of time and space; but the sanction of the law must be imposed by man, in the execution of man-made laws. The sanction of religion is within the discretion of Omniscience; the sanction of philosophy results from the seemingly uncertain reaction of environment upon the individual in time; but the sanction of the law must be relatively certain and immediate for the protection of society.

As the purposes are different, so, it would seem, the degree of responsibility may well be different. As the Omniscient, with All Wisdom, may search souls, weighing and balancing impulses, environments and opportunities; as the result of error is measured by the inexorable laws of life in the living and requires no administration; so the sanction of the law must be applied to men as judged by their acts, without the power to search the soul for motives, other than those naturally drawn from the acts themselves. To require society to delve into the uncertain domain of heredity and find pre-natal impulses, to attempt to measure the effect of generally unknown and always imponderable environment upon the actor, and then to strike a balance, as Omniscience might be capable of doing, in order to determine legal responsibility, is to identify legal responsibility with an absolute moral responsibility and is requiring too much of human society. It is true that there is a history to every act; that from simple, and perhaps innocent beginnings, grave unsocial

crimes result; that the crime and the history are in natural sequence, and that, in a sense, the criminal act is the direct result of a self-created or otherwise imposed environment, but the law cannot suspend its sanction or relieve from consequences unless or until that history, passing through that environment, has so shattered the mind of the actor that he is incapable of distinguishing between right and wrong.

The way of the psychiatrist is, however, different. He would have the "psychology of the individual" be the prime factor in the determination of legal guilt. If such "psychology of the individual" is of a kind that classifies him as abnormal, although there be no real disease of the mind, then it is asserted he should not be held to legal responsibility, as an actor, for any act traceable, academically, to that abnormality. The mere fact that this presents an ethical, rather than a legal, problem fails to deter the psychiatrist from insisting upon the rule as a measure to be applied by human tribunals in the administration of the law.

Now, although as a philosophic proposition there may be such a concept as a "normal man," such a person is in fact merely an imaginative composite; there is no such person. Hence, in a sense, we are all abnormal—which the trained alienist will quite readily admit—and this fact practically eliminates the question of normalcy from practical, legal consideration. We may, however, properly consider the "average man," in the sense that the "average man" has certain characteristics and principles which, for all practical purposes, is what must be meant by "normal man," even though the latter may have a proper place in psychology, as a subject in a college curriculum.

One of the predominant characteristics of the average man, in organized society, is his tendency to obey the law, both naturally and habitually. The average man has no inclination to murder his closest family relations; nor has the average woman the slightest inclination to insure her husband's life for the purpose of collecting the insurance by means of murder, so as to elope with her paramour. The average college youth does not respond to any stimuli which might prompt cutting little girls

into pieces and delivering a parcel containing the remains to the father of the child in exchange for money. The average high school boy would abhor the thought of murdering in cold blood a young companion for the purpose of analyzing the symptoms of pain, both mental and physical, exhibited by the victim during the process. Individuals who do commit such crimes depart so completely from the course of the average man that they may justly be termed "abnormal," for want of a better word, and it is this which affords the psychiatrist his opening wedge in presenting his "psychology of the individual" to the courts as a reason for suspending the penalties of the law.

At this point it may be well to state the rule of law upon the subject of legal responsibility. Courts differ upon the technical question of burden of proof on the issue of insanity, but they generally agree upon the degree of insanity which will relieve the actor from legal responsibility for his acts. Perhaps the rule has been as clearly stated by the English House of Lords as by any other tribunal, and, as there stated, has been freely adopted by the courts of America. For ready reference, we may take this rule as quoted by the Supreme Court of Rhode Island in the case of *State v. Quigley*:²

"Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crime, until the contrary be proved to their (the jury's) satisfaction; that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party was laboring under such a defect of reason *from disease of the mind* as not to know the nature and quality of the act he was doing, *or* not to know that he was doing wrong."

Somewhat in amplification of the above rule, the Supreme Court of Alabama said, in *McAllister v. State*:³

"The defense is not complete if at the time of the commission of the crime he (the defendant) had sufficient ca-

² 26 R. I. 263, 58 Atl. 905 (1904).

³ 17 Ala. 434 (1850).

capacity to enable him to distinguish between right and wrong, to understand the nature and consequence of his act, and mental power to apply that knowledge to his own case."

It would seem that the foregoing rules afforded all of the protection required for any person charged with crime who, in good faith, interposes a plea of insanity or offers evidence of insanity under a general plea of "not guilty." It would seem that these rules were based upon that concept properly expressed by the much-abused words "common sense," and that they certainly were tempered by the spirit of charity for the accused.

To this the psychiatrist replies, again quoting from Dr. White's address:

"However much satisfaction may result from tracking down an offender, identifying him, and bringing him to trial, conviction and punishment, it is coming to be appreciated that the automatic carrying out of this sequence may result in the most serious social consequences. Any one brought intimately into the personal and family lives of individuals knows how much tragedy is brought to pass in the name of Justice."

This well expresses a half-truth with which the courts have long been confronted in the trial of criminal cases, visualized before the jury by the sad-eyed, white-haired mother of the accused sitting by his side and his prattling children hanging upon the arm of his chair. The other half of the picture is more difficult to visualize, but the picture is there and consists not only of the absent victim of the crime, dead, and with all of his aspirations cut short by the actor, but also by that victim's sad-eyed and white-haired mother and his prattling children playing about the arm of a vacant chair. These pictures, in combination, portray to "any one brought intimately into the personal and family lives of individuals how much tragedy is brought to pass"—not in the name of Justice, but in the living of life in our stage of civilization. The damage cannot be eliminated by any judicial act—certainly not by any particular treatment of the responsible actor—but agencies of government are continuously at work

in an endeavor to remedy the evil as completely as possible for those who innocently suffer from the situation.

Again the psychiatrist, with the actor before him for commiseration, continues:

"I am quite sure that I am right when I say the prisoner who is sentenced at the bar of justice is a hypothetical individual. He is not an individual who has been sized up in all of his parts, his assets as well as his liabilities dispassionately evaluated. . . . If one really knew the personality of the average criminal, how pitifully inadequate it was to cope with the situation in which he found himself and how logical and understandable his conduct under all of the circumstances of the situation really was, it would be very difficult to get oneself into a state of mind that permitted the severity of punishment which the law often requires."

This is admirably expressed, but it is based upon the fallacy that the ethical and legal responsibility for an act are identical. In practice, that hypothetical individual presented by the prosecution to the jury is confronted by an equally hypothetical individual created by the defendant. In the former case, the hypothesis is based upon the actual words and deeds of the actor, while in the latter it is based upon such parts of family history as the actor is willing to reveal, together with his alleged reaction to the environment in which he is found, as that environment is chosen to be described by himself and his associates. To the situation thus created, the law applies the rules hereinbefore quoted, and, humanly speaking, society, for its own protection, can do little more.

The purpose of this confusing of ethical and legal responsibility is clearly shown by the conclusions drawn and recommendations made, two of which, from the practical point of view, are controlling. Dr. White, continuing, says:

"I believe fully in society's right to segregate the dangerous, anti-social types so long as they continue dangerous. This means largely the doing away with fixed sentences, at least for certain types of crime, and making the return to

freedom conditioned upon some change in the individual that gives one a right to suppose that perhaps he will function more effectively as a social unit than he has in the past."

Naturally, if the above supposition proves to be unfounded, the individual becomes a recidivist, and we again find him, as the actor, in a criminal proceeding involving another study of the "psychology of the individual," leading not to punishment but to another segregation, until it is again supposed that perhaps he will function more effectively.

And again:

"The discarding of the concept of responsibility. The idea of responsibility is, as I have said, largely a metaphysical one. Society must be protected from people who act anti-socially. So far as possible this should be done without raising metaphysical questions. How they should be cared for is a matter depending on what sort of persons they are and does not require a consideration of such abstruse matters."

In other words, the character of the segregation, heretofore noted, should vary in each particular case, should not depend upon the nature of the crime, but be regulated solely by the result of a study of the "psychology of the individual"—not by All Wisdom, but by man, groping along uncertain, and often unknown, lines of investigation. That is dealing with a "hypothetical individual"—earlier in the address strongly condemned—and certainly partaking much of the "metaphysical."

The stability of human society requires that punishment for crime be impersonal, certain and exact. This may be a heresy of the legal profession, but it reaches far back into the spirit of our institutions. It is this which the psychiatrist desires to avoid. By insisting upon the "psychology of the individual" as a controlling factor in the administration of the law, he requires that every sentence should rest upon a personal foundation. He inveighs against the idea of vengeance, but we must remember that judges and juries are merely human, and he in-

vites vengeance by the injection of the personal, psychic factor. Under our law, the race, color, or condition of servitude (environment or otherwise) of the parents of the accused actor is of no importance and quite immaterial. Under the proposed rule, that condition becomes of prime importance and, as it may arouse prejudice, is quite as likely to prompt vengeance as charity. Furthermore, even though the rule advocated may be applied without the slightest prejudice in the mind of judge or jury, the necessary result is to make punishment inexact and uncertain. It calls for a consideration by men and women of what may be termed comparative responsibility (in the same sense as admiralty recognizes comparative negligence) as a necessary consequence, however much it may be asserted that the concept of responsibility should be discarded. However phrased, it vests in the judge and jury—also persons with an individual psychology, and each with an heredity and environment—the weighing of non-responsibility in the balance with responsibility; the solution of psychic problems, entirely distinct from the recognized conditions of mental disease, involved in a mass of largely hearsay evidence relating to heredity, history and environment, raising innumerable issues wholly disconnected with the commission of the criminal act. It would seem that the maximum and minimum sentences allowed by the law, the indeterminate sentence, and the power of suspension in the case of first offenders vested sufficient discretion in the courts without attempting to endow our judiciary with the attributes of Divinity.

It is also of importance to society that an element of guilt should be attached, by way of stigma, to a voluntary breach of the law. Without this stigma, the segregation of the actor may be complete, but the path to pardon is far too easy. Although neither medically nor legally insane, if an actor, having committed a criminal act, be absolved of that guilt which involves moral turpitude, as determined by an analysis of the "psychology of the individual," because his father was a criminal and because he was reared in an unhealthy environment, then the proposed segregation is solely for educational and not for penal purposes.

Where segregation is merely for educational purposes, it is

probable that some psychiatrists, upon a new analysis of the "psychology of the individual," will conclude that the education has been completed, that segregation should be terminated and that the educated individual should be restored to society with something in the nature of an academic degree of normalcy. Not only might this occur, but it is what the psychiatrists contemplate will happen, as clearly shown by the foregoing quotation to the effect that segregation should continue so long as the individual remains dangerous, and that the return to freedom should be conditional upon some change that "gives one a right to suppose that perhaps" he will behave himself in the future.

It is the general experience of most of the states that the Board of Pardons, or the Governor, is unduly charitable in granting clemency to offenders under the law as it now is. Certainly, under the proposed plan, where the individual has been held to be without moral guilt although he has committed shockingly criminal acts, and where his segregation has been not for penal purposes, but conditioned upon some change resulting from education—and the psychiatrists report that his education is complete—there would be every reason for it to be considered by the Executive that the actor had successfully passed through his purgatory of education and should be restored to the Kingdom. The basis for such a release is essentially different than it is in a case under existing law where the actor has been found to be insane, under presently accepted theories as judicially defined, and examining alienists report that he has been cured of his mental disease.

The law is supposed to represent the accumulated wisdom of the race in temporal affairs, and in the face of abortive prosecutions, scandalous acquittals, and sentimental pardons, it is insisted that the time has not yet arrived for the attempted substitution of the methods of Divinity for the procedure adopted by our race in testing what must be termed the responsibility of criminals under the law. If criminals are to be permitted to roam through society at will, confident that because of a bad heredity and vicious environment they are secured against the penalties of the law, and when convicted of crime they are, for

that reason, to be absolved from guilt and merely placed in a state-supported educational institute until a feigned reform "gives one a right to suppose that perhaps" they are no longer dangerous, and are to be then released to re-enact a drama of crime, certainly our body politic is in a dangerously anæmic condition and a liberal infusion should be made in some manner of the good red blood of the common law, in the hope that a rejuvenated body may arouse and strengthen a dormant, if not actually paretic, social mind. "*Salus populi lex suprema est.*"