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ETHICS, PSYCHOLOGY AND THE CRIMINAL RESPONSIBILITY OF THE INSANE

S. S. GLUECK^a

I. WHAT IS THE PROBLEM, AND IS IT OF PRACTICAL IMPORTANCE?

Discussing the argument for freedom of will that rests on the theological doctrine that since God is sovereign "the will of man is in the bondage of necessity," Dugald Stewart is said to have observed, "There is a fallacy here somewhere, but the devil himself can't find it." A study of the arguments for and against freedom of will, no matter what these rest on, is likely to convince the student sooner or later that Stewart's observation might well be applied to almost all, if not all, the arguments on both sides of the question. For it is of the very essence of this riddle of the Sphinx that there are good arguments on both sides, and that it must always remain unanswerable. Further, it seems that the "good arguments" derive their force largely from a lack of clearness and consistency in use of terminology. In discussing this problem, therefore, we must especially remember that a name is not a description.

The ethical foundations of the question of criminal responsibility cannot be ignored entirely. It is common for writers on criminology and penology to assert that criminal, as moral, responsibility rests on "freedom of will" in the metaphysical sense of ultimate, unmotivated, free activity,¹ or to deny it such a basis, and to consider they have thus paid sufficient respect to the ethical implications of their problem. Those writers who insist that freedom of will is at the basis of criminal responsibility assume that, confronted by two or more alternative courses of action, the criminal is he who has deliberately chosen the illegal course, and who, by the same token, could deliberately have chosen the path of virtue. But the relationship of freedom of will, in

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¹There are numerous definitions of "freedom" and "determinism," depending largely upon varying opinions as to the "degree" of freedom. Few today seriously insist either that human activity is entirely free in the sense that "a movement of the will" is a "bolt from the blue," or, the other extreme, that all human action is inevitably and to the same degree determined by mechanical laws. Professor Horne's "Free Will and Human Responsibility" gives a pithy summary of the definitions of the terms and the arguments pro and con. The view of "freedom" taken in these pages is—the capacity of human beings for conscious, purposive activity in the light of past experience and in conformity with some intelligently conceived plan.

the metaphysical sense, to criminal responsibility is only partial and vague, and this for two reasons. In the first place, while it is true that historically punishment has been justified at one or another on the theory of a society of free-willing individuals, this view of "freedom" has gradually been modified. Conforming to the findings of psychological, anthropological and sociological science after the advent of the Positive School of Criminology, most writers do not use the term "freedom of will" in its 18th and 19th century meaning. Freedom as conceived of today does not rule out other causative factors, such as hereditary constitution and environmental factors. Today it is championed by the Mentalist School of Psychology as meaning the capacity of a human being to act creatively and purposefully, albeit under the influence of motives, and within certain necessary limitations. This seems also to be its meaning when the term is used by judges and by commentators on the criminal law, such as Wharton and Stephen. But it should be pointed out that this view is also designated by some as "determinism," or "scientific determinism"—a practice which has contributed to make "confusion worse confounded" in this field.

The second reason why the relation of freedom of will in the metaphysical sense to criminal responsibility is only partial is that no one view of the rationale of punishment seems, on examination, to have held exclusive sway in our law after the law had reached the stage of a developed system; so that punishment was not always based exclusively on the belief that the basis of criminal responsibility is freedom of will, even when that expression meant absolutely free, unmotivated action; other reasons for punishment blended with this belief.

Writers on the criminal responsibility of the special class of insane offenders also treat at length of "freedom of will" and its relation to the legal guilt of the insane, when what they are usually discussing is the more or less normal conscious, purposive activity of human beings, and the influence of mental disease or defect in disturbing this human capacity for rational, purposive conduct. To attempt to catalogue the numerous writings on the various angles of this subject would be for our purpose a needless occupation. But some consideration of the principal arguments on the freedom of will question seems necessary as a metaphysico-psychological foundation for what is to follow.

This troublesome question might be avoided entirely by a statement from Professor Wharton: "It may be possible that from a high metaphysical point of vision all acts are necessitated. With this, however, jurisprudence, which is a practical science, has nothing to do."²

²Philosophy of Criminal Law, Philadelphia, Kay & Bro., 1880, Note p. 53.

While this statement is true, many would consider the metaphysical problem as of the very essence of an inquiry into the bases of the criminal responsibility of the insane, because, as Mr. F. H. Bradley pertinently asks in criticism of Doctor Maudsley's classical "Responsibility in Mental Disease," "How in the world is it possible to say what relieves a madman of responsibility unless you know what makes a sane man responsible? Unless a man is agreed with us as to our main beliefs as to a sane man's responsibility, how can we receive his evidence as to anyone's non-responsibility?"³

The logic of Mr. Bradley's queries cannot be denied. But we must be clear as to the meaning of our concepts and as to what the law is actually attempting to do. The truth is that the law, following common sense and common morality, assumes a certain degree of freedom of conscious, purposive activity possessed by the "normal" mind. It disregards the metaphysical question, which is concerned with ultimate truth, on the ground that such an ultimate answer cannot be obtained and turned to immediate practical use in the courts. Nevertheless, we cannot overlook the metaphysics of our problem; for it cannot be denied that philosophical considerations have had some part in shaping legal concepts. Further, while the law is concerned with what is, those who hope to reform the law must give some thought to what *ought to be*. At any rate, we cannot throw over both metaphysics and psychology, as Oppenheimer does,⁴ and proceed "feeling lighter for having thrown overboard the metaphysical ballast." His argument and justification for barring both ethics and psychology from his discussion are not convincing. While we agree that, as he says, criminal responsibility is a *legal* concept, it is difficult to see how the objective legal responsibility can be established without a reference to the subjective mental state of the defendant; nor how we can avoid comparing these states which resulted in the illegal act with what the law declares desirable on the part of citizens. True enough, if "Parliament enact tomorrow that lunacy be no longer recognized as a defense to a criminal charge, B., a hopeless madman, will escape punishment if tried today, but he will be held responsible and made to feel the full severity of the law if tried after the new Act has come into operation"; and true, further, as Oppenheimer says, "Criminal responsibility is a term of positive law, of law as it is, not as it ought to be." Nevertheless, the fact is that the law, as it is today, provides that insanity under certain conditions comprising a sufficient degree to constitute

³Ethical Studies, p. 44, Note 1.

⁴The Criminal Responsibility of Lunatics, p. 5.

lack of criminal responsibility, does exempt from guilt; and it is impossible to prove insanity by external behavior alone.

We are therefore justified in examining the metaphysics and psychology of the question. Owing to a widespread difference of opinion as to terminology, one is ever apt, in a discussion of this sort, to incur the criticism that was directed against the author of a work on "The Secret of Hegel," to the effect that the author had succeeded admirably in keeping Hegel's secret. Nevertheless, it is the purpose herein first to indicate the various and inconsistent senses in which the two important terms, freedom of will and determinism, have been used—which can best be done by considering the views of some ethicists as to the practical importance of this philosophical question in our social institutions and daily life; secondly, these questions will be related to the consideration of the pertinent data of the two leading schools of psychology—the Mentalist and the Behaviorist. Next, the relation of freedom in the sense of conscious, purposive activity to theories of punishment will be considered. Further, other bases for penal treatment, presumably ignoring consideration of freedom in the psychological sense, will be shown to depend on this. Finally, we will attempt to sketch a basis of penal treatment which takes account both of the nature of man and his interests, and of the interests of a legally ordered society.

First, what is the practical bearing today of this metaphysical speculation on the problem confronting legally organized society of dealing with its transgressors? If we consider the views of some ethicists as to the practical importance of the metaphysical problem in the field of criminal law, we must conclude that it cannot be of great significance, if for no other reason than that so much difference of opinion has always existed, and still persists, as to the meaning of the terms. The metaphysicists and ethicists of course insist that it does make a great difference in practical affairs whether we believe in freedom of will or determinism; yet strangely enough it is not uncommon to find both free-willists and determinists claiming for their respective camps the philosophical basis of all social institutions, and, stranger still, a view that one protagonist enthusiastically advocates as "determinism" and as therefore constituting the foundation of morals and law, another cheerfully appropriates as "freedom," and by the same logic, insists that it underlies all our institutions. Each side seems to select an extreme statement of the other's views as the points of departure in order triumphantly to indicate that it leads to a *reductio ad absurdum*; and it is not unusual to find one definition of terms at the

beginning of a book and quite the opposite at the end. In view of this situation it is not surprising that much arguing has been at cross-purposes. If our definition of the terms seems arbitrary to some, it is hoped that at least it will have the merit of consistency.

Considering now some typical views as to the practical importance of this question, we find that Professor Horne, in his succinct summary of the arguments for and against freedom of will, asserts: "Determinism would affect our views of punishment in home, school, and state. Punishment would be not so much retributive as preventive in nature and purpose; it would look not toward the past and the return of the deed on the doer but toward the future and the *determining* (italics ours) of the child or criminal away from the repetition of the misdeed. In our courts of justice the tendency is in fact in the direction of blaming heredity, environment, associations, training, and the like, rather than the man himself, for his misconduct."⁵

Before analyzing this passage, let us examine the sense in which Professor Horne uses the terms "freedom" and "determinism." More careful in his argument than many writers on this elusive subject, he attempts clearly to definite the issue between freedom and determinism.⁶ He distinguishes no less than twelve types of concepts of freedom, and finally accepts the position that freedom means "to act in either of two or more ways contemplated." On this he says, "This view suggests the questions: Can a man do differently from what he does do? Could any different thing ever have been done by anybody than that which they did do? Is the future of each individual already written in the nature of things, or 'in his forehead'? as the Mohammedans say? Is some such force as fate, or predestination, or necessity, or heredity, or environment, or any or all of these an adequate explanation of the events of an individual's life without reference to any ability of his own to do otherwise than he does do? . . . To all these questions the determinists answer man and society are determined by efficient causes working out but one inevitable result; the free-willists answer man and society co-operate with the efficient causes in shaping themselves partly at least toward their own ends. . . . To the free-willist the possible is one of several things that may be made to happen, and the actual is the one thing that did happen or was made to happen. To the determinist the future is as fixed as the past, to the free-willist the future is not fixed, but is in process of being fixed by

⁵Free Will and Human Responsibility, Herman Hanell Horne, N. Y., The Macmillan Co., 1912, pp. 173, 174.

⁶*Id.*, pp. 64, 66.

the choices men make in the present. To the determinist the sense of the inevitable is delusory, to the free-willist the sense of the inevitable is delusory. . . . Both cannot be right. Either all events are determined or some events are not determined, there is no middle ground. . . . Determinism holds the former position; libertarianism the latter. The issue could not be more sharply drawn."

After this clear statement of the respective positions, Professor Horne seems, in the first passage quoted, to lapse into the inconsistency that characterizes many discussions of this subject. For to regard the determinists as "determining the child or criminal away from the repetition of the misdeed" is to assume that individuals *are* capable of acting between "two or more ways contemplated," and, therefore, to assume freedom in the sense defined by Professor Horne himself. If all things have been determined, if "some such force as fate, or predestination, or necessity, or heredity, or environment, or any or all of these" is "an adequate explanation of the events of an individual's life without reference to any ability of his own to do otherwise than he does do," if "the future is as fixed as the past," then how can we consistently say that the practical difference that the deterministic position makes is in "determining of the child or criminal away from the repetition of the misdeed"? If "to the determinist the future is as fixed as the past," then all effort to make the criminal consciously control the future is futile. Is Horne not here assuming the position of the free-willist? Or is there not here one of those fallacies that Dugald Stewart puts beyond the ken of "the devil himself"?

Again, McConnell and others appropriate all the features of modern penology for the determinist. Thus McConnell writes: "The conclusion to be drawn from the acceptance of determinism is that the determining causes of crime should be sought and found and removed, or at least attenuated as much as possible. . . . Punishment is to be administered not as an end in itself but as a medicine, a therapeutic treatment, appropriate for the particular individual, and calculated to better his condition and to render him inoffensive, to cure him of his malady and to restore him to society as constructive instead of destructive. . . . The deterministic conception regards people as being only what they must be by virtue of inheritance and experience. . . . It takes people as they are, and admits that they could not be different. On this account, it feels an indulgence and sympathy which forgives the past, and looks forward with hope to the future." This is the

⁷Criminal Responsibility and Social Constraint, Ray Madding McConnell, New York, Chas. Scribner's Sons, 1912, p. 130.

same view of determinism as described by Horne, and the argument is open to the same objections.

To show that diametrically opposite views of the relation of determinism to penology have been held, we quote the following from Professor Tarde's *Penal Philosophy*, calling attention especially to the last sentence:

“. . . I cannot agree with *Fonesgrive* that the penal law must practically remain the same, whether we do or do not admit of free will. 'Like determinist legislation,' says he in his interesting essay on Free Will, 'the legislator who is a partisan of free will will take measures of precaution against the violent madman. Both will be more severe in proportion to the perversity shown by actions: only what one will call perversity of will, the other will call perversity of nature.' But the legislator who is a partisan of free will ought the more readily to excuse, and to punish and blame the guilty man the less, as this man shall have been driven by a more violent inclination, or by a more perverse nature; the determinist legislator will do exactly the opposite. For example, *Fonesgrive* is perfectly right in saying elsewhere that the legislator who is a partisan of free will would be more inclined always to hope for the possibility of an improvement in the most perverse, and as a consequence to prohibit irrevocable penalties, the death penalty above all others."⁸

From the foregoing it will be seen that opposite stands on the questions of freedom and determinism can lead to the same practical conclusions as to penology. The above illustrates the views of those who insist that the metaphysical question is bound up with our more or less permanent social institutions—our broad, social policies, such as the criminal law and penological treatment. Some also stress the importance of the metaphysical question in influencing the acts of public officials in their daily occupations within those social institutions. Thus McConnell holds that "practical action is bound to be modified by the view which anyone takes on this matter of freedom or determinism. Whenever a determinist regards an act, he feels justified in inquiring for its causes. He looks for the motives which determined the will of the actor. The free-willist, on the contrary, may think such a procedure useless. He thinks that the will was free, and not necessitated by antecedent events. . . . A drunkard is arrested and brought up for trial. The determinist judge says, 'This man inherited an uncontrollable thirst for alcohol; he needs to go to a sanatorium for treatment and cure.' The free-willist judge asserts, 'It does not make

⁸P. 16, Note.

any difference how many generations of this man's ancestors drank whisky; he need not have drunk it, and ought not to have drunk it. Let him be punished with the maximum imprisonment.'"⁹

Assuming that the author's use of terms is justifiable, has Doctor McConnell correctly described the judge's psychology? In other words, are the daily decisions of judges the result exclusively of their personal views on our metaphysical question? First of all, the argument assumes that inquiry into motives of action—the duty of psychology—is limited to the determinist (or, what he is likely to be in the field of psychology, the "mechanist"). But aside from this, it is doubtful whether judges really decide cases on the basis of their metaphysical views as to freedom or determinism. The judge of the illustration, like everybody else (determinist or free-willist) consciously or sub-consciously considered the act and its surrounding circumstances in relation to the individual and in the light of his own sentiments, complexes, judgment and ethical views (which latter are not necessarily built upon any definite opinion as to human freedom or determinism). If anyone doubt this, let him read Judge Cardozo's excellent little work on the "Nature of the Judicial Process."¹⁰ The metaphysical views of McConnell's judge might have been one of the influencing factors in the decision, but one of many, and that one vague and indirect as the terms of the metaphysical argument themselves are vague. Many influences obviously entered into the judge's decision, all comprising his own picture as to the end and aim of the criminal law: His personality traits, his whole upbringing, the news he might have read at the breakfast table as to the prevalence of extreme drunkenness in the community, the way his breakfast suited him, the stuffiness of the courtroom and his desire to dispose of the case quickly, the appearance of the defendant, his past record, and so on. It is not inconceivable even that nothing but the caprice of the judge decided the outcome.¹¹ Besides, even if the judge's views as to the reformability of the defendant greatly influenced the decision, and even if we assume that these views were the conscious result of his reasoning on the question of "freedom of will," it is just as easy and quite as logical for the judge to have arrived at exactly the opposite conclusions from those attributed to him by Doctor McConnell. Thus, if he were a free-

⁹Criminal Responsibility and Social Constraint, p. 130.

¹⁰Benjamin N. Cardozo, *The Nature of the Judicial Process*, New Haven, Yale University Press, p. 167.

¹¹See Schroeder, Theo., "The Psychological Study of Judicial Opinion," *Cal. Law Rev.*, Jan., 1918, Vol. VI, No. 2, pp. 89-113. See also Geo. Everson, "The Human Element in Justice," *Jour. Amer. Inst. Crim. Law and Criminology*, May, 1919.

willist, while his views might have made him believe the defendant voluntarily chose the path of evil and could just as voluntarily have refrained, they might also have influenced him in believing that through corrective treatment the defendant could be taught to choose the right course of action when temptation again presented itself. On the other hand, instead of his deterministic views "determining" him to send the man who inherited "an uncontrollable thirst for alcohol" to a sanatorium for treatment and cure, he might have argued that as this "thirst" was "determined" it was futile to attempt to change it by treatment, for that would require the exercise of "freedom of will" on the part of the patient, and freedom of will is by the definition of determinism excluded from the argument.

From all this we see that, first, the influence of the metaphysical question, as it is usually defined by ethicists, either on broad social policy or on the actions of individual judges is greatly exaggerated; and, secondly, that because of confusion of terms, almost diametrically opposite conclusions can be reached from either of the premises.

Some insist that without "freedom of will" ethics and the other social sciences must fall; for, runs the argument, if the will is not free, there can be no such thing as "moral responsibility," and therefore no criminal responsibility that is founded on justice. But the fact that both views and many variations and confusions of them are existing side by side with responsibility is sufficient refutation of that position.

To all that has gone before it may be objected by some that we have not stated the respective views of the determinist and free-willist, in our examples, in the orthodox way in which they themselves would use those terms. It has already been shown that some writers define their positions clearly at the outset, but lapse into inconsistencies in the development of their arguments. A closer examination of the position of "scientific determinism" will disclose the fallacy upon which it rests; and a re-statement of the true position of the modern believer in "free will" as capacity for conscious, purposive activity will serve to clarify the situation.

The modern "determinists" take refuge in a metaphysical sitting on the fence. They wish to be "scientific" and to stamp with approval the remarkable findings of modern science. They believe that these discoveries point conclusively to the "universal sway of causality" in the universe. They insist that both inquiry into motives of human action and the recognition of apparent causality in the mechanical world are exclusively their province. At the same time they wish to

retain something of the "dignity of man," and they feel vaguely that there is something inconsistent in the position of the agitator who insists that all things are determined with mechanical rigor, but who nevertheless vigorously swims against the tide of this relentless determinism in all he does and says. Some of them cannot, in spite of the brilliant evidences of mechanistic "causality" adduced by the physical and natural sciences, rule out the data of introspection, especially the universal feeling and consciousness of capacity for purposive, free activity. Some of them speak of "freedom" as an "illusion, apparently not troubling themselves as to whether their arbitrary notion that freedom is an illusion might not in itself be an illusion.

Such "scientific determinists" point out that they do not take the fatalistic position that there is a power external to ourselves and no matter how we struggle the predetermined event will happen to us; that they do not say with the Mohammedan, "It is the will of Allah"; that they do not believe in the inevitable fatalism of the Greek tragedy, the fate of Oedipus. The reasoning of this pseudo-determinism runs something like this: My character is one of the things which determine my decision in any case. Thus, my first act depended simply upon my native endowment and environment at the time; my second act was influenced not simply by those two but by the first act, which, in its results, was a modification of my original endowment. All these previous decisions enter into my present decision, which always harkens back to my original factors of heredity and environment. My decision is the cause of my act; my will or desire is what underlies the outcome in any case, but my desire or will has been causally determined, and in this sense there is an absence of freedom. I can do what I want to do, but being the result of circumstances beyond my control, it is impossible that I should *want* to do anything else. It is my criminal or other nature that underlies my decision in any given case. My voluntary decision is determined by the whole past history of the universe and my heredity and environment; though I can do some things independently of what I am, nevertheless, what I am has been determined for me.

As has already been intimated, by arguing in this way the determinist is surreptitiously appropriating most of the thunder of the free-willist. Thus the very argument that my character is one of the things which operates to determine my decision in any case and that my character began with my first choice, assumes that my first choice (and all subsequent choices) was free. What warrant have we (if we take the deterministic view) for saying that, as the man is himself one of

the set of circumstances which led up to his decision in a given case, that particular "set of circumstances" which comprised the man could have swayed the whole, unless we assume that that "set of circumstances" was the free activity of mind?

Professor Palmer puts a similar argument in these words: "If my present desire and purpose are altogether controlled by those which preceded, the inner life is as inevitable as the outer and the operations of my character no less fated than those of planetary motion. If we understand character to include future possibilities together with past realities, we speak the language of libertarianism. The point of interest in the whole controversy is whether a new event ever occurs, whether divergence is conceivable from lines already laid down, whether man has any true creative power. A consistent determinist should deny all this as stoutly as ever a necessarian did. What has been will be, he should say, and that alone. If seeming change occurs, it is only in seeming. Forms alter, but the promise and potency of all that can happen is already provided at the beginning. What this means it is not easy to understand. If what has been controls what shall be, one would think it would control its seemings and its form no less than its other features."¹²

To say that, though my will or desire is what underlies the outcome in any case, that will or desire was itself causally determined; to urge that I can do what I want to, but being the result of circumstances it is impossible for me to want to do anything else, seems to be barren quibbling. If it is impossible for me to *want* to do "anything else," what good will my "freedom" do me, and how, under such limitations (supposing responsibility to rest solely on freedom of will) can I be held responsible for a choice that is but illusory?

The popularity of the deterministic position rests largely on the 19th and 20th century tendency to scientific explanation—the search for mechanical determinants of the phenomena of the universe, including man; the prevalence and popularity of the "cause-and-effect" dogma. This view is not new. The Stoics looked upon the universe as a unit in which every part is so tied up with all the other parts that it operates as a concatenated whole; and that is the conception of many modern scientists, who, because they have found the "sway of mechanism" in those segments of nature which they have been able to study with microscope and telescope have gratuitously assumed that the human mind cannot in itself be a contributing cause. Such scientists

¹²The Problem of Freedom, George Herbert Palmer, Houghton-Mifflin Co., Boston, 1911, p. 185.

argue that as soon as we turn to the problem of explaining conduct, we must consider causes, since there is no effect without a cause; thus we rule out "freedom"—a thing cannot be both caused and free. Kant's treatment of this difficulty has never been improved upon. He pointed out that such an inquiry into causality can never get us anywhere, since it involves an "infinite regress, a pushing back of the chain of causality indefinitely; for it is impossible ever to achieve the final cause of the whole series by such argument.

Some determinists have carried their reasoning to its strict conclusion; being thoroughgoing "mechanists" their logic is of mechanical rigor. They insist that the human being is a mechanism, or at most, a "conscious automaton," and that all we can study of him is "behavior," which is by these thinkers said to consist exclusively of automatic responses of "motor sets" to stimuli. They at least have the merit of consistency. Those pseudo-determinists who speak of the "determinism" of heredity and environment being inevitable, and at the same time argue about the "first free choice" and subsequent "choices" between alternatives may call themselves determinists, but such use of terminology has contributed much to the confusion of the subject, especially when applied to the social sciences.

For the determinist to maintain his position consistently and without masquerade, his argument must be stated as Professor McDougall puts it: "Similar (or the same) causes produce similar (or the same) effects. This human decision is a similar effect, therefore it has a similar cause."¹³ In this statement there is not insinuated the very bone of contention, namely, the ability of man to "diverge from lines already laid down," or conscious, purposive activity within certain limits. As soon as "first choice" is spoken of, the determinist has deserted to the camp of the enemy.

Such a correct statement of the determinist position carries its own refutation. Professor McDougall succinctly states it as follows: "This syllogism is obviously foolish. Both its premises are gratuitous assumptions; and in no way can we establish premises from which the determinist conclusion follows. If it be said that some such major premise as 'all events are strictly determined or caused' is a necessity of thought, we may point to the various scientists and philosophers who tell us that any such assumption is ridiculous, that the notion of cause and effect always has been obscure and muddled, incapable of being clearly thought or expressed, and that, however useful it may have

¹³Outline of Psychology, William McDougall, Charles Scribner's Sons, New York, pp. 446, 447.

been and still may be in a limited way, it has had its day and now is merely a clog on speculation."¹⁴

If the above is the true position of the determinist, what is the libertarian view? We said that in his camp, too, there is a babel of voices. But it may be said that the modern libertarian does not regard the resolutions of the will as "bolts from the blue"; nor can we find many who are uninfluenced by the progress of science and who regard the will in the following extreme terms: "The free-willist believes that over and above the particular acts of volition there is a certain entity called the will, which is, as it were, a sort of personage within the human person. This will is free. It is an autocrat. Various motives appeal to it. It sits in judgment over them, and 'decides' freely which shall be followed. Diverse roads of action lie before it: it 'chooses' freely which one it will take. Goodness and badness are offered to it: it 'prefers' the one rather than the other. The free-willist implies that the will is a distinct entity whenever he ascribes 'freedom' to it."¹⁵ Doctor McConnell has here described a brand of libertarianism that has few adherents today. It is questionable metaphysics and worse psychology. Professor Palmer expounds this position and criticizes it in the following words: "Extreme libertarianism, in the form known as the freedom of indifference, makes caprice its essential principle. We are free only when there is nothing to induce us to take one course rather than another. . . . Causation of every kind must be absent. . . . Such is libertarianism at its extreme, the so-called liberty of indifference. It would be difficult to find an advocate of it today, though determinists often put it forward as the only alternative to their doctrine. Indeed, uninstructed and partisan determinists are apt enough to speak of the whole doctrine of libertarianism as indeterminism, showing how little acquaintance they have with any other form than that which denies motivation to action. . . . It should be the first duty of every believer in freedom to see that he is relying on nothing so fantastic and contradictory as this."¹⁶

In order to get rid of a belief in either extremes of fantastic and contradictory theory—namely, the freedom of indifference, on the one hand, and rigorous, mechanistic materialism, on the other—we must turn to psychology for light.

¹⁴*Id.*, p. 447.

¹⁵Criminal Responsibility and Social Constraint, Ray Madding McConnell, p. 135.

¹⁶The Problem of Freedom.

II. MENTAL CONCEPTS IN LAW

We have shown that much of the futility of argument about the "freedom" of the "sane man" has been due to a confused or arbitrary use of terminology. We have also intimated that so long as this confusion persists it is difficult to discuss the practical effects on the criminal law and theories of penology of either "freedom" or "determinism." Because of the confusion we find both sides claiming their respective views as the basis of social institutions, especially the criminal law.

In resolving the question into its true issue it was intimated that what both camps must really turn to in connection with the practical problems of the criminal law is a study of the nature of man. The metaphysical problem, which Kant showed could not in its very nature be proved, must be left to pure speculation. In the meantime we must study the nature of man and the antecedents of behavior from the psychological approach. Whether the feeling of capacity to act creatively in a purposive manner is an illusion or not can make no difference; we are all suffering from the same illusion if it is so. When Pinal, Morel, Esquirrol, Despine, Maudsley, Lombroso, Mercier, and others called attention to the antecedent factors of a criminal act; when they pointed to duress of mental disease or to the individual or social causative factors behind the criminal act, they certainly did not intend to do away with all freedom of conscious, purposive activity, even though they believed in "scientific determinism." They pointed indeed to hereditary and environmental factors which often prove such a drag upon the power of individual self-assertion as practically to nullify it; but they cannot, we believe, be said to have subscribed to an out-and-out mechanistic causation in such cases, without the interposition of some purposive, mental power.

Our notion of responsibility of a person for his anti-social acts is then really bound up with the belief that most persons *can* more or less choose between various lines of activity, that most persons, in other words, can act purposefully in a more or less rational way, on the basis of the innate nature of man, and to a socially acceptable minimum. When they fail to achieve this minimum it is either because they deliberately chose such a result, or because through native mental defect, disease, or the overwhelming pressure of the external world, they were actually unable to exercise their capacity of choice. Considering the "new psychology," we may admit that anti-social acts may sometimes be the vicarious relief-expression of a repressed desire, or the resolu-

tion of a "conflict" of subconscious desires taking the form of crime. Yet this does not mean that all acts are caused this way; further, it is possible to resolve such a conflict in a socially acceptable way under proper psychiatric treatment and by the proper exercise of purposive intelligence, so that it cannot strictly be said that there is mechanistic causation here as there is in the physical realm. Indeed, there is purpose and logic and method even in the activity of such subconscious desires; they are not mechanical "cerebrations."

The issue then becomes, for the practical purposes of the criminal law, a choice between that school of psychology which regards man as a purposive, creative being, capable of some self-direction, and the modern radicals in psychology, who regard man as a machine or at the most as a "conscious automaton." Any discussion of the relation of human voluntary activity to responsibility for crime must employ the terms "will" or "freedom of will" in the sense that they are used by the law and psychology.

In this respect conservative law has shown herself much more sensible than her more impetuous sisters—the experimental sciences. For, recognizing that "experimental determinism" (Jennings) assumes as a working hypothesis the universality of causation and on the basis of such hypothesis is every day finding brilliant examples of the apparent universal sway of mechanism, it nevertheless takes the common sense view that this need not at all affect our practical belief in human freedom within certain limitations. It refuses to become entirely "behavioristic"; it attempts to plumb the mental factors behind the criminal act. But before examining such a psychological conception of freedom as applied to the various theories of punishment which have been advanced at one time or another, it is necessary to treat briefly of the difference of opinion between the Mentalist school and the Behaviorist school of psychology. The former recognizes the reality of mind and the creative activity of mind as expressed in behavior. It is difficult to see how under a purely behavioristic (mechanical-materialistic) conception of the human organism, however, there is any room for even a residuum of free, self-directive, purposive activity.¹⁷

A brief statement of elements of the criminal law will serve to show how the problems of psychology upon which the Mentalistic and Behavioristic schools differ fundamentally become important. "To responsibility (imputability)," says Wharton, "there are, we must remember, two constituents: (1) capacity of intellectual discrimination;

¹⁷For a good exposition of the various schools of "behaviorism," see "Behaviorism and Psychology," Dr. A. A. Roback, Cambridge.

and (2) freedom of will.¹⁸ If there be either incapacity to distinguish between right and wrong as to the particular act,¹⁹ or delusion as to the act, or inability to do or refrain from doing the act, then there is no responsibility. The difficulty is practical. No matter what may be our speculative views as to the existence of conscience, or of freedom of action, we are obliged, when we determine responsibility, to affirm both.²⁰

Some foreign codes, such as some of the Cantonal Codes of Switzerland, expressly recognize these elements. Lucerne, for example, provides that the punishableness of an act, in itself criminal, presupposes reason and freedom of will in the actor.²¹

Such reason and freedom of volition are ordinarily presumed from the commission of an illegal act; but this presumption is of course rebuttable. In practice the question of the existence of free volition comes up only when, at a trial, the question of exemption from normal criminal responsibility is in issue; and it is in the manner of testing deviations from normal responsibility because of mental defect or disease of one form or another that we get divergencies of opinion among jurists and criminalists. It is this testing of deviations from the rational, free-choosing, purposive individual which has caused, and still causes, much trouble in the administration of the criminal law in such cases. But it is important to point out that if the law proceeded on the basis of strict behaviorism, it would look only to the external act and not concern itself with questions of deviations from normal mental power.

For the commission of a crime there must be an illegal act with "criminal intent." Two elements must co-exist: A. The existence in the offender of a state of mind which is declared by law to be consistent with criminality; B. The *voluntary* commission of an act declared by law to be criminal, as a result of, or contemporaneous with, that state of mind. The first condition by itself, constitutes guilt in the field of ethics. But when the law requires the existence of the second, the external act, it does not thereby abandon the first. As someone said, to illustrate the difference between ethics and law, when

¹⁸Having discarded "freedom" in the metaphysical sense, Wharton is here referring to freedom in the sense of conscious, purposive activity.

¹⁹This refers to knowledge of the circumstances surrounding the act; it omits "ignorance of the law." "If ignorance of a law were defense to a prosecution for breaking such law, there is no law of which a villain would not be scrupulously ignorant."—Wharton.

²⁰Philosophy of Criminal Law, p. 109; pp. 51-53.

²¹See Oppenheimer, The Criminal Responsibility of Lunatics, for a good summary of foreign codes on this subject.

the great actor, David Garrick, declared to Doctor Johnson that whenever he acted Richard III he felt like a murderer, Johnson, as a moral philosopher, was bound to retort, "Then you ought to be hanged whenever you act it." But the criminal law attaches only upon the commission of a criminal act, not upon internal feeling alone or an intent without an act. Thus, if a man takes a coat from a stand intending to steal it, and then finds it is his own, he commits no crime.

The great English jurist, Sir James Stephen, writing in 1883, gives the clearest brief legal treatment of the psychological elements of a crime, from the standpoint of the jurist. Assuming that the act is done by a person of competent age, Stephen would list the following necessary elements in every crime:

1. The act must be voluntary, and the person who does it must also be free from certain forms of compulsion.
2. The act must be intentional.
3. Knowledge in various degrees according to the nature of different offenses must accompany the act.
4. In many cases either malice, fraud, or negligence enters into the definition of offenses.

Each of the above, volition, intention (and motive), knowledge and malice, fraud or negligence may be affected by the mental disease or defect of the offender. Stephen defines an action as "a group of related motions of different parts of the body"; and he holds that actions may be involuntary or voluntary, and that an involuntary action may be further subdivided according as it is or is not accompanied by consciousness. Involuntary actions are not only such acts as the beating of the heart and heaving of the chest, but such conscious acts as coughing or the motion which a man makes to save himself from falling, or the struggles of a person in an epileptic seizure. A voluntary action, Stephen holds, is a group of motions accompanied or preceded by volition and directed towards some object. This is what we mean by "conscious, purposive activity." Stephen analyzes a voluntary action in these words: "Every such action comprises the following elements: knowledge, motive, choice, volition, intention; and thoughts, feelings and motions adapted to execute the intention," the elements occurring in the order enumerated. . . . "If there is no intention, if the movements of the body are not combined or directed to any definite end, there may be action, but it is not voluntary action. A man receiving news by which he was much excited might show his excitement by a variety of bodily movement, as, for instance, by the muscular motions which change the expression of the face, but the question whether they

were or were not voluntary would depend on the further question whether they were intentional. A groan or a sob would usually be involuntary; words spoken expressive of pain or pleasure could hardly be otherwise than intentional if they conveyed a distinct connected meaning." More specifically, says Stephen: "Intention is the result of deliberation upon motives, and is the object aimed at by the action which has been caused or accompanied by the act of volition."

We regard the foregoing as a clear exposition of the mental elements involved in a criminal act. This is the sense in which intention or "intent" (these terms seem to be employed interchangeably in the legal reports) is used in the maxim, "a man must be held to intend the natural consequences of his act." This again is in fact a rebuttable presumption. The maximum is necessary, however, because of the difficulty of proving such a complex mental condition as intention; but in the determination of what are or are not "the natural consequences of his act" in any individual case, it is apparent that evidence as to the mental state which preceded and accompanied the act is consciously or subconsciously taken into account, even though presumably the "natural consequences" are considered with reference to the "average" or "normal" man placed in a similar situation.

The law's concern with the psychological elements of a criminal act is further illustrated by its use of "intent" specifically, as an element of the definition of certain specific crimes whose degree of gravity to the public security depends upon the intention with which those acts—outwardly, i. e., "behavioristically," all alike—were actually committed. Thus in such offenses as wounding with intent to do grievous bodily injury, forgery with intent to defraud, assault with intent to kill, etc., the mental complexus comprising the intention becomes specifically important. But, as was suggested before, the intention is a necessary concomitant of all purposive, voluntary action; and as all crime must be such conscious, voluntary, purposive action, intention is a constituent of all criminal acts. (Minor statutory offenses where no intent is necessary are not considered important for our purpose.)

Bearing this statement of the more important mental elements with which the criminal law is concerned in mind (and there are others which are not so important for our purpose), let us consider which of the two major schools of psychology best accords with the practice of the developed criminal law.

Thoroughgoing Behaviorism, under the influence of biological research, insists that all human behavior can be explained exclusively, and will ultimately be completely explained, in terms of the structure

and automatic, mechanical functioning of the brain, nervous system, musculature and glandular activity of the organism; in terms of chemical and physico-chemical reactions to stimuli. Even thought is conceived of as a complex, minute operation of the muscles of speech, in the same way as all external behavior is attributed to the mechanical response of "motor sets" or "bodily attitudes" to stimuli. Conation, volition, desire are either not dealt with at all or explained as consisting of automatic responses to stimuli. All the higher mental integrations and functions are conceived of as complex systems of reflexes which respond automatically to stimuli. Such words as "purpose," "consciousness," "striving," "ends," "aims," "goals," "intention," and many others of ethico-psychological significance and with which the law deals and which common sense recognizes are not to be found in the vocabulary of Behaviorism, strictly construed. Man is a machine. The consequence is that if the machine is out of order and runs amuck in a socially unacceptable way, there is but one thing to do, get it out of the way.

It is not our purpose to enter into a lengthy statement of the Behavioristic views; the exposition of the subject can best be made by a prominent Behaviorist himself, whom we will let quote from his writings, some of the most characteristic passages:

"The psychology which I should attempt to build up would take as a starting point, first, the observable fact that organisms, man and animal alike, do adjust themselves to their environments by means of hereditary and habit equipments. These adjustments may be very adequate or they may be so inadequate that the organism barely maintains its existence; secondly, that certain stimuli lead the organisms to make the responses. In a system of psychology completely worked out, given the response the stimuli can be predicted; given the stimuli the response can be predicted."²² And again: "Behavior on analysis is the separate systems of reactions that the individual makes to his environment. When we come to study the mechanics of such adjustments we find that they depend upon the integration of reflexes connecting the receptors with the muscles and glands."²³ He says further: "Since, according to my view, thought processes are really motor habits in the larynx, improvements, short cuts, changes, etc., in these habits are brought about in the same way that such changes are produced in other motor habits. This view carries with it the implication that there are

²²John B. Watson: "Psychology As the Behaviorist Views It." *Psychol. Rev.*, 1917, Vol. XX, p. 167. See also his "Behavior," N. Y., Henry Holt, 1914.

²³J. B. Watson: "Psychology from the Standpoint of a Behaviorist," Philadelphia, J. B. Lippincott Co., 1919, p. 13.

no reflective processes (centrally initiated processes): The individual is always *examining objects*, in the one case objects in the now accepted sense, in the other their substitute, viz., the movements in the speech musculature."²⁴

If "there are no reflective processes (centrally initiated processes)," it is difficult to see on what basis offenders can be held either morally or legally accountable for their anti-social acts.

By "implicit habit responses," or thinking, says Watson, "we mean sub-vocal talking, general body language habits, bodily sets or attitudes." And again: "A man may sit motionless at his desk with pen in hand and paper before him. In popular parlance we may say he is idle or 'thinking,' but our assumption is that his muscles are really as active and possibly more active than if he were playing tennis. But what muscles? Those muscles which have been trained to act when he is in such a situation, his laryngeal, tongue and speech muscles generally."²⁵ This whole view of thinking as language habit or "sub-vocal talking" is piercingly criticized by Bertrand Russell in his article, "On Propositions: What They Are and How They Mean."²⁶

The inadequacy of the behavioristic concepts and methods in the field of psychiatry and in the field of our special interest in this discussion—the determination of the mental condition of the accused who pleads insanity as a defense to crime—is well indicated by Jelliffe: "There can be no doubt that psycho-neuroses have brought about 'habit twists' which have become a faulty equipment in the patient's reactions to life. To acknowledge this is by no means to lose sight of the relation of the habit twists as only forms of expression of a self that is more than a complex and co-ordinated system of language and bodily habits. . . . The very fact that the patient cannot phrase in terms of words the habit twists which have become a part of his biological equipment would imply that there is something more than merely bodily habit twists." The data of psychopathology must convince one that "Speech is no more capable than any other mechanism of taking the place of affective functioning, but is one of the vehicles through which this is given discharge, an implement which the same affective impulses first formed and are still perfecting for their use."²⁷

As mental states and mental concepts of knowing, intention, motive, negligence, rashness and many others important in the criminal

²⁴Psychology as the Behaviorist Views It," note p. 174.

²⁵Psychology from the Standpoint of a Behaviorist, pp. 14, 15.

²⁶Aristotelean Society, Supp. Vol. II, pp. 8, *et seq.*

²⁷S. E. Jelliffe: "Dr. Watson and the Concept of Mental Disease," Jour. Philos. Psychol. & Sci. Meth., 1917, Vol. XVI, pp. 269-270.

law are thus shown to be rigidly excluded from a thoroughgoing behaviorism, the requirement of the law that to constitute criminal responsibility there must be "capacity of intellectual discrimination" and freedom of volition cannot be satisfied by such a discipline. If all human action is reflex action, if it is the result "merely of the play of nervous currents, started in the sense-organs by stimulations from the physical world and propagating themselves through the jungle of the nervous system, finding always the paths of least resistance according to purely physical principles," then the conscious-volitional basis of both moral and legal responsibility must be abandoned; and either all men must be exempt from responsibility on the ground that they are automata with no control over their responses to stimuli, no power of purposive planning and execution of their purposes, or, arbitrarily, machines which interfere with the smooth running of the social machine, must be "parked" out of danger or scrapped entirely without regard to the "rights" of the machine or the equities of any individual case. Behaviorism, in other words, is unsatisfactory as a basis either for ethics or law.

As intention and volition are the two concepts with which the law on the subject of criminal responsibility of the insane is mainly concerned, and, as Behavioristic psychology makes no provision for these,²⁸ a brief description of them from the standpoint of psychology as the science of mind is necessary.

We have seen that free volition in the sense of conscious, purposive activity must be assumed by the law. In assuming these and acting upon such assumption, the law is doing no more than is popular thought and popular morality; indeed all social intercourse rests upon such assumption. As Professor McDougall points out, "neither 'the Will' nor 'Conscience' is a faculty, an entity of any kind, distinct from the rest of the personality. 'The Will' is character in action; and 'Conscience' is moral character—character developed under moral guidance, character in which the moral sentiments are duly incorpo-

²⁸To say, as the Behaviorist probably would, that "intention" consists of "implicit language habits" would not serve the purposes of the law; nor would it give any reason why, as Doctor Roback has indicated, "implicit" language habits should involve greater culpability than "explicit," external behavior. For it is well known in the law that a mere declaration of intention is not always or necessarily an indication of the actual mental condition of intention or "intent" which the law requires as an ingredient of a crime. The requirement of "intent" is to take account of the need of the culprit having foreseen the consequences of his act or having known that his act would result in injury or might thus result; and, further, to take account of the defendant's capacity restrain the commission of an illegal act even after he had envisaged it—in other words, of the defendant's capacity for conscious, purposive activity (including capacity for inhibition of acts which he knows are illegal).

rated in the system of the sentiments and, through the medium of the sentiment of self-regard, are given due weight in all moral issues; character consolidated by habitual and consistent decision and action, in accordance with the promptings of the moral sentiments and of an unyielding self-respect."²⁹ A little reflection will convince the reader that this is essentially what is meant by character in everyday thought and conversation.

Professor McDougall's views are convincingly proved by the fact that once self-respect is destroyed, character and volition are weakened, as in the case of a victim of alcohol or drugs, and, more strikingly, by the war "shell-shock" cases, where, as he points out, loss of "will power" was often traceable directly to a severe shock to a soldier's self-respect, as where he suddenly realized his terrible fear in the face of some crisis in a battle and that he could not therefore live up to the social ideal of the time and place and circumstances. "The self-assertive impulse, made strong and delicately responsive by much and varied exercise, may come to the reinforcement of any other motive and may support us to the bitter end in any task, trivial or serious, to which we have once set our hands."³⁰

For the description of motive and intention and their distinction from the standpoint of the science of mind, the following extract from Professor McDougall is instructive:

"Suppose that you are sitting in a concealed spot near a lonely road, and that you observe an acquaintance, X, walking alone along the road. Suppose, further, that you see a needy-looking man coming in the opposite direction; that, when the two meet, they stop and exchange some words; and that X put his hand in his pocket, hands some money to the other man, and passes on. How will you interpret that behavior of X? . . . You will be able to infer that the man begged alms of X, and that X gave them; further, you can infer that X, when he put his hand in his pocket, intended to find a coin and to give it to the beggar. About his intention, then, you are clear. But what about his motive? That remains problematic. Here we have a clear illustration of the obvious fact that motive and intention are entirely distinct facts. Yet many psychologists and some lawyers deliberately confuse them, or assert that a motive is merely an ulterior intention. There is no distinction of more importance for the understanding of behavior. . . . If X, when he put his hand in his pocket,

²⁹Outline of Psychology, Wm. McDougall, Chas. Scribner's Sons, 1923, p. 442.

³⁰*Id.*, p. 445.

had pulled out a pistol instead of a coin, and had put a bullet through the other man, the question of motive would have become a matter for the lawyers to discuss.³¹ The intention to shoot at the other man might be confidently assumed, though the motive remained absolutely unknown."³²

Proceeding further in this analysis, he says: "On seeing the coin given, at least three possible motives might be guessed with equal plausibility. You might guess that X was a timid person and that he gave the coin because he was afraid of the other man, afraid of being assaulted by him if he refused to give. Secondly, you might guess that X was a pitiful or kindly man, and that he was moved to give by pity. Thirdly, if you were 'inclined to be cynical,' you might guess that X is a man who likes to feel himself superior to others and who enjoys any situation that enhances his feeling of superiority to others and their sense of his power over them. . . . In each case you would be assigning an emotion as the motive of the action; and, in so far as your guess was a good guess, you would have explained the action as completely as the psychology of the common-sense tradition can pretend to explain it. Of course, your explanation might be less simple; you might guess that all these three emotions were at work together, that X was a little bit afraid, a little bit compassionate, and a little proud, all at once; and, if he were a stranger to you, it would be safest to assume some such mixed motives or emotions. . . . Common sense identifies emotions with motives. Common sense, when it has named correctly the emotion dominant during any man's action, holds that it has explained the action, made it intelligible, in general terms. . . . If any further explanation is required, it must take the form of explaining why that man experiences and displays that emotion under the circumstances of that moment. This stage of the explanation involves the description of his 'character'; and an adequate understanding of his character can be attained only by considering both his hereditary constitution and the course of his development."³³

Just as in the case of the criminal law, Professor McDougall holds that "in this all-important matter of the explanation and understanding of human behavior or conduct, . . . 'common sense' is right, and "many of the psychologies and philosophies of the past" are wrong,

³¹Motive need not ordinarily be proved as an element of the crime; it only becomes important indirectly as throwing light on the required "criminal intent."

³²*Id.*, pp. 121, 122.

³³*Id.*, pp. 122-125.

"because they have rejected the common-sense procedure and offered in its place a variety of fantastic theories."³⁴

Sketching his own theory of human conduct, in which "the cue offered by common sense was frankly accepted as a working hypothesis," Professor McDougall gives a brief summary of the views he first advanced in his fundamental work, "An Introduction to Social Psychology," in these words:

"Emotion was regarded as a mode of experience which accompanies the working within us of instinctive impulses. It was assumed that human nature (our inherited inborn constitution) comprises instincts; that the operation of each instinct, no matter how brought into play, is accompanied by its own peculiar quality of experience which may be called a primary emotion; and that, when two or more instincts are simultaneously at work in us, we experience a confused emotional excitement, in which we can detect something of the qualities of the corresponding primary emotions. The human emotions were then regarded as clues to the instinctive impulses, or indicators of the motives at work in us. . . . A little dose of intelligence may modify the impulsive power of emotion or of instinct."³⁵

Considering human personality, then, as a "federation of organic impulses" distinguished from the lower animals by the degree of intelligence which can be interposed to modify these instinctive tendencies and their corresponding emotions, we get nearer to what the law actually regards to be the makeup of human personality. These impulsive instincts which urge for gratification are shared by man with the lower animals. They are modified or kept in check originally by their own inward antagonisms, as where two impulses arise simultaneously (as the urge to fight and the drive to run at the sight of danger); but with the organization of social life other considerations than the mere gratification of the individual's desires prompt to action. Primitive man, as the lower animals, simply destroyed any obstacles in the way of gratification of these primitive, instinctive urges. As social life progressed the conflict between that set of instinctive trends comprising the egoistic instincts and the federation of organic impulses comprising the social instincts became more acute. In law it represents the stage where social rights or interests were beginning to be set off

³⁴*Id.*, p. 126. For a clear, elementary exposition of the various schools of psychology, as well as a convincing critique of those schools which "lend themselves readily to alliance with the mechanistic view of organisms which denies the reality of purposive action," especially thorough-going Behaviorism, see the introductory chapter of the *Outline of Psychology*.

³⁵*Id.*, pp. 127, 128.

against individual rights or interests. The history of criminal law consists in an ever-widening consideration of "mitigating circumstances," of consideration, after the teachings of the Correctionist School of Criminology, of such facts as age and mental condition in the evaluation of criminal responsibility. The recognition of the nature of man, of his vast variety of motives (or emotional phases of primitive instinctive desires), and of the important fact that "according to the measure of his intelligence he can weigh them, estimate possible consequences, and follow one and inhibit the others";³⁶ and the recognition by man that though the primary instincts may cry for satisfaction, such satisfaction might "harm him in his property, liberty, in his life for the injustice and injury he is doing to others"—all this is at the basis of responsibility for anti-social conduct that is punished by society. But these are not the only considerations which should enter into the measuring of social responsibility. Other factors will be considered below.

We have gone so much into detail on this subject, because we believe such a view of human nature—a view which common sense and the law recognize and which psychology and the other social sciences can refine and make more useful for the purposes of penology—to be the most promising from the standpoint of criminal responsibility. We agree with McDougall that neither the old wine of "reflexes" and "conditioned reflexes" poured into the new bottle of Behaviorism, nor the "ideo-motor" theory of human conduct, which regards that mysterious entity, an "idea" as a motivating agency, nor the theory of "psychological hedonism," which regards pleasure and pain as the only motives to human conduct, nor the conception of that much-abused entity, "the will" as something distinct and self-sufficient (which has formed the target of Determinism), nor the view that "reason" as a "faculty" is the spring of action, nor the "unconscious"³⁷ as a distinct and separate entity without regard to other data of mental life—not any one of these correctly explains human conduct, and not one of these can be a point of departure for estimating criminal responsibility. Professor McDougall's procedure on the basis of what he calls "the common-sense cue" is not only justified by the theory of evolution and the facts of behavior in animal and man, as he convincingly shows in his work,³⁸ but without his general view of the

³⁶The Psychology of Misconduct, Bernard Hollander, London, George Allen & Unwin, Ltd., pp. 178-180.

³⁷Unless we conceive the entire system of instincts as constituting the "Unconscious," and take account, further, of the other data of mental life.

³⁸The Outline of Psychology. See also his epoch-making work, An Introduction to Social Psychology (14th Edition), Boston, John W. Luce & Co., 1921.

nature of human action criminal law especially would be without a sure basis; unless the law were converted into an arbitrary and capricious weapon, or unless it reverted to the stage of the *lex talionis*. If there is such a thing as criminal responsibility, based on moral responsibility, it must take account of the instinctive nature of man and his capacity to modify the impulsive, primitive power of instinct by the injection of some degree of intelligence.

In primitive times, penal law was objective; it considered the external deed alone, for which it had a pre-established schedule of penalties. Primitive law ignored the personality of the agent; it was therefore the legal condition *par excellence* of a behavioristic psychology. No account was taken of "extenuating circumstances," of mental defect or disease and its influence on free volition. No account seems to have been taken of moral obliquity, which rests upon recognition of the capacity of conscious, purposive activity. There was just the fact of anti-social behavior vaguely recognized as such, without inquiry into the extent to which this behavior might have been due to the enslaving influences of heredity or developmental and environmental factors. "Intention" had little to do with it. The *Wergild*, a stated price in requital for a private injury, and the sacrifice to the gods by way of expiation in the case of public injury, were not based on questions of the nature of behavior, purpose, intention, volition, negligence, malice or any other mental concepts with which the law deals today. What was the act and who was the author thereof? were the only pertinent queries. All this was perfectly natural in a primitive state, where bloodshed was the rule and where men were in the habit of giving free play to their instinctive desires.

We are not here concerned to go deeper into the difference between the mechanistic-materialistic psychologies and the views expressed by Professor McDougall. It is enough for our purpose to reiterate that the law does proceed on the assumption that such terms as are popularly designated as impulse or instinct, voluntary activity, desire, motive, intention, deliberation and others are generally understood to describe certain mental data, and that these must be considered in a discussion of crime; further, that behaviorism or any other mechanistic psychology cannot satisfy the demands of the law on this score.³⁹ Indeed such terms and what they connote are affirmatively disavowed by behavioristic psychology.⁴⁰

³⁹See, for example, *Psychology from the Standpoint of a Behaviorist*, by Watson.

⁴⁰See "Behavior," by J. B. Watson, pp. 7-10. Doctor Roback's chapter on Behaviorism and the Law in his "Behaviorism and Psychology" gives an excel-

It is true that these terms as used in the law are not always synonymous with the views of psychology; but this is rather a matter of the necessity of the introduction into the law of clearer views as to the nature of the human mind and of the springs of conduct than a refutation of the fact that the law deals with such concepts. That requirement of a union of act and intention which is necessary to constitute a criminal act is a recognition of the fact of conscious, purposive activity in man and of the fact that this capacity may be weakened or destroyed by mental disease. It is true, too, that in many cases the volitional element of the act is disposed of by a legal "presumption"; but this is inherent in the difficulty of proving human conduct and its motives. If the law concerned itself only with external behavior, it would never have required an inquiry into motive and intention; and, for those cases where our imperfect psychology is unable to give us data as to intention, it would never have felt the necessity of "presumptions" as to the mental state necessary to constitute a criminal act; it would have looked no further than the external behavior, as did primitive law.

There is, moreover, a grave danger in acceptance of the purely behavioristic attitude by the criminal law. Saleilles⁴¹ makes an important point in this connection that most of us are wont to overlook. After discussing the fact that the primitive "objective penal law, in which responsibility has no place, becomes a penal law based upon the notion of taking one's chances," he warns against the return of law to "an objective attitude," under which the "theory of taking one's chances tends to reappear." He points out that professional criminals still take the attitude that having chosen an occupation that involves risks, "they realize the risk which they incur. If they steal, they pay for it, as a debt, by so many months of imprisonment. Society appears as a creditor to whom a debt is due. With the debt paid one may begin anew; the score is canceled." Our law today also accepts too cheerfully its role of creditor to whom a debt is due which can be canceled by a definite term of incarceration fixed in advance as was

lent, brief exposition of the dependency of criminal law on mental concepts. "Suppose we accepted behaviorism in its extreme form . . . it would behoove us, as Watson has done, to eliminate all mental states from our scientific discussions. Since intention is a mental state, we should be obliged to give up this term, too, until the great day comes when the physiological mechanism is discovered that the intention will be translated into. Meanwhile, what are the jurists to do? Wait for the transformation and not bother about such 'assumed realities,' or lay themselves open to the charge that they are dealing with entities which psychology (behaviorism, of course) does not recognize?—p. 138.

⁴¹The Individualization of Punishment. (Modern Criminal Science Series), Boston, Little, Brown & Co., 1911, pp. 33, *et seq.*

the schedule of penalties in the *lex talionis*. We are still, from the angle of the judicial sentence based on fixed statutory penalties, treating crimes instead of criminals. True, our so-called "indeterminate sentence" (not indeterminate in the real sense, because it fixes limits) permits some degree of individualization on the part of the judge and parole boards; but there is still too much of the cut-to-the-same-pattern view of all criminals committing the same offense.

Perhaps the idea of a debt due to society may legitimately form one of the bases of penology; but when it is the only basis, punishment is little better than "a sublimation of the vengeance motive."⁴² More undesirable, punishment conceived of as the payment of a predetermined debt is abortive. It is well known that the "old-timer" who has done several "bits" before is usually the best behaved prisoner, the "trustee" playing the waiting game cheerfully, with the sole businesslike view of reducing his little debt to society by some "snatch" of time off for good behavior.

III. FREEDOM OF WILL AS CONSCIOUS PURPOSIVE ACTIVITY, AND THEORIES OF PUNISHMENT

Thus far we have attempted to show that most of the disagreement between determinists and free-willists is due to a confusion of terms; that the metaphysical problem does not today have much influence either on broad social policy or on the action of individuals—judges or penologists—that the practical issue is between mentalistic and behavioristic psychology; and that the criminal law today proceeds upon a subjective, mentalistic basis. In what follows it is proposed to show that all theories of punishment that lay any claim to morality have also proceeded on such a basis. Purposive activity and free action in the psychological sense are interchangeable concepts for our purpose. Freedom means creative capacity; and creative capacity is essentially involved in the notion of purposive action. Henceforth when we use the term "freedom of will" we are expressing the idea merely that mind, in addition to its function of contemplative intelligence, is an active, directive agency; but in holding this view we of course by no means overlook the influence of hereditary equipment, environmental influences and conscious and unconscious motives in influencing and circumscribing what would otherwise theoretically be a chaotically free mind or will, whose single purpose would be reckless freedom of action.

⁴²Insanity and the Criminal Law, William A. White, New York, The Macmillan Co., 1923, pp. 16, 17 and 31.

In the above sense we think it can be safely asserted that belief in freedom of will has always been a necessary assumption of developed (as opposed to primitive or only partially developed) systems of criminal law. Otherwise punishment for a violation of law could hardly be morally justified. If, for example, the view of the determinist prevailed in criminal jurisprudence, the criminal act being only one of a series of natural effects, it would be as absurd to hold the agent accountable to the law and punishable for his crimes as to hold some inanimate object accountable for having been employed by a criminal in the commission of a crime; if, on the other hand, we adopt the extreme libertarian view (which has always been the target of determinism), the conception of the will as completely isolated from character, as a mysterious power of totally unmotivated choice standing part from the personality, then not the personality ought morally to be held responsible to the law but this mysterious external entity.

The jurist schooled in the psychology of purpose will of course readily recognize psychological freedom at the base of imputability or criminal responsibility. But even those jurists and criminologists who may be called "mechanistic" in their psychological views must tacitly assume that it is possible to refrain from reacting to stimuli in ways which the law as recognized as constituting criminal offenses. And this freedom of choosing the method of reaction to stimuli or of inhibiting certain reactions is, as we have often asserted, what we mean by the free activity of man. By not always stating the position of the free-willist in clear terms some exponents of theories of punishment have insisted that the free will question does not enter into their theories at all; and in so far as they meant freedom of will in the abstract "high metaphysical" sense they have no doubt been justified in taking such a view. But wherever they referred to purposive, free activity in the psychological sense their positions are untenable.

Some criminologists and penologists are really purposivists, although, like some metaphysicists, they insist upon calling themselves determinists, by giving an altogether unreasonably wide definition to the term "free will," a definition which the believer in the purposive activity of mind justly refuses to accept. Thus the great jurist, Kor-kunov,⁴³ insists that, "We must put the question categorically, 'Is the will free or not free?' It cannot be considered as halfway free. It comes under the principle of causation or it does not. When the question is thus put it is very simple, and the answer by no means doubtful. To maintain that the will is absolutely free is in such formal contra-

⁴³General Theory of Law, Translated by Hastings, 1909.

diction to the best known facts that it today hardly finds any longer a serious defender." He then resumes the well-known arguments against "freedom of will." But an examination of his definition shows that he is assuming that unwarranted, chaotic freedom of some mysterious, extra-personal entity, which we showed to be unjustified.

On the proposition that a belief in freedom of will in our sense described above is at the basis of criminal law and of the rationale of punishment, let us consider the views of some representative schools of penology, omitting "transcendental" theories, however, on the ground that, stripped of their disguise of metaphysical terminology, the "*Leitmotiv*" in all such theories—as the theological view of punishment as a religious duty; or the expiatory theory; or Kant's view of punishment as a moral necessity; or as a logical complement of crime—is the idea of justice in the abstract.

Oppenheimer, in his "Rationale of Punishment" (pp. 267-8) gives a summary, in simple terms, of the different attitudes which the State takes towards crime and criminals upon the various political, hence practical, theories of punishment. He holds that under all theories, except the preventive theory of punishment, the State virtually says to the criminal or prospective criminal, "Do what you like. I lie low and wait until you have committed an offense. Then I come down upon you and do what I consider to be my duty. I cannot prevent your going wrong; you are a moral, i. e., a free agent. But neither am I at liberty to alter the . . . consequences of your choice. For my line of action is but the necessary moral complement of your conduct." These theories, therefore, avowedly recognize freedom of will.

What Oppenheimer calls the theory of justice holds, "Your choice has shown you to be a danger to society, and I have to deal with you in such manner as the interests of society demand." This may be conceived of as a "mechanistic" or "behavioristic" theory; for the law does not, according to this theory, make any inquiry as to whether the act was free or determined; it simply waits for punishable acts to occur and then punishes them. But can punishment be morally justifiable if a person is not free to act as he wills? We will see later that there have been attempts to base punishment on an apparent disregard of this question, and, moreover, to justify such disregard.

The state, according to other, more specific, political theories, says Oppenheimer, holds somewhat like the following:

1. The deterrent view: "I will punish you by making an example of you." This recognizes that fear is a motive influencing action. But some criminologists, as we have shown, confuse the idea of motivated

activity and the concept of determinism; free action does not mean unmotivated action.

2. The theory of disablement: "I will make it impossible for you to offend again." This view, too, we believe, can only be morally justified by a recognition that the prisoner was at the time of the act a free-willing person in the psychological sense. There have been attempts, however, to justify it on the ground of safety to the group. The only remedy that consideration of safety to the group can justify is the placing of the offender where he cannot repeat his offense; the extreme measure of physical disablement is not necessary for the avowed purpose of protection of the group. Justice requires that more than the safety of the group should be considered; that the judicial (and legislative) process should be a more or less conscious balancing of the interests of the group and those of the individual.

3. Theories of legal and moral reformation: Here the state says, "I will teach you such a lesson that you will not be likely ever to forget it," or, "I will reform you by casting the devil out of your soul." In order for lessons to have an effect, however, it is imperative for this school to believe in the freedom of the individual to choose the right and avoid the wrong, after the right course has been pointed out to the prisoner; or, to plan future action in the light of past experience and under the influence of certain motives, and to be free to carry out that plan.

4. The doctrine of prevention: This holds, "What is the use of waiting until a crime has been committed? Every crime is a shock to the peace and good order of society. Therefore, we must prevent all crimes or nip them in the bud." But this is really not a view of punishment, but of an anticipatory process. As far as it is concerned with the prevention of recidivism by one already imprisoned, it, too, must be based on belief in freedom; for this school advocates, among other devices, indeterminate sentences for the mentally sound offender, who committed the offense as a normally free-willing being; and indeterminate incarceration in an insane hospital, under proper medical care, for the offender of unsound mind, who is liable to re-embark upon a criminal career if discharged perfunctorily at the end of a predetermined, definite term of incarceration, without regard to whether he is in a fit condition to take up the broken threads of social relationship. And the change of treatment from imprisonment for the mentally sound offender to hospital care for the mentally unsound offender, we take it, is a recognition of the relative freedom of action of the first and lack of freedom of the second.

It will be seen from the foregoing sketch of theories of punishment that in one form or another the leading schools of penology must implicitly postulate freedom of will in the sense of conscious, purposive activity of mind. Let us now look at the views of one or two criminologists who claim to base punishment on other grounds than freedom.

Even so acute a thinker as Tarde seems to confuse the capacity for conscious, purposive activity—a matter of psychology—with freedom in a high, metaphysical sense. He deplores the fact that legislators share in the “prejudice which indissolubly binds these ideas (i. e., metaphysical freedom and moral responsibility) together.”⁴⁴ Thus quoting Article 51 of the German Penal Code to the effect “that at the very moment of the act the perpetrator must have been in position of his ‘liberty of will,’” he deplores the fact that “this requirement has as its inevitable result the acquittal of many dangerous malefactors. It is becoming more and more difficult for the medical expert, called in an ever increasing number of cases to pass upon the mental condition of the accused, to vouchsafe the opinion that he was free to will otherwise than he did. If he expresses this opinion he is doing violence to his scientific beliefs.”⁴⁵

Of course the code section in question is not discussing freedom in the metaphysical sense, but “normal” capacity for conscious, purposive choice between alternative lines of action, which, when it is destroyed by mental disease, excuses a defendant from criminal responsibility. The question of metaphysical freedom is unanswerable; the question of deviation from normal capacity is one for the psychiatric expert.

Reviewing all the arguments for freedom in the metaphysical sense Tarde puts punishability on the basis of “individual and social similarity.” He claims, like all determinists, that the “affirmation of free will is in contradiction to science” (showing here that he is discussing the philosophical question of freedom); but much like Kant he adds, “yet to deny it is to contradict conscience.” By his doctrine of “similarity” he means a theory which presumes to base responsibility on the notion of personal and social identity, holding that in order that the doer of an act contrary to the wish of others may have the feeling of guilt, and in order that in spectators and judges there may arise a corresponding feeling of indignation, the following two things are

⁴⁴Penal Philosophy, Gabriel Tarde, Translated by Rapelje Howell, Modern Criminal Science Series, No. 6, Boston, Little, Brown & Co., p. 15.

⁴⁵*Id.*, pp. 15, 16.

necessary: First, the author must attribute to himself the act in question and not blame it on organic or physical causes outside of his person; and, secondly, a man must judge himself or be adjudged as forming part of the same society as the judges and the victim belong to. Responsibility, in other words, exists only when the author of the deed preserves his "real and personal identity," and when between him and the social *milieu* of a particular time and place, there exists a sufficient number of resemblances that will awaken his guilty feeling and make him admit his responsibility.

Tarde illustrates the working of this hypothesis by insisting that a hypnotized man is irresponsible not because he is not free, but because he has momentarily lost his identity, and not he himself is acting, but he, altered by suggestion. Again, he holds a person insane is not responsible, not because of lack of freedom to act intelligently, but through lack of both personal and social identity, claiming that insanity "alienates, separates, and destroys both identities." But this ingenious theory is not always applicable, as Garofalo⁴⁶ has shown. For example, the criminal who was insane before the crime and continued so afterwards would be preserving his "personal identity" throughout the act, yet he is not always responsible legally. To this Tarde might reply that this criminal had lost his *social* identity throughout the period of the act, he having been alienated socially as soon as he began to exhibit such extreme symptoms of mental alienation as would distinctly and dangerously differentiate him from his fellows.

De Quiros⁴⁷ points out that a better argument against Tard's view is that this irresponsibility on the ground of lack of personal or social identity can in theory (and probably could in practice) be applicable to all emotional acts, including even mere angry outbursts immediately preceding the act. Personal identity, too, is, as a matter of fact, really never completely lost even in mental disease; Tarde's assumption that an absolutely new personality takes the place of the old one is not warranted in the case of many mental diseases. But we believe the best argument against Tarde's notion to be that he is merely giving us the old difficulty in new words; for in practice we cannot see that it would be any easier to decide the question of individual and social identity in each case than to say whether the culprit was free and responsible, or irresponsible.

⁴⁶Quoted by DeQuiros, *Modern Theories of Criminality*, Modern Criminal Science Series No. 1, p. 145.

⁴⁷*Id.*, pp. 145, 146.

The great German psychiatrist and criminologist, Aschaffenburg, in his "Crime and Its Repression"⁴⁸ (pp. 241, *et seq.*), says that "legislation is built upon the basis of the doctrine of the free determination of will." The penal code for the North German Federation, he says, for example, holds that, "The right of the state not only to adopt measures of security against the criminal, but to punish him, rests on the general human opinion that the mature and mentally sound man has sufficient will-power to repress impulses to criminal acts, and to act in accordance with the general consciousness of right." Assuming such capacity (which we have called conscious, purposive activity) to be what is meant by philosophers when they discuss "freedom of will," he proceeds to attack the view that eminent criminologists ordinarily have held, that "free-will" is the "basis of criminal law." He mentions the fear entertained by some moralists that without belief in "freedom," "the old belief in a man's responsibility for his acts" must be abandoned; and hastens to remind us that both St. Augustine and Luther denied the doctrine of free-will. He insists that "with the deterministic view it is still possible to maintain the responsibility of a man for his acts—though from an entirely different standpoint," first, however, disposing of the vexing question of freedom of will in the metaphysical sense, as if for all time, by the usual arguments to the effect that "the phenomena which we call acts of will must be preceded by a causal activity. This activity goes on in our brain, hence is dependent on the latter's condition." A "free will" that acts without cause, or, as he says, "more comprehensively, without motive, does not exist." As to this argument we have already said it is not warranted to assume that to act with consciousness of purpose, in the light of past experience, and toward more or less definitely conceived goals, means to act without motive. To hold with Aschaffenburg and with so many who use free action and unmotivated action interchangeably would be to speak of some mysterious, chaotically-free, but absolutely reasonless or intelligenceless creature. To take Aschaffenburg's definition of freedom would be to fall into the fallacy of championing a fantastic and contradictory view against which Professor Palmer warns us.

Aschaffenburg asks the question, assuming he has proved universal causality, "What right have we to make a criminal responsible for acts not the expression of free-will, but depending on the organization and development of the brain, on intelligence, experience, and emotional excitability, on the one hand, and, on the other, on external

⁴⁸Modern Criminal Science Series, No. 9.

conditions?" He then bases punishment upon an analogy he finds in the whole organic realm, namely, that every organism in the world of nature responds to stimuli of sufficient strength, that is, reacts to irritations; and that the motives of each of these defense reactions are well-being and self-preservation. "This is true of the single cell as of the highest animal." He concludes by agreeing with Ferri: "The natural foundation and the fundamental principle of the repression of crimes exists solely in the necessity for self-preservation, which applies to every individual and every social organism." Crime in this view, however, is considered only from the standpoint of an injury to society, and punishment is "only the necessary social reaction against it." It is from this starting point alone, Ferri and Aschaffenburg insist, "that the struggle against the criminal must be carried on."

A similar view is held by Hamon.⁴⁹ "The individual and society feel the need to react against a nuisance by suppressing the criminal or preventing his acts. The only responsibility is *social* responsibility. . . . 'Society has the right to defend itself and to preserve itself. Man is responsible because he lives in society, and only because of that social existence.' We are thus brought, Hamon points out, to the acceptance of the old English legal maxim that everyone, whatever his state of consciousness, always acts at his own risk and peril. The insane and abnormal are, *socially*, necessarily responsible. . . . We should replace the term 'social responsibility' by 'social reaction.' Such social reaction manifests itself in preventive treatment, and in social hygiene and prophylaxis, applied not only to the agent, but to the causes which produced his acts."⁵⁰ This, as we said above, is Ferri's view expressed in his "La Sociologie Criminelle"; a similar stand is taken by McConnell.

There are several objections to this view as we see it. Logically, on the analogy of the immediate reaction to stimuli which Aschaffenburg uses, to say that "such social reaction manifests itself in preventive treatment, and in social hygiene and prophylaxis, applied not only to the agent, but to the causes which produced his acts," is a *non sequitor*. Prevention, anticipation of the irritating stimulus to the social organism, has no place in such a view, logically. Secondly (and related to the first objection), such view treats only the crime, disregarding the criminal, except as an object of punishment, regardless of his actual responsibility, mental status, motives, or any other extenuating or aggravating circumstances of the individual case. Such

⁴⁹La Responsabilité, Archives d'Anthropologie Criminelle, Nov., 1897.

⁵⁰The Criminal, Havelock Ellis, New York, 1903, pp. 365-366.

a view is strictly behavioristic and looks only to the external act and regards all similar crimes as arguing the same imputability on the part of the agents. Thirdly, this view disregards the data of psychology entirely, and it is even questionable from the point of view of social psychology, for groups react, not always mechanically, in the same way and to the same degree to the irritating stimuli of recalcitrant members; but even on the part of the "many-headed tyrant" there are varying types of reaction.⁵¹ Finally, such a theory is not in harmony with the actual facts; it does not express the true nature of that process of "social engineering" which the law is more or less consciously endeavoring to carry on. It overemphasizes the social interest in the general security, just as in the 18th century the social interest in the individual life was overemphasized. In such view there is no room for compromise. But the actual legal process is consciously or subconsciously a constant compromise, a "balancing of interests."⁵² As a theoretical basis for treating with crime, such view at the best can only justify our taking into custody of the offender; it tells us nothing as to our justification for, or nature of, actual penological treatment, once he is in custody.

This review of theories of punishment would indicate that in one way or another we are forced to recognize that the problem is largely psychological, and that the basis of responsibility is largely the recognition that all of us have to a greater or less degree the innate capacity for conscious, purposive activity.

But even the psychological approach is insufficient, standing alone, to insure a just estimate of responsibility in the individual case. To measure the responsibility of any alleged malefactor according to any yard-stick, be it chaotic freedom or purposive capacity, is impossible. What we can do, however, is proceed from a correct view of the make-up of human personality and at the same time take into account in the individual case not only differences of mental constitution, but the more or less immediate environmental influences which contributed their share to the criminal act. The health, economic and social status, heredity of the defendant, his mental and moral education—these and many other factors ought justly to be weighed in determining responsibility and penal treatment. To some extent, although too haphazardly, this is actually being done today. Investigations by probation

⁵¹We believe one must admit this, even though one does not go so far as to accept the concept of a "group mind." See *The Group Mind*, William McDougall.

⁵²See *Outlines of Lectures on Jurisprudence*, Roscoe Pound, p. 89. See also Demogue, *Notions fondamentales du droit prive*, pp. 170-200.

officers and social workers prior to disposition of the case, investigations and study within penal institutions and some attempt at individualization of treatment—all these improvements no doubt weight the complex elements of responsibility to some extent. The greatest promise, however, lies in a well-organized, capably-manned, well-equipped psychopathic-sociological laboratory attached to the criminal courts, and at the same time supervising penal treatment in a directive way.

“ . . . The criteria of responsibility involve so much that is intricate, uncertain, metaphysical, and are themselves properly subject to variations by reason of environmental and disease conditions, by reason of innate defects and differences in social suggestibility, that, for the purposes of general discrimination and the development of a general standardization, they are thoroughly impracticable.”⁵³

Healy and others have shown the complexity of causation at work in the production of anti-social conduct, and that general causation theories are of little value. He has also recognized that the study of causes of crime must proceed from a study of the mental factors of the criminal act in each individual case. “*Whatever* influences the individual or his offense must influence first the mind of the individual. It is only because the bad companion puts dynamically significant pictures into the mind, or because the physical activity becomes a sensation with reproduction in psychic life, or the environmental conditions produce low mental perceptions of one’s duty towards others, that there is any inclination at all towards delinquency.”⁵⁴ Might we not also say that this inquiry into the mental factors of the individual criminal act and their hereditary and social setting is the only rational basis for estimating responsibility, and that such procedure must replace pure speculation as to abstract freedom of will? The same objection that Healy raises against general theories of criminality may be raised against general theories of responsibility. No two offenses are indicative of exactly similar responsibility on the part of the perpetrators, although behavioristically considered they both present the same outward aspect. The capacity of every individual to act in a socially-acceptable manner depends upon a host of subtle and complexly interrelated influences; hence the responsibility of each individual is different. But the human capacity for conscious, purposive activity is the most important of these influences, even though this capacity is of different degrees in different people.

⁵³The Individual Delinquent, William Healy, Boston, Little, Brown & Co., 1915, p. 20.

⁵⁴*Id.*, p. 28.

Our point is simply that general theories of responsibility based on philosophical speculation alone can get us nowhere for the practical purposes of the criminal law; that in studying the causative factors of the criminal act of the individual offender according to the Healy methods we are not only finding the causes of the trouble in the individual case and the means to be employed to remove them, but, from the point of view of pure ethics alone, we are actually getting nearer to estimating the measure of the offense in terms of moral responsibility than has ever been achieved by pure speculation, unrelated to scientifically acquired data as to hereditary, developmental and environmental influences and unrelated to any problem of the individual case. In discussing freedom or determinism "from a high metaphysical point of view," we are speaking *in abstracto*, we are discussing "man" *in vacuo* apart from the social setting of any individual man. "*L'homme isolé et individuel n'est qu'une abstraction qui n'existe que dans les livres de philosophie. Il n'y a de réel que d'Humanité.*"⁵⁵

Though Healy, Glueck⁵⁶ and others insist upon the psychological-psychiatric point of departure, they recognize that, while basic, the mental factor is not the only one. If a psychological-psychiatric examination alone were to determine responsibility, and a method could be devised whereby individuals could be graded in responsibility for similar offenses on the basis of their individual mental ages and their individual personality make-ups, the task of estimating responsibility would not be so difficult. But, as we said, a thorough sociological investigation of the individual case is necessary. Thus Healy, in his path-blazing study of the individual delinquent, found that in 162 cases out of 823 in which the complex causative factors of delinquency based on thorough psychological, psychiatric and sociological investigation were penetratingly analyzed, defective home conditions were a primary causative factor; in 394 out of the 823 cases, defective home conditions were a secondary causative factor. In 556 out of 823 cases, defective home conditions were thus found to be largely responsible for delinquent conduct.⁵⁷ In face of such findings how can we limit our estimate of responsibility to a psychological examination alone?

⁵⁵C. de Blignières, Exposition Agrégée et Populaire de la Philosophie et de la Religion Positive, Paris, 1857, p. 465.

⁵⁶Bernard Glueck, The Mentally Defective Immigrant, New York Medical Journal, Oct. 18, 1913. See also his "Study of 608 Admissions to Sing Sing Prison, Mental Hygiene, Jan., 1918, and "Types of Delinquent Careers," Mental Hygiene, April, 1917.

⁵⁷The Individual Delinquent, pp. 130, 131. As to the importance of the mental approach, see also his Mental Conflicts and Misconduct, Boston, 1917, and Studies in Forensic Psychiatry, Bernard & Glueck, Criminal Science Monographs, No. 2, Jour. Crim. Law and Criminology, Chicago.

Indeed such sociological factors as poverty and defective home conditions cannot be divorced from mental factors, upon which they have a direct influence.

The important conclusion is that the question of responsibility, like the question of crime, is an individual question. It is linked up with individual treatment, and such treatment may very well, in certain cases, include punishment together with the other instruments of criminal therapy. None can seriously question the right of society to defend itself against individual, anti-social behavior. But once the offender is segregated, the question of the nature and degree of penal treatment to be meted out is inseparable from the whole question of the mental and moral make-up of the individual offender, his developmental and environmental background, the circumstances under which the offense was committed, his response to various types of penal treatment, and other such questions which can only be intelligently answered by a scientific study of the offender. This is no less true in the case of definite mental disease as a defense to crime.

For the problem of the criminal to be effectively, economically and in general rationally treated, the modern psychopathic-sociological clinic is an indispensable integral part of the whole socio-legal machinery that is concerned with crime. Such a clinic should have the leading role both in the pre-sentence examination of the offender and in the question of his disposition; finally, such a clinic should have general supervisory jurisdiction over penal and disciplinary treatment, its nature and *length*, probation and parole. To examine an offender and prescribe a program of treatment without the opportunity to supervise and modify such treatment, as necessary, and without the power of determining the length of such treatment, has little practical value. As the courts, police system, and institutional treatment of offenders are all concerned with different angles of the same problem, the criminal clinic, police, court-system and penal institutions could more effectively be combined under one general supervision, such as a general ministry of justice. But whether this is so or not, the work of clinics in dealing with juvenile delinquents has been so promising that such institutions dealing with *all* offenders and having closer connection with penal treatment ought to be generally used. Under such a scheme the "criminal responsibility" of the offender who pleads "insanity as a defense" could be as thoroughly and impartially determined in his case as in all other cases, once a jury found the fact as to whether he committed the criminal offense or not, or once the commission of the act was confessed.

Until such time as the whole problem of the criminal insane is treated on more rational lines, certain improvements which can be made more immediately, both in the "tests" of criminal responsibility and in the procedure in such cases, ought to be adopted after a thorough study of the subject. Professor Keedey and the Committee of the Institute of Criminal Law and Criminology that recommended the Expert Testimony Bill have already taken an important step in the right direction, and the constant interest of public-spirited lawyers and physicians cannot fail to achieve a much saner treatment of this vexing problem than is now characteristic of many jurisdictions.

IV. CONCLUSIONS

Gathering together the loose threads of the foregoing discussion, we will summarize the points involved. We first considered the relation of the metaphysical problem of "freedom of will" to psychology and to criminal responsibility. We found that while, conceived metaphysically, this problem is actually not considered by the law in practice, it has had some influence on theories of punishment. Nevertheless, the confusion of terminology in discussions of this metaphysical problem seems to have prevented the arguments as to freedom or determinism from having any marked effect in criminal administration. Moreover, what the law really implies by "freedom" is the power of conscious, purposive activity possessed in varying degrees by all of us. The metaphysical question, as such, it is forced to leave to philosophers. Further, considering some of the more generally quoted arguments on the question of "freedom" in the metaphysical sense, we found that the disagreements on these questions were largely due to the gratuitous assumption that because events in the physical world are caused, mind cannot itself be a cause.

Turning to the nature of human activity, of which crime is but a branch, we found that Behaviorism and its methods are wholly inadequate to supply the answers as to mental states that precede or accompany the criminal act that are required in all definitions of crime; and this is especially true when insanity is pleaded as a defense. On the other hand, that psychology which recognizes man's capacity for conscious, purposive activity, but at the same time does not ignore the contributing influences of hereditary, developmental and environmental influences in the causation of crime, was found to supply the needs of the criminal law.

"Freedom of will" was then used in the sense of conscious, purposive activity, and it was shown that such a concept is explicit or

implicit in the various theories of punishment, including even those theories whose exponents deny it as a basis. The theories of punishment based on "social reaction" were examined and criticized as inadequate. Finally it was shown that as general theories of criminality are inadequate, so, too, general concepts of "responsibility" can get us nowhere. As the most effective instrument for ascertaining both the degree of responsibility (and therefore, of punishability) and the entire penological program of the individual case, the clinical study of the individual offender—psychologically, psychiatrically and sociologically—was suggested; and it was recommended that this device be extended to all criminal courts—adult as well as juvenile—and its scope enlarged to include supervision of penological treatment, probation and parole. In the meantime, the need of reformation both of substantive and procedural law was alluded to. The basis of responsibility is not condition, but a process; a process of scientific study of the factors of criminality in the individual case, and of the balancing, by trained, experienced scientists, of the individual and social interests involved in each individual case, and with reference to the ideals of our day and age.