

CRIMINAL RESPONSIBILITY

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Criminal responsibility by Charles Mercier

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CHARLES MERCIER

**CRIMINAL
RESPONSIBILITY**

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BY

CHARLES MERCIER, M.B.

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

LECTURER ON INSANITY AT THE WESTMINSTER HOSPITAL MEDICAL SCHOOL
AND AT THE MEDICAL SCHOOL OF THE ROYAL FREE HOSPITAL;
AUTHOR OF 'THE NERVOUS SYSTEM AND THE MIND'; 'SANITY AND INSANITY'
'LUNATIC ASYLUMS, THEIR CONSTRUCTION AND MANAGEMENT'; 'LUNACY
LAW FOR MEDICAL MEN'; 'PSYCHOLOGY, NORMAL AND MORBID';
'A TEXTBOOK OF INSANITY'; ETC., ETC.

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PREFACE

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

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

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

CONTENTS

CHAP.	PAGE
I. RESPONSIBILITY	7
II. VOLUNTARY ACTION	20
III. WRONG-DOING	57
IV. INSANITY	76
V. MIND	102
VI. MIND (<i>continued</i>)	127
VII. CONDITIONS OF RESPONSIBILITY	153
VIII. THE ANSWERS OF THE JUDGES	167
IX. PROCEDURE AND PRACTICE	205
INDEX	229

CHAPTER I

RESPONSIBILITY

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

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

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

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

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

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