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AN UTILITARIAN TEST FOR CRIMINAL RESPONSIBILITY

ANDERSON WOODS¹

No greater confusion appears in any field of thought than in the effort to draw a line of demarcation between responsibility and irresponsibility on the part of offenders against the criminal law. This results, I venture to contend, from the fact that the practical need giving rise to this distinction has in the course of years been overlooked. The utilitarian considerations which have thus become obscured must again be brought to light before a satisfactory criterion of responsibility can be adopted.

The legitimate social reactions to crime are three: (1) direct restraint of the offender himself from further misdeeds; (2) moral education of the offender directed toward his reformation or cure; (3) punishment, with a view to deterrence from crime, not only of the particular-offender, but as well of other persons unlawfully disposed. These three processes may be designated in brief as restraint, cure and punishment. Each of the three is in some degree present, or presumably so, in every concrete measure employed by the criminal law, except the death penalty, which obviously cuts off cure. But whatever mingling of these there may be, they are theoretically distinct; and especially is the element of punishment to be kept separate, in any discussion of the subject of criminal responsibility. Punishment proper has for its primary end deterrence. The inmate of an asylum is in a sense punished by his confinement, as the deprivation of his liberty is painful; but the primary purposes thereof are restraint and cure, and do not include intimidation. On the other hand, a law-breaker is not sentenced to prison or to death unless it be held desirable to deter him and others (or in the case of death others only), through fear of the prescribed penalty, from similar future offenses. These latter measures are punishment, and it is only in reference to such that the question of responsibility arises. Only the so-called responsible can, under the law, be *punished*.

Now, if responsibility is punishability, and if the object of punishment is deterrence; then it is impossible to see how the essential characteristic of responsibility can be anything different from the

¹Brooklyn, N. Y., 1454 E. 18th St.

state of being subject to deterrence from the particular offense through fear of the penalty prescribed therefor. This surely seems the only utilitarian answer to the question. Conversely, he who is not thus subject to deterrence—he whose intimidability with reference to the act and its penalty is not sufficient to overcome his impulse to commit the act—is irresponsible.

When punishment is not useful and necessary in the combatting of evils worse than itself, it is wicked and cruel. Notwithstanding the confusing influence of certain religious and metaphysical ideas, this utilitarian principle has always to an extent been recognized. A common example is the treatment of children in the home. Those who by a sufficiently advanced mental development are enabled to understand that a penalty will be repeated if an offense is repeated, and who can thus be brought to refrain from a harmful act, are punished; while those who, because of extreme youth or other circumstance, cannot reason in this way from cause to effect, are exempted. Likewise, in dealing with the lower animals, while we hesitate not to inflict pain when useful and necessary, we recognize it as inhumane to do this when it will produce no proportionate benefit. By the same reasoning, society has recognized that there are limits on its moral right to punish offenders against it; and though, as stated, the subject is much confused, there is prevalent at least a sub-conscious feeling that punishment should not be imposed in cases where not useful and necessary in deterrence from wrongdoing.

The fact that the deterrence aimed at is not that of the particular offender alone, but even more that of other persons similarly inclined, need not vary our criterion of responsibility. To be controlled by the fear of punishment, it is necessary only that the duly intimidable individual recognize himself as a member of the class held legally responsible. For this purpose, to be sure, the law as to responsibility requires clarity. The criterion herein proposed lends itself, as I think will presently be seen, more readily to popular understanding than do any of the criteria now current.

Proceeding to an examination of the theories on this subject which now prevail: We find it announced that irresponsibility cannot exist without mental disease. But what is disease? Nobody limits it to structural defect of bodily organ. In its practical sense the word surely covers all bad functioning; and this, when applied to mental conditions, manifestly includes all criminal inclinations. Recognizing this, legislators and jurists have usually specified that the disease must be only such as takes away the knowledge of right and wrong.

Here again we are at sea; what is the knowledge of right and wrong? First, taking the phrase in its ordinary sense, i. e., the moral: If to know that an act is wrong means merely to know that it is condemned by general opinion, it takes a veritable half-wit not to know that the most common crimes are so condemned. If it means a real moral consciousness, then if the perception be strong enough the wrong will not be done; and, on the other hand, the man without it needs more than any other the deterrent influence of the penal law.

The discussion at this point may seem in danger of drifting into the free-will controversy. If space permitted, I should like to argue that the basic conceptions of freedom and necessity are, in the ultimate, not incompatible. But no more need be said here than that only in so far as the will of the evil-disposed is believed subject to external influence, can there be justification for punishment at all.

Going back to the knowledge of right and wrong: if the words mean, as has been held by some courts, lawful and unlawful; again we find a distinction patent to all but extremely low grades of intelligence. The fact is that to be deterred by the law a man must not only know the law; he must fear it, and the fear must be sufficient to overcome his unlawful impulse.

Now, what connection is there between the non-intimidability here put forth as the test of irresponsibility, and mental disease? In the first place, we may, if we choose, regard this abnormal non-intimidability as itself a manifestation of disease. Secondly, there may be such relation between it and other so-called pathologic indications also present as to render the latter evidentiary of the former. This question of indirect psychologic evidence may well be one for the expert, whose assistance may thus become invaluable in a determination of the degree of intimidability present.

But the condition being one of non-intimidability with reference to the given act and its penalty, it matters not how such condition was caused. Whether due to nerve lesion, to bad education (in other words, bad mental hygiene, producing bad mental functioning), or to something else, there is present in any event the *sine qua non* of irresponsibility.

It is now time to face the inevitable question, how, by this test of responsibility, can there be any responsible law-breakers at all, and how do they come to break the law? The answer is also inevitable; the offense can only be committed because of an uncertainty in the law's operation with reference to the particular act, with a corresponding doubt in the mind of the offender as to whether he will be

punished. The logic of this is unescapable: the purpose of the penal law being to deter, then either the violator must be non-intimidable to such a degree that the law cannot be expected to deter him, or else the law has failed to inspire confidence in itself by punishing with due uniformity similar offenses in the past. If the first alternative be true, the offender is irresponsible; if the second, then responsible.

To be sure, this criterion of responsibility embodies a reflection upon the efficiency of the legal machinery. It assumes that where the offender is responsible the crime is committed because of failures to arrest, failures to convict, or failures to consummate punishment, in cases where arrests, convictions and punishments should have been carried out. It is indeed imaginable that this proposed admission of a relative inefficiency on the part of the state, with its suggestion of a lowering of the commonwealth's dignity, has been the obstacle to a due consideration of what were otherwise so obviously the utilitarian test of responsibility. But what of this admission? It is merely a recognition of a disturbance in the ideal equilibrium between the criminal impulse and the deterrent force, which equilibrium there must be an effort to restore. No human institution works perfectly, and the work of a governing body, like that of any other agency, must consist largely in a continuous effort to remedy its own shortcomings. The very commission of the crime is itself a clear evidence of failure on the part of the penal machinery; for is not the design of that machinery the prevention of crime? Nor will it do to answer that the fault is all that of the criminal; because it is just such individuals that the penal law seeks to control. To be sure, every crime is an arraignment not of the state alone, but of the church, the school and the home. Yet it is not within the province of the court to correct defects in these latter institutions. It must confine itself to its prescribed field, and here it can, and should, aid in making punishment for the particular crime more certain by punishing the instant offender if he be a member of the class subject to deterrence by such means.

Neither may the offender be heard to say that by past penal uncertainties he has been unfairly misled, and that his punishment should therefore be remitted. Whatever criterion of responsibility were adopted, the one held responsible could always complain that society, had it been good enough and wise enough, would have prevented his misstep. The question is not one of absolute justice to the individual, but of social utility.

Having indicated the substance of the proposed utilitarian test of responsibility, it is now time to offer some suggestive language, the like of which might either be embodied in a statute or be made into a rule of jurisprudence. I accordingly propose the following:

If at the time of committing the act there was present in the mind of the actor a well-founded hope of escaping the penalty prescribed therefor by law, but for which hope he would not have committed the act, he is to be held responsible; otherwise, irresponsible.

If the foregoing formula is difficult in application, it is less so than others now current. For the would-be offender who fears the law, it defines sharply a class of punishable individuals of which he can readily recognize himself as a member. True, he may nevertheless commit the offense, if after reflecting upon the criterion of legal responsibility and finding it against him he still hopes that a breakdown in some other part of the penal machinery will enable him to escape punishment. But at least one element of uncertainty—that relating to the theory upon which the jury will be instructed to base their decision as to his responsibility—will have been removed.

Something should be said in reference to a possible indefiniteness in the expression, "the penalty prescribed therefor by law," in view of the wide discretion allowed judges in imposing sentence. There is much merit in the view that in all cases a certain amount of punishment, proportioned to the stated offense, should be made sure and irreducible. A serious question may arise, to be sure, in the case of a young offender, whose future it is felt may be ruined by ignominy; but even in such case (assuming responsibility in the sense herein used) there should be some inescapable deprivation of privilege. On the other hand, abandonment of the system of indeterminate confinement is not practicable, in view of the claims of restraint and cure as distinguished from punishment. But it would seem that after the needs of punishment in the strict sense have been met, such further detention as an offender may require upon the ground that he is not fit to be at liberty is to be imposed as upon an irresponsible rather than a responsible individual, and so is not to be regarded as penalty at all. An "habitual criminal," in whom the habit of crime is so deeply ingrained as to render him insensible to the fear of punishment, is irresponsible; and while the name of the institution in which he is kept is unimportant, he should be considered from that time on not as a subject for punishment but as one to be observed and cared for by experts in moral psychology.

The term "penalty" would thus be applied to the irreducible deprivation imposed directly for deterrence, and so would become definite in meaning. If this distinction is not to be made, no doubt in the proposed rule the word "minimum" ought to be prefixed to "penalty"; or, if judicial latitude is not to be limited more than at present, perhaps the prefix should be "average."

A further criticism of the proposed test may be that the term "well-founded hope" is not sufficiently explicit. Some elaboration might be in order, but from this I desist in the interest of brevity, trusting that the phrase will be given an every-day, practical meaning.

The scope of this essay not permitting an attempt to solve all the related problems, it is time to leave with the reader the above formula for a criterion of criminal responsibility; the language of which is designed only to be suggestive, but the substance of which affords, as it is humbly claimed, a logical and utilitarian test to be applied in jurisprudence.