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PSEUDO-SCIENCE AND THE PROBLEM OF CRIMINAL RESPONSIBILITY

C. O. WEBER¹

What is more common in our daily lives than the experience of "voluntary" action, and the typical feelings of justification or blame which accompany it? But we live and learn! For, if we pause to examine this commonplace experience, the mystery of it enmeshes us in logical tangles so abstruse that they beggar both science and philosophy. William Healy well observes that the question of responsibility is a metaphysical question. But, our need for enlightenment concerning it is extreme, and we are willing to seek for help even in metaphysical grubbing.

The world-war, the apparent increase in crimes of violence since the war, together with other influences, have brought the problem of responsibility to the forefront of public and academic interest. We are on the verge of a new criminology which is gaining a rapidly increasing adherence, both in theory and in practice. Indeed it threatens to revolutionize both the courts where criminals are judged, and the prisons where justice is meted out to them. This new criminology seems to be championed by the bulk of the "academicians"; the class-room criminologists, alienists, sociologists and psychologists. Yet, it is gaining an increasing list of advocates from those who deal with the criminal officially—judges and prison officials. This new view is regarded as an "enlightenment"—it claims to have dispelled the darkness of that hoary notion of crime, the retributive theory, which has its roots in savagery and primitive religion.

It is essential at the start to state these two views of crime in their essential opposition. Every one is familiar with our traditional Christian view of Crime. It is an attitude so ancient that it was practised mutely and instinctively for ages before it found verbal expression. It is the doctrine of responsibility for conduct. It is the attitude of anger towards offenses. It finds expression in the instincts of animals. Indeed, this is a favorite argument of the new school: how could the thirst for punishment be less blind than the instinct from which it has its rise? Well, perhaps it is the instinct which sees, and our comprehension of it which is blind. This, at least, is

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the writer's suspicion. In this paper I propose to defend the traditional attitude towards offenders, and thus accord to the new view that which new views always require, namely, criticism.

But it is necessary to state the two views so that we may know where their essential opposition lies. The traditional view of justice, despite its "animal origin," at length finds expression in religious and philosophical codes of morality. In syllogistic form, its essential arguments are perhaps the following:

- a. There exist standards (legal and moral) which enable us to distinguish good conduct from bad conduct.
- b. Free will is a reality; and it makes it possible, at the cost of effort, to choose good conduct in place of the bad.
- c. Therefore, punishment for bad conduct is justified to the extent that it is volitional in origin.

Let us ignore for the moment both the "formal" and "material" validity of this deduction. We need to center our attention on the opposing view of justice, offered as an enlightenment in modern penology. Clarence Darrow is its typical spokesman, who is as daring in putting it into practice as he is sincere in defending it.² In the preface to his *Crime, its Causes and Treatment*,³ he writes as follows:

"Man has slowly banished chance from the material world and left behavior alone outside of the realm of cause and effect. . . . My main effort is to show that the laws that control human behavior are as fixed and certain as those that control the physical world. . . . I am fully aware that this book will be regarded as a plea or an apology for the criminal. To hold him morally blameless could be nothing else. . . . I have tried the best I could to understand the manifold actions of men and if I have to some degree succeeded, then to that extent I have explained and excused. I am convinced that if we were all-wise and all-understanding, we could not condemn."

We have here, in this brief paragraph, a rejection of every one of the essential tenets of the traditional view. He denies that human conduct is free, accepting for psychology the same rigidity of law

²We choose Darrow's statement, not because we imagine him to be an authoritative champion of the hypothesis of universal determinism, but because his power as an attorney, together with his own sincerity and courage, enable him to put this view into practice. So long as the problem of determinism is the classroom preoccupation of philosophers, it remains harmless because it never escapes philosophical doubt. Thus, philosophy may never have a certain truth, and yet perform an invaluable service in restraining humanity's mad predilection for believing anything.

³N. Y., 1922.

as obtains in the physical world; in short, he accepts simple mechanism and determinism. Like Madame De Stael, he exclaims that, "To know all is to forgive all." "If we were all-wise and all-understanding," says Darrow, "we could not condemn." Let us at present disregard the contradiction involved in announcing in advance what we would know if we were all-wise. In Darrow's case, theoretical inconsistency is over-shadowed by the grim consistency between theory and practice. Numerous scholars of prominence share the essentials of his view: we may instance Barnes, Wines, William White, Sutherland, DeFleury, Mercier. However, their position is far more than a statement of theory. On the contrary, they one and all regard empirical fact as their main stronghold. They rest their determinism on two classes of alleged fact: (1) historical evidence of the failure of the jury system and its punitive justice, and (2) proof from the twin sciences of psychology and psychiatry that criminal conduct is indeed subject to prediction and determinate law. Yet (3) while claiming to eschew philosophy, these writers show everywhere their reliance, not on the facts of science alone, but on its theoretical assumptions.

We have here an interesting phenomenon in the psychology of belief. Today, exact science is the very "pathway to reality." Our food, clothing and shelter are its gifts. Botany is more real than plants, and H_2O is the "real" water—the vast ocean contains an impure imitation of it! The pain caused by a falling stone will pass away—not so the famous principle of the acceleration of gravity. Our defenders of the Darrow view of responsibility rest their case here. Physics is the model of the sciences. What she has attained, Psychology may attain.

I wish to examine these three supports of the new criminology. I propose to drive it from its so-called factual strongholds and to exhibit it in its true colors as a blind philosophical faith in the threadbare cause of fatalism. It will be a positive contribution to the subject of criminal responsibility if we can convince the reader that deterministic criminology is an essentially metaphysical position regarding a question that has been the will-o'-the-wisp of philosophy from Greek times to the present. The only dangerous philosophers are those who are philosophers in disguise—who utter metaphysical dogmatisms with the naive assurance of a man who counts his own fingers.

II

The Alleged Failure of Punitive Justice

The opponents of punitive justice loudly voice the charge that punishment has failed to reform offenders. This theme is a favorite with F. H. Wines in his study of the penitentiary system.⁴ However, such statements deserve the most serious distrust. Whether or not the infliction of punishment will deter from crime is answerable in only two ways—psychologically and statistically. If Wines could show, as a matter of actual record, that the frequency or the severity of crime is unrelated to the frequency or severity of punishment, then little could remain to be said in favor of punishment. But his lordly disregard for statistical data soon becomes apparent to the reader. In supporting his claim that punishment does not reform, he contents himself by noting, in general, that crime continues in spite of prisons. He enlarges especially on the cruelty of medieval punishments and the fact that crime continued in spite of them. Now, the subject of medieval cruelties is an excellent one when the writer wishes to stir up tearful pathos. But, if you condemn punishment because it springs from the animal instinct of vengeance, then you are logically compelled to condemn sympathy on this ground, since it has an equal claim to instinctive origin. Many animals are more capable of sympathy than they are of anger. Whether anger or sympathy are justified depends on their consequences. Bergson stated that there is enough anger in the world to reform every evil, if it were properly directed. Suppose we weigh sympathy and anger in the balances to see which one is “wanting.” Practically, maudlin sympathy and blind anger are equally evil in their results. If sympathy wins our approval by becoming “enlightened sympathy,” then anger restores its repute by becoming “righteous anger.” Wines wishes to discredit punishment by citing revolting instances of it: just as well argue that the use of food is to be universally condemned because it harms the Gormand. Because one advocates punishment, it does not follow that one means, the more of it the better. The argument that punishment is bad because it is brutal and medieval in its origin only illustrates a fallacy which besets the human mind in every sphere of thought. The root of this fallacy is the notion that *a thing can be defined in terms of its origin*. Thus, the revolt against Darwinism is moved in part by the notion that if man originated from apes, he is essentially an ape. In fact, the principle of evolution

⁴Wines, F. H., “*Punishment and Reformation*,” N. Y., 1919.

was Darwin's very device for escaping this predicament into which the fact (as he thought) of our origin puts our respectability. In short, *things which evolve* are what they *are*, not what they *were*. So with punishment.

The grim truth seems to be that whether or not there is a relation between punishment and deterrence cannot be determined on a statistical basis, because the statistics do not as yet exist. Scientific criminologists of repute know full well that this is the case. Says E. H. Sutherland,⁵ "There can be no complete enumeration of crimes that are committed." Many major crimes are concealed, either by the criminal, or his friends, or even by the victim or the police. In the United States, every state defines crime to suit itself, and there is no uniform method of reporting criminal offenses. Canadian statistics of crime are far better than ours, because of the careful records kept of convictions. But the number of convictions does not assure us of the number of crimes. As for the effect of punishment on deterrence, our statistical data is so bad that we cannot even decide the effect of capital punishment on murder, though figures in this field are the most reliable. The American Institute of Criminal Law and Criminology and the American Bar Association have attacked the problem of criminal statistics, but so far with no concrete results except recommendations to the Bureau of the Census.

Then, will punishment deter offensive conduct? We have left only the data of psychology, and common-sense observation. Of course pain has deterrent power. It would be a strange world indeed if pain so utterly failed in its biological purpose. To profit from pain is the very essence of adaption for the normal creature, including human beings. It is the writer's belief, that in the last analysis, pain is perhaps our only teacher—that in some one or other of its endlessly modulated forms, it is the stimulus to every thought. However that may be, the notion that pain does not affect conduct is so at variance with the daily experience of normal mankind that in the absence of contrary evidence it deserves to be treated as preposterous. But, criminal offenders may not be normal. It is a fact of psychopathology that certain abnormal subjects, flagellants and the paranoid, may crave pain as an excitant. Heretofore we thought these were rare exceptions. If they prove to be the rule, they put the whole matter in a new aspect. If criminals on the whole are unable, because of the presence of physical or mental abnormalities, to profit in a normal manner from pain, then punishment in their case is in-

⁵Sutherland, E. H., "*Criminology*," 1924, ch. 2.

deed indefensible. This brings us to the second of the empirical arguments upon which the new criminology founds itself: namely, that psychology and psychiatry have isolated just such inevitable determiners to crime in human nature.

III

Psychological Determinism in Misconduct

That the abnormal are not responsible for their conduct is a kindly teaching which, by a certain logical *tour de force* can be extended to all offenders. This is the easy-chair "proof" that the author of misconduct, because of the very fact of that misconduct, is to that extent abnormal, and therefore, to that extent to be excused. This is an instance where a definition (of abnormality) is mistaken for an argument. We can conceive that conduct may be misconduct without being abnormal and even that conduct could be abnormal without its author being so. The new criminology, however, is free from this charge, that it assumes abnormal personality where there are abnormal deeds. It proceeds, empirically, to show that the authors of abnormal conduct turn out to be mentally abnormal when judged by quite other criteria than their criminal conduct.

In recent anthropology, psychiatry and psychology, the most lively experimental work has been devoted to this question. As a consequence of this work, the general doctrine that criminals are irresponsibly feeble-minded, atavistic, paranoid, and burdened with complexes has gained a wide credence. This data is indeed so massive that I am unable, in so brief a space, to evaluate it justly. I do not doubt the value of these studies; but (1) I do doubt the excess of certainty which is so often accorded to them, and (2) I entirely reject the notion that since we find human nature in part a deterministic system, that we may infer that the rest of it is also. This latter device is far more excellent for saving mental energy than it is for solving problems.

Of significant studies in criminal anthropology, there naturally occurs to our minds the memory of Lombroso and his school. Lombroso's "criminal man" is held up by criminologists of the present as a figment of the imagination. But, in truth, the notion of a *criminal type* is not rejected, but is taken over under a new cloak. We only discard Lombroso's favorite stigmata: for satyr eyes, prognathous jaws, and the Darwinian nodule, we substitute low I. Q., complexes, compulsions, and numberless other labels with which mod-

ern psychology is replete. Charles Goring,⁶ in an extensive comparison between English convicts and normal Englishmen, a study involving the most careful measurements, covering a period of eight years, which measurements were carefully worked out by such experts as Karl Pearson, has wholly disposed of Lombroso's notion of criminal stigmata. Yet Goring too finds a positive symptom in that the average criminal is physically weaker and smaller, more poorly nurtured than his normal fellow. Well and good: let the juries make an allowance for this in judging a thief. To the degree that we understand, let us forgive. It is easy to see that in our competitive life, the individuals who are weaker will be more sorely tempted to be dishonest. But this is not to accept absolute determinism (Darrowism), for to do so would result in a wholesale permission for all those below a certain weight to steal just so much! This scarcely exaggerates the native inability of the deterministic doctrine to guide us in moral matters. In the sphere of moral experience, we do not determine good conduct by a statistical resume of *how we did behave in the past*: on the contrary, most of our intense ideals are those deeds which *we failed to do*. The ideal of truthfulness is a dear ideal despite the fact that all mankind (except Washington) is untruthful. In the moral aspect of our lives we must live *as if* we could do that which on the basis of statistics we have more failures than successes. No one regards drinking water as a prime virtue, and it is just because it is a good so easily achieved that its goodness becomes neutral. This capacity in human nature to strive for the unattained must be at the root of all progress. If statistically determined averages were our ideals of conduct, there would be no progress. It may be a surd to mechanistic thinking that man should seek always to be someone else (a better self), but it is no surd to our moral sense. Our moral sense does not feel "at home" in a universal mechanic, just as mechanism is lost in a world where there is free choice. Science too must act *as if* mechanism were true.

Let us add to the scientific study of the criminal the contributions made by modern psychology. Chief of these, no doubt, is the alleged discovery of excessive mental deficiency among criminals. The literature on this subject is immense, and the author has contributed his mite to it. In harmony, then, with my natural sympathy, I will present for examination one of our choicest results. It is the following table showing the relation of mental deficiency to crime.⁷

⁶Goring, C., "The English Convict," London, 1913.

⁷Anderson, V. V., "Bulletin on Mental Disease and Delinquency."

TABLE I

MENTAL DEFICIENCY OF CRIMINALS

Institution	Cases	% Feeble-Minded
Sing Sing Prison.....	608	21.8
Auburn Prison.....	459	35.6
Mass. State Prison (men).....	300	32
Joliet Penitentiary.....	49	28.5
San Quentin Prison.....	150	27.5

The above figures have all of the accredited ear-marks of honesty which numbers, by some ill-understood black magic of their own, have always exacted of the human mind. Nevertheless, they are deceptive. Since mostly the stupid offenders are caught, these figures tell us little about the real relationship between mental deficiency and crime. Even if we accept them uncritically, this still leaves about 63% of prisoners exhibiting normal or superior intelligence. But, what is worse, any student who is familiar with this literature could find other studies, apparently made with equal care, which contradict the results of this table. I submit as an example, Murchison's study of criminals with the Army Alpha intelligence test, given in five prisons.⁸

TABLE II

MENTAL STATUS OF CRIMINALS

Alpha Score	Cases	Percent Criminals	Percent White Draft
E	298	7.5	7.5
D	271	6.9	8.8
C-	706	17.8	21.4
C	1,118	28.5	28.7
C+	898	22.8	18.8
B	444	11.4	9.7
A	207	5.3	5.1

The first column to the left gives the letter ratings of this test, in which E is the poorest group. In the third and fourth columns we have the percentage of criminals who got the various scores, and so with the normal white draft.

The first column to the left gives the letter ratings of this test, in which E is the poorest group. In the third and fourth columns we have the percentage of criminals who got the various scores, and so with the normal white draft.

Contrary to table I, table II seems to show that criminals are of normal intelligence, or even better than the white draft of the American Army in the recent war. Indeed it is said that the intelligence

⁸Murchison, Carl, *Journal of Criminal Law and Criminology*, 1924, vol. 15, pp. 239-241.

of the inmates of Ft. Leavenworth is great enough to excite universal envy! In the case of one prison, Murchison gave the intelligence test to the guards as well as the prisoners. The average I. Q. of the guards was entirely at a disadvantage. Thanks that the walls of the prison are strong and that the guards are at least intelligent enough to keep the gates locked! I need not add to the above the insistence of Dr. Healy that the feeble-minded are models of good conduct, and that he can never find enough of them in Boston to supply the demand for them as trusty domestics.

What does this contradictory data indicate? Only that psychologists are disagreed as to what constitutes normal intelligence; a result, not at all surprising in view of the fact that they have never agreed as to what intelligence is. But, granting that 27% of all criminals are mentally deficient, does it follow that punishment in their case is useless? On the contrary, it would seem that since they cannot profit from reasoning, pain is the only thing left that can teach them. If the votaries of Darrow reply that the punishment of the mentally deficient is to be condemned not because it is useless, but because it is *unjust*, they only accept another horn of their dilemma. If Darrow honestly believes mechanism is universal, then there is no place at all for the category of *justice*. Justice is something that *ought* to exist, but this is meaningless in a deterministic universe which merely *is*.

It is not true that it requires intelligence to profit from painful experiences. The Russian physiologist, Pavlov, has demonstrated that all organisms are able to abandon painful reactions by virtue of a simple mechanism laid down in the nervous system, termed the "conditioned" reflex. The lowest creature in existence may learn, provided only that pain will follow soon enough after an injurious action. This is probably the explanation for England's relative success in dealing with crime. In England, justice follows crime swiftly and surely.

We have not as yet considered the role of psychopathic elements in crime. No doubt every paranoid patient is a potential criminal; yet, as in the case of mental deficiency, the definition of these diseases, their frequency, their presence in criminals, are still matters of the vaguest conjecture. As for Freudian complexes, since alienists themselves never agree as to whether they are present or absent in a given defendant, the public may well distrust them.

But, where physical enfeeblement is found, where low I. Q. or paranoia is found, and even where a genuine complex is found, let

punishment be tempered with mercy. Does it follow that if we knew all we would forgive all? It emphatically does not. I am only quarreling with this metaphysical criminology, which is unique only in its adherence to this strange fatalism, under the illusion that it is "science." We wish to enquire whether it is science or metaphysics.

IV

The Scientific Status of Determinism

Scientists of today are far less hopeful of establishing a universal mechanic than were Bacon, Galileo, and Gilbert. A true scientist does not and need not assume that determinism is universal; because a true scientist does not assume answers to his questions. The true physicist need only assume that mechanical analysis is his appropriate method, not that mechanical analysis can answer all questions. There is a vast difference between mechanism accepted as a *guide* to research, and mechanism accepted as the *end product* of research, in advance of research. To assume that the whole of reality is determined because we find that part of it is, is to go beyond evidence, and is a flagrant violation of scientific method. The natural twin of this error is the notion that because mechanical understanding sometimes succeeds, that there are no other modes of comprehension. There is also *genetic analysis*, which can never be resolved to mechanical analysis, since machines themselves have a history which lies outside their present functioning (embodied in the science of mechanics). But, I wish to consider, not history in general, but that private form of it which comes *via* introspection.

Introspection acquaints us with the private experiences of *choice* and *effort*. If these exist as they represent themselves to exist, then so much the worse for the theory of universal determinism. But, the consideration of the problem of choice involves intricacies that cannot be handled in so brief a space. Let us consider effort alone, which is always pursuant of a choice. With the stinging reality of the experience of effort, every person is familiar. It points to a principle which is the direct opposite of the physical principle of *inertia*. We may entertain two views concerning the doctrine of inertia: (1) that it obtains only in the physical realm, and (2) that it is universal. With the first view, typical of physical scientists themselves, I have no quarrel. Trouble only arises when hasty theorists, materialists, and doctrinaires seek to universalize it. To accomplish this universalization of the machine, several devices are

employed. One of them is to treat effort as an illusion: this being a wide-spread habit of present-day psychology. The favorite device is to treat effort as a form of kinaesthetic sensation. This is far from being experimentally established. Muscular activity (where kinaesthesia chiefly arises) is only one of the spheres where effort is experienced: we find it also in memory, attention, and thought. But, perhaps the ingredient of effort in attention and thought may be due to kinaesthetic strains which accompany them. Experimentation does indicate that muscular tension is a typical accompaniment of all mental processes, hence Watson's rather surprising view that thought is a form of "sub-vocal" talking. Only, Watson overlooks his own admission that thought is after all not talk. We get thought by an *inhibition*, never quite successful, of the muscles of expression. All effort is perhaps essentially inhibition. We inhibit whenever any established or habitual response is unsuited to a new situation. Effort thus always moves in the sphere of *becoming*: we do not experience it in the mechanical side of our nature, except when mechanisms (reflexes or habits) are to be created or destroyed. Now, it is just such *coming into being* which concerns the question of responsibility. It is not the proper function of the jury to decide whether or not the defendant performed the crime—a good detective is the best judge of that. Supposing the defendant guilty, it should be the business of the jury to decide whether the defendant was responsible, and to what degree. And, in doing this, they should not forgive because the offender *had* had habits at the time of the crime, but should hold him responsible for not forming better ones in the period preceding it.

But granting that effort and kinaesthesia are identical, we can hardly imagine that giving effort a new name will change its nature—it still remains what it was before in moral experience, labor, strain, a price paid for what we *ought* to be.

Another device is to treat effort as illusory in the sense that a "bent" stick in water is illusory. But true illusions are so called because we have a standard of correction. That is, we can call the stick bent because we have straight ones to correct it by. But effort is unique in that we do not have this standard of correction. The experience of effort is universal except for two types of exceptions. In abnormal psychology we sometimes meet with a rare but curious symptom, called "depersonalization" by White and others. The victims of this malady declare roundly that they have perished, that a sense of complete fatalism accompanies action, that

they are as much spectators of what occurs within them as of what occurs without. The other group who deny effective effort (freedom) as a personal experience are the deterministic philosophers themselves. Regarding them, I cannot be derisive, as is Poincaré, who declares that each one of them feels free and responsible for at least one thing, the theory of determinism. In the one case we have abnormal cases, and in the other case prejudiced exceptions to the universal subjective awareness of freedom. And this evidence stands as valid until an intimate knowledge of physiological processes (which we are far from possessing) shows that it is illusory.

Another way of attacking the theory of free-will is to point out the unreasonable implications to which it leads regarding the relations between mind and body. Clifford gives typical expression to this. How can we conceive, he exclaims, that a bodiless idea is able to set up chemical processes in the nerves, so that the idea of a beef-steak is able to turn our legs to the nearest dining room. Just as well imagine that a train of cars is held together by the affection between the engineer and someone on the rear platform! The reply to this is that the fact that such control *exists* is not conditioned by our comprehension of *how* it can occur; any more than the engine is hampered by the fact that the passengers of the train do not understand "how it works." In any case, Descartes, Johnstone, Poynting and others have given plausible accounts of how freedom can be a fact without denying the axioms of mechanics.⁹ Clifford's disdain is moved by his acceptance of the ill-examined notion that only *like can effect like*—that it requires matter to effect matter. But he overlooks the point that where matter effects matter, we could not expect to find the experience of effort to arise, since the behavior of bodies during impact is fully explained by their *inertia*, which is the reverse of effort. The law of inertia holds for bodies whether they are at rest or in motion, which means that so far as their inertia is concerned, there is no difference between rest and motion to physical bodies. The live difference which we know to exist between "rest" and effortful activity must grow out of the interaction, not of matter on matter, but out of mind on matter. We do not hold a brief for the view that some discarnate ghost or other inhabits the body to interact with it; but that whatever mind and body are, *there are somehow two of them*, and that the chief evidence of their *twoness* is the striking difference that exists between *mechanical action and reaction*, and *voluntary conduct*.

⁹Weber, C. O., "Scientific Method and Moral Concepts," Jour. of Philosophy, 1925, vol. XXII, pp. 293-300.

V

Concluding Implications for the Problem of Justice

At first thought, the acceptance or rejection of the practice of punishment in dealing with criminals does not at all seem to involve the thread-bare issue: freedom versus mechanism. Darrow rejects punishment in the name of determinism; but M. De Fleury,¹⁰ another determinist, accepts punishment as a determiner to good conduct. To cap the climax, Kant argues that the criminal has a right to be punished! The prime fallacy of Darrow and De Fleury alike is, that first they universalize determinism, and then naively proceed to tell us what "ought" to be done about it. Denying responsibility for all humanity, Darrow then proceeds to shift responsibility from the criminals to the rest of humanity—he only punishes those who have not offended! But I have repeatedly justified the deterministic view of man in admitting that where there are inevitable causes of misconduct, over which the individual has no personal control, to that extent we should forgive. But a consistent psychological science, I am told, cannot be founded on two opposite sets of axioms—I cannot accept both vitalism and determinism. Now, I wholly reject this as an erroneous notion of what the function of science is.

All thinking, including the scientific mode, is under two necessities, and one of these is logically prior to the other. (1) Our knowledge ought to be based on a set of mutually consistent principles, and (2) our knowledge must be true to the realities with which they deal. The last named necessity is the logically fundamental one. But the thirst for consistency is the besetting sin of the class-room mind—we will have it at all costs, even at the cost of violence to the realities. We forget that we may crave the simple and consistent, not because nature is simple, but because our minds are. And so we make a virtue out of a necessity, as Russell says, and imagine nature simple because our feeble intellects only find simple laws. I insist on the priority of my second principle—to be true to the realities. We should simplify, not as much as we can, but only as much as we *dare*. Then, if our human nature is two-fold, let us accept that as our present result. After all, we simplify both man and nature at the cost of neglecting differences. This is notorious in scientific classification. In order to get you into the logical class, *man*, I must throw away your entire personal biography and individuality, and by the time I get you into the class

¹⁰De Fleury, M., "*The Criminal Mind*," London, 1901, ch. 5.

animal, not even your spine is left, since only the vertebrates enjoy these. Sometimes, we are forced to leave the six protective walls of the class-room and then we must restore to all things all that uniqueness which we sacrificed for the sake of definition. Just as after a battle, numerous soldiers are buried each under the same unvaried crosses. We can only make amends by adding the individual name or a special epitaph for each.

Now human nature is, I believe, the scene of warring principles. In vain do we strive to make either vitalism or mechanism to cover all of the facts. Our nature is a dual one. Man is the focus, so to speak, of two opposed principles of being, which at once telescope and struggle. We are half body, half soul. In the oppositions of will and habit, desire and reason, truth and error, good and evil, beauty and ugliness, we discern a deep-seated warfare in our natures which perhaps extends out through the entire fabric of reality. To do justice to the facts, I must employ both mechanical and vital categories in my psychology. If this be unscientific, then so much the worse for science.

Then, however great the measurable factors of delinquency may be, no matter how mentally deficient, and poorly nurtured, and "complex ridden" an offender may be, there is always a remaining factor in conduct, however small, for which we do not make excuses. For every evil deed, we should allow for all extenuating circumstances, but their sum total can never quite be the sum total of human nature. For, by definition, a thing which is 100 per cent mechanical is a pure mechanism—it is not living at all. The problem in every criminal trial is to decide the enigma: were the precipitating factors too strong, or was the will to blame? To find the will "weak" because the offense was committed is to miss the whole problem of justice. If scientific justice involved no more than the tabulation of the factors that *were present* during the crime, then we might well assent to the statement of a certain drunkard, who pleaded that since the liquor was beyond his throat, it was foolish to blame him for being "drunk."

To decide the problem of justice, common-sense has long since found its own method. It brings together twelve persons, chosen by lot so that they may represent *average humanity*. Then, it excludes those who might be unfair judges because of some bias or other. Once in the court-room, these men carry on a process of judging, which Mr. Barnes¹¹ calls "colorless" because he is blind to its true

¹¹Barnes, H. E., "Trial by Jury," American Mercury, 1924, vol. III, pp. 403-410.

color. Each jurymen should judge the offender according to the formula: "If I had been in the defendant's place, could I have done any better?" Our principle of justice seems to be this: that *we should expect of no man's will what the average will is incapable of*. What the average will is capable of the jury decides from direct introspective data. To be sure, it would be better if we could by some magic place each one of them in the circumstances of the crime, to see what they would do. No doubt prisoners have suffered untold injustice at the hands of juries. But, would it be more sensible to replace the jury with theorists who would mete out justice according to the direction of current winds of doctrine? At present, Darrowism would accord forgiveness to all, but perhaps Kant is right in declaring that criminals have a right to be punished.