


1957

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Recommended Citation

Jos Andenaes, Determinism and Criminal Law, 47 J. Crim. L. Criminology & Police Sci. 406 (1956-1957)

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DETERMINISM AND CRIMINAL LAW

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I

The following story is told about the Greek philosopher Zeno. One day he caught his slave stealing, and proceeded to whip him. But the latter was evidently one of those intelligent slaves who had listened attentively to his master's teaching about the inevitable connection among all things. He objected therefore that it was unjust to whip him, since it was his fate to steal. "Yes, and to be beaten too", retorted the philosopher.

This story illustrates some of the many paradoxes one runs up against in any attempt to investigate the problem Determinism-Indeterminism and its practical consequences.

The question, or complex of problems, is difficult; and every time I return to it, it seems more difficult. It is one of the problems one would like to keep at arm's length because one has the feeling that one will never get any where in solving it. But once the problem is allowed to exert its fascination, it is difficult to relinquish it. Let us approach it circumspectly; let us start by casting a glance at the question of Determinism-Indeterminism in the natural sciences.

Classical physics and its picture of the universe around us are based on the idea of strict causality. The astronomer is able to calculate an eclipse of the sun centuries in advance. In the mechanical laws of falling bodies, as we learn in our physics class at school, we also encounter this strict regularity. The speed of an object falling in a vacuum can be expressed by a simple formula, with time as the variable factor. It does not fall sometimes quickly, sometimes slowly.

We also use this pattern of thinking in cases where we cannot calculate or verify the course of events. Let us consider the snowflake, whirling through the air, now here, now there, following a course which appears entirely fortuitous. Once we consider the matter, we shall understand that here, also, are strict regulatory rules, and that flight of the snowflake is determined by wind currents, the degree of humidity and various other atmospheric conditions. It was on this basis that the physicist and philosopher Laplace at one time made the inspired statement that a person with a perfect insight into both the state of the universe at a specified instant of time and the forces at work in it, would be able to predict with perfect certainty everything that is going to happen. The apparent uncertainty is due only to our ignorance.

II

As is well known, modern atomic physics has upset this picture of strict causality. The tiniest material particles apparently behave fortuitously. It is possible to formulate only statistical laws for their motion. Strict regularity exists only as the sum total of the statistical probabilities. Absolute computability applies to macro-cosmos, but not to micro-cosmos. The way in which the casual in microcosmos and strict causality in macrocosmos are related may be illustrated by an experiment. Take a piece of radio-active material which emits tiny particles; the particles are thrown on and stopped by a screen with a fissure just large enough to allow for some particles to pass through only one at a time. The particles may be registered with a Geiger counter, the result being a very irregular drumming noise, made by the particles on emerging from the fissure. If the counter is set in such a way as to register only every fourth particle, a certain degree of regularity will be attained. The regularity increases still more if only every eighth, every sixteenth, or every thirty-second particle is registered by the counter. If the counter registers, say, only every sixty-fourth particle, in a proper density of particles, the sound is just as regular as a metronome. In this case it is the sum of the statistic probabilities which creates regularity.

Atomic physicists are still discussing whether any deeper law, still hidden, may be found for the motion of atomic particles so that even in this field it might be possible to establish a system of absolute laws (the discussion about "hidden parameters"). But the preponderant view appears to be that irregularity, spontaneity, is a genuine phenomenon. In this way, it seems to me, modern atomic physics has dealt a final blow to Kant's idea of absolute causality as an *a priori* principle for our mode of perception. It seems to me that, once science has reached the conclusion that the atoms perform their way of motion without any absolute regularity of this nature, then our thoughts are well capable of adapting themselves also to this state of affairs. The idea of strict causality, hence, becomes a working-hypothesis which has for a long time proved fruitful, but which now needs to be modified in conformity with new experiences.

III

In the human mind, too, we can speak of Determinism and Indeterminism in the same way as in physics. The mind, with its welter of perceptions, thoughts, and emotions may be conceived as moving according to strict laws, in such a way that complete prediction would be possible, if we had the necessary knowledge. But we can also imagine that the course of events is to a certain extent undetermined, fortuitous, in the same way as the movement of the atoms, and that such regularity as we can observe is consequently only a statistic regularity. We can even conceive of a direct relationship between indetermination in the movement of the atoms and similar indetermination in the human mind. Mental phenomena are, as we know, based on physical processes in the brain and in the nerve cells; and if the tiniest particles are unpredictable, and only small effective quantities are required to effect psychic experiences, then the psychic, too, must to a certain extent be unpredictable.

The question of Determinism or Indeterminism in this sense is naturally an interesting problem. It bears upon the question of the unattainable boundaries of psychological science. But when we speak of Determinism and Indeterminism in the

sphere of the human mind, we are as a rule concerned with an entirely different contrast. We are faced primarily with a question of moral philosophy, with the question of the basis of *guilt* and *responsibility*. This question is of vital importance when a person has infringed a moral or legal norm. We reproach him for having transgressed the norm, and impute guilt to him. He ought to have acted differently. We distinguish between what he "could have helped" and what he "couldn't have helped". But on the other hand, we cannot help the hereditary dispositions with which we are equipped, nor can we help the milieu into which we are born. Personality is formed as the result of an interaction between disposition and milieu; and the individual act is the reaction of this personality to a definite external situation. How can we be reproached for an action if we cannot be reproached for any of the factors which have determined it? Or as a juvenile delinquent put it: "How can I help being what I am? That's just the way I am".

At this dilemma we stand at the parting of the ways.

In the modern theory of moral philosophy it is sometimes maintained that assertions of guilt and responsibility must be judged on their functional value pedagogically speaking. If the influences they exert are expedient, they are legitimate, and need no further justification.

I believe this purely functional attitude to moral judgments is alien to the common way of thinking. When we express reproach, we mean that there is something which *deserves* reproach. If it is clear that the agent could not help what he did, the basis for reproach ceases to exist. What then are the consequences of the preceding analysis on this premise?

Radical moral-philosophical Determinism, which has played a significant role in the theory of criminal law, though a lesser one in practice, deduces from the analysis that traditional conceptions of guilt are based on illusions, and must be abandoned. They are based on the attitude that one stops at the personality of the individual concerned, without searching beyond for the factors which have determined his personality. Human actions must be considered from the same angle as other events in the organic or inorganic world. If we say that a person *could* have acted differently, we are merely stating in an other way that *if* he had possessed a different personality, or *if* the external situation had been different, the action, too, would have been different. Determinism cannot, as has been said, entertain other feelings with regard to a criminal than those with which a person suffering from an infectious illness is regarded.

In dealing with moral-philosophical Determinism I should add one more observation. From the point of moral philosophy it makes little difference if—in a way corresponding to that in nuclear physics—allowance is made for a certain play of irregularity. What is decisive from the point of view of moral philosophy is not the question of strict regularity or not, but the contrast with the other trend of thought, the indeterministic, with its inherent conceptions of free choice, moral responsibility, and personal guilt. As we realise, this moral-philosophical Indeterminism is in its nature quite different from the Indeterminism of which we speak in nuclear physics. Neither strict regularity nor the assumption of a certain measure of irregularity can provide any support for conceptions of guilt and responsibility. What the indeter-

minist is seeking is some third factor, what has often been described in philosophical debate by the controversial term of "free will". No value is ascribed to indetermina-*tion per se*, except in so far as it is considered necessary in order to allow this freedom full play. The expressions Determinism and Indeterminism are consequently no longer really capable of describing the antithesis we are here dealing with, but these terms are traditionally established, and I use them for want of any better.

Moral-philosophical Indeterminism may assume various forms and various philosophical foundations. But what is common to them all can, I believe, be summed up in two points: the belief that human beings and their actions cannot be explained entirely as a natural product, and the belief that the very nature of Man justifies judgments of guilt and responsibility. We are dealing here with conceptions of a metaphysical nature, and of a belief which cannot be proved or disproved scientifically. The deterministic conception of Man, on the other hand, is anti-metaphysical in its nature.

IV

It is not my intention here to assume any personal standpoint with regard to the question of Determinism and Indeterminism. The task I have set myself is a more modest one, an attempt to analyse the consequences that each conception involves in criminal law.

Criminal law is concerned with the problem of judging human actions. Guilt and responsibility are not only moral but also juridical concepts. It is therefore natural to expect that the opposition which the terms determinism and indeterminism represent in the appraisal of human conduct, also applies, consciously or unconsciously, when one is faced with fundamental questions in criminal law.

The history of criminal law through the ages reflects considerable differences of opinion with regard to the justification for punishment. From the welter of theories two main trends emerge: on the one hand we have the attitude that the aim of punishment is expiation or retribution of the crime; and on the other hand we have the attitude which considers that the aim of punishment is to be measured in terms of its benefits to society, primarily its ability to prevent crime. There have been determinists who have paid tribute to theories of retribution. In the religious sphere, e.g., there is the doctrine of predestination, which declares that some people have been chosen from everlasting by God to enjoy salvation, while others are doomed. And the theory of retribution is also familiar to us from criminal law. But nowadays most people find it difficult to combine Determinism with the conception that the retribution due for a crime is based on the demands of justice. From the practical point of view the theory of retribution presupposes some form or other of Indeterminism.

On the other hand the converse does not apply. An indeterminist may very well draw the line at retribution as an aim in itself, and maintain that a punishment should only be applied in so far as interests of the community demand. The theory of retribution is today rejected by the great majority in Scandinavia, irrespective of the individual's attitude to the problem of free will.

But the problem crops up afresh as soon as we try to complete our formulation of

the aim of punishment. Punishment is used not only to induce the person punished to abide once more by the law (individual prevention), but also to hold up to the members of society generally the need for obedience to the law (general prevention). It happens not infrequently that a serious crime, such as a murder, is the result of an unfortunate personal conflict, and with a considerable degree of certainty it may be said that there is no fear of a repetition. In other words punishment is not necessary as far as the criminal himself is concerned. In a case of this kind, unless considerations of retribution are to form the basis, punishment must be based on the significance of inculcating respect for human life among the general public. This general preventive motivation for punishment presents the determinist with a more difficult ethical problem than the indeterminist. The indeterminist can say: "He might have acted differently. He has deserved the punishment". In the case of serious crimes condemnation may take the form of violent moral indignation, which makes it easier to reconcile oneself to the suffering which the punishment inflicts on its victim. As far as the determinist is concerned these conceptions are based on illusions. According to his temperament he may either feel antipathy and repugnance towards the criminal, or he may be filled with dejection at the thought that human beings can act in such a way. But there will be no room for reproach, let alone vexation and indignation. Anyone punished out of consideration for general prevention of crime becomes, as it was once said, "a martyr to the maintenance of the social order". The result is a sort of human sacrifice which one naturally shuns.

In my opinion the aversion to punishment nowadays encountered in a great many circles, especially among psychiatrists, psychologists, and social workers, and the corresponding predilection for an entirely non-punitive treatment of law-breakers, are due to a large extent to an attitude of this kind with a deterministic colouring, which is almost bound to arise among people who, by the very nature of their occupation, are constantly preoccupied with the question of the causes of social derailment and the possibilities of rehabilitation.

As the examples I have mentioned show, there is as a rule no *logical* connection between the standpoint adopted vis-à-vis Determinism-Indeterminism and that adopted with regard to definite questions in criminal law. In discussions on this subject this aspect has often been stressed too rigorously. The relationship is in fact more complicated: it is more a question of natural psychological relations than necessary logical consequences.

The problem is rendered still more complicated by the fact that Determinism and Indeterminism are not two sharply delimited standpoints: there are *degrees of Determinism*. "Free will" may be allowed more or less weight, besides the determining factors of a hereditary or environmental character. There are also degrees of conviction. Beside the convinced determinists and convinced indeterminists there are doubters of all shades of opinion; and there are degrees of *consistency*. A person who is a determinist in principle may in his practical thinking nevertheless be influenced by indeterministic notions and conversely. It frequently happens, not least in the moral sphere, that mutually conflicting perceptions may live side by side in the same person, without his realising it.

In the case of those people who have not consciously philosophised on this ques-

tion—and this undoubtedly applies to the majority—what exists is a penchant in one direction or the other, rather than a principle formulated on the basis of logical thinking. On the one side we have the evaluating moralising attitude, which ponders the question of guilt and merits in judging the actions of his fellow men; on the other hand we have the attitude based on causal investigation: which seeks to probe the causes for an action.

V

I have made a few observations about the relationship between Determinism and criminal law in a general sense. What is the position in present-day criminal law?

The laws existing in a country seldom or never constitute a logically elaborated system. They are the result of an historical development, to which various trends of thought have made their contribution. This may have resulted in compromise solutions, or it may have resulted in various views having set their seal on different parts of the system.

Our existing criminal law undoubtedly contains a considerable admixture of indetermistic thinking. In our criminal code we distinguish between punishment on the one hand and preventive measures on the other. A feature of punishment is that by nature it is reproachful, moralising, and is dependent on responsibility and guilt. On purely practical grounds the reason why responsibility is a necessary condition of punishment is that it is neither necessary nor practical to apply punishment in the case of a person who has acted under the influence of madness or in an unconscious state. But the traditional reason for the necessity for responsibility is coloured by indetermistic conceptions: an irresponsible person lacks the *moral responsibility* which justifies the use of punishment. A somewhat similar principle applies in the case of subjective guilt as a condition for punishment. We are accustomed to considering it one of the demands of justice that no one shall be punished for any action except such as he himself has committed, and which deserves to be branded as willful or at any rate negligent. When we come across laws which for instance allow one member of a family to be punished for what another member of the family has done—laws of this kind are to be found not only in old penal codes, but also exist to a certain extent in Soviet Russian criminal law to this day—we are in the habit of regarding this as symptomatic of an undeveloped sense of justice. Generally speaking I think it is right to say that the criminal law of the western world is based on an ideology of justice with markedly indetermistic roots.

On the other hand during the last generation there has been a marked development in the direction of a psychological-determistic approach. This is not due to the philosophical discussion about free will, but primarily to the growth of the modern sciences dealing with Man, which have focused attention on the causes of criminal action. The views held by experts have gradually spread to wider circles.

This new approach, with its demand for a sympathetic and not a condemnatory attitude, has gained ground especially with regard to breaches of the law committed by children and young people. An expression of this is to be found in a comparison between our new Child Protection Act of 1953 and its predecessor, the Welfare Act of 1896. The circumstances which warranted intervention were formerly described

in moralising expressions such as: "depravity", "moral degeneracy", risk of "moral ruin", etc. In the new Act these terms have been replaced by expressions of a more neutral nature: "maladjustment to its milieu", "conditions detrimental or likely to prove a serious danger to the child's health or development", etc. The motives adduced for this Act assert that the former wording of the Act dates back to an age when less was known about the mind of a child and about reasons for abnormal behaviour than is known today, and that it contained a moral evaluation which has no tenable scientific basis—in many ways a remarkable statement. The Swedish child psychiatrist Gustav Jonsson recently gave a lecture in Oslo on the subject of punishment or treatment of children and young people. He pointed out that if a child is taken from its parents or exposed to other strains, the result may be that the child will be subject either to fits of fear, bed-wetting, and other neurotic symptoms, or the child will steal. In the first case we consider it a matter of course that the child should be given help and understanding, and not be punished or reproached. Surely the same should apply just as naturally in the second case, is the train of thought.

A similar change of attitude is taking place with regard to inebriates. The idea that alcoholism is a disease, to be considered on a par with other diseases and tackled with treatment and help instead of by punishment and correctional measures, is steadily gaining ground, although warning voices are also raised against proceeding too far in this direction.

With regard to offenders who deviate from the normal without being irresponsible, the deterministically-coloured attitude has asserted itself more and more strongly. The question of how repetition can be prevented, rather than what punishment the offender deserves, is being asked more and more. Undoubtedly the reason is partly that these people are regularly subjected to psychiatric examination, and that the courts are given a psychiatric appraisal, expressed in descriptive terms, which are morally neutral. The psychiatrist's report reads like a doctor's casebook. It is infused with a desire for understanding and treatment, and inevitably this is bound to have its effect on the prosecuting authority and the court.

The apportionment of punishment in individual cases provides an example of how the divergent views are fused. In allotting punishment within the wide limits set by the law, a great deal of attention is paid to the question of how much the offender should be reproached. It is a generally accepted principle that the punishment should be reasonably proportionate to the offender's guilt. Youth and a lack of intelligence are regarded as extenuating circumstances; and the same is true of difficult home life during formative years, neuroses, injuries to the brain resulting in a change in character. These after all are causal factors for which the accused is obviously not responsible. But once this line of reasoning is pursued, it is difficult to know where to stop. It may be argued that the actions of an adult, normal person, in full possession of all his faculties, must also have *their* causes; they may not be so obvious, but if one is capable of going back far enough, one will always run up against circumstances beyond the control of the agent. The uncertainty of our judgment is evident in the fact that choice of terminology may influence our attitude. If a person is described as "a ruthless egoist, cynically exploiting others for his own

ends", the moralising terms used create an impression of a high degree of guilt and a well-merited punishment. The situation is entirely different if the same person is described in psychiatric terms, for example as "a psychopath, emotionally frigid, with reduced powers of empathy and self-control", especially if at the same time it can be established that the anomaly can be explained on the grounds of heredity or infelicitous upbringing. In cases involving torture during the Occupation the fact that a person has shown refined cruelty and obviously enjoyed ill-treating his victims, has been adduced as an aggravating circumstance. The situation is entirely different if the same emotional disposition is represented as a neurotic twist due to unfortunate impressions in childhood.

I have tried, admittedly somewhat imperfectly, but as impartially as I have been able, to pose a problem and to sketch a development which is taking place. Before I conclude there are two questions which I expect you would like me to answer. First of all, what forecast can I make?: are there grounds for believing that the development I have dealt with will continue, until the conceptions of responsibility, guilt, and punishment have disappeared, and the problem of preventing crime is regarded as a purely social-hygienic problem? And secondly: how is a development of this kind to be appraised: should it be welcomed as a step forward, or should we try to retain our traditional criminal law with its basis in the concept of guilt?

The answer to both questions must be: I don't know. An appreciation of this question demands greater clarity with regard to the basic moral-philosophical problems than I have managed to reach; and any forecast is bound to be just as uncertain as a long-term weather forecast, more and more uncertain the longer the period of time one attempts to cover. In any country criminal law is woven together not only with economic and social conditions, but also with the whole mental atmosphere of the community. In our age we have witnessed tremendous changes in every sphere—in applied science, economics, politics, and social life, as well as in ways of thinking and attitudes to life, without any unequivocal trend in the development emerging. Today prophetic vision is required if one is to forecast what the future carries in its womb. Sober scientific reasoning is not enough.