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RATIONALE OF A CRIMINAL CODE

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Criminal justice in the United States functions through a variety of oddly-assorted agencies. In the main these agencies are uncoordinated and are not conceived to carry the burden of modern criminal traffic. The fact is that the whole fabric of the criminal law and its administration stands in urgent need of reconstruction; but this presents an exceedingly complex task. One difficulty is that the social engineer who approaches this undertaking is apt to believe that the defects of a part are the faults of the whole and to proceed to insert props here and there instead of rebuilding from the foundation. The problems of reconstruction are many and of different types. To enumerate but a few, there are jurisdictional difficulties centering in the county, the local administrative unit for crime control. Here operate the prosecuting attorney, the sheriff, and the coroner, whose duties and powers stand in need of revision. The jurisdiction of the police, their relation to state and county officials, and police personnel present another phase of the difficulty. Political dominance of and interference with the agents for crime control further complicate the situation. There are problems of procedure and of coordination and control of the agents for law administration, and problems relating to the treatment of offenders and to probation and parole. The social engineer who grapples with this task must appraise all these difficulties, but, if he is to rebuild from the foundation, he must delve yet more deeply and reexamine the basic philosophy of the criminal law; he must study the concept of criminal responsibility on which the criminal law is founded, and which in one of its phases has given rise to a penal system which is "as irrational in its mercies as in its rigors, and in its rigors as in its mercies." [1]

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1. CARDOZO, LAW AND LITERATURE (1931) 89.

No one can review the histories of our prison population, which record how prisoner after prisoner has started a criminal career with juvenile delinquencies and petty offenses and has moved on through more serious crimes for which he has incurred sentences to reform schools and a series of sentences to penitentiaries, without being struck with the social waste, the futility, and the hopelessness of our processes.[2] We would like to assume that these processes are aimed to protect society from anti-social elements and to secure for it a more wholesome environment. The discriminating observer cannot escape the truth, however, that these procedures do not function in that way; rather do they increase the hazards of society through making those of its members who have demonstrated anti-social tendencies incurably and viciously anti-social. The modern state, it seems, prefers to eliminate its weeds through an elaborate and costly scheme of watering and fertilization.

Need for Reexamination of Basic Theory

Criminal law administration has been under severe criticism for some time. This criticism has been centered on the laxity of law enforcement. There is no doubt that the administration of the criminal law is ineffective, but it has occurred to only a few of the many who have made indictments that this laxity, this ineffectiveness of administration, might be a symptom rather than a prime condition—a symptom of some deeper-lying causes.[3] Sheldon Glueck, writing in 1928, observed that "in all of the survey reports thus far published, and in the work of commissions and conferences, no serious attempt seems to have been made at a basic analysis of the presuppositions and prejudices crystallized in the substantive and procedural criminal law." [4] Since that time a number of important studies have been made; yet Glueck's statement remains essentially true.

There are indications that we are at the beginning of a number of undertakings in various states to codify, or, as the situation may be, to recodify the criminal law. Is this work to proceed, as it has so often in the past, without an analysis of the assumptions underlying the criminal law? Historically that law is based upon the doctrine of the free determination of the will, on the "theory of punishing the vicious will".[5] This, as Pound has pointed out,

> "postulates a free moral agent, confronted with a choice between doing right and doing wrong, and choosing freely to do wrong. It assumes that the social interest in the general security and the social interest in

2. *Id.* at 91.
3. See Glueck, Crime and Justice (1936), particularly chapter I, "The Climate of Justice"; McDougall, *Crime in America* (1927) 77 Forum 518.
4. Glueck, *Principles of a Rational Penal Code* (1928) 41 Harv. L. Rev. 453.
5. Pound, Criminal Justice in America (1930) 33.

> the general morals are to be maintained by imposing on him a penalty corresponding exactly to the gravity of his offense." [6]

Are we to go on assuming the validity of these postulates in the light of modern thought and in view of the studies made of this problem by psychologists, psychiatrists and criminologists?

In preparing itself for the task of drafting a criminal code, any group charged with the undertaking should begin with a thoroughgoing research into the basic aims of the criminal law. As a guiding principle it should steadfastly hold to the view that it must make this fundamental reexamination and establish a unity of aim for the prospective code before it turns to drafting. The need for this approach was recognized and emphasized in an excellent report to the Council of the American Law Institute by a committee appointed to advise the Council on a criminal justice project. This report states:

> "Not only are the substantive, procedural and administrative parts of the law so dependent for effectiveness one upon the other that their provisions must be coordinated into a harmonious whole, but . . . all the content of the law must be formulated in contemplation of existing social and economic conditions with an appreciation of human characteristics. If the substantive law is built upon certain assumptions of social and economic conditions and human characteristics, the procedural law and approved administrative practices must be based upon consistent assumptions." [7]

The study of aims must go deeply into the recesses of human behavior and motivation. It must take into consideration social attitudes that prompt an insistent demand for severe punishment. The builders of a systematic code should weigh the dangers of fashioning one which is too far in advance of the mores of the time.[8] It would be unsafe as well as unscientific for them to assume that the retributive theory of punishment is a dead issue. Let anyone who doubts this statement open his eyes to what is going on about him. Let him consider the motivation of the parent who chastises his child, the attitude of the two-fisted fellow who replies to an insult with blows, the psychology behind feuds, and the phenomenon of the *Hauptmann* case. "The thirst for vengeance," admonishes Mr. Justice Cardozo, "is a very real, even if it be a hideous, thing; and states may not ignore it till humanity has been raised to greater heights than any that have yet been

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6. *Id.* at 33-34. See Social Service Faculty of the Catholic University of Milan, *On the Reform of the Italian Penal Code* (1924) 14 J. CRIM. L. 524-525.

7. 12 PROC. AM. LAW INST. (1935) 385, 386. And see Gausewitz, *Considerations Basic to a New Penal Code* (1936) 11 WIS. L. REV. 346, 350.

8. See SALEILLES, THE INDIVIDUALIZATION OF PUNISHMENT (1911) 187-188; Hall, *Criminology and a Modern Penal Code* (1936) 27 J. CRIM. L. 1, 11.

scaled in all the long ages of struggle and ascent." [9] There can be no doubt that it would be preferable to give no consideration to the retributive theory in a schematic treatment of the subject of crime, for it is destructive of the ends which should be sought through a scientific modern code. Yet the desire for vengeance is so deeply rooted in human psychology that it would be a serious mistake for the drafters of a code not to grapple with it.

As the group proceeds with its preliminary researches it will need to weigh the deterrent theory of punishment; it will need to conduct careful studies into the social effects of punishment. Is there adequate evidence that punishment prevents the offender from the commission of future crimes? Arguments for punishment for the sake of deterrence have been advanced for centuries, but no carefully weighed judgment on the effects of punishment, founded on supporting data, has ever been made. Statements on the subject by judges and legal writers have, for the most part, been mere individual opinions based on casual observations. The question calls for controlled studies under the supervision of skilled individuals. The persistence through the years of the belief that punishment is a deterrent is not to be ignored, and we know from the studies of the psychologists that fear is a powerful motivating force. Punishment may deter some from committing a second crime, and so the social effects may be good as to those who are held in check. And through the example made of those who are punished the criminal tendencies of others who have not yet trodden the path of criminal deeds may be deterred, and thus the claim for severe punishment might be substantiated.[10] The deterrent theory must be given weight in the drafting of a code, but the question for determination is, how much emphasis should be given to it? If punishment is an important factor in curbing crime, it might be wise to insert provisions in a code for conspicuous and cruel punishment. The whole tenor of a code might even be shaped about that principle. However, in the light of long experience with penalties of varying degrees of severity, we can be fairly certain that the doctrine of deterrence cannot be made the central theme of a modern code. While it probably is true that "there are inhibitions in the threat of punishment

9. CARDOZO, *op. cit. supra* note 1, at 87-88. *Cf.* Glueck, *supra* note 4, at 456: "No thoughtful person today seriously holds this theory of sublimated social vengeance, nor that 'expiative theory' which is the reverse of the shield of retribution."

10. An interesting but less commonly advanced point of view is stressed in the following statement: "When, therefore, a criminal act is punished too severely or when the criminal escapes punishment altogether, the average person is apt to feel that his own personal freedom is in danger. It is as though he could say to himself, 'If another person has escaped the punishment that he deserves, why should I seek to conform to standards which are against my own instinctual impulses?' In other words, a failure to punish a criminal is a kind of threat to the repressions which each person places upon his own *id*. When a criminal whom everyone believes to be guilty is dismissed by the creation of a reasonable doubt in the minds of a jury, a court is put in the position of saying that the defendant must be allowed to conduct himself in a way that is denied other persons." GRIFFITH, AN INTRODUCTION TO APPLIED PSYCHOLOGY (1934) 265.

that society cannot afford to withdraw from any capable of feeling them",[11] the fact remains that punishment as a means of control has been tried in a major role for centuries and has proved patently inadequate. Punishment for the sake of deterrence has been one of the theories, if not the major one, underlying the philosophy of criminal law administration during modern civilization; yet under its sway we have merely achieved a crime situation from which we ardently seek relief.

In the evolution of the criminal law from its primitive beginnings centered in vengeance to the present time, there has gradually taken place a shift in emphasis in the concept of punishment which may easily escape attention but which is responsible for no little confusion. The vengeance motive involved punishment in kind—an eye for an eye. It was retaliative, and in its origin it was a personal affair. The injured person did not hate crime, nor did he or his kinsmen conceive of punishment as a measure involving group security. The mores of the time demanded that he avenge the wrong. The retaliatory act had no utilitarian or ethical significance. Later, when punishment was taken over by the priests, the procedure became an expiatory rite[12]—the wrongdoer atoned through suffering. This ceremony still involved no thought of punishment of anti-social conduct nor of assuring group protection or security. There was no indignation against the offender. But with the advancement of the deterrent theory a distinct change in emphasis occurred. This theory involved a rationalization on punishment. It should be observed, however, that they who advanced the theory did not ask, should we punish? They assumed that they should as part of the established order; their task was to find a reason for punishment. Punishment for them was, as it is with us, an institution. They found that the vengeance and expiatory theories would not rationalize, for they spelled futility. But punishment as a deterrent was quite another matter. With the advancement of this theory recognition could be given to punishment both as an institution and as a utilitarian procedure. We have emphasized the need for research into the basic aims of the criminal law and have urged careful analysis of all presuppositions. Consistent with this procedure the investigator should probe to its foundation the question whether punishment as an institution, encumbered as it is with historical implications and entanglements, should be retained in a modern code.

The shift in thought on the concept of punishment is all the more marked in the light of present-day thinking. From punishment as an institution of vengeance and expiation, without social utility, to punishment as a deterrent, still an institution but with rationalization of its social signifi-

11. CARDOZO, *op. cit. supra* note 1, at 88.

12. See ALEXANDER AND STAUB, THE CRIMINAL, THE JUDGE, AND THE PUBLIC (1931) 67-68.

cance, modern thought is turning its emphasis to measures of social utility. The tendency is to ignore the institution of punishment and to inquire into its effectiveness as an instrument for crime repression and control. Under this view punishment tends no longer to be an end in itself; it tends to lose its institutional traits and to become a mere procedure subordinate to social ends, to be weighed along with other procedures on the scale of their effectiveness in protecting society.

Protection of Society

This brings us to another cardinal principle which should be followed in the drafting of a modern code. The basic aim of the code should be the protection of society,[13] and it should guarantee individual rights so far as feasibly consonant with that principle. As the German psychiatrist, Aschaffenburg, has said:

> "I agree 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.' From this standpoint, which sees in crime only the injury to society, and in punishment only the necessary social reaction against it, the struggle against criminals must be carried on." [14]

To which Ferri has added:

> "The reforms proposed by us should guarantee individual rights at the same time as social rights." [15]

If we take the protection of society as a basic aim, we are in a position to begin the unravelling of the tangle. Punishment could then be considered as a protective measure and evaluated as a means to that end. It is from that point of view that we should construct a new philosophy of the criminal law. Factors which heretofore have been obscure should be judged in the light of this aim. If the object is to protect society, the emphasis shifts from the particular offense to the personality of the offender. The whole system of the penal law as it now stands stresses the offense. But if protection is the aim, the principal inquiry should be as to the dangerousness of the offender. It is he whom society has to fear. To find how much it has to fear him it must diagnose him to determine his motivations, his anti-social tendencies, his personality, and his responsiveness to peno-correctional treatment. Liszt pointed out years ago that the doer, not the deed, should be punished. But our system is not adapted to these ends. What we have is a formal program of regulations prohibiting various types of conduct and

13. 12 Proc. Am. Law Inst. (1935) 384.
14. Aschaffenburg, Crime and its Repression (1913) 247.
15. Ferri, *Reform of the Italian Penal Code* (1920) 36 L. Q. Rev. 292, 300. Ferri also takes into consideration the person injured, which feature presents an interesting point for study. See Kidd, *Project for an Italian Penal Code* (1922) 10 Calif. L. Rev. 384, 390-391.

declaring what the state proposes to do to those who violate these regulations. The penalties are measured according to the legislator's judgment of the gravity of the offense. There is no effort to determine the dangerousness of the offender other than through the possible implications arising from the fact that he has violated a regulation. At best, this is a hit-or-miss procedure and only indirectly and casually is the public protected by it.

Individualization of Punishment

Closely associated with the position that the basic aim of the criminal law is the protection of society is the doctrine of individualization of punishment. This doctrine involves dealing with the offender according to the risks he creates for society; it requires that the nature of the punishment be determined by the nature of the individual. Under it the criminal is dealt with on the basis of his present and potential dangerousness to society, and only when he is judged a safe risk is he released.[16] A person suffering from a contagious disease is segregated during the term of his affliction. An insane man is committed for the period of his insanity. To permit either of these persons to go about in the community would expose its members to well-recognized risks. Can it be conceived that they are any more dangerous to the community than a vicious criminal at large? The situation has been aptly stated by the Italian criminologist, Ferri, in the following parallel:

> "This is one of the conclusions upon which the school of criminal anthropology has most strongly insisted, namely, that it is as absurd to predetermine the date at which a convicted person shall be released from prison as for a doctor to stand at a hospital door and say to each patient: 'Stay two weeks in the hospital.' 'But what if I am cured before that?' 'Stay two weeks anyhow.' 'But if I'm not cured in a fortnight?' 'You go out just the same!'" [17]

Motive

But how is individualization of punishment to be achieved? Stated more broadly, if protection of society is to be the basic aim of the criminal law, and if this protection can best be secured through a process of determining the dangerousness of the individual offender, how are we to determine when a particular individual is dangerous and when not? This, to be sure, cannot be accomplished through any of the usual processes now employed in the law.[18] The fact that an individual has transgressed one of society's formal

16. See Gausewitz, *supra* note 7, at 359.

17. Quoted critically in Social Service Faculty of the Catholic University of Milan, *supra* note 6, at 527. See also Aschaffenburg, *op. cit. supra* note 14, at 249.

18. But compare Gehlke, Criminal Actions in the Common Pleas Courts of Ohio (1936). At the conclusion of this valuable statistical study, Mr. Gehlke expresses the view that we have practically abandoned the classical principle of criminal responsibility. This he believes has been accomplished through provisions for indeterminate sentences and "the prac-

regulations may be some indication that he is dangerous, but this conduct, particularly if it was a single act, affords an imperfect criterion of his character. To understand his character and to determine his anti-social traits we must know a good deal about human behavior and about the socio-psychological factors which have influenced the individual under examination.

We must, indeed, give weight to a factor in the study of behavior which the law has long neglected, and not only neglected but consistently and expressly shunted aside. In order to interpret particular individual conduct we must have knowledge of the motives underlying the given act.[19] It is a curious comment on legal learning that judges and lawmakers have so long resisted consideration of what is essentially the determining factor in human behavior—that they have taken the position that motive is of no consequence in the criminal law. Actually this element has slipped in, often vicariously when it was called something else, and at times sub rosa when it was said that something made the jury go awry; but never has it received the august approval of the law. And yet what is it that determines human conduct? What is it that determines character? Why do some men kill, steal, rape and commit perjury? Why do others refrain from such conduct? When we have the answer to these questions we are on our way to understanding character and to understanding why society needs protection from some individuals and not from others. From the point of view of the danger they hold for society, it is far more important to determine why men have committed offenses than to determine that they did commit them.

Modern thought and research in psychology and psychiatry have made such progress in diagnosing behavior that there is little question but that these disciplines can make valuable contributions to the criminal law. They maintain that behavior is determined by social, biological, and psychological causative factors, and that it represents a complicated balance between gratifications and renunciations. Thus a man is constantly subjected to conflict-

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tice of granting probation, suspending sentence without probation, imposing nominal sentences, finding the defendant guilty of lesser offenses, modifying sentences once imposed, etc. To this is added the whole procedure of the accepting of pleas by the prosecutor, in which there is no theoretical limit to the variety of sentences that may be imposed as a result of the plea." *Id.* at 292. The demand for individualization of treatment, he believes, could scarcely be more completely satisfied, if it were not for one fact. That fact is "that the basis of individualization is the character and behavior trends of the defendant, not as scientifically determined, but as determined by the formal decision of legal guilt together with whatever observation the judge or the prosecutor can make. And in the case of the prosecutor, the judgment is further affected by his need for making a 'good record' for percentage of successful cases. We have individualization of treatment by the courts, plenty of it, but the basis is faulty, whether from the strictly retributive point of view or from the point of view of determining the course of treatment which will be most likely either to reform the criminal or to segregate him if incurable." *Id.* at 293.

19. See ALEXANDER AND STAUB, THE CRIMINAL, THE JUDGE AND THE PUBLIC (1931) xiv-xv.

ing motives.[20] It is through study of these motives that insight can be gained into his character, but character is not revealed alone through the immediate motive which prompted the criminal act. Many men have motives for criminal conduct but do not yield to them. The factors which caused a person to yield are important. Any person who contemplates the commission of a crime, particularly if it is his first, is likely to be beset with a number of conflicting antecedent motives. These motives are determined by his background—his environment, heredity and training. His conduct depends upon the relative strength or weakness of his motives, and his dominant motives determine his character. The answer to the question whether a particular individual is dangerous to society lies in an analysis of the strength of his motives for good or evil; it lies in a study of his whole personality. In view of the scientific studies on motivation in relation to crime which have been and are being conducted, and in the light of modern thought, it would seem clear that this factor must be given consideration in any thoroughgoing work on a criminal code. We add, therefore, as another principle which should guide those who are to labor on the drafting of it, that they make a searching examination into the motive factor both in its relation to the substantive criminal law and to the administration of that law, and that they give particular attention in this study to the quesion whether an acceptance of the scientific implications involved in the doctrine of motivation can be rationalized with the prevailing views on criminal intent and with the doctrine of criminal responsibility.

Criminal Responsibility

The criminal law is erected on the premise of responsibility. For criminal responsibility there must be a criminal act and, in the usual case, an intention to commit the act. This responsibility is based on a preconceived conception of freedom of the will. Under this theory, when an offender is being tried the issue centers on whether he intentionally committed the act and, if the further issue is raised, on matters of extenuation or defense. If it can be established pathologically or psychologically that the offender did not have freedom of the will at the time the act was committed, he escapes punishment. Such is the doctrine. No question is raised of his

20. See Alexander and Healy, Roots of Crime (1935); Aschaffenburg, *op. cit. supra* note 14, at 243-245; Ferri, Criminal Sociology (1917) 423-432; Glueck, Probation and Criminal Justice (1933) 197; Saleilles, *op. cit. supra* note 8, at 239-253; Ploscowe, *European Criminal Codes* (1930) 21 J. Crim. L. 26.

Article 62 of the Penal Code of Italy provides that "having acted for motives of special moral or social value" shall "extenuate the offense". Article 48 of the Penal Code of the R. S. F. S. R. (Russia) has a similar provision. Article 47 of the Russian Code has this provision: "The fundamental question to be decided in each particular case is that of the social danger of the crime before the court." See Zelitch, Soviet Administration of the Criminal Law (1931) 172. For a statement on the progressive measures of the Mexican Code, see Mendoza, *The Mexican System of Criminology* (1930) 21 J. Crim. L. 15.

dangerous quality, and there is no weighing of the interests of society. The issue focuses on the offender's moral responsibility which, in its ultimate terms, involves a metaphysical question.

Now if we were to accept the protection of society as a basic aim of the criminal law and were to deal with the offender according to the measure of his danger to society, the whole problem would become rational and there would no longer be any complicated question of moral responsibility. We would then be dealing with the criminal as we do with any other person whose presence involves a menace to the community. We do not stop to inquire whether a man with a contagious disease is morally responsible for his condition. When this condition is established we deprive him of his liberty forthwith and segregate him with the greatest expedition possible. It is submitted that the traditional approach through the doctrine of responsibility and freedom of the will has sent us off on the wrong track and set us to discussing metaphysical problems while the enemy is at our door. Let us turn to reality. The criminal is an enemy of society—a social menace—and should be dealt with accordingly.

In the meantime our scientific co-workers are piling up evidence which has reached formidable proportions to the effect that the very presuppositions on which the legal doctrine rests, namely, responsibility and freedom of the will, are myths. If we accept this thesis, a will that acts without motives does not exist. While the outposts of learning have not been far advanced in this field, the view stressed in this study would avoid the implications of a fatalistic doctrine under which events move according to a predetermined and immutable schedule. The position is that a given act is determined by antecedent motives; that, in fact, every act is the result of the effect of a series of motives on a certain character.[21] To that extent, and for any given act, conduct is determined. But this does not mean that the emotional tendencies are not amenable to therapy and guidance. The view is that the individual is subject to treatment, and that with proper treatment it is possible to shift the balance of conflicting forces within him from anti-social to social tendencies. This, it is submitted, is the direction in which the best thought in this field is moving.

But we must not go too far in appearing to advocate a particular program. It is not the purpose of this study to establish that the psychiatrists, psychologists, or, as the case may be, the social workers, are right in any given position. What is stressed is that their studies and researches must be considered and that their views must be heard before any serious attempt on a major criminal code project is undertaken. The lawmaker has traveled long and far on the path of presuppositions and his mistakes have been

21. See ASCHAFFENBURG, *op. cit. supra* note 14, at 243; GLUECK, *op. cit. supra* note 20, at 204.

written into the criminal law of every state. Whatever our views and, indeed, whatever our prejudices may be, we must not ignore the evidence presented to us by trained and competent fellow-workers.

Scope of the Code

The workers on a code will need to determine its scope. Obviously they cannot go into the minutiæ of the criminal law. Indeed, it would be unfortunate if they did. They will need to determine what anti-social acts are to be included and to classify and define them, but other than that it would be well if they adopted a plan confining the code to statements of broad underlying principles and aims and to the establishment of an administrative scheme which would outline basic procedures. The definitions should be so conceived that they include sufficient elasticity to be adaptable to the ever-changing social and economic scene and to the advances in science. Of course it is impossible to foretell the future, but it is possible, in the drafting of a code, to contemplate future changes. It is true that the code will be subject to legislative changes and amendments, but it is also well known that such changes come painfully and only interstitially. The McNaghton test [22] was written into our law in 1843.

To be effective a code should have a unity of aim in all of its phases, and to this end it is essential that it cover administrative features as well as substantive law. If the criminal is to be dealt with on the basis of his dangerousness to society, the question involves not only the adequate segregation or other means of effective disposal of the dangerous criminal, but, equally important, the problem of salvaging the offender who is amenable to treatment. A code should, therefore, include provisions for correctional treatment in conformity with the general aims of the instrument. In fact, to the end that the various actors in criminal law administration function toward a common objective, a code should cover all the "agencies created for its interpretation and administration, including police, prosecutors, courts and penal institutions." [23]

Personnel and Administrative Organization

A study as is here proposed should delve deeply into the question of the personnel of the agencies set up by society for crime control. Some fine pioneering has been done in this field, particularly in the reports of the Committee on Improvement of Personnel in Criminal Law Enforcement of the Section on Criminal Law of the American Bar Association. It probably is true, as that Committee has stated in its last report, "that the ineffectiveness of criminal law is attributable more to the character and attitude of the per-

22. McNaghton's Case, 10 Clark & F. 200 (1843).

23. 12 Proc. Am. Law Inst. (1935) 384.

sonnel upon whom its administration depends than to deficiencies or faults in the content of the criminal law itself." [24] But how is better administration through improvement of personnel to be achieved? The question calls for research into the functioning of democracy as a whole and into localized democracy; into the local administrative units of the state and especially the administrative set-up of the county, the basic unit for crime control.[25] It calls for an examination into the surroundings and atmosphere in which the criminal law is administered and into the training, tenure and independence of law-enforcing officers. The workers on a code should study the question of whether a reallocation of functions within a state is feasible, under which the sheriff's office and that of the prosecuting attorney might be brought into a coordinated and unified system; and they should investigate the practicability of a coordinated program for crime control between the state and the federal government.

Diagnostic Board

The various items considered for inclusion in a major project of this kind will need to be scrutinized in the light of existing law and particularly in the light of constitutional provisions. One serious problem is presented in connection with the guilt-finding factor. "Among students of criminology," says Cardozo, "there are now many who maintain that the whole business of sentencing criminals should be taken away from the judges and given over to the doctors." [26] But this raises the question, are the judges and juries, in finding guilt, to be governed by the doctrine of criminal responsibility and by all of its implications? It would be preferable from the standpoint of a scientific program to have these legal agencies decide only whether the offender has committed the anti-social act, and, once having established that he has done that act, forthwith turn him over to a diagnostic board set up for the purpose of determining what further is to be done with him. This would dispose of the defense of insanity and other mental incompetency defenses. This result obviously is a desirable objective, for these defenses impede the program of protecting society. The insane criminal manifestly is a major menace to society. It would also render superfluous the orthodox legal tests on insanity and would make the division of crimes into degrees unnecessary. But the question arises whether this procedure would be constitutional under the due process clause and the decisions of courts bearing on the traditional methods of determining guilt.[27]

24. Section on Criminal Law of American Bar Association, Program and Committee Reports (1936) 25.

25. See Millspaugh, Local Democracy and Crime Control (1936).

26. Cardozo, *op. cit. supra* note 1, at 79.

27. See State v. Strasburg, 60 Wash. 106, 110 Pac. 1020 (1910). And see comments on this case in Rood, *Statutory Abolition of the Defense of Insanity in Criminal Cases* (1910) 9 Mich. L. Rev. 126.

The code should provide for indeterminate sentences, and, whether or not the orthodox burdens involved in finding guilt are retained, the offender should, after his guilt is determined, be turned over to a diagnostic board. This board should be provided with a staff of competent research assistants. It should have the responsibility of studying each individual offender to determine his motivations and his attitude toward society, to prescribe treatment, and to decide when, if ever, he is to be released. It is essential to this program to establish a thoroughgoing indeterminate sentence law. It may be deemed necessary, in view of popular sentiment and attitudes, to retain provisions for minimum sentences, graded on the gravity of the offense, but if the aim of protecting society is to receive adequate consideration, the maximum limits of sentences should be removed. The diagnostic board should not, however, be given absolute and final power to determine the maximum limits of sentences. In the interest of the individuals confined, its decisions should be made subject to judicial review.[28]

Particular attention should be given to the personnel of the diagnostic board. It is desirable, so far as possible, to avoid specific provisions in a code, to the end that it may have a fair measure of elasticity and be adaptable to changing conditions. But it should be specific in providing that the diagnostic board be manned by persons who are scientifically trained and qualified for this important and technical work. Sheldon Glueck has submitted as a broad, guiding principle, that

> "Society should utilize every scientific instrumentality for self-protection against destructive elements in its midst, with as little interference with the free life of its members as is consistent with such social self-protection." [29]

All phases of a code should be examined in the light of this principle, and particular weight should be given it in the establishment of a diagnostic board, in the naming of its personnel, and in the defining of its procedures.

Definitions in Terms of the Solution of Social Problems

Law making, properly conceived, presents a delicate and complicated task. By no means is it a mere problem in draftsmanship. Two divisions of the task must be distinguished: first, the treatment phase, which has been discussed in connection with personality analysis and individualization of treatment; second, the definition phase, which involves defining anti-social behavior in terms of the solution of social problems.[30] As to the latter phase, the work of the draftsman should be preceded by searching investigations

28. See Gausewitz, *supra* note 7, at 491.
29. Glueck, *supra* note 4, at 455.
30. See Hall, *supra* note 8, at 2.

into the underlying causes for the social situations which appear to call for relief and then be followed by further studies to determine whether the definitions proposed are designed to meet the situation. In the substantive part of the code it is essential to define anti-social behavior; we must define crimes. But on what are these definitions to be based? Surely on social data, and this involves determining what the social problem is and how to go about giving it relief. As Hall has pointed out in an illuminating work, "the heart of the problem of theft is found in the receiver." [31] Has the aim of the criminal law been focused on him? We have an elaborate and technical array of statements defining the fine points of larceny and another array of statements on receiving stolen goods, but the arch culprit—the professional receiver—manages to escape their meshes. The definitions have not searched out and defined the social problem and they have not been designed to solve it.

This is an essential phase in the construction of a code and one which calls for painstaking research. It places "the emphasis where it needs to be placed, namely, upon the most detailed empirical research possible by the most creative minds that can be enlisted." [32] Similar researches should be made on the administrative parts of the code. Once anti-social conduct is defined, administrative agencies must be established to check that conduct. This involves the finding of appropriate means to accomplish the ends sought and, equally important, the establishment of adequate restraints upon officials to protect the individual against unfounded accusations and arbitrary action.

Prevention

One question keeps recurring as one seeks to view in perspective the problem of a criminal code project. The processes of the criminal law ever work after the fact. They are set in motion to bag the offender after he has committed a crime. It is as if we were engaged in a hunting enterprise under the rules of which society must not capture nor shoot until the game has reached a given stage of growth and development. This method of dealing with the criminal misses the essential point. Society wants protection. What are the inhibitions on the state which keep it from entering upon a thoroughgoing program of crime prevention.[33] Is it necessary that a criminal code be conceived to deal only with anti-social behavior and only through indirect means? The state does not hesitate to enact laws aimed to prevent unwholesome conditions in matters of sanitation and health.

31. Hall, Theft, Law and Society (1935) 125.

32. Hall, *supra* note 8, at 9.

33. "In effect, what there is in the way of preventive justice, in the domain of the criminal law, is achieved not by legal but by extra-legal agencies. It is done for the most part not by the agencies of the law, but by social workers." Pound, *op. cit. supra* note 5, at 35. See also Sutherland, Principles of Criminology (1934) 578-595; Hall, *supra* note 8, at 14, 15.

Through the studies of social workers we know that there are delinquency areas, and we know a good deal about the conditions which foster crime and about the causes of it. Here are channels which are unexplored by the law-makers.

In this, as on other occasions, we appear to have been lured off the trail onto bypaths of free will and criminal responsibility. The need for crime prevention is at the heart of the protection program. If we accept the view that individuals are amenable to guidance and correctional treatment after they have committed anti-social acts, all the more, it would seem clear, would they be amenable to these influences before they have committed them. This presents a major research factor both in its implications as a means to an end and as a question in lawmaking. It is a problem which should engage the serious thought and research of any group charged with the responsibility of drafting a criminal code.