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Crime, Punishment and Responsibility

T. Brian Hogan

CRIME, PUNISHMENT AND RESPONSIBILITY*

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NEARLY TWENTY YEARS AGO Dean Harold Reuschlein approached the law department at the University of Nottingham with a view to establishing an exchange of teachers. Professor J.C. Smith, head of that department, who has a keen eye for a good idea, responded and the arrangement was established. Quite why I came to be the first visitor under the exchange I cannot now recall. My claims as a junior member of the staff were not strong, particularly as I had then only fairly recently returned from a six month visit to the University of Adelaide in Australia. My selection may have had something to do with the fact that anyone who can face Australia can face anything; and it was also the fact that my wife and I, being as poor and as profligate as church mice, could pack everything we owned into two dog eared suitcases on less than half an hour's notice. And so, having replied with an unblinking No to the question—Are you, or have you ever been, a member of the Communist Party?—put by an embarrassed United States immigration officer, we arrived in Villanova in the summer of 1962.

During that year, and I simply assert as a fact that it was for my wife and myself a most happy one, we made many good and durable friends. Of these *primus inter pares* was Donald Giannella. He and his wife, Gisela, extended to us an unstinting friendship and a prodigious hospitality. His untimely death diminished all of us who knew him but we can also look back on friendship that was enriching. Donald's two greatest virtues, as I saw them, were his kindness and his honesty; these informed all that he did: for his family, his friends, and his school. It is most fitting that the school for which he gave so much should honor him by instituting the Donald A. Giannella Memorial Lectures. And I count it a very real privilege to contribute to this apt memorial for so good a friend.

In Crime, Punishment and Responsibility I have chosen a large canvass. I am by no means the first to stand uncertainly before it brush in hand, pallet loaded with colors of every imaginable hue. The

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canvass has been painted and repainted so many times before; it is thickly encrusted with paint and the dominant color is a pervasive and threatening dark umber with only odd patches in lighter hues. Not only does the picture lack the meticulous geometry of a Canaletto, it has not even the surrealist order of a Dali or a Magritte. It might pass for Modern Art but it lacks the discipline to which even the most esoteric art must conform. I cannot hope within the hour to re-cover the whole surface using only the brightest pigments. I may as well admit at once that dark umber will retain its predominance. Moreover, I happen to belong to a certain school, which I suppose would be categorized—or stigmatized—as the liberal school, and the influence of that school will be seen in much that I have to say. I make no apology for that. We are on the lookout for converts.

I. RESPONSIBILITY

In the early period of the development of the common law, it is probable that liability for crime was strict in the sense that if someone caused harm, he was accountable for it without any consideration of his intentions. It is true that Bracton, writing in the thirteenth century, seems to have had no difficulty in distinguishing between deliberately and fortuitously inflicted harm,[1] but Pollock and Maitland concluded that the actual practice of the courts was otherwise.[2] Hence even as late as the fifteenth century, Chief Justice Brian could say that "it is common knowledge that the intention of man will not be probed, for the Devil does not know man's intentions."[3] Why this should have been so is problematical. It may have been owing to forensic weaknesses in the examination of witnesses or it may have been owing to the rule, which was not modified either in England or America until the second half of the nineteenth century, that the accused could not give evidence in his own behalf; a rule which may in its turn have given rise to the troublesome presumption that a man is deemed to have intended the natural consequences of his act. It is permissible to guess, though, that it went deeper than this and that a man was thought to be responsible simply because he had caused the harm.[4] At a more primitive stage of legal development, beasts which had caused harm might be put to death and such irrational notions of

1. *See* H. BRACTON, 2 THE LAWS AND CUSTOMS OF ENGLAND 340-42 (S. Thorne trans. 1968).

2. *See* F. POLLOCK & F. MAITLAND, 2 THE HISTORY OF ENGLISH LAW 472 (reissued 2d ed. 1968).

3. Y.B. 17 Edw. 4, f. 2 (1477).

4. F. POLLOCK & F. MAITLAND, *supra* note 2, at 472.

"responsibility" must have contributed to the rules of deodand whereby any chattel, animate or inanimate, which caused harm was forfeit. The forfeit went to the Crown, which was expected to apply the ransom to pious uses, as Coke surmised, to appease God's wrath.[5] So a horse which was the proximate cause of a rider's death by throwing him, or a boat which was the proximate cause of a passenger's death by sinking, would be forfeited as deodand. As long ago as 1240 Bracton had divined that it was not the horse nor the ship which had provided the cause and the occasion but rather the stupidity of the handler.[6] Others were not so perceptive as Bracton and nearly 600 years were to pass after his death before deodands were finally abolished.

This all sounds very quaint to us now and we can compliment ourselves upon the adoption of much more sophisticated theory of liability which has no place for the deodand. But can we? As it happened, our forebears managed to make considerable progress. Long before its formal abolition in 1846, deodand had been a dead letter and, very likely influenced by canon law with its emphasis on the thought rather than the deed, they had arrived well before the nineteenth century at a theory of accountability, mens rea, which distinguished between intentionally and recklessly caused harm, which was generally punishable; negligently caused harm, which was only exceptionally punishable; and inadvertently caused harm, which was rarely punishable at all.[7]

But then towards the middle of the nineteenth century, courts in both England and the United States introduced a doctrine, the doctrine of strict liability, which imposed criminal liability without fault and made a criminal of a man who had taken all reasonable steps to conform his conduct to law. Thus in England in 1846 Nevill Woodrow was convicted of selling adulterated tobacco though he did not know it was adulterated and had no cause to know it to be so;[8] and in Connecticut in 1849 Alphonso Barnes was found guilty of selling liquor to a drunken person even though he had taken all reasonable care to instruct his servants in the proper performance of their duties.[9] Curiously, as Professor Sayre pointed out, strict liability emerged quite independently, and at about the same time, on both

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5. E. COKE, 3 INSTITUTES OF THE LAWS OF ENGLAND 57 (London 1817); F. POLLOCK & F. MAITLAND, *supra* note 2, at 473.

6. H. BRACTON, *supra* note 1, at 384.

7. For possible instances of the imposition of strict liability at common law, *see* J. SMITH & B. HOGAN, CRIMINAL LAW 79 (4th ed. 1978).

8. Regina v. Woodrow, 15 M. & W. 404 (Ex. 1846).

9. Barnes v. State, 19 Conn. 398 (1849).

sides of the Atlantic.[10] Was it a case of great minds thinking alike, or of fools seldom differing? I do not wish to rehearse all the arguments for and against strict liability but merely to state my conclusion. It is that it is foolish for any legal system to say to a man: take all the care that you can, do all that we can reasonably expect of you, but, remember, we will still convict you. That strikes me as the pinnacle of absurdity and is barely more rational than the old rules of deodand.

Nor am I impressed with the argument that offenses of strict liability are only quasi-criminal; that they afford a convenient way of regulating such minor matters as liquor licensing, road traffic, pollution and the like which are not criminal in any real sense but which are in the nature of public welfare offenses. For one thing it is just not true. It is often overlooked that elements of strict liability are imported into many serious crimes, crimes as serious as murder and manslaughter, and whatever these are they are not public welfare offenses. Many common law jurisdictions still retain doctrines of constructive murder and manslaughter which impose liability for causing death though the death was neither intended nor foreseen by the accused. Such doctrines can have no place in a rational scene of things which, in matters of *criminal* responsibility, must look to the accused's intentions and not impose liability on objective principles of causation.

Furthermore, even confining the issue to the so-called public welfare offenses, it has never been satisfactorily demonstrated that the imposition of liability without fault contributes to a reduction of the conduct which is sought to be proscribed. It is possible to go further and say that the simplistic crime and fine policy which it has led to in so many jurisdictions has caused us to miss the point. The assumption seems to be that we have done something about a problem if we make a crime of it, and clearly this is an illusion that legislators would like us all to share. They can satisfy their customers by telling them that something of which they disappoved has now been made a crime as though that was that. No customer is ever bold enough to ask whether making a crime of it will make it disappear. The legislator is thus spared the exacting task of devising a policy that might be effective to cure the evil.

In recent years there has been a move away from the imposition of liability without fault. Courts have recognized its unfairness even though they have not acknowledged its fundamental irrationality. The modern tendency, whether by judicial construction or legislative pre-

10. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 62 (1933).

script, is to prefer liability based on negligence. This is an improvement for at least the accused can excuse himself on proof that all reasonable care was taken. The development has been welcomed, even hailed, by commentators. It is often called the Halfway House, suggesting a comfortable resting place on the road between liability based on deliberate wrongdoing and liability without fault. The danger, as I see it, is that the resting place may become a refuge from thought, and I say that for two reasons. One is that while it is unquestionably fairer to the accused to say that he will be excused if he has taken all reasonable care, the elimination of the evil is not thereby necessarily made any more likely. The conversion of offenses of strict liability to offenses of negligence improves the accused's position but it masks the real issue which is whether there might not be more effective ways of reducing the evil than by making a crime of it.

Secondly, I am unhappy about punishing someone on account of his negligence. From the utilitarian point of view, on what basis is punishment assigned for the accused's failure to foresee or appreciate a risk which the most of us would have recognized? The punishment can hardly deter the majority of us since, as reasonable men, we would have foreseen or appreciated the risk and thus have had the chance of running it or avoiding it. Nor can it deter the minority of nonreasonable men who share the accused's lack of perspicacity because, *ex facie*, they would not have foreseen or appreciated the risk either. Perhaps by punishing the accused we make sure that *he* does not make a mistake again; but at most all we can ensure is that he will not make *that particular mistake* again, and we cannot ensure that he will not make other egregious errors of judgment in different situations. From the moral point of view I am unhappy about punishing a man who, because of mental or physical shortcomings, does not identify a risk that the reasonable man would have seen. One aspect of the reasonable man is often overlooked. Since he never makes an error of judgment when he is handling a motor vehicle, or processing food, or operating machines, he is quite unlike that man on the Clapham omnibus or that dutiful American who returns each evening to mow the lawn, both of whom make errors of judgment.

Take the offense of careless driving, dealing with which takes up a staggering amount of time and money in the use of police, legal, and judicial resources. What could happen if this crime were removed from the statute book altogether? It can hardly be supposed that it would inaugurate an era of gay abandon on the roads. The motorist, after all, has not only his own safety to think of but also—a matter of even greater concern to many drivers—the sanctity of his car. No one wants an accident. It is highly inconvenient, time-

consuming and may prove to be expensive. All drivers do as best they can to avoid accidents, and they will do neither better nor worse because we make a crime of careless driving. An insurance system and the civil courts can best serve the interests of society; to make an offense of careless driving makes no useful contribution to road safety.

Another example is provided by the laws relating to proscribed drugs. Until recently in England, many offenses relating to drugs were offenses of strict liability, as they still are in many common law jurisdictions. But now, fired by the Halfway House shibboleth, legislation has been introduced making it a defense for the accused to show that he was reasonably unaware that the substance he possessed was a controlled drug.[11] It seems to me, however, that in this context, as in many others, fairness demands that a sharp distinction be drawn between the deliberate and the thoughtless. But once a man is convicted, who pauses to make the distinction? From the fact of conviction the inference will inevitably be drawn that he was one of the deliberate and not merely one of the luckless.

I am arguing, then, for a restriction on accepted bases of criminal liability. I am arguing for the elimination of strict liability and at least the severe curtailment of liability for negligence. Maybe, though, it is all the pursuit of an illusion. Professors in law schools and theoreticians in their writings can spell out refined ideas of mens rea which have a logical resplendency on paper bearing no resemblance to the grubby facts of life. I have mentioned how the common lawyers had developed long before the nineteenth century a sensible doctrine of mens rea. But what was the reality? Here it is as explained by Baron Brampton when as a young man he was practicing at the Old Bailey:

> Let me illustrate it by a trial which I heard. Jones was the name of the prisoner. His offence was that of picking pockets, entailing, of course, a punishment corresponding in severity with the barbarity of the times. It was not a plea of "Guilty," when, perhaps, a little more inquiry might have been necessary: it was a case in which the prisoner solemnly declared he was "Not guilty," and therefore had a right to be tried.
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> The accused having "held up his hand," and the jury having solemnly sworn to hearken to the evidence, and "to well and truly try, and true deliverance make," etc., the witness for the prosecution climbs into the box, which was like a pulpit, and before he has time to look around and see where the voice comes from, he is examined as follows by the prosecuting counsel:

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11. Misuse of Drugs Act, 1971, c. 38, § 28.

> "I think you were walking up Ludgate Hill on Thursday 25th, about half-past two in the afternoon and suddenly felt a tug at your pocket and missed your handkerchief which the constable now produces? Is that it?"
>
> "Yes, sir."
>
> "I suppose you have nothing to ask him? says the Judge. 'Next witness.'
>
> Constable stands up.
>
> "Were you following the prosecutor on the occasion when he was robbed on Ludgate Hill? And did you see the prisoner put his hand into the prosecutor's pocket and take this handkerchief out of it?"
>
> "Yes, sir."
>
> Judge to prisoner: "Nothing to say, I suppose?" Then to the jury: "Gentlemen, I suppose you have no doubt? I have none."
>
> Jury: "Guilty, my lord," as though to oblige his lordship.
>
> Judge to prisoner: "Jones, we have met before—we shall not meet again for some time—seven years' transportation—next case."
>
> Time: two minutes, fifty-three seconds.
>
> Perhaps this case was a high example of expedition, because it was not always that a learned counsel could put his questions so neatly; but it may be taken that these after-dinner trials did not occupy on the average more than *four minutes* each.[12]

So much, one might say, for mens rea. Of course we no longer hold after dinner trials and Jones would now have no difficulty in securing a reversal of his conviction. But it remains the fact that courts are still as hard pressed to get through their business and this can and has led to an administration of justice which seeks by deals of one sort or another to avoid the trial process altogether. Many accused make only a fitful appearance in court for the purpose of sentence and even that may have been largely predetermined. It could well be that such cases still do not detain the courts, on average, more than four minutes each. If criminals in England and the United States could form a union, their shopstewards could bring the whole administration of criminal justice to a standstill by requiring all their members to plead not guilty. It would be interesting to see what the result would be. My own view is that it would lead to a drastic reduction in the number of crimes. We would be forced to choose between what are the important functions of the criminal law and what are not. I shall now argue that this would be a wholly desirable development.

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12. THE REMINISCENCES OF SIR HENRY HAWKINS, BARON BRAMTON 27-28 (R. Harris ed. 1905) (emphasis in original).

II. CRIME

There can be no doubt but that in Western democracies there has been an enormous increase in the *apparent* amount of crime. Much of the apparent increase can be explained, if not explained away. Thefts of and from motor vehicles, for example, have increased dramatically but it has to be kept in mind that the proportion of thefts in relation to the number of motor vehicles remains remarkably stable. Increase the number of vehicles, *i.e.*, the number of opportunities, and you increase the number of thefts; decrease the number of vehicles and you decrease the number of thefts. But when the slide rules of the criminologists are put to one side the fact remains that there is little cause for comfort and a good deal for unease. People progressively *feel* less safe walking through cities and even their homes.

When we think of "crime" we think ordinarily of homicides, rapes, burglaries, and robberies. But what is "crime"? It is a trite observation, but nonetheless a true one, that crime or criminality is a conferred quality. No conduct is inherently criminal, inherently deviant, or inherently immoral; it becomes so only because society makes it so by some formal process. The consumption of liquor in Pennsylvania is not a crime but it is one in Saudi Arabia. There is nothing inherently wrong or right about consuming alcohol; it becomes wrong only if society wishes to make it so. It is the same with theft. It is true that theft, unlike alcohol, is proscribed by the Decalogue but you will notice that God wisely refrained from saying what theft is. That complicated task he left to mere mortals and they define it to reflect the dominant ethical values at the time of the definition.

There are of course many acts on which most societies will almost invariably confer criminality and for very good reasons. If the law did not proscribe homicide, mayhem, rape, and robbery, and seek through its agencies to prevent them, we would all be exhausted by providing for our own self-preservation. But there are many other types of conduct where the danger is much less obvious, and I refer to crimes in connection with drugs, prostitution, gambling, and the like. I am not going to extol the virtues of gambling, the social utility of prostitution, or the benefits of drug taking. Given what we now know of the effects of tobacco, the British government would have been entirely justified in setting fire to Sir Walter Raleigh's cargo when he returned from the New World. But it would have been too late; tobacco had been in use for twenty years before Raleigh became involved in the trade and not even the tirades of a king could rid his subjects of the habit. So it has been with drink. Its attendant evils are

obvious, more obvious, perhaps, than the evils attendant on many other drugs, and a society may well be entitled to seek to eliminate those evils. Perhaps if Prohibition had succeeded, America would have been a better place for it; but all Prohibition succeeded in doing was to create a cataract of crime, making criminals of millions of Americans and ultimately bringing the law into disrepute.

The lesson to be learned is pathetically obvious though few seem to heed it. It is that not all the evils that assail us can be obviated by praying in aid of the criminal law. It can sometimes be worse than useless to do so, because it creates a barrier between ourselves and the problems and makes us that much less effective in dealing with it.

It is my guess that within a hundred years the ashtray will be as rare as the spittoon today. This will have been achieved by the patient and compelling campaigning of those who have a care for our health. Their policy is to place the facts before the individual and allow him to choose. Their argument will prevail because even those of us who smoke know that it makes sense. Reason has the best chance of success. If there is a place for coercion it lies in banning the advertising of tobacco products. This would be effective and would even enlist the support of the smoker, for he has no interest in ensuring that his vice is adopted by his children.

When some of us argue for the decriminalization of much conduct that is presently criminal, we are not arguing for public approval of the conduct. We are merely saying that the problem cannot be solved by the criminal law. On that the evidence is all one way. Society can no more control the problems associated with drugs, prostitution, gambling, and the like by the use of the police and the criminal courts than Cnut could hold back the waves.

There is the further point, persuasively made by Professors Morris and Hawkins, that police power is a limited resource and society has to make up its mind what its priorities are to be.[13] Do you prefer to be mugged or offered for sale an obscene book? Would you rather your house was burgled than be accosted for immoral purposes? Unless each of us is to have his personal police officer, we cannot be protected from everything we find offensive.

III. THE CRIMINAL

And who is the criminal? Who is this base, atavistic type who preys on law abiding citizens? According to criminal statistics there are far too many of them about though some small comfort may be

13. N. MORRIS & G. HAWKINS, LETTER TO THE PRESIDENT ON CRIME CONTROL 13-25 (1977).

derived from the fact that they are still very much a minority group. But are they? The answer depends on the definition. If by "criminal" we mean someone who has been convicted of a crime before the courts, then it is a minority group; but if we mean someone who has committed a crime, then the indications are that all but a handful of us are criminals. The automobile makes criminals of nearly all of us. Only by the exercise of monastic self-control, or leaving the car permanently in the garage, can the motorist hope to avoid some infraction of the criminal law. But, as we reassure ourselves, there is a difference between crime and "real" crime. It is not a "real" crime to obstruct the highway, exceed the speed limit, or fail to produce a driving licence on demand. The real criminal is he who kills, causes bodily harm, or robs. The motorist does not go abroad with gun, knife, or bludgeon and with malice in his heart. But he does go abroad with his motor vehicle and more than occasionally he cuts corners, speeds, drives with knowledge that his fitness may be impaired by drink, and from time to time knowingly exposes others to the risk of bodily injury or even death. When a man is killed on the streets of Leeds or Philadelphia, the chances are distinctly in favor of his being killed by a "good" guy whose driving is impaired by alcohol, rather than a "bad" guy with a gun. That same good guy has probably never stolen in his life, but the odds are that presented with an opportunity to defraud the Internal Revenue Service by failing to disclose income which he knows the Service cannot trace, he will unhesitatingly have taken it.

I find that on visiting prisons and talking with prisoners a recurring complaint, bitterly voiced, is that they should be on the inside when so many criminals are on the out. My answer is not a sympathetic one. I say, and I'm willing to cite chapter and verse, that the chances are that they committed more crime, and more serious crime, than those on the outside. They have overplayed their hands and their bluff has been called. So I am not suggesting that we should all be on the inside because it is obvious that crimes vary in their seriousness and call for different responses. Nevertheless, what I am suggesting is that we might just be a little less sanctimonious, a little less self-righteous, in our view of the criminal. You will no doubt recall that those who would have stoned the women taken in adultery slunk away from the eldest even unto the last when the invitation to throw the first stone was extended to he who was without sin.[14] I do not offer this as authority for the proscription of all punishment, but

14. *St. John* 8:1-11.

merely as a reminder that in dealing with the criminal it is well to bear in mind that most of us have feet of clay.

IV. PUNISHMENT

We have, at least in most common law jurisdictions, progressed over the centuries from a system of hideous and almost entirely vengeful ferocity to an uncertain system in which notions of retaliation compete uneasily with notions of rehabilitation. It is, I think, worth noting that as penal systems have become less brutal, and even more humane, there have always been those who stridently argued against this form of advancement. The argument—and it is the hardiest of perennials—is that the "softer" we get in dealing with criminals, the more crime we will have. At the turn of the nineteenth century, for instance, people in England were as worried then as they are now about the appalling rate of crime. Writing in 1796, Patrick Colquhoun described a London ravaged by footpads, burglars, highwaymen, and theives, and where people banded together to make their way safely after dark.[15] Yet the law was savage; a wide range of felonies attracted the death penalty with a rate of executions that would work out at 500 a year for contemporary England. What was wrong? One anonymous pamphleteer, no doubt voicing the views of many, identified the cure. It was, as the title of his pamphlet proclaimed: Hanging, Not Punishment Enough.[16] If only, he argued, criminals could be broken on the wheel, whipped to death, hanged in chains till they starved to death, why then "for Five Men Condemned and Executed *now*, you would hardly have *one then*."[17]

So it has been down the years; the belief that one more stroke of the lash, one more turn of the screw, one more shriek of pain, and crime, if not eliminated, will be drastically reduced. But if history has any lessons to teach, one is that savagery in dealing with the criminal just does not work. It does not contribute to a reduction in crime, and those who cannot see this cannot be made to look facts in the face. Thus, as Morris and Hawkins consistently and rightly reiterate, capital punishment is irrelevant to the crime problem.[18] Capital

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15. P. COLQUHOUN, A TREATISE ON THE POLICE OF THE METROPOLIS ch. V *passim* (London 1796).

16. Hanging, Not Punishment Enough, *quoted in* L. RADZINOWICZ, 1 A HISTORY OF ENGLISH CRIMINAL LAW 231 (1948).

17. Hanging, Not Punishment Enough 7, *quoted in* L. RADZINOWICZ, 1 A HISTORY OF ENGLISH CRIMINAL LAW 233 (1948) (emphasis in original).

18. N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 75 (1970).

punishment has failed us except to the extent that it might rid us of a handful of miscreants. So too imprisonment has failed as a reducer of crime except to the extent that it contains for a period a number of people who would otherwise be making their trifling contribution to the overall volume of crime. In its way imprisonment, that is imprisonment as Howard and Fry envisaged it and not as they found it, was a noble experiment. Their belief that if criminals were placed in a disciplined but decent security they might be reclaimed by society was not an unreasonable one. It had much more reason to it than anything that went before, and it would be quite absurd to criticize these reformers for the failure of their vision. What they supported did not make things better but it did not make them worse. Their great contribution was that they broke with the philosophy of revenge and embraced a philosophy of compassion.

V. CONCLUSIONS

So where are we now? I did say at the outset that on my picture dark colors would continue to predominate. It would be impudent of me to suggest that I know the answers that have escaped so many minds which have applied themselves to the problem we call crime. I have no more than a number of suggestions. What emboldens me to make them is not the conviction that they will work but the knowledge that much of what we have tried in the past has failed.

The first is that crime must be recognized as the problem of the community, and not a problem which belongs to governments and police. I do not mean by this that we must all become vigilantes and informers, but merely that we see that crime cannot be legislated away, nor, unless we are prepared to devote an inordinate amount of our resources to it, can it be policed out of existence.

Secondly, no matter how theoretically desirable it may be, we cannot get rid of everything we do not like. Priorities have to be established in crime just as they have to be established in medicine, highway construction, education, and the like. The most important priority is to secure people against depredations on their persons and their property. "The universal object of a system of law is obvious," said Lord Edmund Davies, "the establishment and maintenance of order."[19] Hence, "[t]he *first* aim of legal rules is to ensure that members of the community are safeguarded in their persons and property so that their energies are not exhausted by the business of

19. Director of Pub. Prosecutions v. Majewski, [1976] 2 All E.R. 142, 168 (H.L.) (Lord Edmund-Davies).

self-protection."[20] This is not the *only* aim of legal rules, but it is the *first*. The more aims we add, the more crimes we create, the less likely we are to achieve this primary aim unless we are prepared for an exponential increase in the bureaucracies and police necessary to secure them. It follows, I believe, that much conduct that is presently criminal must be decriminalized so that the police resource can be applied where it matters most. The most effective deterrent is the certainty of detection. Colquhoun recognized that this was the way to curtail the footpad; it is equally the way to curtail the mugger.

Thirdly, we must recognize that the most effective way to curtail conduct which is harmful is not always, or even often, to make a crime of it. Supposing, for example, that drugs are harmful—some may be less so and some may be more so than the drugs of alcohol and nicotine—, and even accepting that society is entitled to seek to eliminate their use, the policy that rationally appears to offer the best hope of success is to legalize them, to control them, and to seek to educate people about their use. The existing policy has utterly failed and has done no more than create an industry of crime. With so evident a failure, what is it that blinds us to trying some alternative?

Fourthly, I suggest the elimination or drastic reduction of crimes of strict liability and negligence. Criminal courts should be concerned only with those who have deliberately broken the law; not those who are trying their best but whose best is not good enough, and still less those who have done as well as anyone can be reasonably expected to do.

Fifthly, we must recognize that imprisonment has failed as a means of reforming the offender and of deterring others. The reason most people abide by most of the law most of the time, I am glad to assert, is not because they are cowed by the threat of punishment but because they approve the law and willingly assent to it. Legislatures do not on the whole aim to pass laws which do not command general acceptance but seek to pass laws that do. It is not the addition of a term of imprisonment for breach which secures the *general* acceptance of that law, but the fact that it has been promulgated in a democratic society whose members approve the form of government. The justification for imprisonment does not, then, lie in deterring the law abiding, for the law abiding do not need to be deterred. Nor can it lie in reforming the offender for in this it has signally failed. It lies only in containing the dangerous, and by dangerous I mean danger-

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20. P. STEIN & J. SHAND, LEGAL VALUES IN WESTERN SOCIETY 31 (1974) (emphasis in original).

ous to the physical security of others. We should move, and move rapidly, to a policy which seeks to eliminate imprisonment of offenses directed only against property, if only because noncustodial sentences are more likely to be successful—or not likely to be any less unsuccessful—in reclaiming the offenders than are custodial sentences.

Sixthly, serious attention should be given to an overall reduction in prison sentences. Sentencing is not a precise science and it is doubtful whether it can become one. So far, as imprisonment is concerned, the judge mixes a number of ingredients, variously labelled "retribution," "deterrence," "protection of the public," "reform of the offender," in order to arrive at a sentence which fits the crime. The single most important principle, and the only one capable of scientific measurement, is that like cases should be treated as like. There thus emerges a sort of "going rate" for particular crimes. A typical crime within a particular class will receive a sentence of X years imprisonment, with X plus years where there are factors of aggravation and X minus years where there are factors of mitigation. But the X is arrived at largely by means of the hunch theory: X years is *believed* to be the minimum period compatible with securing justice in that kind of case. It is my *belief* that in most cases X could be reduced by as much as a half without producing any noticeable *increase* in the volume of crime. I am not suggesting that a reduction in the average length of prison sentence will bring about a corresponding reduction in the amount of crime, but merely that it will not bring about an increase in the amount of crime.

Experience appears to lend support to this view. The progressive reduction in the barbarity with which our societies have treated their criminals has not demonstrably increased crime. Punishment, most obviously imprisonment, can be justified only by results, *i.e.*, the reduction of crime and the rehabilitation of the offender. It cannot be justified by a feeling that it is deserved since what is deserved is incapable of measurement when the yardstick is no more than a desire for revenge. To punish a man on the ground that he deserves punishment is to insist on the abdication of reason in favor of emotion. Emotion encouraged our ancestors to think, and not so very long ago, that punishments we now see as savage and unprincipled were fair and reasonable. But if we are ruled by emotion, our sentences do not become fair and reasonable merely because they are less savage. Retribution, since it is entirely incapable of measurement, should be abandoned as a basis for punishment. If we are unsure what the alternatives are, let us at least be clear that retribution is not one of them.

Seventhly, if we have any interest in the rehabilitation of the offender, we must take practical and positive steps to that end. Under the existing system not only is a man a criminal when he is convicted by the court, but he remains so after he has paid his forfeit; not only does he enter prison as a criminal, but he leaves as one. Thus he may be denied the opportunity to hold public office, obtain employment in the public domain, qualify for a license to enable him to practice a profession, or even to raise a loan to purchase a house or a vehicle. Whatever efforts he may be prepared to make to rehabilitate himself, he may be dogged by his conviction until the day he dies.

In some jurisdictions some steps have been taken to wipe clean the criminal's slate. In England, the Rehabilitation of Offenders Act of 1974[21] provides that a conviction, if it involves a sentence of less than thirty months' imprisonment, becomes a "spent" conviction after the lapse of specified periods.[22] Subject to exceptions, the rehabilitated person may refrain from disclosing his spent conviction in extra-judicial contexts,[23] and thus appear to the inquirer what he is in fact: a good citizen. He is further protected from disclosure of his spent conviction by others, most obviously the Press, to the extent that in an action for defamation consisting of a reference to a spent conviction, the defense of justification will be rebutted by proof of malice.[24]

It is a small step but a valuable one. If rehabilitation is to have any meaning, if it is even to be attainable, the criminal must be able to look forward to time when he can reclaim his former status in society. It would be too much to expect complete rehabilitation on the day he completes his sentence. Having regard to the nature of the crime, it may be right to deny him certain privileges and opportunities beyond the period of imprisonment. But such denials should be particularized and, for preference, be spelled out by the court which sentences him. The vice of the existing system is that it imposes on the criminal, and especially the criminal who is sent to prison, shackles of which he cannot rid himself. It behooves us to move, and to move rapidly, to a situation where we specify the conditions upon which, and the time within which, the criminal can rid himself of his label. In the case of serious crimes the conditions may be stringent, but precise conditions there must be and they must be reasonably ascertainable. If we cannot offer the criminal hope, how can we sensibly expect him to keep faith in us?

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21. The Rehabilitation of Offenders Act, 1974, c. 53.
22. *Id.* §§ 1, 5.
23. *Id.* § 4.
24. *Id.* § 8.

Eighthly, concern for the victim of crime should be expressed not in sentiment but in hard cash. Compensation schemes are now not uncommon in common law jurisdictions and are rightly becoming commonplace. The prevention of harm by criminal conduct, and no one questions but that considerable expenditure is required for that, is of course preferable to compensation for harm actually caused; but the latter is just as much a community responsibility as the former. If the English experience is anything to go by, although the scheme in England is confined to compensation for personal injuries, the cost is modest and the scheme is widely endorsed.

Lastly, we need to acknowledge that while we can justify sanctions against the lawbreaker, he is, in the end, one of us. Most of us are normal and conventional and hence we tend to be suspicious of the abnormal and unconventional. So, for instance, physical deformity and mental abnormality are generally considered misfortunes, both for the sufferer and his family. No doubt we no longer go out of a Sunday afternoon, as people once did, to amuse ourselves by taking a view of the lunatics at the local asylum, but our underlying unease in dealing with the abnormal remains. In the end, though, we are best judged not by how we respect the able and reward the fleet of foot, but by how we treat the disadvantaged, the disabled, and by how we treat the criminal.