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ENEMIES OF SOCIETY

MAX RADIN¹

We are invited periodically, in the newspapers, from the pulpits, on the air, to engage in a war on crime. The military metaphor is so persistent and is carried out in such detail, that we can scarcely help taking it for granted that somewhere before us, there is an entrenched and hostile force consisting of men we call criminals, whose purpose it is to attack Society, that is to say, us. The matter is presented as a simple enough affair, and it is assumed that if we fight valiantly, we shall win and conquer the enemy.

And then? Unfortunately, we are not quite clear what is to happen then. In wars, the conquered enemy is forced to make peace. But these enemies are most dangerous when they profess to be at peace. Evidently we are being urged to a war of extermination, a war against Amalek who is to be utterly destroyed and not spared. That, at any rate, is the implication. It should, therefore, not be unprofitable to ask ourselves who these enemies are—perhaps even to ask ourselves just what we mean when we call them enemies. Because metaphors and exhortation do not of themselves give us very useful information in social questions.

Popular feeling about criminals needs little analysis or explanation. One of the chief purposes of living together is security. Against the more or less external dangers of hurricane, earthquake and, to a certain extent, war and disease, security in a real sense is impossible. That is to say, we cannot control the first two at all, and apparently cannot do very much with the last two. For that reason, we feel a violent resentment against what seems a danger from within, treachery on the part of those who are fellow-members of our group, and who nevertheless constitute a gratuitous and preventable menace to our personal safety. And it seems the more preventable because it is taken to be the deliberate act of men who do that which we do not do and which we rarely feel any desire to do.

This, I say, is the popular feeling about criminals, but that statement needs qualification. The feeling is chiefly directed against those who commit the obvious crimes of murder, rape, burglary,

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robbery, abduction, arson and unmistakable thefts and frauds, in which the evil intention to gratify brutal instinct or avarice through the suffering of another person, is clear and evident. We cannot go about our daily business, if such acts are common and we are not quite easy in our minds, if they are possible at all, even if uncommon. Certainly it needs no explanation to account for the fact that men who do these acts seem to be our enemies, even if they do not know of our personal existence. We are tempted consequently to think of criminals in the way the radio pulpiteers do, i. e., as enemies of society, that is, of society as a whole, not of any one in particular. In fact, this is the way a crime is generally defined at the present time and distinguished from other wrongful and harmful acts. Some wrongful acts are directed exclusively against particular persons, like a breach of contract or a slander. Others endanger society as a whole, like murder and theft. These latter are crimes.

This is quite simple. Unfortunately, it is too simple. Are we sure we know why murder threatens society and slander does not, why a breach of contract is a man's private business and the picking of his pocket is the business of the state? But, even more important than this question is the historical difficulty into which the simplicity of our definition lures us. If it is the essence of crime that harmful acts like murder and the rest must be deemed to be directed against the whole community, then many communities in the past lived in the beatitude of crimelessness, although murderers and thieves flourished, and were feared and punished. As far as the ancient Mediterranean societies are concerned, and those of northern Europe as well, nothing is more certain than that their notion of crime did not arise out of their attitude toward wrongdoing, but that it was developed late, out of concepts of a different sort and quality. Robbers and murderers were decidedly held to be not public enemies, but enemies only of their victims.

And yet most of these communities, ancient and modern, had a clear notion of what the term, enemies of society, means. They were aware of the existence of men who constituted a specific or a general menace to the group in which they lived and of which they formed an acknowledged part. Usually, these were men who carried a taint or had been involved in a taboo or had incurred the enmity of real but supernatural persons outside the physical community. As such, they were dangerous to the other members of their society, dangerous because their taint might spread as a plague

might spread or else because the offended god could not be trusted to distinguish between his enemy and those who happened to be near him. The aim of gods was notoriously bad or else, perhaps, they lacked engines of precision in wreaking their vengeance.

However, persons like these were not criminals in our sense and our notion of crime did not arise out of the situation in which they found themselves in regard to their community. It is important to insist on this because the view that crime did so arise is widely held and has been made to seem significant. Punishment has been derived from the custom of human sacrifice or of propitiatory offerings in general and crime has been declared to have grown out of the pollution caused by the spilling of human blood. Professor Calhoun has, I think, demonstrated the falsity of this last notion for early Greek civilization. I do not go quite all the way with him in his opinion of the late origin of the concept of pollution, but he has, I should say, made out an almost conclusive case against the idea that crime and criminal law are derived from this particular group of religious ideas.

All these dangerous people, polluted, tainted, cursed, anathematized, are persons whom the community will eject or kill or sacrifice and they will often do so reluctantly, as reluctantly as Jonah's shipmates cast him into the sea. There is no sense of moral condemnation, no feeling that there was something here which the victim should have prevented or should not have done. The man had become a *piaculum*; something to eject, much as healthy tissue seeks to eject foreign matter. The ejected *piaculum* is not really distinguishable from the devoted and self-immolated hero, Protesilaus, Decius Mus, Menoeceus. These men made *piacula* of themselves by a supreme act of heroic self-devotion. Others like Oedipus became *piacula* by causes beyond their control. Still others were born *piacula*, like monstrous births, children with contorted bodies or six fingers or other hideous deformities.

It is quite true that acts that we should call shocking crimes were also sometimes treated as *piacula*, parricide among the Romans, sodomy among the Hebrews, a few types of sacrilege or incest everywhere; but nothing is clearer than that these acts did not create a general idea of crime. All kinds of *piacula* continued to be treated as monstrous and exceptional occurrences, involving pollution and taboo, long after crime in our sense had been recognized and dealt with much as we deal with it.

The enemies of ancient society were, accordingly, not those we

call criminals, and as has been said, that certainly was not due to the absence among them of men who committed acts like rape, murder, abduction, robbery, theft. They had a good many of them. Such persons were taken to be merely enemies of their victims, against whom these victims must protect themselves as best they may with varying amounts of neighborly and kindred assistance. Further, let us note that neighbors and kindred could not be taken in so large a sense as to include the whole community or any considerable portion of it. The victim had to rely for assistance on a sharply limited group. If the persons who made it up were too weak, too timid or too indolent, he had no other redress. By letting him down, his kinsmen had done him a wrong, but that, too, and more emphatically was no one's business but his own. And worse still, from our point of view, the wrongdoer himself might claim support from his kinsmen, even when his guilt was undoubted and even after standards were sufficiently developed to make his act seem morally wrong to good men. The victim of such wrongful acts and the group to which he belonged might well regard the wrongdoer and his group as their enemies. Other men and other groups did not do so—by law could not do so. In fact, members of the wrongdoer's group were compelled to regard the victim as their enemy.

This attitude is so strikingly different from our own that the difference must be emphasized again and again to avoid confusion. We are the more prone to confuse these things, because we have, under circumstances that I shall set forth later, shifted our attitude so that the private wrongdoer of older communities is the very type and example of a public enemy, a *piaculum*. We use of such men, to a very large extent, the expressions that formerly were used only of *piacula*. They seem to us dangerous elements in the social life, which must at all costs be removed.

But, on closer examination our attitude turns out not to be quite the same as that of ancient societies. There were no two courses about *piacula*. They must be removed. In some cases they could be cleansed, but that was not the rule. No one spoke, or reasonably could speak, of warding them off before they occurred. These things happened. There was no will to be a *piaculum* which must be checked or destroyed.

We, on the contrary, have to deal with such a will. While we often talk and act as if our only purpose is to remove or destroy our public enemies, we also—especially in our calmer moments—talk and act as if that was not our purpose at all, but as if our purpose

was to prevent other men from becoming public enemies. We assume that people become so voluntarily, that some have a strong desire to become so, and that they can be prevented, if we frighten them off. We call our purpose that of deterrence.

There is still another phrase not infrequently employed. We speak of vindicating the majesty of the law, of avenging society on its enemies. This, to be sure, has come to be newspaper rhetoric, as far as those particular phrases are concerned, but the ideas involved are still firmly entrenched in our minds. While potential offenders are to be deterred, we say that the actual offenders are not merely to be removed, but that they are to be punished. Something painful and disagreeable is to be done to them, because they have done painful and disagreeable things to us, the Community. And this notion that the community is to be avenged on its enemies, survives in our sophisticated and morally advanced classes. Its expression is checked somewhat by the general formal acceptance of religious standards which repudiate vengeance, but often, under stress, the guardians of these standards themselves omit the checks, and frantically demand that violence should be meted out to men who have used violence.

We can rationalize our desire to make these people suffer by the idea that we do so, not on our own account, but for the state or the community, an abstract entity which can be personalized and treated with awe and reverence. That is, of course, the rationalization used by the religious persecutors in Christian Europe. They inflicted agonies, not to avenge injuries to themselves, but injuries to their God.

Besides this, there was and is another attitude in punishment, which, however crude some of its manifestations are, must be called moral. Punishment is quite honestly thought of as a means of improving the person punished. There is among some groups a real desire to reform the wrongdoer, to rehabilitate him, to make him a beneficial rather than a harmful member of the social system.

We may grant that the assertion of this purpose is often a particularly loathsome form of hypocrisy and is not infrequently the unconscious masking of sadistic stirrings within the *bête humaine*. But that is not always the case. And it is idle to deny, when the notion of inflicting pain for this purpose is wholly or partly discarded, that one of our modern attitudes to the enemies of our society is an interest in their moral welfare.

This implies that their acts have been deemed to be morally

wrong, that is to say, that we have made a vertical scale of acts according to their moral quality, and that the acts of criminals, come quite low on the scale. Unfortunately, not all the acts which we class as crimes, are rated low in the moral scale, and we have the uneasy consciousness that some undoubted crimes might be quite high on it. But we can safely say that the group of crimes with which we started, viz., acts of unprovoked violence against others—that these acts are morally bad as well as crimes. Our moral attitude to these morally bad actors is—or may well be—a reasoned expectation of turning them into good actors.

Of all these purposes, that of deterrence is more or less the official one. It is the one readiest at hand. It seems to afford the amplest and fullest justification for any act of punishment or of removal, and it makes at present an immediate and general appeal. If we consider it a moment, we shall see that its implied background is one with which our training has made us familiar in youth. We have all been members of groups in school and elsewhere in which it was far more important that certain acts should be prevented from happening than that the doers of these acts should be removed or punished. Deterrence is the chief instrumentality of what we call discipline.

This seems a rather modern idea and not one that we readily credit to early or primitive communities, and, as a matter of fact, I should hesitate to say that it was found everywhere in past time or that it can be found everywhere now. If, however, we confine ourselves to the East-Mediterranean culture-area, it was consciously utilized in one important phase of communal life. That was the community's function as an armed host. In most of the city states of the Mediterranean, the yearly muster of the adult male warriors was one of the bases of civic life. And in these and all the other communities, whether organized as city-states or not, every able bodied man was required to take the field at a given signal, the tocsin, the clarion, the cry, "To your tents, Oh Israel." It is quite true that ancient warfare was in some respects a series of single encounters and not a combination of mass-movements. This was nowhere so strikingly the case as in the operations before Troy. Yet even here, as in the encounter with Thersites, the necessity of discipline was clear and imperative and the maintenance of it was the first duty of a good chief. The one obvious military offense is, of course, disobedience of orders, but the essence of military discipline is that any act which seems to threaten the authority of the

commander or the safety of the host, is punishable at once, and that no complete list of such acts can be made up in advance. The question of punishability must depend on the circumstances. The same acts committed by a different person at a different time may be a very different act from the point of view of discipline. The determination that the act is an offense and, that it needs immediate suppression is necessarily discretionary and must remain so.

Within the host, consequently, conflicts between individuals had a different aspect from that of conflicts between individuals inside the city. If two men quarrel in the city they had to make it up with the aid of their friends and kinsmen, or the quarrel continued until one of the two was killed or frightened into acquiescence. Even when the rest of the community decided to interfere, they generally did so by providing a tribunal of composition or of security against an undue demand for composition. The community—*i. e.*, the rest of the community—encouraged the making up of quarrels, and first facilitated and afterward compelled, the injured person to accept composition. But it was a private quarrel at all times, whether it resulted in a feud or was settled by reconciliation and property-payment. No one was particularly concerned with it except the immediate parties and their kin.

The community of course did take a part in the quarrel and did so in the way mentioned, by offering a method of settlement and later by prohibiting any other form of settlement, but even that was long after private wrangling in the field had been treated not as a mere quarrel between the wranglers but as an act imperilling the discipline of the army and as requiring drastic repression. It was a long while before it became apparent to those who governed the community that brawling within the walls was as bad as without them. And at home it was an essentially military authority, the *imperium* of the magistrate which, at first had to intervene directly.

Imperium is a Roman technical term. In its complete form, it is found only there. But it had elements that were common to all forms of magisterial authority. One of the most characteristic of these was the right of the magistrate to inflict immediate punishment for any act which was committed in his presence and which he deemed offensive or dangerous—the *ius coercendi*. To restrict abuse of this right, at Rome the intercession of the tribunes was devised, as well as the appeal to the people, the *provocatio*. This latter, we may remember, was an appeal to the armed host, the

centuriate comitia, the *exercitus urbanus*, the army in the city. The fact that such an appeal existed is a highly significant fact. The right of discipline on the part of the commander in and out of the city was discretionary, but it had limits. It was meant to restrain not a mere personal affront but one that affected the entire body of men and it must not be so arbitrary as to invite popular disapproval.

The position of the Greek magistrate toward the members of the city-state showed a number of variations but in all of them this residuary right of prompt animadversion in the case of obvious and immediate offenses, existed. The formidable Board of Eleven who constituted the Athenian police, sheriffs and executioners, were clearly rather ministers of the magistrate than independent officials. Their right of summarily imposing small fines was called *ἐπιβολή* [*epibolē*], a word that obviously meant, as it does in older literature, an unmistakable laying on of hands, *Zeus δὲ πρὸς χεῖρα βάλοι* [*Zeus d'epi cheira baloi*]. All magistrates as a matter of fact had such a right of *ἐπιβολή* [*epibolē*]. It was a method of maintaining order that we understand and have followed—or rather, it is hard to see what else persons faced with similar problems could do.

These persons so disciplined were in no sense thought of as dangerous things in themselves. There was no desire to remove them and no disposition to impute to them any ineradicable taint. Nor again was there any suggestion of vindicating the majesty of the law, and equally no notion of avenging the helpless victim on his oppressor. The action of the coercing magistrate was intended to frighten the person coerced so that he would not repeat his act and that no one else would imitate it. Very definitely it was a human will that was to be restrained.

This transfer of camp discipline to the general communal life has of course nothing surprising in it, if we recall that the camp life was at least as normal as the life within the city's walls, even when no campaign was toward. It is likely that the distinction of "at home" and "abroad," *domi* and *militiae*, was much less sharp than it often seems to us. The important thing is the fact that the notion of an act which is harmful because it is subversive of discipline, which is dangerous not in itself, but only if it is repeated or imitated, and which engages the moral responsibility of the actor—that such a notion in early Mediterranean society seems first to arise during the military occasions of communal life and not during the civil.

Evidently that is not the only conceivable origin. If we make

a huge leap in space and time, we find among the Crows of Montana and Wyoming an organization that created a need for discipline in a different setting. Acts of violence or depredation as between one man and another are purely private affairs in which at most the clans of the participants have an interest. There are no magistrates, the so-called "chiefs"—even the first chief—being merely warriors renowned for their prowess and wearing the insignia of their brave deeds. These chiefs are wholly without political power. But there was a "police society" which changed every year and whose chief activity was exhibited not in the military expeditions, but in the most important of communal operations, the buffalo-hunt. Military expeditions, raids or the resistance to raids, seem to have needed little conscious discipline. Far more than even the Homeric battles, they were a series of individual engagements. The success was in the main the success of the individual brave, his defeat or flight was his individual humiliation. Obviously concerted action of some sort was involved, but it apparently had not given occasion for the enforcement of rules. The Crow who acted quite without reference to his fellows, would probably have suffered for it by being captured or killed.

But the buffalo-hunt was a different matter. The tribal food supply—and indeed other commodities—depended on it. The great danger was premature action on the part of individuals which would tend to make the herd scatter or move elsewhere. It was at this point that the police society entered. If any Crow had killed a buffalo privately or if several were obviously arranging to do so, the society would either attempt to induce them to refrain, or failing that, would severely beat the recalcitrant or destroy his teepee.

The police society exercised a similar control during the course of the hunt. Breaches of discipline were rare then, but they were contemplated and apparently punished in the same fashion.

So we see the same situation in different forms in widely differing communities. Groups of individuals, responsible for the success of communal undertaking, found it necessary to repress any act which was dangerous in the sense indicated—not dangerous in its quality—but because, if it were repeated, the communal undertaking would fail, or be imperilled. Just what these dangerous actions were, was generally obvious enough and known in advance, but the responsible governors would feel free to deal with any act imperilling discipline, even if it were wholly unprecedented.

Out of this need for maintaining discipline, I think, most of

our concepts of crime and criminal law were originally developed. The community has definite communal interests, or, better far, there are communal officials who recognize certain communal interests. The officials may be selected in any one of a dozen different ways. They may be intermittent. They may exploit their position for their own advantage. But they are not in ancient contemplation, in any sense, either masters of the community or servants of it. There were theocratic states in which the people and the land were the property of the god and the King-priest was the living incarnation of the god. That was not so north of the Taurus Mountains. The magistrate who acted for the community exercised what was consciously felt to be the community's authority. He protected what, by some plausible pretense, could be considered the community's interest and his action could never be quite arbitrary, at any rate must never seem so.

It is for that reason that it is in such unmistakable communal activities, as war or the buffalo hunt, that we first find acts against the common good recognized to be such. Which is another way of saying that a concept of crime is established. And it is recognized just as clearly that the conduct which constitutes crime will vary with the circumstances. The typical anti-communal act is not rebellion or treason, but disorder. In other words, the crime of "disorderly conduct" which is the emergency classification of our existing criminal codes, has some pretension to be called the oldest of crimes.

Evidently, disorderly persons are undesirable citizens. They are surely undesirable to the magistrate—that is, to the war-leader, the *basileus*, the *praetor*, the *Herzog*. But they are equally undesirable to the great majority of their fellows, just so long the latter have any confidence in their leaders. When this confidence is gone, disorder ceases to be a crime, because order is no advantage. And it ceases equally to be a crime, when the danger incident to a disorganized group cannot be imagined to be imminent. There is rarely a distinction between slight and serious disorders. Men in crowds are prone to run on the "all or nothing" principle.

All the while, let us remember, other undesirable citizens are known. There are, first of all, the *piacula*, the sporadically occurring cases in which men are the centers of a social infection and must be removed. And, secondly, there are those persons who make life hard or impossible for other persons, but for persons who are in no sense representative of the community.

That these, too, are undesirable, even though their acts are private wrongs and not anti-communal, was established at least as early as the recognition of disciplinary misconduct in times of crisis. The system of social values which classes these acts as wrong, is, so far as we know, as old as any other element of social life. It shows itself in recognizing the right—or rather the duty—of vengeance as fundamental. The groups which were not affected, that is, the kinship groups to which neither the aggressor nor the aggrieved belonged, gave a moral support to an injured man who avenged himself. At a later stage, this moral support was conditioned on the observance of certain forms. Still later, popular feeling permitted the acceptance of a property fine and, finally, it allowed no other form of vengeance.

In one of the three societies mentioned, that of the Crows, this system was still in its early stages. Pressure was applied to induce the injured man to accept compensation, but it was in the last analysis his own decision. In Greece and Rome, our earliest sources show us stages beyond this. With a few exceptions, bound up with religious concepts, compensation for wrongs is practically compulsory.

But this system of enforcing composition, together with the instrumentalities that it created, laid a foundation for civil law, not for a penal or criminal law. And it is quite conceivable, as among the Crows, and, to a certain extent among the highly civilized peoples of China and India, that no criminal law would ever have developed from it or been fused with it. The only institution which, for a very long time, corresponded functionally to our system of crime and punishment, was that of magisterial or quasi-magisterial discipline, the *ius coercendi*.

We can almost put our fingers on a moment of time, or on a specific change in policy, which tended to fuse two of the three elements which I have been discussing. About the year 590 B. C., the Athenian Solon undertook to revise the constitution of his state. His political and economic reforms were extensive enough but there was one provision in his laws which is of special value for our purpose. He permitted any citizen to prosecute a wrongdoer instead of confining this privilege to the person wronged. That is to say, he has been regarded as having invested every wrongful act with a public interest, and made it by implication a wrong against the community.

We are not quite sure whether this was an innovation of Solon's

or whether something like it already prevailed elsewhere. It is rarely mentioned among ancient writers and may have seemed to them of slight importance. And, as is so often the case, we are not quite sure that it was a law of Solon, since so many laws were attributed to him. The extant fragments of his poems make no mention of it.

The immediate occasion for the enactment, if it was Solon's, was doubtless the growing power of an arrogant nobility of wealth which intimidated ordinary citizens and prevented the poorer and feebler of them from seeking redress, even for brutal injuries. Solon doubtless intended to make it possible for such a person to find a protector in the very class to which his enemy belonged. But he may, after all, have meant no more than to secure for a person wronged that vengeance or compensation to which by the social norms of his people, he was entitled. In this he may well have kept within the range of ideas of individual controversy. It was not a magistrate who undertook the redress of wrongs and there is no suggestion that the bolder or stronger outsider who protected the weaker plaintiff spoke for the people.

Curiously enough, the scheme was neither popular nor successful. It continued to be the person wronged, or at best some close personal friend, who appeared as accuser and if an outsider did so, he was open to the imputation of blackmail or demagoguery. But there were indubitable cases in which the accuser did speak for the whole people, the *δίκαι δημόσιαι* [*dikai demosiai*]. These were cases in which there was some element of treason, and they were principally acts which threatened the existing democratic constitution, but they also included other acts that savored of sacrilege.

That is to say, whether the step was taken by Solon or not, at some time before the fifth century, there was another way in which communal interests were guarded besides the immediate intervention of the magistrate to preserve a threatened discipline. Where the communal interest was unmistakable, the governing body in the state called on the assistance of all their sympathizers, not merely to denounce the transgressor, but to take many of the steps that would lead to his punishment.

Most of these "public cases" *δίκαι δημόσιαι* (*dikai demosiai*), had to do, as I have said, with the democratic constitution. They were really variants in one form or another of the charge of treason, *κατάλυσις τῆς δημοκρατίας* (*katalysis tes demokratias*) and corresponded very closely to the charge of "counter-revolutionary activities" of

the modern Soviet system. The creation of an indefinite number of public accusers to assist the magistrates could scarcely have occurred to anyone, if it had not been evident, not only that an attempt against the constitution was a matter of public concern, but that there were a considerable number of men who had every interest and every inclination to make such an attempt.

Why was this method employed instead of mere personal denunciation to the magistrate, followed by prompt arrest and punishment? Denunciation was a favorite device—although somewhat extra-legal—in the Roman Empire. During the Middle Ages it was systematized and quite generally used. The reason that a formal action was required in Athens and also officially at Rome seems to lie in the fact that in the regular methods of settling controversies between private citizens, a special form of trial had been developed and this form of trial seemed adequate for the one insuperable difficulty of all legal systems, that of determining what had happened when the facts were disputed. The coercing power of the magistrate at home and abroad was effective enough, if the culprit was caught in the act. If he was not caught, his guilt might come to seem a mere controversy between him and his accuser. Or at any rate, since there had long existed a machinery for determining whether a thing had happened or not, the same machinery was employed in this situation.

That made the only difference between a criminal and a civil trial—or as the Greeks and Romans would say—between a public and a private trial—lie in the representative character of the accuser or plaintiff. And to the extent that the private, disinterested accuser of the Solonic legislation is a representative—which is unfortunately somewhat doubtful—we have taken a step in the modern direction, that is, the direction of treating some private wrongs; those involving violence at all events, as something that threatened the public welfare.

If the threat to the general welfare was the same as that which military discipline has in view, we should say that it lay in the fact that the injury received by one member of the community weakened the entire community by just so much and put it at a disadvantage against its ever-present enemies. But that does not seem to have been the view taken. The provision of Solon was rationalized by a statement attributed to him, to the effect that that country is best governed in which every man deems himself injured, if any one is.

It strikes us as trite and commonplace enough and it soon be-

came something of a commonplace in ancient society, because we find it attributed to several different persons, but as a matter of fact it takes us into a new order of ideas. A psychological factor is involved. When almost every one feels himself wronged by an injury to any one, it is by a process of imaginatively identifying himself with the victim. This is a common enough thing to do, but is usually done in different degrees. The identification is rarely complete and the extent to which it takes place depends upon a great many factors of which a large number have to do with similarity in social position between the identifier and the injured person. But to the extent that it does take place at all, it inspires the desire to punish the wrong-doer that desire is prone to fancy itself a duty. There is a vicarious but perfectly real vindictiveness about it, which is in no sense felt as an improper emotion, since when we first meet it, vengeance is still a duty and always a defense.

That is different from the community's attitude towards a *piaculum*, and different from the attitude of a commanding officer to a breach of discipline. It will be communal only if all persons actually feel the wrong as one to themselves, and, since that will never quite be the case, the extent to which the community is really concerned in it will vary considerably. And it is apparent that the welfare of the community will be much more engaged in the first of these situations in which a dangerous or tabooed person is to be removed than in the last, in which the highly subjective factor of identification must enter.

Vindictiveness as an emotion has many aspects. It is and has been, almost everywhere and at all times, a constant factor in human relations. It is not too much to say that the concept of justice grew out of it, since justice seemed at one time to be exhausted in determining the extent to which vindictiveness might properly go. It measured the extent of the retaliation which vengeance implies, but it was predicated upon the propriety and indeed upon the duty of vengeance. It is still the largest component of the notion of justice in the minds of most persons, civilized and uncivilized, educated or not. Discussion of what is to be done with those who commit outrageous acts even when carried on in University faculties generally discloses a raw vindictiveness at bottom, just as a similar vindictiveness is more frankly admitted among less trained minds.

We must recall that this vindictiveness originated in the controversies that we should call civil and which ancient law called

private, and that its transfer to larger groups was the result merely of the desire to put this duty or right of vengeance within the reach of every citizen, even the poorest and meanest. It is certainly not at once assimilated to the already existing concept of a wrong done to the state by a defiance of the state's discipline. We do not hear, even in philosophic discussion of this question, the idea advanced that a wrong by one man to another is a contempt of the law or of a magistrate. Even in the dialogue between Socrates and the Laws in the *Crito*, no such position is taken. The wrong which Socrates refuses to do is a direct violation of magisterial command. He declares he will not save his life by a defiance of such a command. That is sufficiently lofty ground both for his time and ours, but it is not at all the idea we regard as fundamental, the idea, to-wit, that some wrongful acts though done to private individuals are really done to the community.

The process by which the three notions indicated—*piaculum*, discipline, sympathetic vindictiveness—were fused into our concept of crime was facilitated by the existence of a special type of judicial machinery. There was an existing method of determining whether disputed events had happened. That method had grown up in connection with private or civil controversies. It was merely extended to include controversies in which the state's authority was engaged, if a public official was the accuser, or in which a large number of the community might be interested because any citizen might be an accuser. Since this machinery was complicated and hard to set in motion, a system or routine of doing so was created and this system had a large number of ritualistic elements in it. All such systems tend to codify themselves, whether in writing or in oral tradition. Men must know how and when the machinery can be used and know it in advance. Those situations in which it can be used will constitute a criminal code, if the question to be determined is whether communal discipline has been violated or if the question is one which any member of the community can raise by virtue of belonging to the community. But the fact that such a code, such a list of situations exists does not exhaust the occasions in which communal discipline will be upheld by punishment, when the magistrate will intervene so to speak on his own, by virtue of his residual authority.

But the idea of such a list of occasions does foreshadow what in the United States we have made a fundamental principle of criminal law and taken into our constitution, the rejection of *ex*

post facto punishment, our constitutional form of the maxim of the Enlightenment, *nulla poena sine lege*. It merely foreshadows it, of course, because the requirement that all punishment must be known in advance of the act to be punished contradicts somewhat the notion of magisterial intervention in the interests of discipline. And this notion, let us remember, is the essence of crime, in its earliest recognizable form.

As has been pointed out there is another factor which begins to play a part in this connection, and that is, the condemnation of the criminal act on the part of those who give the community its moral tone. A criminal may be a dangerous recalcitrant, he may be an arrogant despoiler of the weak, he may be a thing accursed, but is not because of these facts necessarily thought of as an immoral man. The moral ideals of the community, the standards of conduct of a good man, are in the hands of the moral leaders of the community, however they may be constituted. And in many places these moral leaders are able to get acquiescence in their standards, even if they do not get conformity. Evidently these ideals, by the mere fact that they are ideals, are not likely to be the subject of enforcement either by the magistrates, or by the judicial machinery for the settlement of controversies, but they will color the treatment which both magistrates and judges will give to their proper functions.

However, if moral ideals do not directly engage the attention of state functionaries, moralists did concern themselves with state activities. It took generations for the notion to establish itself legally that a great many persons besides an injured man ought to interest themselves in his injury. Moralists had doubtless done so long before. But that a breach of communal discipline was a moral wrong was not so clear, even if the Platonic Socrates in the passage cited is strongly of the opinion that it is. It is ordinarily quite conceivable that the moral ideal and the communal discipline will come into conflict. Indeed the "higher law" is a concept well known to Sophocles. But in the main obedience to those in authority, subordination to communal purposes, is part of the duty of a good man.

The situation is complicated when religion assumes the task of maintaining moral ideals with which originally religion had nothing whatever to do. A number of East-Mediterranean communities were organized more or less as theocracies. The Old Testament records were made chiefly by men who sought to estab-

lish a theocracy in their own community. They never quite succeeded, but the post-biblical Jewish community settled ultimately into a theoretical theocracy, in that the chief priest was, by virtue almost of his office, also the secular ruler. It is out of this community and of communities established by it, that the Christian congregations arose. And when in 372 A.D., the grandiose and maleficent attempt was made to identify the Roman super-state with the community of the faithful, there began to enter into the texture of the state machinery a system of moral ideals which had been sanctioned by the only really fundamental authority in the combined church state.

Long afterwards the movement which historians call Caesaropapism was on the point of creating in the Western half of the old Roman empire a super-state in which moral wickedness, breach of social discipline, private injury and religious taboo were similarly and indiscriminately dealt with by the same governmental agency. It was never quite carried out anywhere and soon collapsed completely, but its terminology and some of its ideas survived into later discussion and have obscured and sometimes seriously hampered the development of a scientific attitude toward crime.

The theocratic principle has made current and common the idea which gives this paper its title, the idea, to-wit, that all whom the social machinery disciplines or constrains, are in the same degree enemies of society. That concept, we may remember, was at first restricted to those who bore a taint of some sort and as often as not, a taint for which they had no moral responsibility. The later Christian centuries took from the triumphant church state of the first Renaissance—*i. e.*, that of the eleventh and later centuries—the doctrine that moral responsibility is implicit in the fact of the taboo. The swindler, the usurer, the robber, the murderer, the brutal assailant, the witch, the heretic, the incurable demoniac, the outlaw, the rebellious vassal, all could be grouped within the formula of the old indictment—"not having the fear of God before his eyes, but being moved thereunto by the instigation of the Devil." Evidently removal of the tainted person was as much a necessity in medieval Europe as it was in ancient communities, but the Christian system allowed more general and extensive purgations by which the taint could be removed, than had been known before. None the less, they recognized that the taint was sometimes ineradicable, or that the Divine ruler was inexorably offended. In

these cases as we know, the only purge was often the drastic one of fire or the sword.

But, while the clearest examples of such tainted persons were in the Middle Ages, as at all times, associated with religious taboos, the judicial side of state activity had almost independently developed a *piaculum* of its own. The task of determining whether events had or had not taken place, devolved on a much more primitive machinery than that which had existed in the ancient Mediterranean communities, but such as it was, its results were as definite as any other. If its verdict was adverse, the person affected usually became an outlaw, *utlagatus*, one whose life had no value, a wolf, a *caput lupinum*. One who became *utlagatus*, had lost his *laga*, which is the sum of his civic and social relationship. Just so, in Athens and elsewhere, many centuries earlier a man was *ἄτιμος* [atimos], that is, his civic status had no *τίμη* [timē], no calculable value. The outlaw had no longer any kinsmen who were responsible for him, who were bound to act as his compurgators, and were entitled to demand *wergeld* for him. He differed, however, from a *piaculum* in that he was neither accursed nor unclean, but, as can be seen by the ancient term of "wolf," he was most emphatically an enemy of society.

Outlawry was a ready method of dealing with those who had improperly undertaken the ritual of court procedure or who had refused to submit themselves to it. But there was no diminution of the magisterial power to deal drastically and immediately with crimes committed in his presence. The thief, hand-having or back-bearing, was incontinently hanged, and minor punishments of mutilation, fines, or flogging were administered by various grades of officials. All these punishments had the purpose which disciplinary acts generally have. They were meant to deter others from similar breaches of discipline and care was taken that the punishment was given as full publicity as possible.

In England, a number of special factors created a classification of instances in which magistrates might intervene. The most prominent of these factors was the multiplication of parallel courts and parallel offices who competed actively for jurisdiction and so required sharp delimitation of powers. It was not the maintenance of the principle that all punishable acts should be listed but merely the need of justifying the interposition of a particular court or a particular official.

On the continent, on the other hand no such conflicts or com-

petitions between courts showed themselves. Those who possessed the authority to punish made something of a point of reserving a large and undefined field in which an act would be dealt with as a crime in accordance with its circumstances or its effects. This gave rise to the celebrated formula of "reasons of state," on the basis of which royal tribunals arrested and condemned men for acts which had never been before that classified as crimes.

In England, too, the prerogative court of the Star Chamber during the 16th and the first part of the 17th century used "reasons of state" for its action and it is this element of arbitrariness—as it seemed to the victims—and not its so-called secrecy which must be taken to be the essence of Star-chamber proceedings.

Against these "reasons of state," the humanitarian movement of the Enlightenment used all its romantic eloquence and all its moral fervor. It is the burden of Beccaria, Filangieri, Montesquieu, and Feuerbach, and it seemed an obvious and clear dictate of reason and justice. The principle of *Nulla poena sine lege* called for a Code, and this idea the Natural Law movement which had been absorbed into the Enlightenment particularly fostered. The notion of a crime is thereby standardized. Whether the criminal act is a violation of a taboo or a breach of discipline or a personal wrong in which many persons identify themselves with the victim, or a disregard of a moral ideal, the essence is declared as to be that the penal consequences of the act must be known in advance or else they may not be inflicted.

If this idea is generally accepted, the definition of a crime is a very simple thing. It is the doing of any act specifically prohibited in the Penal Code. Nothing else is a crime and all the acts so designated are equally crimes.

The Codifying movement which had its roots in humanitarianism carried its humanitarian impulse still further. Not only must the punishable act be known in advance but the exact extent of **the punishment**. This was still within the range of ideas which are symbolized in the Code-formula. But to this was added an urgent desire to lighten punishment in the name of humanity and this movement ran somewhat counter to the purpose of announced penalties.

It was justified by a natural law doctrine which sought an exact equivalence or, an almost exact equivalence, between certain acts and the penalty prescribed for them. The theft of a six-penny toy seemed obviously less than death and therefore death could

not reasonably be inflicted. While no definite scale was attempted, there was undoubtedly prevalent the notion that reason and investigation would disclose the appropriate penalty in every case.

Evidently reason will do nothing of the kind. The idea of fixed and suitable penalties was really a rationalization of the principle of talion which had never ceased to be the foundation of popular ideas of justice. But in its day, the demand for fixed and appropriate penalties was an immense improvement on the abuses to which "reasons of state" had led.

As far as the famous principle is concerned, it is evident that just like "reason of state" it is based on the notion of deterrence. It is in fact predicated upon communal discipline just as much as the latter idea is, and both are derived from the *ius coercendi*, the right of restraint, which seemed to be one of the essential elements of magistracy. But the prescription of penalties was meant as a check on the magistrate and indicated a lack of confidence in the authority of princes as a means of securing a good life. In a sense, the newer school looked forward to a theory which makes governors unnecessary because government could be carried on automatically by means of a rational law, or rather by means of Reason embodied in law. At any rate they assumed that a prescribed rational law would ultimately turn authoritarian magistrates into mere ministerial functionaries. We may say at once that the idea of a completely prescribed code has not worked. Almost every nation has a penal Code, even the English speaking countries which in the main have successfully resisted Codes. But everywhere Codes must be eked out, first, by a system of interpretation that adjusts the Code to popular needs and administrative policies, secondly by a residual group of offenses capable of indefinite extension, like disorderly conduct, offenses against public morals and the like, and, finally, by a subsidiary popular justice, whether it takes the form of "wild justice" like lynching, or becomes so strong an ostracism as to be tantamount to expulsion.

In other words, the discretionary element in the magisterial *ius coercendi*, can never be completely eliminated and it will be more and more extended in times of crisis, *i. e.*, in times when a communal discipline seems more and more important.

Each of the four elements which have been fused into our notion of the criminal, the "enemy of society," has its own emotional implications. A *piaculum* is something from which people might shrink in fear and horror, but which could none the less en-

list a real compassion and respect. The standard example is the incestuous parricide, Oedipus, who becomes almost the supremely tragic figure of Greek tragedy. We shall note a modern development of the piacular attitude in which sometimes excessive tenderness to criminals is combined with a theory which would justify a ruthless extermination.

The self-willed individualist who imperils the success of a group faced with a common danger, excites anger rather than horror or fear or pity. And this anger can be fierce and cruel enough even when the crisis is remote or imaginary, as all history shows us. I do not need to cite specific illustrations of the wave of unreasoning rage which sweeps over us in the presence of a person who so much as shakes his fist stealthily at the symbols of our social discipline.

Again, our own wrongs or those from which we can imagine ourselves suffering, stir in us a vindictiveness which by a natural process usually seeks far more than the exact equivalence of our loss. If we cannot imagine ourselves suffering from these acts, our sympathies atrophy and in practice the wrong ceases to be a crime. The general apathy with which lynching or the third degree or unjust arrest is treated by most white and propertied Americans is due largely to the unjustified assumption that such things, even if wrong, could not very well happen to them. The people who suffer under them are persons of a different class with whom we find it difficult to identify ourselves.

But finally, to the extent that we have accepted a moral scale, with or without religious sanction, we are committed to condemning certain acts which are at the bottom of the scale. Our condemnation varies from extreme indignation to a mild disapproval, but it is a real indignation and disapproval, not a hypocritical pretense. And this moral condemnation is not confined to the "better minds" among us. It forms a real part even of the more direct and explosive emotions of which the other attitudes to crime are compounded, and it ranges from the rending of the robe and the crying of "Woe unto the wicked: it shall be ill with him," to an earnest, even an enthusiastic desire to do something for the wicked. The theocratic state which almost consolidated Western Europe in the thirteenth century may be said to have given the fusion of our categories a renewed life and we still find ourselves using the terms which have a real meaning only under the conditions of such a theocratic system; but even though the categories are fused, the emotions incident to them are kept apart. However composite our idea of crime

is, our attitude toward it is likely to take in turn the form that belongs to one or another of the elements which I have discussed. It is sometimes a frenzied eagerness to be rid, no matter how, of the *piaculum*, and sometimes a mere lust for vengeance, justified by a real or vividly imagined sense of being wronged. Those who think of themselves as members of a governing class—or as potential members of such a class—frequently enough fancy themselves in the role of repressing disorder and maintaining discipline. The unfortunate thing is that we are likely enough to shift from one attitude to another in discussing the matter, without advantage to clearness in our own minds or in others.

The attitude which bases itself exclusively on the moral ideal and the obvious failure of most acts otherwise called criminal to conform to it, is exceptional, but it is often enough the attitude of men of authority and importance, and at certain times is semi-officially recognized. Almost any system of rehabilitation of criminals deals with them as persons in whom an understanding of moral ideals can be implanted and who can be made to regulate their conduct by it.

It is precisely against this attitude—which has some claim to be regarded as ethically higher or better or more developed than the others—that the *piacular* attitude finds itself chiefly in conflict. Whether consciously or not it thinks of criminals as noisome things, taboos, accursed, and doubly so because it regards them as responsible for their own condition. We have really an amalgam of contradictory elements, but logic is of course irrelevant in such matters. Those to whom the criminal is something to get rid of, like a monstrous birth, go on the assumption that there is no way in which he can be purged or made clean or changed. It is curious that the Italian school on exactly that presupposition is the one which more than any other has worked in the direction of rehabilitation. It is another one of many examples that practical policies do not depend on scientific premises, but are the results of quite different considerations. The *uomo delinquente* of the so-called “positive” school is undoubtedly a *piaculum* even though the positivists are more tender about him than their ancient forerunners were.

Evidently in our own point of view we have shifted our emphasis. We should like more than anything else to prevent the multiplication of future criminals. As far as our handling of existing criminals is concerned, we have not really advanced in theory

or in practice beyond the methods in vogue ever since the problems raised by criminals were presented to responsible social governors. In one sense, humanitarianism has made our methods even less adequate for the particular purpose of rendering these particular social enemies—the actual, not the potential criminal—harmless in the future. But we are at least conscious of the fact that the problem of prevention is far more serious than the problem of treatment, and we are aware also that the attempt to solve that problem by the mere automatic working of punishment, whether that punishment is announced in advance or not, has never been successful, except in a slight degree.

Of course, there are some situations which it is scarcely possible to meet in more than one way. If it is true that some members of the community are, in fact, *piacula*, that is, are so dangerous to us that there is no living with them, plainly we must either kill them, expel them or permanently segregate them, just as soon as we are assured, as ancient societies were and as the positivists declare they are, that this dangerous quality is ineradicable.

Outside of the school of Lombroso, the idea of born criminals, has gained a strong foothold. I suppose there is no one who has not heard of the so-called "Jukes" family, that group of criminals, degenerates and imbeciles, all descended from one feeble-minded servant girl. If we assume this and other instances are real examples of the inheritance of criminal tendencies, we have a real *piaculum* before us. We must get rid of them and we could do so by killing them off before they reproduce or by sterilizing them. The great difficulty, of course, is that in doing so we should be merely repeating the action of ancient society in drowning a misshapen child. We have no assurance that new Jukes families will not come into being, because we have only the dimmest understanding of the factors that create Jukes' and how—or whether—they can be eliminated. Until we know more, our treatment of the *piaculum* will involve the same repulsion that ancient people felt, and, we may add, it will generally be less humane because it will be less tinged with compassion. We have, as I have said, developed the habit of running through the gamut of the various anti-criminal emotions in relation to any one criminal group, and we use any one of our attitudes to justify any type of treatment.

Similarly we shall make no real advance in the treatment of other types of crime, until we ask in regard to them what makes them possible or frequent. Why are some persons disorderly, *i. e.*,

why do they infringe our disciplinary measures? Why do individuals prey on each other? Why do they fail to realize the higher moral ideals, while accepting them as ideals? Are there answers to these questions?

The presence of criminals of some sort was taken by ancient societies as an unescapable fact. Even in ideal commonwealths, *piacula* were possible, although the method of dealing with them might be to escort them courteously and deferentially to the borders of the country as the Platonic guardians would escort their poets. It is only in regard to breaches of discipline that any reference is made to the conditions that cause them. Generally these conditions seemed to Greeks and Romans to be two, overweening self-confidence, *hybris*—the Greeks had a word for rugged individualism—and a desire for change, for which the Romans did not have a word but a paraphrase, “the eagerness for something new,” *studium rerum novarum*.

That is to say, to Greeks and Romans, the resistance of an individual to the representatives of the state, was generally taken to be a psychological matter. The men who resisted had an unsatisfied will to power or were inordinately egocentric or in some other way, were disturbed in their psyche. It seemed wholly a matter of personality.

But when it came to private wrongs, while *hybris* plays a part here, much the greater part was obviously played by avarice, the stripping of a weaker man to enrich a stronger, the joining of house to house, the laying of field to field, till there was no place. When a private wrong became a public crime in the way that has been set forth, its motive did not change. It was still the lust of gain, the *auri sacra fames*.

As far as the realization of moral ideals is concerned, the ancient answer varied. There were schools, the oft cited schools of Plato and Aristotle, to whom the attainment of the higher moral ideals was a privilege to which only an elite could aspire. The general run of mankind had, to be sure, a virtue which, each man in his own category, could completely realize, but it was a virtue of an admittedly inferior character. The more popular schools, Cynic and Stoic and in theory at least Epicurean and Cyrenaic, set one and the same standard for all men and declared that the highest one was possible of attainment by anybody.

We have taken over through Christianity a large part of the most characteristic rules of Stoic ethics and most of our moralists

are committed to the idea that moral excellence may be obtained by any person, if he is properly taught. A morally excellent person does not commit crimes and is not an enemy of society. The problem reduces itself then to one of teaching. All we have to do is to discover how moral excellence is to be taught. Perhaps, the project method might be employed. Or perhaps the method which has superseded the project method in popularity among educators. Unfortunately these methods change rather frequently.

If we discard Christian and Stoic theory, as most upper-class Christians do in practice, our problem is frightfully complicated, because the fact that moral standards are arbitrary and relative is almost a common-place. We may wish to modify that statement somewhat, but whether we do or not, we find ourselves in the midst of a philosophic controversy that, as far as I know, began with Herodotus and probably will not be ended by the next published Hibbert lectures. If we are not altogether sure what all the implications of our moral standards are, we cannot quite tell what we wish our immoral man to get rid of in order to make him cease being an enemy of society, and we obviously cannot tell him how he is to do so. It may be that we shall have to leave it for many years, exactly where it has been left ever since moral standards were recognized. Those who do not conform to them are looked on with disapproval by those who do, and if the former are not sensitive to disapproval, there is little that we have found it possible to do in the matter.

That leaves us only the predatory and the disciplinary types of crime. The motives, as ancient society declared were economic and psychologic. We are a little inclined to use the economic category for both. After all, one of the chief instrumentalities of exhibiting and exercising an inordinately developed ego is in the accumulation, the display and even the destruction of property. If this were made impossible the number of offenses both against private persons and public order, would be much reduced. Marxian determinists declare it would be quite eliminated. Property is acquired chiefly for power and power is exercised chiefly to get more property, the whole forming the most vicious of all circles.

Now a society in which men had neither an inordinate will to power nor an excessive desire for gain would be a society lacking the principal motives for the two kinds of crime most in our minds. It would seem to be a very good society indeed. Such a society can be imagined. Can it ever be realized? It seems unescapable

logically, that if a type of crime is dependent on the lust for property, it must disappear wherever property is wholly abolished, or where it is so far abolished that that which is left is not worth desiring. It is frequently stated that this has taken place in Soviet Russia. How has this fact affected crime in that country?

Mr. Walter Duranty, the Russian correspondent of the *New York Times*, in an interesting cable to his paper in the issue of September 10, 1933, finds that the most profitable kind of crime, organized crime, does not in fact exist in Moscow where, if anywhere, it might well be found. The *New York Times* is not a radical organ and Mr. Duranty is not a Communist. He has, to be sure, been called "sympathetic" to the Soviets, whatever that term implies. But it is conceded even by those who are not sympathetic that he does not knowingly misrepresent what he sees nor misstate the source of his views. We may therefore take his statements at their face value with some confidence.

What is it that Mr. Duranty finds non-existent? He says that there is no "organized crime in Moscow, no commercialized vice, no racketeering nor kidnapping, no speakeasies, gambling hells nor brothels." For this he gives two reasons. The first is that these types of crime are entered into only if money can be made on a large scale. But money on a large scale cannot be made in Russia. First of all, one cannot buy very much with money and secondly, the mere possession of money which does not come from the government at once expose a man to suspicion. That is one reason. The second reason is that all these offenses—offenses implying combination, organization and planning—are treated as anti-social and come within the jurisdiction of the Ogpu, which acts sharply, immediately and drastically.

In giving these two explanations, Mr. Duranty follows established forms. Nothing delights an American so much as the opportunity to refer some desirable situation to a police that arrests, imprisons, executes, without legal forms and without the intervention of "slick lawyers." Apparently, Anglo Saxon tradition in its modern form vehemently repudiates the Bill of Rights and the struggles which established it. It need only be noticed, however, that if there really is no "percentage" in organized crime, the admirable and effective Ogpu, which so charms the imaginations of authentic sons of the English and American Revolutions, has no occasion whatever to exercise its drastic powers. Mr. Duranty

need not have troubled us with his second explanation, if his first one is accurately stated.

But crimes—in the sense of wrongs to individuals—are often committed for so small a percentage or without percentage, out of sheer brutality or sadism, that the virtual abolition of the profit motive will not altogether eliminate crime. Are crimes committed in Moscow in which there is practically no profit? Our informants tell us that they do occur and when they do, those who commit them are not classified as criminals but as “victims of economic environment.” They are imprisoned in a prison colony where—I am quoting Mr. Duranty verbatim—“every one lives in perfect freedom without bars, cells, warders or restrictions, save that they must spend the night on the premises. They have their own homes, workshops, factories, farms and kitchen, can marry and divorce and can go to Moscow as they please. They must work, but they receive union wages. . . . They can escape at will, but they do not escape.” Generally the period of residence—one cannot call it imprisonment—is five years.

Mr. Duranty does not say that he has seen this colony, and I suspect he would have said so, if he had seen it, but I am very willing to believe that it exists. One might almost say that if the conditions are as idyllic as here described, men might commit crimes merely for the purpose of getting into this prison colony. Still they do not seem to do so, since the colony is very small.

It does seem to be a fact that if there is little to be gained by committing outrages against other persons, very few people will commit them, and those few can be treated by a system that is in effect a form of hospitalization. This hospitalization is also used for the placid criminals. The Soviets are nothing if not positivists and they are quite prepared to admit that there are men of the type of Lombroso's *uomo delinquente*, a sort of sub-human anthropoid, who could not be turned into a real member of society even by life in a prison colony. What is done with them, according to the available accounts we have of Soviet criminal practice, is similar to the disposition of the other type of criminals. They are victims in an even more marked sense than the others, although they cannot be called victims of economic environment. In theory—I have had no access to more detailed information—their segregation is permanent.

But if these two types of criminals either do not need, or do not receive, much attention, a different type of criminal is very

much in the eye of the government. He is the person guilty of "counter-revolutionary" activities.

When we recall that a racketeer or kidnapper—that is, a member of a group organized to commit deprivations for profit—is a counter-revolutionary, that the same is true of a saboteur, of a spy, of a speculator, we see at once what we have to deal with and what the range of ideas is in which we are moving. These are offenses against the governmental discipline, and just as in the days when such offenses were first recognized and dealt with, the essential characteristic of the manner of handling them is that it is discretionary. Any act is a crime which may have counter-revolutionary implications and while the majority of these acts are capable of being so classified and announced, not all are of that character.

Whether the multiplication of such crimes is merely a mark of the provisional character of the present organization, or of its transitional character, we cannot be quite sure, but it is clear that the elimination of the profit motive will at most eliminate a certain type of crime. It will not eliminate that type which consists in an attempt to breach the social discipline, as a mutinous soldier might breach it or a Crow Indian who scattered the buffalo herd before the communal hunt. Evidently the tighter the organization, the more complete the frames and categories of the society, the more thoroughly it is socially organized, the more numerous are likely to be the attempts to break through the framework. This is possible through the sheer movements of curiosity, restlessness or recalcitrance that seem to be part of human behavior under all conditions. It is not necessary that the rewards should be high or that the attempted breaches be serious. A counter-revolutionary act may be the leading of a hostile army to overthrow the existing regime. When that danger is definitely removed, it may be the expression of an opinion which is inconsistent with the opinions officially declared to embody the spirit of the regime. If this is the most serious counter-revolutionary act which is in fact committed, it will be the most serious crime on the calendar, and will seem to need the most effective repression. When the essence of crime is a relation, there must be crimes as long as there are terms to relate.

In the disciplinary crime, therefore, new forms of social organization will merely shift the place of crime in the scheme of organization, but cannot prevent it from having a place. But even the crime which consists of a wrong done by one individual to another, will not be surely eliminated when the particular types of

wrong now punished will have disappeared with the profit motive. These wrongs are, let us remember, acts like robbery, rape, fraud, murder, assault. There were societies which had not arrived at regarding these acts as sufficiently engaging the general sympathy to make them crimes, but which did regard the evil eye and evil gesture as such acts. It is not unlikely that in societies in which violent depredations no longer occur, the evil speech or the evil will may take on a new and socially more important character. They may rouse the vicarious vindictiveness we now apply to those violent outrages from which we can imagine ourselves suffering, and we are likely to repeat the process which, about Solon's time, led to the creation of a communal interest in what had been before, a man's private affair.

In other words, the process of living together in communities carries as one of its implications the fact that there will be varying degrees of fitness for common life in the members of the community. These degrees can be arranged in a series. We may take the last few terms of this series, if we like, and classify those who are included in them, as enemies of our society, as criminals, as *piacula*, as rebels, as wicked men, and our problem in respect of them will be simply that of getting rid of them. Logically and mathematically, it will always be the same problem, because if we eliminate an existing extreme, it means merely that there is a new extreme. There must always be a last term in every series.

But logic and mathematics are not the whole of living experience. In experience, quantitative differences are often qualitative. Our existing society has an enormous range of socially undesirable persons, a range that runs from homicidal maniacs to persons who eat peas with their knives. Evidently we can reduce this range considerably. There is no logical reason, however, to suppose that we shall really be more comfortable when all classes of socially undesirable persons are eliminated except those who by our present scale of values, are guilty of nothing worse than bad manners.

Still it might be worth trying. At any rate, we have a long way to go before we shall be able to find out whether the statement is true or not.