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Criminal Responsibility

By SIDNEY J. KAPLAN*

THE SOCIOLOGIST is concerned with personal responsibility insofar as (1) it relates to the explanation of human behavior and (2) as it has implications for criminal adjudication and punishment.

With regard to understanding behavior, the sociologist assumes that behavior has a deterministic basis.¹ That is, behavior, criminal or otherwise, is derived from a host of factors which have previously impinged and which continue to impinge upon the individual. In short, just as causality is by modern science imputed to every "natural" phenomenon, so also is this same causality of action imputed by the sociologist to human behavior. Upon this assumption is predicated the sociologist's investigation of his subjects. This point of view, it may be added, is held currently by the modern behavioral sciences.

Put in this gross fashion the nation of determinism is something of a contemporary commonplace. Developments in the behavioral sciences in the past one hundred years have made for a general acknowledgement of determinism. But once the conceptual leap is made from determinism to responsibility in human behavior the problem seems to be much less innocuous. Since, it is argued, behavior is determined by antecedent conditions, in what sense is the individual responsible for his actions? If an individual commits a crime, is this not the result of his biological makeup and socialization which engendered in him desires, attitudes, motives and other reaction tendencies which inevitably gave rise to the crime? Similarly with regard to the impetus to any behavior be that behavior adjudged praiseworthy, blameworthy, or neutral by society.

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¹ The viewpoint offered here is essentially that of the so-called "positive school." See Ferri, *Criminal Sociology* pt. 7 (1917). A similar "orthodox" point of view may be found in Waller, *A Deterministic View of Criminal Responsibility*, 20 *J. Crim. L., C. & P. S.* 88 (1929). See also, Hospers, *Free Will and Psychoanalysis in Readings in Ethical Theory* 560 (Sellers and Hospers eds. 1952).

Now if an individual is not responsible for his behavior in what sense can society blame him, and secondly what justification would there be for exacting punishment of a person who acts out his "peculiar nature"? Logically, rooted as he is in determinism, the sociologist must necessarily question the appropriateness of such concepts as responsibility, blame, and punishment. And this holds true not only for the very young and the "insane" categories specifically recognized by the law as lacking responsibility, but of all people. The premise of determinism must necessarily lead to this conclusion, despite conventional attitudes to the contrary.

Having rejected the concepts of responsibility, blame, and punishment, has not the sociologist defeated the avowed purpose of the law? In other words, is not the assumption of human responsibility, if questionable philosophically, nonetheless a necessary ingredient of social control? Moreover, what of the entire structure of criminal law? Is it not naive or even inane to reject the corpus of criminal law which, based upon centuries of accumulated human wisdom, embodies hard won criteria which safeguard not only society but the individual as well?

"Simplistic" as it may first appear, the sociologist nevertheless asserts just that. Moreover, he questions the objection that personal responsibility is necessary in order to assure social control. While he may reject personal responsibility he substitutes in its stead what may be called "social accountability."² In short, just as the community reserves the right to protect itself from any danger, so too, society through its legal system takes such steps as would insure its protection and at the same time preserve such rights as may be ascribed to the individual. The individual, in other words, even though not responsible for his acts is nonetheless held accountable for them, his disposition being made by such tribunal as is legally constituted for that purpose.³

While the above framework of determinism in an abstract sense may be logically acceptable, there still remains a tremendous gap between the broad framework and its translation into workable legal formulae. If for no other reason than this, traditional

² Ferri, *id.* at 352 et. sec. See also Wood and Waite, *Crime and Its Treatment* 484 (1941).

³ For consideration of the several forms such a tribunal might take, see Weihofen, *Mental Disorder As a Criminal Defense* c. 10 (1954).

jurisprudence would find it to be not only "mere nonsense but objectionable nonsense."⁴

But even though at first appraisal this transparently gross framework may seem impracticable legally, such an overarching viewpoint, philosophically persuasive, and empirically founded upon sociology, psychology, and particularly psychiatry, nevertheless can serve as a yardstick for the detailed legal interpretations, modifications, and implementations that a rapidly changing society would seem to entail. That the deterministic viewpoint, often in the guise of humanitarianism and practicality, has been incorporated in the law is clear. Probation, parole, the juvenile court, the occasionally broad interpretation of the M'Naghten Rules, the doctrines of irresistible impulse and diminished responsibility and the recent *Durham* case indicate this to be so.⁵ Moreover, the continual psychiatric-legal ferment of recent decades seems to bespeak an increasing acknowledgement of determinism.⁶

What is actually found in law is a marriage of responsibility and determinism which alliance, at least to some philosophers and sociologists, seems quite illegitimate, although from the legal point of view a marriage of convenience whose empirical consequences have much to commend it.⁷ To which the sociologist can reply, "Yes, to the extent that determinism is incorporated in the law, to that extent is the marriage to be commended. To the extent that responsibility and its associated doctrines are retained is there much to dispute with regard to convenience, practicality, and other pragmatic justifications."

⁴ Ascribing this hypothetical reaction to jurisprudence may be entirely unwarranted. Determinism has already been incorporated in the law—with concrete formulae—particularly for young offenders. *Ibid.*

⁵ See Sobeloff, *Insanity and the Criminal Law: from M'Naghten to Durham to Beyond* 41 A.B.A.J. 793 (1955).

⁶ See Wechsler, *The American Law Institute: Some Observations of Its Model Penal Code* 42 A.B.A.J. 321 (1956).

⁷ Waller refers to the alliance of determinism and personal responsibility as "a hodgepodge, a melange, a collection of ill-assorted notions which are given coherence by wishful thinking." *Op. cit. supra* at 91. A more temperate expression of the same criticism may be found in Ross, *Foundations of Ethics* c. 10 (1939). Says Ross, "A philosophical genius may some day arise who will succeed in reconciling our natural thought about freedom and responsibility with the acceptance of the laws of causality; but I admit that no existing discussions seem to be very successful in doing so." p. 251. On the other hand an avowed reconciliation may be found in Schlick, *Problems of Ethics* c. 7 (1939).

Responsibility and Punishment

If determinism is ascribed to the criminal act then what basis would society have for punishing a person? "That freedom of the will is essential to criminal responsibility is a fundamental proposition recognized by every civilized penal system in the world. There cannot be, and there is not, in any locality or age a law punishing men for what they cannot avoid."⁸

The rationale for imputing responsibility is quite clear. The law finds it necessary to charge liability or responsibility for a crime in order that punishment may be applied. And why is punishment invoked?

On the one hand punishment functions as retribution. It serves to get back at the "perverse free will" and by exacting some kind of pain affords society a sense of justice done. In fact, it may be said that our legal code, influenced as it has been by theological doctrine, is permeated by retribution.⁹ On the other hand, a second function is also attached to punishment. It is maintained that punishment by representing a threat to potential criminals would serve as a deterrent to prevent additional crime. The basis for assuming the efficacy of punishment (as a deterrent) is the doctrine of the freedom of the will.

According to this doctrine a person is free, at least to some extent, to do as he pleases, and society in some way must prevail upon him to bring his behavior into conformity with generally accepted standards. When one violates the law it is assumed that he might have acted otherwise if he so desired. Therefore he is held not to have disciplined himself sufficiently, and he deserves to be punished. He must be taught a lesson, and others impressed by his experience, will choose to obey the law.¹⁰

But what are the effects of punishment conceived of as deterrence? What have empirical studies of deterrence shown? In short, does punishment deter, and if it does is the validity of personal responsibility (free will) affirmed? On the other hand, if

⁸ Weihofen, *op. cit. supra* at 81. Quoted from Judge Somerville in *Parsons v. State* (1886) 81 Ala. 577, 2 So. 854. This quotation is offered as a legal point of view.

⁹ For a criticism of "social positivists" and their understanding of retribution, see Hall, *General Principles of Criminal Law* 352 et. seq. (1947).

¹⁰ Caldwell, *Criminology* 396 (1956).

punishment does not deter does this vitiate the concept of responsibility and affirm the soundness of determinism?

Since capital punishment as a deterrent has been investigated at length, there may be some merit in examining the effectiveness of punishment in that context. Following this appraisal, however, punishment in general will be considered.¹¹

As a prefatory note to the examination of the statistics of capital crime, the following dramatic quotations would seem to be noteworthy.

On June 21, 1877, ten men were hanged in Pennsylvania for murderous conspiracy. The New York Herald predicted the wholesome effect of the terrible lesson. "We may be certain," it said editorially, "that the pitiless severity of the law will deter the most wicked from anything like the imitation of these crimes." Yet the night after the large scale execution, two of the witnesses at the trial of these men had been murdered, and within two weeks 5 of the prosecutors had met the same fate.¹²

In England in the 18th century, the brutal hangings were public and almost like carnivals. Yet there was no evidence that the crime rate declined. Indeed, pocket-picking became so common in the crowds assembled to witness the public hanging of pick-pockets, that hangings had to be made private.¹³

Admittedly the above accounts hardly serve as a basis for dismissing the efficacy of punishment as a deterrent, but they are nonetheless of sufficient moment to make one deliberate before glibly asserting the validity of punishment to deter.

More weight, however, may be attached to the statistics of capital punishment. The deterrent effect of capital punishment may in part be appraised by comparing states which make use of capital punishment with those states with no such statutory provision. "In general, when the homicide rate in states which authorize the death penalty is compared with the homicide rate in other states, it is found that the former states have a homicide rate two or three times as great as the latter."¹⁴

¹¹ See p. 244, *infra*.

¹² Barnes and Teeters, *New Horizons in Criminology* 356 (2d ed. 1951).

¹³ *Id.* at 358. Other considerations, it should be added, were involved in the abolition of public hangings.

¹⁴ Sutherland and Cressey, *Principles of Criminology* 292 (5th ed. 1955).

More convincing, since geographically proximate states are compared, are the inferences which may be drawn from the following table:

TABLE 2
ANNUAL AVERAGE HOMICIDE RATES IN FIFTEEN STATES
SELECTED ACCORDING TO CONTIGUITY¹⁵

	1931-35	1936-40	1941-46
Rhode Island ^a	1.8	1.5	1.0
Connecticut	2.4	2.0	1.9
Michigan ^a	5.0	3.6	3.4
Indiana	6.2	4.3	3.2
Wisconsin ^a	2.4	1.7	1.5
Illinois	9.6	5.7	4.4
Minnesota ^a	3.1	1.7	1.6
Iowa	2.6	1.7	1.3
Kansas ^b	6.2	3.6	3.0
Colorado	7.5	5.5	3.7
Missouri	11.1	6.6	5.3
Nebraska	3.7	1.7	1.8
Oklahoma	11.0	7.2	5.6
Arizona	12.6	10.3	6.5
New Mexico	12.5	8.4	5.3

^a Abolition state.

^b Abolition between 1931 and 1935.

It may be noted that Rhode Island, which has abolished capital punishment, has a homicide rate lower than that of Connecticut where capital punishment still obtains.¹⁶ In Michigan, too, despite the absence of the death penalty, the rate is lower than the contiguous states of Indiana and Illinois. On the other hand, Wisconsin, without the death penalty for a hundred years, has a rate much lower than that of Michigan. Reference to the Minnesota figure shows a rate much like Iowa's, even though only Iowa has the death penalty. The inference, then, to be drawn from this appraisal of adjacent states is that the homicide rate is quite irrelevant to the penalty which exists.

¹⁵ Schuessler, *The Deterrent Influence of the Death Penalty*, 284 *Annals of The American Academy of Political and Social Science* 54, 58 (1952).

¹⁶ *Id.* at 57-58. This lengthy appraisal of the death penalty is a close paraphrase of Schuessler's analysis.

An interesting before and after comparison may be made using the homicide rates for Kansas and South Dakota. The death penalty in Kansas was abolished in 1907, and reinstated in 1935. The rates of homicide was greater just prior to the imposition of the death penalty in 1935 then subsequently. This would seem to lend credence to the deterrent effect of the death penalty. But if one notes the states adjacent to Kansas which maintained capital punishment continuously, it may be seen that they too were characterized by an decrease in homicide. "The experience of Kansas, then, when viewed in context, merely emphasizes that homicide trends are the resultant of social conditions rather than the resultant of changes in the death penalty policy."¹⁷

This inference is further reinforced by the figures for North and South Dakota. South Dakota did not have the death penalty between 1915 and 1939. North Dakota has not had capital punishment since 1915. Yet between 1930 and 1939 "the average annual homicide rate in South Dakota dropped from 1.8 for the period 1930-39 to 1.5 for the following ten-year period, while in North Dakota the rate dropped from 1.8 to 1.1."¹⁸ Again, it may be asserted that if a relationship exists between capital punishment and homicide, such relationship is dubious. Indeed, in this latter instance, North Dakota without the death penalty had a greater drop in homicide rate than South Dakota, which had the death penalty.

Similarly, on the basis of a survey of states having capital punishment and those not having capital punishment, and a comparison of cities in capital punishment states and non-capital punishment states, Wood and Waite assert that "no causal relationship between the rate and the presence or absence of the death penalty can be established. Rather, the homicide rate should be regarded as a function of many social, economic, and demographic factors in community life."¹⁹

In 1932 Vold sought to investigate the relationship between the death penalty and homicide by appraising contiguous tiers of counties in Iowa and Missouri.²⁰ In both Iowa and Missouri the

¹⁷ *Id.* at 58.

¹⁸ *Ibid.*

¹⁹ Wood and Waite, *op. cit. supra* at 478.

²⁰ Vold, Can the Death Penalty Prevent Crime, *The Prison Journal*, 3 Oct. (1932).

death penalty was in effect. His examination showed that a group of ten southern Iowa counties had an average rate of 3.9, and a northern group of eight Missouri counties had a rate of 3.5. But a survey of twelve southern Missouri counties showed the average rate to be 10.5. Both the northern Missouri counties and the southern Iowa counties exhibited similarity in culture and population composition. On the other hand, the group of southern Missouri counties (high rate) were markedly different culturally from the other two county tiers specified. On that basis, Vold argued that the rate of homicide was irrelevant to the death penalty which existed in both states.

But it may be maintained, with obvious justification, that much more important than the existence of capital punishment is the actual fact of execution. It is entirely possible that despite the statutory provision for capital punishment few murderers may be executed, thus nullifying the deterrent effect of the death penalty. Schuessler, investigating the relationship between the certainty of punishment and homicide, correlated the risk of execution (the number of executions for murder per 1000 homicides) with rates of homicide in the capital punishment states. "The correlation between these two indices was $-.26$, indicating a slight tendency for the homicide rate to diminish as the probability of execution increases."²¹ Moreover, on the basis of additional statistical analysis Schuessler asserted that:

This evidence, included primarily because of its suggestiveness must be classed as negative from the standpoint of deterrence theory since (a) the homicide rate does not drop consistently as the certainty of the death penalty increases, and (b) the geographic correlation between risk of execution and the homicide rate is not impressive, failing to reach the 5 per cent level and statistically accounting for only 7 per cent (R^2) of the variability of the homicide rate.²²

Also, by comparing the probability of execution and the homicide rate in terms of time series analysis by establishing a one-year time lag between the two indices on the basis that deterrence assumes that the execution of the death penalty will be followed by a reduction in homicide rate, Schuessler computed a number of cor-

²¹ Schuessler, *op. cit. supra* at 59-60.

²² *Id.* at 60.

relation coefficients which suggested that the two time series were independent of one another: “. . . this evidence fails to substantiate the belief that the deterrent influence of the death penalty is enhanced by its frequent use, as changes in homicide rate do not correspond in a systematic way to variations in the probability of its being used.”²³

There are still additional figures to make one skeptical of the efficacy of the death penalty as a deterrent. These statistics relate to European experiences with capital punishment. According to Sutherland and Cressey, European countries which have discontinued application of capital punishment have a lower rate of homicide than countries retaining it.²⁴ England, with the death penalty, has a homicide rate twice that of the Scandinavian countries, which do not have the death penalty. A before and after analysis of Sweden and The Netherlands also demonstrates that the death penalty is unrelated to the rate of homicide.²⁵

But it may be argued that homicide is a special kind of crime, and in such cases where passion often plays a part, one would not expect to find deterrence effective. Yet Rusche and Kirsheimer on the basis of French, German, and Italian figures for a variety of crimes (fraud, larceny, assault, embezzlement, etc.) claim that there is no relationship between punishment and the general crime rate:

Our investigation has thus substantiated on a still broader basis the conclusions which Ferri reached at the end of the 19th century on the basis of Italian experience, that the policy of punishment has no effective influence on the rate of crime. Changes in penal praxis cannot seriously interfere with the social causes of delinquency. If the effects of the policy of punishment could be isolated, that is to say, if they could be examined in a period of complete social and political stability, then it might be possible to discover a certain measure of influence. *This very necessity for isolation, however, itself reveals, the social irrelevance of methods of punishment as a factor in determining the rate of crime.*²⁶

²⁴ Sutherland and Cressey, *op. cit. supra* at 294.

²⁵ *Ibid.*

²⁶ Schuessler, *op. cit. supra* at 58-59.

²⁶ Rusche and Kirchheimer, *Punishment and the Social Structure* 204-205 (1939).

Aside from the statistical analysis of the relationship between punishment and the rate of crime, several considerations, already discussed lend weight to the arguments for nonresponsibility. One of these considerations is the overwhelming impact of the psychiatric literature. Despite controversies, and despite in many instances the absence of respectable scientific control, the clinical findings are irresistably persuasive. The fact that the law acknowledges the psychiatric body of knowledge is to some extent testimony to modern day acceptance of psychiatric findings. Similarly, the use of clinics staffed with psychologists, psychiatrists and social workers as adjuncts of the courts testifies to that general acknowledgement.²⁷

The law to be sure, provides exemptions for responsibility in extreme cases of mental unbalance, but for all others shifts to an assumption of full or partial responsibility. There is little confirmation of this in modern psychology and psychiatry which recognizes no sharp breaks between the mental processes of the normal and the so-called abnormal personality.²⁸

When the law recognize nonresponsibility it does so in those cases which are obviously extreme. What it fails to do is to acknowledge the entire body of psychological and sociological knowledge which relates to the processes of personality development. This writer then, in consideration of the substance of social-psychological thought, and the persuasive character of the statistics relating to punishment and crime, must align himself with those who affirm the case for determinism and deny the argument for free will.

In sum, this writer rejects the philosophical notion of the free will and its concomitant of responsibility and embraces what appear to be the sounder conceptions of psychological and physical determinism. And determinism asserts that a person does not act other than he does, simply because he is "conditioned by a variety of inner and outer circumstances which may outweigh any latent fear of punishment."²⁹

²⁷ Guttmacher, *The Status of the Adult Court Psychiatric Clinics*, 1 No. 2. N.P.P.A. Journal 97 (1955).

²⁸ Wood and Waite, *op. cit. supra* at 480.

²⁹ *Ibid.*

But does this mean that deterrence is not operative at all?³⁰ Does this not belie common sense? Consider the not uncommon situation that occurs when a tornado or flood strikes a community? Doesn't looting take place and is this not so because of the break down in law enforcement, that is, absence of the deterrent? Yet the more significant point is that most people despite the absence of the deterrent do not loot. If some loot stores it is not because of the action of a free unencumbered will, but because the individuals concerned have not incorporated the values of the community. In other words, their conditioning was such that given the situation of open shops and general chaos, they simply "acted out their natures." The cynic might add that each man has his price, and while at first consideration this would seem to confirm free will, it rather contradicts it. What it means is that each person has been so socialized that he responds in a way (or at a price) which is peculiar to his nature. What is indicated then is not punishment which is often no more than retribution, but relearning, or to use the common term, rehabilitation. Now punishment is denied as being efficacious only in the sense that it is retribution. Punishment as part of the relearning process may be effective.³¹ This may appear to be a semantic twist to ensure that the determinist is bound to have his cake and eat it too; but suffice it to say, however, that it is logically consistent and is in conformance with inferences drawn from psychological and sociological research.

Responsibility and "Insanity"

A factor hitherto merely alluded to is the matter of community reaction. It may be maintained with some social-psychological

³⁰ ". . . a refutation of hedonistic psychology and its conceptions is probably not sufficient to justify the rejection of the broader aspects of the deterrence argument. In a broader perspective, the criminal law and its application by police and courts probably have great effects upon public morality. Although specific severe punishments may have little immediate demonstrable effect in deterring specific criminals, the existence of the criminal code with its penal sanctions probably has a long run deterrent effect upon the development of criminalistic ideologies." Sutherland and Cressey, *op. cit. supra* at 289.

³¹ "Probably no one advocates abolishing all unpleasant forms of dealing with criminals. There are cases where disciplinary measures are necessary and beneficial; and with incorrigible or incurable offenders indeterminate incarceration may be the only thing possible. The point is that the criminologist would inflict discipline and suffering, not under the assumption that 'justice' or morality demand that 'he who sins must suffer,' but only because they seem necessary for the person's own rehabilitation or for the protection of society." Weihofen, *op. cit. supra* at 486.

justification that punishment tends to restore the community's sense of social solidarity.³² Presumably the criminal's act makes for a psychic imbalance and the punishment functions as a catharsis which reinstates society's sense of integrity. Society is thus buttressed on two counts by punishment. On the one hand, the criminal may be safely locked up, and on the other hand a kind of psychological closure ensues.

That societal reaction is a major consideration in the processes of law is a trite observation. The criminal law functions to protect society with due recognition for the right of the individual. In short, we have as a backdrop the conflict between the individual and society. And in case of doubt, ignorance, or fear, there seems to be little question that society takes it upon itself to ensure its security. This consideration raises a knotty problem which superficially at least would seem to vitiate the previous discussion of punishment and responsibility.

While logically and empirically the case for determinism is a substantial one, it cannot be denied that (1) social expedience may be necessary which from the long range point of view may appear illogical, and (2) the scientific knowledge at our disposal is full of gaps which might make implementation of policies based exclusively upon determinism questionable from a practical point of view. It is interesting to note that Moreland in making a recommendation prefaces his comment with an acknowledgement of its unscientific and illogical basis.³³

Society, then, acts in the light of existent knowledge to safeguard itself and its hard won legal rights, despite the compelling implications of determinism and sociological and psychological

³² A very ingenious argument for the appropriateness of responsibility and associated doctrines (despite their admitted scientific inadequacies) is offered by Thurman Arnold. In essence he suggests that the "folklore" of responsibility serves the very important function of maintaining social solidarity. Trials and punishment are important, then, insofar as they reaffirm the ideals of society, and by so doing, reinforce popular belief in law and order. See Hill, *The Psychological Realism of Thurman Arnold* 22 *The University of Chicago Law Review* 377 (1955). A point of view similar in implication is found in the following comment by Holmes: "If I were having a philosophical talk with a man I was going to have hanged (or electrocuted) I should say, I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises." Katz, *Law, Psychiatry, and Free Will* 22 *The University of Chicago Law Review* 397 402 (1955). Quoted from Holmes-Laski *Letters* 806 (Howe ed. 1953).

³³ See Moreland, *Mental Responsibility and the Criminal Law—A Defense*, p. 215 of this journal.

research. This truism is particularly germane to the problem of responsibility and insanity.

From the deterministic viewpoint insanity would present no departure from the suggestions offered in the first part of this paper. That is, no criminal would be regarded as responsible and the insane criminal would be disposed of in terms of his social accountability. Davidson, in his discussion of criminal responsibility appraises the several formulae which might be used to define responsibility and offers the following cogent comment with regard to determinism (crime treated as a disease) :

This is a very attractive thesis. It has a rigorous logic about it which is appealing. Normal people don't commit crimes, since, generally speaking, criminal behavior being deviant behavior is abnormal behavior. Therefore it follows that all criminals are abnormal. Since sickness is the term we doctors use as a criterion of abnormality it again follows that all criminals are sick, and the way to handle criminals is to treat them as sick men.

As applied to deviant behavior, this thesis would wipe out the doctrine of personal responsibility. Society is not ready yet to buy this, nor are we psychiatrists quite ready to pay off on the promise that we have the cure to crime.³⁴

Given the current legal frame of reference, the importance of due process including the jury trial, public opinion, and the acknowledged lack of scientific knowledge, one, on pragmatic grounds is led perhaps to be hesitant about accepting a framework of determinism. Realistically, one should expect no such marked change. Yet the dicta of Judge Bazelon in the Durham case may have wider ramifications than anticipated.

Conclusion

Perhaps the sociologist is beating a dead horse when he recommends a framework of determinism. The law has in fact in many specific instances embraced determinism. The problem may be rather how far the concept of determinism should be extended. "The basic philosophy of the new approach has already been

³⁴ Davidson, *Criminal Responsibility: The Quest for a Formula in Psychiatry and the Law* 66 (Hoch and Zubin eds. 1955).

adopted in a growing number of specific situations, so that its general acceptance now would merely be an extension to all cases of what already is being done in many."³⁵

Now what would a complete extension of this approach mean with regard to crime and punishment?

If this approach were adopted it would, among other effects, practically eliminate the defense of insanity. The jury, its function restricted to deciding whether the accused committed the act charged, would no longer have to consider the state of mind with which the act was done. All offenders would be accorded the kind of therapeutic or custodial care appropriate to their individual cases. Those suffering from mental illness would be sent to a mental institution—which is what usually happens under a successful insanity plea anyway. But such illness, instead of being taken into account in determining whether the defendant was 'guilty' or not, would enter into consideration only in deciding what to do with him. In short, this approach would largely abolish the concept of criminal responsibility.³⁶

Any crime then would entail a reaction on the part of society which would serve to protect it. Society, recognizing the danger of any criminal would take the criminal in custody and make such disposition as the character of criminal and the protection of society dictated. And this latter function could be performed by a "dispositional tribunal" which would have access to contemporary psychological and sociological resources.³⁷

This procedure then would not do violence to society's need for protection since, if need be, the criminal would be put in custody. Moreover since the assumption of the deterrence value of punishment is dubious, little would be lost in that regard. But what of the criminal's residual rights? Suppose, found "guilty," he were sent to some appropriate institution. Would he be protected from being incarcerated for too long a period of time? In this case, protection would be afforded by legal provision for periodic appraisal of the criminal. And at such time as the examiners felt the individual ready for release—the protection of society being kept uppermost—he would be discharged, and if

³⁵ Weihofen, *op. cit. supra* at 486.

³⁶ *Id.* at 482.

³⁷ *Id.* at 480-482.

necessary, with the kind of extra-institutional supervision indicated. That this is not a simple problem is obvious. Criteria for release would have to be formulated so that an individual incarcerated for a relatively minor offense, ostensibly "incurable," would not be permanently institutionalized. Both public tolerance and "an adequate body of therapeutic knowledge" would be crucial in this regard.

Such a procedure is by no means new. In the Youth Correction Authority Act of the American Law Institute such ideas are already embodied, and implemented, it may be added, in current juvenile court practice. And in the Maryland Defective Delinquent Law there is provision, at least for socially "dangerous" criminals, for a similar "therapeutic" treatment. The departure, then, is not so much in terms of theory or practice, but rather in terms of extension to criminality in general.