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In moments of exasperation, one may be tempted to misapply Mark Twain's comment about the weather and complain that everyone talks about criminal justice, but no one does anything about it. Sober second thought quickly reveals, however, that the statement is not literally or even substantially true. Since the eighteenth-century Enlightenment much has been done, for good or ill, about the criminal law and penal justice. Capital punishment was notably curtailed in the western world, and a regime of prisons, reformatories, and other so-called secondary punishments was instituted. Hopes for rehabilitation of offenders soared in the nineteenth century, and the rehabilitative ideal dominated thought in our own era. Such products of penal rehabilitationism as the juvenile court, systems of probation and parole, and the indeterminate sentence recommended themselves to American legislators and, indeed, to lawmakers throughout western civilization. Then in the 1970s American allegiance to the rehabilitative ideal precipitously declined, and we find ourselves today searching for a new intellectual blue print or paradigm to guide thought and policy for the remainder of the century. The substantive criminal law itself has expanded enormously, and today expresses an extraordinary range of purposes including not only that of minimizing violent behavior threatening to lives and property, but also the regulation of economic enterprise; protection of the environment; correction of relations among races and genders; alteration in habits of consumption of liquor, drugs, and sex; and even compliance with legislative dictates concerning times at which clocks are to be set. Many years ago I wrote that "the system of criminal justice may be viewed as a weary Atlas upon whose shoulders we have heaped a crushing burden of responsibilities relating to public policy in its various aspects. This we have done thoughtlessly without inquiring whether the burden can be effectively borne." The statement is a little flamboyant, as perhaps befits youth; but stripped of metaphor it seems accurate enough.

The questions about the criminal law that I propose to address in these remarks are in no sense new. They relate to the propriety of criminal sanctions as devices to achieve certain social ends. Propriety, as I am using the term, refers to the effectiveness of the criminal sanction in achieving given social purposes, but also to its capacity to gain social ends without imperiling or destroying other important values in the process. Questions about the propriety of criminal sanctions in this dual sense arise whenever serious thought is directed to legal regulation of human behavior. Moreover, the questions are never answered fully or for all time. They recur as social purposes change, as the social context alters, and as basic values relating to the relations of individuals and groups to state power are redefined.

The reasons for the persistence of questions surrounding the use of criminal sanctions become clearer when one considers some of the characteristics of the criminal law. First, the criminal law is the heavy artillery of society. If regimes of political terror of the sort that accompanied the emergence of totalitarian societies in the present century are removed from consideration, nowhere will one encounter such extreme exercises of state power within the confines of domestic policy as those occurring regularly in the ordinary administration of criminal justice. Under the authority of the criminal law a society may deprive its members of their property, liberty, and lives; and all societies, in fact, do many of these things almost routinely. The very weight of criminal sanctions requires societies valuing individual volition to erect principles of containment in order that the powers of government employed in law enforcement may be prevented from overreaching their bounds and destroying or impairing

basic political values. That the system of penal sanctions is capable of being utilized to ravage the institutions of liberal societies is another of the lessons to be learned from the history of totalitarian dictatorships in the twentieth century. The weight of criminal sanctions creates other important problems, some of them of a less apocalyptic sort. The severity of such penalties often makes them disproportionate to the purposes for which they are employed. To borrow an idiom from Sir Leslie (now Lord) Scarman, we ought not to "use . . . a nuclear weapon to control a street riot." When overly severe penalties are authorized, one of two consequences may follow. First, the sanction may be applied with the result that disproportionate injuries are inflicted on the offender. This is the problem of overkill. Second, the mismatch of penalty and offense may be so apparent to those who administer criminal justice that they may be induced to withhold penalties in situations in which sanctions of some sort are required. This is the problem of nullification.

It is true, of course, that there is a great range of severity in the penalties administered by modern systems of criminal justice, extending from little more than admonitions to the infliction of capital punishment. It is also true that alternative civil penalties, such as license revocation, may fall with greater economic effect on the offender than a fine or even a short period of imprisonment; for the withdrawal of the license may deprive the offender of a livelihood for himself and his family. Altogether too little attention has been given to the impact of such "civil" sanctions, and perhaps too great significance has been attached to the "criminal" or "non-criminal" forms of the penalties. Nevertheless, there is one feature of even apparently mild criminal sanctions that enhances their weight. The criminal law deals in the allocation of stigma; it dispenses social moral condemnation. Much of the effectiveness and also the destructiveness of criminal sanctions are related to this fact.

Another characteristic of the criminal law that inhibits rational policy is the very accessibility of penal sanctions. Like the mountaineer's mountain, the system of criminal justice is *there*. Criminal courts hold session in every county seat. It is much easier for legislators to supply criminal penalties than it is to inquire whether such sanctions are appropriate in a given regulatory situation and, if so, of what type, or whether there are alternative civil sanctions more likely to achieve the legislative purpose and at less social cost. The insouciance of lawmakers approaching these questions is illustrated by a story. When the principal draftsman of a major piece of New Deal legislation was asked about the presence of criminal penalties in the bill, he answered: "I don't know. They got into the draft late one Saturday afternoon."

There is one further characteristic of the criminal law that discourages sober consideration of the propriety of criminal sanctions in the multitude of circumstances in which they are employed. Criminal sanctions are means to the accomplishment of social goals; they are not ends in themselves. There is a morality of ends and a morality of means. The morality of ends concerns itself with what goals are to be pursued through the utilization of state power. The morality of means is concerned with the propriety—the effectiveness and decency—of devices proposed to achieve social objectives. In our society many more persons are concerned with the morality of ends than of means. Fierce conflicts surround the selection of governmental objectives, contentions all the more acute since the elections of November, 1980. Typically, persons strongly committed to particular social goals think little about the propriety of the means proposed; many lack either the capacity or inclination to do so. Indeed, many such apostles of the morality of ends interpret questions about means as evidences of covert hostility on the part of those who pose them. After all, who can doubt that food sold in the marketplace should be pure, drugs should be properly labelled, our air and water unpolluted, family members free from parental or spousal violence, our society rid of racial and sexual discrimination? With such interests at stake, who can in good faith quibble about means? The tendency to disregard or slight the morality of means, which is always strong, has been rendered even more formidible by recent developments in our political life. More and more, American public policy is being influenced by organized groups that gain potency by restricting their interests to single issues or single groups of issues, and display neither knowledge nor concern about any other part of the polity. Groups that achieve a tenuous coherence through advancing single narrow ends are little inclined to re-examine the methods proposed. The morality of means does not flourish in an era of single-issue politics.

Yet the claims of the morality of means are insistent, and at no time more so than when criminal sanctions are contemplated. The central proposition relating to the use of criminal sanctions with which I shall be concerned here, is that the criminal law ought not to make unwise and counterproductive interventions; it ought not, that is, to undertake punitively what in fact cannot be accomplished or cannot be accomplished without doing more harm than good or without incurring unnecessary social costs. Such broad aspirations cannot be codified in the form of crisp commands to the legislature. This is true because in any given area of regulation views are likely to differ in advance of legislation about what is wise or can be achieved or where the balance of benefit lies. The matter is by its nature very much one of trial and error. Yet although it may often be impossible to prescribe wisdom in advance, there is no justification for ignoring what may be learned from past experience and past failures. Unhappily, legislative practice in the penal area is not characterized by earnest scrutiny of why past attempts failed, or even by efforts to learn which attempts failed or succeeded. What is most disheartening is not that the same mistakes are repeated, but rather the unawareness of many lawmakers, legislative and judicial, that mistakes are being made.

In the remarks that follow, I shall identify some areas of penal interest in which pressing concerns of the morality of means arise. I shall briefly inquire into how the claims of that morality have been flouted and what may be required to honor them. . . .

A decision by a society to impose criminal sanctions in any area of human activity inevitably entails consequences, some of them going much beyond the intended law-enforcement objectives. The chronic failure of lawmakers to concern themselves with such consequences and to perceive that social costs may vary significantly from one area of penal regulation to another, constitutes a serious obstacle to the attainment of rational penal policy. Without a sensitive awareness of likely consequences, legislative consideration of the appropriateness of proposed interventions by the criminal justice system into the lives of persons is likely to be meager and of limited relevance. These points can perhaps be illustrated most readily by reference to American experience with the so-called victimless crimes—offenses involving such acts as the possession and use of liquor and drugs, prostitution, and gambling. Many of the most important effects of such legislation stem from the fact that what is being criminalized is conduct typically performed privately or secretly.

In order to discover whether crimes are being committed and to identify the violators, law enforcement must impinge heavily on constitutionally protected zones of privacy. It is no accident that for practical purposes the law of the Fourth Amendment begins not in 1791 when the amendment was first included in the Bill of Rights, but rather with the Prohibition Experiment in the twentieth century. The law of search and seizure has ever since been nourished and expanded most importantly by police activity associated with the sumptuary offenses. Nor can it be doubted that the practical difficulties encountered by law enforcement in these areas have induced courts to relax constitutional restraints on police powers. The ease with which the Supreme Court validated the use of hearsay evidence to establish "probable cause" for arrest and search reflects this pressure, as does the Court's persistent sanctioning of undercover informants and police spies in American criminal justice, despite the moral incongruities and abuses that such resort admittedly entails. In short, the decision to criminalize behavior in these areas has resulted in significant redefinitions of the relations of individual right to governmental power.

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The victimless crime area is familiar territory; observations of the sort just made have long been familiar to criminal lawyers and social commentators. Another area of penal regulation is emerging, however, with problems of comparable seriousness that have received much less attention in the literature of criminal justice. The area to which I refer is that in which efforts are made to order and regulate behavior in the family setting and in other intimate relationships through the use of criminal sanctions. It is not entirely fanciful to assert that the problems of achieving rational penal policy in these fields are rendered unusually difficult by a conflict between what I have called the morality of ends and the morality of means, between intensely desired objectives and circumstances tending to frustrate their achievement and to distort their effects. These are important and complex issues, and only their broad outlines can be sketched in these remarks.

Among the most typical, strongly held, and important aspirations of persons living in the late twentieth century are those seeking the security of women and children against violence in the home and the enhancement of the scope and dignity of women's roles in the larger society. Clearly related, also, are the contradictory objectives of those caught up in the abortion controversy, a controversy more threatening to the viability of American pluralism than almost any other in these times. Given objectives so fervently held and, in many instances, so obviously just, one must expect that the recruitment of all possible means to achieve these goals will be strongly advocated and that criminal sanctions will be prominent among those proposed. It would seem likely, also, that criminal condemnation of private behavior antagonistic to such goals will take on a symbolic significance that may at times interfere with rational utilitarian calculation. It is my modest proposition that the claims of the morality of means now require increased attention in these areas.

The nature of these problems makes dogmatism especially inappropriate. It cannot be asserted, for example, that criminal sanctions have no proper role to play. So long as the policy objectives include the suppression of violent physical assaults, criminal penalties must be available, however assiduously alternative methods are pursued. Moreover, in some areas criminal sanctions appeal to be the most effective devices available. Thus a recent study persuasively and somewhat disconcertingly demonstrates that the threat and application of criminal sanctions may constitute the best means to hold deserving fathers to their legal obligations of child support.

Yet one attempting to think seriously about the problems of sanctions in these fields is likely soon to become sensitive to the fact that this is an area in which unanticipated consequences abound, in which the devices employed to achieve policy objectives frequently prove ineffective and counter-productive, in which the social costs of penal interventions are sometimes very high. Suspicions that the dynamics of intimate family relations create a peculiarly difficult milieu for penal regulation may be raised in the first instance by discovery of the fact that more policemen are injured while intervening in violent disputes between husband and wife or other family members than in the performance of any other law-enforcement function. One important reason for the high police casualty rates is that often the warring family members temporarily suspend hostilities between themselves and give expression to their mutual misery and frustration by attacking the intruding representatives of law and order. Obviously, despite the perils, the police cannot ignore disputes that disturb the peace and threaten life and limb; but across the country serious efforts are being made to substitute mediative and conciliatory interventions for those of the more punitive and authoritarian sort.

Some strands of the evolving penal policy in these fields deserve to be greeted with considerable skepticism. That the dignity, not to say the physical integrity, of women requires that they not be forced violently and against their will into sexual relations with their husbands in the home as well as with strangers in the street, is a proposition deserving of unqualified acceptance in contemporary society. There is abundant evidence, however, that forced relations occur in many American homes. Yet when one moves from acceptance of the principle and the fact of its widespread violation to the problem of appropriate official response, it by no means follows that we should, as some states have done, redefine the crime of forcible rape to include forced relations between a husband and wife living together. Nor is such an alteration of the law of rape mandated simply by the fact that the reasons traditionally given in judicial opinions for excluding wives from the crime's definition are inadequate and offensive. There is need for more serious consideration than has apparently yet been given to such questions as whether any increment of deterrence is gained from prosecutions of husbands for rape rather than for assault, and whether such enhancement of stigma and penalties threatens nullification and hence reduced rather than enlarged protection of married women. No doubt, other inquiries need also to be pursued.

When one moves to the abortion controversy, the prospects become even more somber and threatening. In recent years literally scores of proposed resolutions calling for a "Right To Life" amendment to the United States Constitution have been introduced in Congress. Although the language of these proposals varies somewhat in content and legal sophistication, they typically direct that "no unborn person shall be deprived of life by any person." The fetus is defined to be a person from the moment of fertilization, and full enforcement powers are conferred on Congress and the state legislatures. The implications of

these proposals are broad and sobering; no adequate canvass of them can be given here. It will be noted that the prohibitory language apparently encompasses not only abortions as that term is ordinarily understood, but also some forms of birth control. If such an amendment is approved and ratified, the passage of implementing criminal legislation, some of it congressional, seems inevitable. The spector of the policeman in the bedroom—and a federal policeman at that—which we thought had been put to rest by such cases as *Griswold v. Connecticut*, may rise to menace us again.

Definition of the proper role of criminal sanctions in the family and in other intimate relationships encompasses some of the most difficult and neglected issues in modern criminal justice. The neglect is not entirely surprising. These are areas in which basic policy orientations have been in contention and dispute. The claims of the morality of means are often unheard when strong feelings are aroused in battles over fundamental objectives. Yet sooner or later the problems of consequences and means must be addressed. Sound policy demands more than reflexive resort to criminal sanctions because they are there, or merely because of the symbolism of criminal condemnation. Sophistication about the use and application of sanctions is required both in order to achieve policy objectives more effectively and also to avoid damaging the fabric of our basic political values upon which hopes for the next half century rest.

The concerns of the morality of means are not limited to questions about the appropriateness of penal interventions into various areas of human activity or those relating to the proper definitions of criminal offenses. There remain the difficult and important problems of what the system of criminal justice is to do with offenders once they have been convicted. These are questions of extraordinary scope and complexity. Indeed, the problems of correctional treatment have long been a principal focus of American criminological thought. Certain of these issues have gained a new urgency in the closing years of the twentieth century.

As was mentioned in the opening comments, the 1970s were marked by the precipitous decline of allegiance to the rehabilitative ideal. Although the purpose of rehabilitating convicted offenders has never been given full and consistent expression in the actual practice of American corrections, to a remarkable degree the ideal of rehabilitation served as a widely shared aspiration for the penal system during the larger part of the present century and as a standard for measuring the performance of criminal justice. The reasons for the decline in allegiance to penal rehabilitationism in the decade just past are many and complex, and cannot be examined here. For present purposes it may be sufficient to say that the decline has made the construction of a new theoretical pattern or paradigm one of the primary obligations of those concerned with American penal policy. It has also posed the issue of what role, if any, rehabilitative efforts in and out of the prisons are to play in the future.

Since the second world war, and even before, a comprehensive critique of the rehabilitative ideal has emerged. The critique not only casts doubt on our capacities to alter the criminal propensities of convicted offenders, but also warns that in some of its manifestations penal rehabilitationism imperils the central values of liberal societies. Mature consideration has led some observers to the conclusion that such deleterious social consequences flow, not from the mere presence of rehabilitative programs in penal institutions, but primarily from the role that rehabilitation has been accorded in American corrections. In short, it is suggested that a range of pernicious and unintended consequences arise when rehabilitation is made the *purpose* of penal treatment rather than a means by which the self-improvement and self-realization of convicted offenders can be facilitated. If rehabilitation is thought to be the purpose of institutional programs, then the success or failure of penal institutions will be measured by whether the reform of offenders is achieved. Because such changes in criminal proclivities are hard to come by and because a penal system must necessarily serve many purposes other than inmate reform, a strong tendency develops among correctional personnel to exaggerate grossly their rehabilitative achievements and to pretend that much of what is being done for entirely other purposes is motivated by rehabilitative ends. For their part, prisoners being held under indeterminate sentences quickly perceive that their release dates depend upon their giving evidences of reform; and not surprisingly, many set avidly to work to provide such evidences. As many commentators have remarked, the prisons are converted into great schools for thespians. Because typically the goals and methods of the rehabilitative effort are imposed upon rather than chosen by the inmates, the effectiveness of the effort is minimal.

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With these considerations in view, commentators such as Professor Norval Morris have urged that rehabilitative programs should be regarded as facilitative rather than coercive. Persons should be sentenced to prison, not to be reformed, but rather because such punishment represents just deserts for their crimes or is required to deter the prisoners and others from committing similar crimes in the future. Educational, vocational, and therapeutic programs should be made available to prisoners desiring them, but their participation in them is not to be compelled nor should their release dates be determined by administrative findings that they have been reformed. The pragmatic advantages anticipated from this recasting of the penal rehabilitative effort are clear. Because the rehabilitative goal is one voluntarily assumed by the prisoner and the program of self-improvement freely entered into, it is hoped that institutional correctional programs will more successfully achieve their rehabilitative ends than in the past. The penal institution is relieved of the often impossible obligation of reforming the irredeemable and the parole board of the often equally impossible task of determining when the prisoner has been reformed and eligible for release.

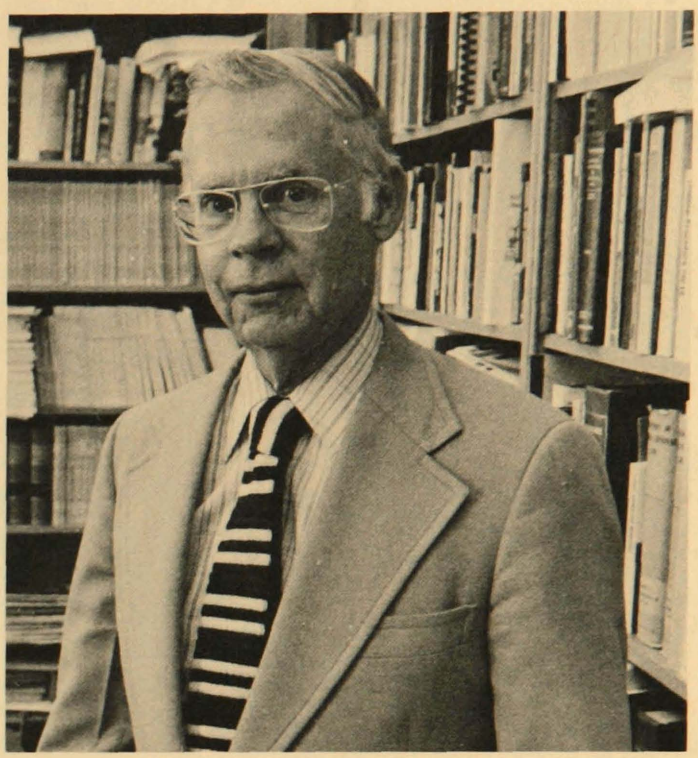
The proposal for redefinition of rehabilitative effort in the penal system is thus one based on the principle of inmate voluntarism. It has been defended primarily as a means to eliminate or reduce the factors that frequently in the past rendered rehabilitative regimes ineffective and sometimes malignant. The principle of voluntarism in prisons, however, may possess an even broader significance. It may be identified, that is, as expressing a basic assumption of public morality applicable to a wide range of public issues, as occupying a central position in the morality of means. It seems responsible to assert that the 1980 elections, portentous as they may prove to be, will not, in the long run, alter the main outlines of the welfare state. Social purposes that can be achieved only through the exercise of governmental authority will persist, and the

problems of defining areas of individual autonomy and volition in a society in which state power is a salient fact will continue to challenge and perplex us. Urging an enlarged role for voluntarism in areas in which state power is now wielded does not imply an attachment to romantic anarchistic assumptions that governmental coercion can be wholly or largely eliminated. It is rather to invite new attention to the strategies for according a substantial reality to individual volition in a society pervaded by claims of governmental authority.

Voluntaristic rehabilitative programs in the prisons may contribute to a public ethic governing the relations of the state to convicted offenders. The defining of such an ethic is doubly important at a time like the present when popular outrage about widespread crime is approaching a climax. In the best of times the conditions of penal custody tend toward waste, inhumanity, and brutality. At present a variety of economic, psychological, and cultural factors threaten the serious exacerbation of the prison environment. We need first to assert the human dignity of those we imprison and to stand against their dehumanization at our hands insofar as we are able. This implies that however deplorable the wrongs done by the prisoner, we as a society will not strip from him whatever aspirations for self-improvement he may retain, and that we will supply whatever assistance we can to advance the achievement of his educational, vocational, or other self-fulfilling goals.

Second, we need to refrain from imposing rehabilitative goals and regimes upon him, and this not only because past efforts of this sort have largely failed, but also because to do so is to infantilize adults. It is an ominous thing, one basically incompatible with the assumption of liberal societies, that the state should attempt through coercion to invade the very mind and will of those held in its custody. In the past the radical incompatibility of extreme rehabilitationism with our basic political and moral values was disguised by the fact that the rehabilitative techniques employed were fallible and such success as they achieved depended largely on the voluntary efforts of the inmate. But this will not always be true; it is not wholly true today. The coerced application of drugs, psychosurgery, and other forms of behavior modification invade human personality and assault autonomy, as do programs of "thought control" practiced in totalitarian societies and in some religious and political cults within our own community. The morality of means in these areas implicates our most fundamental concerns.

These comments have been intended to suggest that at a time like the present when we are being invited to redefine our social objectives, it is of importance to give particular attention to how we propose to achieve them. As Edna St. Vincent Millay observed many years ago, the end cannot stand pure of the means. You will note that I have not chosen to address questions of constitutional rights and limitations in these remarks. Much of the morality of means, of course, is given expression in constitutional doctrine; but too often American constitutionalism diverts thought about social policy from needed consideration of its rationality and decency. It is the concern with means that is, paradoxically, both the glory of the legal profession and the basis for its bad reputation in the community: its glory because the values that distinguish liberal societies from others often relate less to objectives than to how ends are achieved; bad reputation because a concern with means may often give rise to complaints (some of them deserved) of pettifogging, excessive technicality, and obstructionism. It is not surprising that revolutionary regimes, impatient to create their versions of the brave new world, have typically sought to destroy the legal professional or to minimize its role. Not all of the lawyer's purposes are encompassed in the morality of means; but we cannot fulfill our commitments as lawyers and neglect its claims.



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