

A CRITIQUE OF THE LEGAL APPROACH TO CRIME AND CORRECTION

ANDREW S. WATSON*

Definition of crime and theories of correction need to be considered together. In relation to the policy goals of the criminal law, the "why" of the crime must be related to its definition, and it cannot be separated from the corrective process without abandoning all psychological rationality. All too often, it would appear that in practice, these two elements in the process of criminal law and administration are widely separated, are implemented by different groups of people, largely without each other's interest or participation.

I

INTRODUCTION

Though primitive societies seem not to have utilized physical punishments extensively,¹ in the earliest days of codified criminal law, the process of defining crime was directed toward isolating individuals whose behavior was regarded as unacceptable or dangerous and insuring that they would be severely punished, which was felt to be the way to safeguard society. This involved moral judgments about goodness and badness, and badness deserved the community's punishment.

The relationship of the crime to the punishment was always clear, and since crime aroused anxiousness as well as anger, criminals were severely punished in a mood of open and violent retribution. Many primitive legal codes followed the *lex talionis*, and cruel and mutilating punishments, usually ending in death, were regarded as well-deserved by wrongdoers.² Such punishment came to be regarded as the only way in which the group could be protected from the onslaughts of its offenders. There was little emotional conflict about inflicting such punishment, since the danger of the prohibited behavior was regarded as sufficient to justify fully unmitigated, retaliative reaction.

Various philosophers have postulated that this early relinquishment of personal retaliation to the social institution of the law was a mutual agreement whereby all parties agreed to suppress their own retaliative impulses in exchange for similar

* B.S. 1942, University of Michigan; M.D. 1950, M.S. in Medicine, 1954, Temple University. Assistant Professor of Psychiatry, School of Medicine, and Associate Professor of Psychiatry in Law, School of Law, University of Pennsylvania; Co-Director, Law and Behavioral Science Project, Institute of Legal Research, University of Pennsylvania; Member, Law and Psychiatry Committee, Group for the Advancement of Psychiatry. Contributor to medical and legal publications.

¹ See EDWIN H. SUTHERLAND & DONALD R. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 256-59 (5th ed. 1955).

² See JOHN BIGGS, JR., *THE GUILTY MIND* 12-15 (1955); Wolfgang, *Political Crimes and Punishments in Renaissance Florence*, 44 *J. CRIM. L., C. & P.S.* 555 (1954); H. OPPENHEIMER, *THE RATIONALE OF PUNISHMENT* 103-37 (1913).

suppression on the part of others, turning the function of punishment over to the sovereign.³ Such a hypothesis makes sound psychological sense, and child psychiatrists studying the early control mechanisms of young children make it clear that the child relinquishes his hostile, attacking impulses in order to secure, friendly, loving treatment at the hands of his immediate family and society. He makes a bargain to control his aggressive and destructive impulses in order to avoid similar counter-impulses from others and retain love and acceptability. If he breaks his "agreement," his expectation is that he shall be punished severely; and, indeed, the fantasies of most children in this regard are little different from the real penalties doled out to early criminals in the form of cruel, degrading mutilations and death.⁴

It is just in the nature of this universal childhood expectation that we may understand something of the difficulty which besets efforts to make more rational, criminal codes and corrective institutions. Though historically we have moved well away from the period in which violent reprisal was the penalty for lawbreaking, every adult is not more than a few decades removed from the period of his individual life when retributive punishment was expected for all breaches of conduct.

Understanding the means by which a child learns to harness his own aggressive impulses will shed some light on the dynamics of retribution. It will also illustrate some of the forces which make it progressively more difficult, in the face of our evolution toward an ethical concept of relationships, to deal out violent punishments or to execute criminals. The tendency toward nullification has become extremely important in the trial of capital cases, and the mere process of selecting a jury which at least consciously will consider giving the death penalty may exhaust many jury panels before twelve such persons can be found. Even then, it is far from clear that they will deal with the case with any degree of rationality.⁵

A child begins its painful and oft-times frightening efforts at controlling aggressive and murderous impulses by disowning them and burying them deeply away from self-awareness. The impulses are hidden so thoroughly beneath the surface of his consciousness that, in fact, he does not "know" he has them, and strong opposite feelings may be put in their place. He will feel that to kill is Evil, and since the mere thought of killing arouses such internal anxiety, he will become Good. These repressive mechanisms are essential socially in the development of children, and those who do not develop them become delinquents, recognized or unrecognized. Young children need such mechanisms to control their impulse-life, and respectable society reinforces such attitudes at every opportunity. (If the theory of deterrence has any psychological validity, it is most likely to apply to the very

³ CESARE BONESANA BECCARIA, *AN ESSAY ON CRIMES AND PUNISHMENTS* 11 (3d ed. 1770); OPPENHEIMER, *op. cit. supra* note 2, at 50-58.

⁴ Early conscience formation, at its base, is related to the child's fear of physical harm from being abandoned to his helplessness or of direct physical injury in retaliation for his own assaultive wishes. These internalized fantasies may become completely divorced from social reality. For a psychoanalytic description of this process, see OTTO FENICHEL, *THE PSYCHOANALYTIC THEORY OF NEUROSES* 105-10 (1945).

⁵ See Hart, *Murder and the Principles of Punishment: England and the United States*, 52 NW. U. L. REV. 443 (1957).

young. Though they are largely oblivious to the happenings in the criminal courts, they are extremely sensitive to what happens to the transgressor in their immediate environment, and in this way, they are deterred.) This method of literally blocking out all awareness of disapproval of aggressive desire, then, is the first means by which everyone learns to control impulses, and historically it would appear to be the first stage in the development of a social ethic as well as a criminal law. Thus, we find in the early books of the Old Testament that God's vengeance upon sinners is likely to destroy them completely. A forbidden glance at sinning could turn Lot's wife into a pillar of salt.⁶ This punishing attitude in the setting of the Old Testament is to be found in most primitive legal codes.

With growth and development in a healthy child, new methods of control become available which make it possible for him to weigh the pros and cons of aggressiveness, and on the basis of ethical rationalism, impulses may be more consciously controlled or redirected. With the child's growing capacity to master his impulses and his body, he also is able to realize consciously the existence of powerful inner drives to kill, hurt, steal, or indulge in sexual behavior. He may do this without being overwhelmed by anxiousness, stirred by the apprehension that these impulses will break out into the open and provoke serious punishment by the people around him.⁷ In other words, he is able to consider his behavior and make judgments about the appropriateness of various possible actions. It is only at this point, when increased awareness of inner impulses occurs, that the individual truly may be said to have any degree of "free choice" or "free will." Behavior governed by the more primitive conscience of the child can hardly be called free will, since actions are not considered, but rejected automatically, without any conscious judgment whatsoever.

With greater control, sensitivity to inner drives becomes possible once again. It is essential that the growing child be given opportunities to deal consciously with them, in the open, to gain skill in reality-oriented expression. If he is not permitted and assisted in this process, he feels limited, criticized, and too severely punished, for "just being human." Punishment will be considered as unjust, and he will feel that the group around him is not fair. This, in turn, increases his tendency to rebel against the "system," or to withdraw, which may ultimately result in a disastrous outburst of inner passions, overthrowing tenuous controls in some sort of "impulse" crime. At this stage of development, the picture of others being punished for their impulses has no demonstrated value. Making an example of others is more likely to arouse an inner sense of injustice than to afford righteous relief.⁸

Parents with their children systematically practice incapacitation as a technique for molding behavior. When a child is deemed too young to understand a situation or to cope with it, he is removed from the difficult circumstances. Mature parents incapacitate the child only until he can learn to cope with the situation by himself.

⁶ GENESIS 19:26.

⁷ An excellent discussion of the child's psychosocial development may be found in ERIK ERIKSON, *CHILDHOOD AND SOCIETY* (1950).

⁸ See FRANZ ALEXANDER & HUGO STAUB, *THE CRIMINAL, THE JUDGE, AND THE PUBLIC* 3-II, 39-40 (rev. ed. 1956).

The moment he is capable of learning, he is permitted to tackle it.⁹ Such experiences repeated, again and again, ultimately produce competence, freedom, and independence, and the child will become a truly free adult in his community. When there has been failure to resolve successfully some social problem, good parents step into the situation and invoke the process of rehabilitation. This is educative in nature and is directed toward helping the child achieve more appropriate and, therefore, efficient means of coping with his problems.¹⁰ Here, too, the corrective process is applied only so long as it is necessary. It is accomplished in a positive atmosphere and without retributive intention. It should be noted, however, that all education of children is carried out in an atmosphere of prohibition and inhibition. To be educated into a civilization requires the inhibition of impulses and the control of those impulses or, at the very least, their redirection into channels which are acceptable socially. Such an inhibiting process itself produces anger and rebelliousness, which adds to the burden of control by the child. Thus, the process of education or rehabilitation itself may provoke some form of angry aggressiveness.¹¹

Perhaps by now, the reader is wondering what these remarks have to do with the legal approach to crime and correction. A second thought, however, should reveal that the definition of crime (the value judgment of behavior which is forbidden and punishable) and the means by which this inappropriate behavior is altered, is closely related to the psychological process present in every individual. A standard of justice is developed by everyone, and the desire to know the outcome of one's behavior in terms of its acceptability or punishment is universal. It is no wonder that the illusion of the "known certainty of the law" is so desirable. Each individual's conscience is a lawyer of a sort and attempts to define a criminal code in order to anticipate and avoid punishment. Each individual, if reasonably mature, is constantly attempting to remodel his own penal code to arrive at a more precise and equitable form of justice in order that he may enjoy greater psychic freedom. Each is willing to submit to external codes only if they are felt to be equitable and relate justly to him. While the desire for predictability and uniformity of application is great, even greater is the desire to know that the system will be just, in the sense that it will take cognizance of his needs and capabilities as an individual.

II

THE CORRECTIVE PROCESS

We have noted how justice relates to the child's early growth and development. While initially this necessitates a more or less rigid code which "answers" all problems, the maturing capacity to comprehend social relationships creates the

⁹ See Whitehorn, *Stress and Emotional Health*, 112 AM. J. PSYCHIATRY 781 (1956).

¹⁰ For a discussion of both success and failure in this process, see LEON J. SAUL, *THE HOSTILE MIND* 163-80 (1956).

¹¹ An excellent discussion of this subject by Anna Freud, renowned authority on child education and child psychotherapy, may be found in *Psychoanalysis and the Training of the Young Child*, 4 PSYCHOANALYTIC Q. 15 (1935).

realization that justice cannot be so rigidly defined. The new need arises at this point, and willingness to accept the system is partially related to whether or not justice is tempered with understanding and sympathy.¹² Social and ethical development along these lines is responsible for the progressive tempering of justice and for the progressive relinquishment of retribution, with an increased interest in rehabilitative techniques. This reflects the increased capacity to cope consciously with angry, retributive impulses, instead of pretending that they do not exist, as well as a greater ability to understand these impulses in others. One may not understand and effectively deal with the antisociality in others until these impulses are acceptable to oneself. We can clearly see the evolution of this concept in the Judeo-Christian religious tradition, as well as in the other ethical religions.¹³ The development of the legal concepts of responsibility also reveal progressive dissatisfaction with punishment which is divorced from consideration of an individual's total capacity to control himself. It is possible, also, that greatly increased police efficiency has reduced the intensity of fear, anger, and retributive wishes felt by the average citizen. Each individual criminal caught by the police does not stand for hundreds of uncaught criminals in the mind of the law-abiding. The cry for greater severity always goes up when it appears that police efficiency is disintegrating.

Most modern writers, discussing the policy goals of criminal law, tend to deny the current importance of retribution. It is summarily dismissed as being no longer an appropriate goal for the law, and, ipso facto, it no longer exists. A cursory examination of a few criminal trial records makes it all too clear, however, that, even if not widely acknowledged, it is still a potent factor in the process of criminal adjudication. Those judges whose public statements leave little doubt of their retributive intentions toward certain types of offenders are by no means exceptional in relation to ultimate results.¹⁴

Modern psychiatric theory can illuminate and perhaps lend some assistance in dealing with this ubiquitous impulse. Perhaps the mere fact that there is such a vociferous denial of retribution in criminal law is, itself, a symptom of the stage of development in which man and society find themselves. The psychoanalyst takes it for granted that all individuals biologically must respond to any threat with the impulse either to fight back, or to run away from the source of the threat. This we

¹² "Let us consult the human heart, and there we shall find the foundation of the sovereign's right to punish; for no advantage in moral policy can be lasting which is not founded on the indelible sentiments of the heart of man. Whatever law deviates from this principle will always meet with a resistance which will destroy it in the end; for the smallest force continually applied will overcome the most violent motion communicated to bodies." BECCARIA, *op. cit. supra* note 3, at 8. See also I. J. S. MILL, AN EXAMINATION OF SIR WILLIAM HAMILTON'S PHILOSOPHY 292-93 (1865).

¹³ *E.g., compare* "And the man that committith adultery with another man's wife, even he that committith adultery with his neighbor's wife, the adulterer and the adulteress shall surely be put to death," LEVITICUS 20:10, with "He that is without sin among you, let him first cast a stone at her." JOHN 7:7.

¹⁴ See GREGORY ZILBOORG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT 69-88 (1954); HENRY WEIHOFEN, THE URGE TO PUNISH 130-70 (1956); JEROME FRANK, LAW AND THE MODERN MIND 100-17 (1936); JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES OF THE COMMITTEE ON PUNISHMENT FOR CRIME, REPORT 23-30 (1942).

view as a primitive physiological reaction which is impossible to eradicate. The most any person may hope to accomplish is to learn how to cope with this powerful reaction in ways which are socially efficient.

It should be clear that the most efficient means involve some conscious handling of this reaction. The child's method of denying hostile reactions provides him with a modicum of control, at the cost of losing close and precise contact with the realities in a situation. The criminal process, if it is to deal effectively with the hostile retributive impulse, should make full use of our knowledge and do what is possible to help the participants in the process deal consciously with it. It is quite obvious that during many criminal trials, counsel for each side, consciously or unconsciously, attempts to impinge upon this impulse in whichever way will favor his side of the case. The prosecutor will attempt to arouse the retributive impulse, while defense counsel will try to arouse sympathy and even guilt about this impulse. Accepting the presence of such tendencies raises several questions about the kind of argument permissible, if the true objective is to arrive at a just and rational finding.

The recent popular television and movie story, *Twelve Angry Men*, is a brilliant description of the manner in which this retributive impulse impinged upon several members of the jury in a murder trial. The way in which these jurors gained insight into their emotional reactions and altered their judgments was clearly brought out and, in fact, illustrates possible techniques whereby the effect of the universally-present retributive impulse might be diminished.

We should point out that the effect of this retributive impulse may be eliminated from legal decisions only to the extent which the general understanding and ethical standard of the community will tolerate. As Holmes stated:¹⁵

The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution. At the same time, this passion is not one which we encourage, either as private individuals or as law-makers. Moreover, it does not cover the whole ground. There are crimes which do not excite it, and we should naturally expect that the most important purposes of punishment would be co-extensive with the whole field of its application.

We should recall, again, that the ethical attitudes of the public toward its criminals is a function of the society's maturation.¹⁶ As its level of ethical morality increases (and police action becomes more efficient), it has less need to be retributive and more opportunity to "love" those who offend it. Such attitudes have long been expressed in the ethical religions of Christianity, Mohammedanism, and Buddhism.

¹⁵ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 41-42 (1949).

¹⁶ Beccaria said: "I conclude with this reflection, that the severity of punishments ought to be in proportion to the state of the nation. Among a people hardly yet emerged from barbarity, they should be most severe, as strong impressions are required; but in proportion as the minds of men become softened by their intercourse in society, the severity of punishments should be diminished, if it be intended that the necessary relation between the object and the sensation should be maintained." BECCARIA, *op. cit. supra* note 3, at 178.

Such an attitude of love does not mean approval of the antisocial behavior, but rather involves understanding of causes and a sincere wish to bring all men into acceptability. This is much the same relationship as loving parents have with their children. It involves imposing necessary limits and controls on the child's behavior when he has reached his own limits and is not able to provide them for himself. In this way, skill in self-control is increased. Admittedly, this is a delicate line to follow. Psychiatric evidence is clear, however, that only through such understanding is unacceptable behavior changed to effective behavior.¹⁷ Such treatment is not "soft" in the sense that it permits the individual to "get away with" his inappropriate or offensive behavior. Indeed, he is called to task for it and penalized in some fashion. Any punishment used, however, always serves the process of changing behavior; and mere physical punishment will usually bring no such change, but will arouse rather further hostile and aggressive desires to thwart the punishing authority.¹⁸

It is interesting to recall that occasionally societies have evolved means of criminal treatment which utilize completely the tort concept of repayment for ill done, rather than punitive action in a retributive manner. This was apparently true under Cossack law.¹⁹

Under this legal code, all actions were considered claims for damages by one party from another. No action could be taken against an individual in the interests of society as a whole, but only on the charge of specific injury to person or property, brought by the victim. Such charges did not distinguish between civil and criminal offenses. All injuries from murder to the misuse of borrowed property might be compensated for according to an elaborate tariff of fines, damages and reparations. . . .

The mere pressure of social disapproval seemed sufficient to bring offenders to settle their obligations. These practices were apparently introduced through Moslem influence on Turkish and Mongol codes, in which the Mohammedan prohibition against killing other "believers" was expressly forbidden. It would appear that in this cultural setting, such a system of justice worked very efficiently. Such techniques are currently feared because of the feeling that many potential criminals feel more free to take their chances with the risks involved in this form of punishment.²⁰ While this is logical, it does not relate to the basic forces which shape most social conforming, the internal images of what is good and what is bad behavior.²¹

We mentioned earlier, while discussing the dynamics of conscience-formation,

¹⁷ Erich Fromm develops this thesis in an interesting work which attempts a synthesis of psychoanalytic theory, religion, and philosophy. See ERICH FROMM, *THE ART OF LOVING* 107-33 (1956); see also THEODOR REIK, *MYTH AND GUILT* 428-29 (1957); LAWRENCE S. KUBIE, *PRACTICAL AND THEORETICAL ASPECTS OF PSYCHOANALYSIS* 156-57 (1950).

¹⁸ For a case study of such a person, see ROBERT LINDNER, *REBEL WITHOUT A CAUSE* (1944).

¹⁹ ALFRED E. HUDSON, *KAZAK SOCIAL STRUCTURE* 67-69 (Yale University Publications in Anthropology No. 20, 1938).

²⁰ See RAYMOND SALEILLES, *THE INDIVIDUALIZATION OF PUNISHMENT* 21-34 (1911), reprinted in ALBERT J. HARNO, *CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE* 1 (2d ed. 1939).

²¹ See Modlin, *The Position of the Psychiatrist in the Administration of the Criminal Law*, 4 KAN. L. REV. 353 (1956).

that the very act of inflicting injury on another brings an individual into conflict with himself.²² This being true, it poses the ultimate social necessity of abandoning any type of retributive punishment in order to reinforce the progressive tendency toward rehabilitation. Such trends are reflected by the law in such examples as the eighth amendment of the Constitution, which specifically prohibits cruel and inhuman punishments, and in the increasing tendency to abandon the death sentence. It may be stated flatly that punishments designed to hurt do just exactly that and nothing more. They do not help to bring the wrong-doer into a constructive relationship with society. Simply speaking, they do not work, have never worked, and only serve to brutalize the society that enforces them.

The law must deal with the universal presence of retributive impulses. Rather than building into the law mechanisms which facilitate denying their existence, efforts should be made to force this impulse to the surface, so that individuals involved in the legal process as either judges, jurors, or advocates will have the maximum potential opportunity for avoiding their reactions to this impulse.

In considering the policy of incapacitation, we should recognize clearly that its moral basis and its psychological efficiency are limited only to those situations where an individual's capacity to conform to social demands is absent or distorted. Any deviation from this policy will be publicly perceived as running counter to the common sense of justice. The law will appear as a punishing, tyrannical parent who lashes out blindly and with violence, and may be feared and hated, but not respected or trusted.

It is a common complaint by prison inmates that it is impossible for them to learn how to live "outside" from their experience "inside the walls." A walk through any prison corridor should confirm this statement for nearly anyone. The atmosphere in the average penal institution is electrified with hostile tensions which can surely bring good to no one, and it would appear very difficult, indeed, to justify such incapacitation in the name of social rehabilitation. There is a vast literature in the field of penology to demonstrate the inadequacy and the folly of such punitive treatment, and a glance at recidivism rates will certainly demolish any theory that this form of treatment assists criminals in becoming better adjusted to the society in which they earlier failed.

Recent efforts to modify corrective institutions toward truly rehabilitative goals show a promise which, in the long run, not only will salvage many potentially good citizens, but will alleviate the increasing financial problem of maintaining and building prisons. Incapacitation, if utilized for therapeutic goals, can lead to rehabilitation, and so reduce the amount of incapacitation necessary for social safety.

The most widely-accepted goal of the criminal law is that of deterrence, and this is the basis for most current theory in criminal law.²³ One may question the

²² See ALEXANDER & STAUB, *op. cit. supra* note 8, at 18; Szaz, *Psychiatry, Ethics, and the Criminal Law*, 58 COLUM. L. REV. 192 (1958); see also Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378 (1952).

²³ "Of all these purposes, that of deterrence is more or less the official one. It is the one readiest at

moral validity of the idea of deterrence, since this philosophy deliberately utilizes the offender as if he were a thing, to be used as an "example" for the theoretical benefit of society. This view has recently been elucidated further by Professor Caleb Foote in a work written for the United Nations.²⁴ This paper will, however, explore only the practicability of the idea.

According to this principle,²⁵

if a person has engaged in behavior of a sort which is undesirable and can be deterred, and if he is subjected to treatment which is generally regarded as unpleasant, other persons may be deterred from engaging in similar conduct by the fear that if they do so they will be similarly treated.

It is interesting to note that this definition has the conditional statement: behavior which "can be deterred." The psychiatrist would certainly concur with this view that some crimes *cannot* be deterred and that most crimes of "violence" and "passion" are in this category. For example, a large percentage of homicides are committed by persons with a close emotional relationship to the one they kill, and the homicide usually occurs in the throes of a sudden and powerful outburst of aggressive rage.²⁶ Though there is insufficient evidence from which to draw final conclusions, none of the studies of the motivational patterns of such murderers gives any indication that deterrence possibly could affect them.²⁷ At the moment the homicide is committed, the law and the consequences for breaking it are remote from conscious consideration. It is only after the pressure of the passion is past that such abstract matters may come into awareness. All too frequently, these individuals are not devoid of conscience, but rather have a conscience which is dedicated to denying the existence of the murderous forces which it must control. Such a conscience, we have already said, is always potentially dangerous and sets the stage for possible complete loss of control. It is an all-or-nothing conscience.

We remarked earlier that the time at which deterrence is most likely to be effective is with children of a very tender age. Early behavior conformity is related, at least to some degree, to the principle of deterrence. A child follows the expected pattern in order to avoid the pain of punishment. By the age of six or seven, how-

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." Radin, *Enemies of Society*, 27 J. CRIM. L. & CRIMINOLOGY 328, 333 (1936).

²⁴ Foote, *Problems in the Protection of Human Rights in Criminal Law and Procedure*, in UNITED NATIONS SEMINAR ON THE PROTECTION OF HUMAN RIGHTS IN CRIMINAL LAW AND PROCEDURE working paper E (1958).

²⁵ JEROME MICHAEL & HERBERT WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* II (1940).

²⁶ See MARVIN WOLFGANG, *PATTERNS IN CRIMINAL HOMICIDE* 203-221 (1958).

²⁷ See LINDESAY NEUSTATTER, *THE MIND OF THE MURDERER* (1957). This volume has the descriptions of many different types of personalities who committed murders, but does not reach far toward their motivational patterns. See also DUNCAN ET AL., *PSYCHOGENETIC DETERMINANTS IN MURDER: STUDY OF SIX PRISONERS CONVICTED OF FIRST-DEGREE MURDER AND THEIR PARENTS* (to be published).

ever, he is beginning to learn mainly through the positive desire to be like those whom he admires and loves. If the model's behavior is socially appropriate and ethical, the child will learn to behave likewise and will have a sense of unworthiness when he fails. Psychiatrists regard this kind of emulative learning as the most powerful force in creating adults who will have the capacity to perceive social values and to behave in a socially-constructive manner, rather than destructively. Individuals reaching maturity without the capacity for social conformity are not influenced readily by the example of others. Dession has said,²⁸

. . . I suppose that it is evident that the deterrent effect of any particular sentence imposed must depend on two things: the way in which the convict sentenced is capable and has been conditioned to respond to such a prescription; and the way in which others of comparable personality and similar inclination in the general population are capable and have been conditioned to respond to the example of the sentence inflicted on the convict. If deterrence is to work the latter must presumably identify with the convict, must be averse to suffering a similar sentence themselves, and must be made aware that there is a high probability of the latter eventuality.

For these reasons it seems to me that we must rule out as promising subjects for the deterrence approach those who will consider any expected sentence a martyrdom preferable to conformity with the law (the political fanatic who identifies with an alien hostile culture, the religious fanatic, the patriot who engages in espionage on behalf of his own country abroad), those in whom the conscious awareness involved in the process of being deterred will not be controlling (the mental defective in a complicated situation, the psychotic in many situations, the intoxicated or drug-influenced, the extremely neurotic offender who "does not know why he did it" in the sense that he was driven by sub-conscious or not altogether conscious impulses, and the "temporarily insane" offender who happened to be confronted by a situation with which he could not otherwise emotionally cope), and those who will not identify with the convict and hence not take him as an example (members of elite groups in the community who may consider themselves, rightly or wrongly, as exempt from the law or regulation in question, persons who feel that in any event they have adequate protection, and persons who feel that they are sufficiently smarter than the convict to avoid getting caught).

The kind of people who *are* deterrable by example are intelligent, mature, well-informed, well-controlled, and under no extraordinary pressures. Such persons commonly find their own conscience and the good opinion of their friends quite adequate deterrents. It is not the kind of punishment that deters the normal man, but his conviction that he will probably be caught and will lose the approval of society and the fact that he will lose his own self-respect whether caught or not. The more violence involved in the crime, the less deterrable by means of example it is likely to be. In less violent crimes, it is the loss of approval which is the effective agent, not the unpleasantness following the loss.

It would seem, therefore, that punishment which involves incapacitation can serve fruitful purposes only in so far as it leads to rehabilitation of the individual himself. If it serves no deterrent function to others, then its degree should be

²⁸ Dession, *Justice after Conviction*, 25 CONN. B. J. 215, 223-24 (1951).

limited by the rehabilitative needs of the individual—*i.e.*, he should be incapacitated only so long as needed to prevent future criminal behavior or so long as needed to alter his behavior in order to avoid subsequent criminality; to incapacitate a person longer than this runs counter to a sense of justice.

We should raise a note of caution in regard to incapacitation for rehabilitative purposes in the light of our limited knowledge in precisely predicting therapeutic results and future behavior. The possible duration of such incapacitation should be related to the severity of the potential risk. In other words, minor offenders, though they commit crimes which arouse some negative reaction in the community, could not justifiably be held for indeterminate periods, with only the vague possibility of rehabilitative change. Therefore, the standard for the duration of any rehabilitative sentence must include a consideration of how dangerous or annoying the person would be, *if* he did not change at all. Only substantial danger should justify continued forced rehabilitation.²⁹

Many authors have written about the problems arising when the goals of deterrence and rehabilitation conflict in the corrective process.³⁰ Considerations of deterrence very often block potential rehabilitation. (It is nearly impossible to conduct any kind of rehabilitative process in an institution dedicated to retributive punishment. When the institution is heading in one direction, while the therapists are attempting another, the result will be an impasse.) Incapacitation should be a function either of the individual's capacity to be rehabilitated, or of continued social risk.³¹ Any compromise which impinges on the rehabilitative potential or social necessity should be dropped because of its demonstrated inefficiency.

Many policies set forth in the name of deterrence appear to be social rationalizations in the service of retributive impulses. For example, it is often stated that our knowledge of criminal behavior is so uncertain that it would be socially dangerous to try out the suggested changes in correction practice. This statement does not begin to reflect our current experience. There is ample evidence that retributive and deterrent techniques make little impact on many classes of criminals; in fact, they appear to strengthen criminality.³² Since these methods do not work, it is logical to begin some form of alteration upon them. Society is not protected by the perpetuation of ineffective techniques and is increasingly endangered by them. To experiment widely with rehabilitative techniques could hardly produce social loss or increase social risk, since such experiments would be coupled with some form of incapacitation.

There is social gain in dedicating ourselves to some rehabilitation process, even though practically it is not yet possible to treat actively all those whom we presently are incapacitating. Merely changing the names and the treatment policies of our

²⁹ See Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L. & CRIMINOLOGY 543 (1950); Tappan, *Sentences for Sex Criminals*, 42 *id.* at 332 (1952).

³⁰ See Frym, *Past and Future of Criminal Rehabilitation*, 3 J. PUB. L. 453 (1955).

³¹ An excellent analysis of the problem is Waelder, *supra* note 22.

³² See EDWIN H. SUTHERLAND & DONALD R. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 590 (5th ed. 1955).

institutions would have a salutary effect, however, and would open the way to future change.

It may be argued that since the rehabilitative process has been tried without remarkable success in the case of the juvenile offender, there is little reason to attempt it with adult criminals. There can be little doubt that our treatment of juveniles has not approached the desired results. It is also clear, however, that there has been very little creative effort to approach the core of the difficulty—the offender's emotional and personality structure. Since it is difficult to imagine devising any more retributive methods of punishment than have been used through the years, we may safely assume that such a treatment has little chance for success. In the light of minimal rehabilitative efforts ordinarily made with juveniles, therefore, it cannot be contended that this method has been disproven.

If the progression from retributive to rehabilitative forms of correction is desirable and to be anticipated as a matter of evolution, what are the forces which block such progress? Do these barriers offer any possibility for conscious alteration, and is there anything which those interested in the administration of criminal law can do to accelerate change? If we accept even tentatively the points enumerated above, several things emerge which might be done to assist this change.

We have seen that every person in growing from childhood to his adult role in society must pass through the same form of maturational progression that society, as a whole, has experienced. We have stated that within each person resides powerful, retributive impulses, and that maturing increases the capacity to handle impulses according to rational rather than irrational methods. We saw that one of the common ways in which retribution is handled by children is through covering it over with a sort of moralistic, inverting maneuver, so that attack can be unleashed against social offenders in the name of righteousness, with pious horror.³³ An increase of self-awareness in every individual, and most especially in those who are to become involved with the process of criminal law, is essential to understanding and dealing with this primitive impulse.

This raises a question about the nature of legal education. Courses of criminal law deal mainly with substantive issues, and the corrective process, with its sociological and psychological implications, is largely left out of consideration. An examination of most of the currently-used casebooks in criminal law underscores this situation. Only two of the entire group have any substantial amount of material drawn from the behavioral sciences.³⁴ These tend to deal with statistical implications, rather than to elucidate motivational forces which must be considered to arrive at any rational method of correction.

³³ Many crusading types of persons utilize this kind of impulse control. An example of such a person was Anthony Comstock, in his drive to institute federal control of obscenity in the mails. See Paul & Schwartz, *Obscenity in the Mails: A Comment on Some Problems of Federal Censorship*, 106 U. PA. L. REV. 217 (1957).

³⁴ GEORGE H. DESSON, *CRIMINAL LAW ADMINISTRATION AND PUBLIC ORDER* (1948); JEROME MICHAEL & HERBERT WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* (1940).

III

THE DEFINITION OF CRIMES

There is a great opportunity to utilize psychiatric and other behavioral science data in the process of defining criminal acts, and one place where this is being done very effectively is in the formulation of the Model Penal Code by the American Law Institute. In their comments on the various articles of the code, the reporters have amassed an impressive amount of relevant behavioral science material, and its impact on the code formulations is conspicuous. Many psychologically meaningless legal distinctions, generally present in criminal laws, have been eliminated, and on sound scientific grounds. For example, the research of Kinsey has apparently lent considerable support to the abolition of several classes of sex crimes which public attitudes have tended to nullify.³⁵

The praiseworthy goals of the ALI in its code can be best stated in the Reporter's own words:³⁶

Paragraph (2) defines the major purposes of the provisions dealing with the sentencing and treatment of offenders and the goals to be pursued in their administration. The section is drafted in the view that sentencing and treatment policy should serve the end of crime prevention. It does not undertake, however, to state a fixed priority among the means to such prevention, i.e., the deterrence of potential criminals and the incapacitation and correction of the individual offender. These are all proper goals to be pursued in social action with respect to the offender, one or another of which may call for the larger emphasis in a particular context or situation. What the Code seeks is the just harmonizing of these subordinate objectives, rather than the concentration on some single target of this kind. It is also recognized that not even crime prevention can be said to be the only end involved. The correction and rehabilitation of offenders is a social value in itself, as well as a preventive instrument. Basic considerations of justice demand, moreover, that penal law safeguard offenders against excessive, disproportionate or arbitrary punishment, that it afford fair warning of the nature of the sentences that may be imposed upon conviction and that differences among offenders be reflected in the just individualization of their treatment. Finally, it is among the basic purposes of the draft to define, coordinate and harmonize the powers, duties and functions of the courts and of correctional administration, to advance the use of generally accepted scientific method and knowledge in the sentencing and treatment of offenders and to integrate responsibility for the administration of the state correctional system in a unified state agency.

The sentencing and treatment plan proposed has been designed to further and, so far as possible, to harmonize these goals.

A factor which tends to mitigate rational elaboration of the corrective process is the universal desire for certainty. Lawyers have always attempted to formulate laws which are clear, concise, and free of ambiguity. One may readily sympathize with this goal, since each of us has a powerful psychological desire to order the world around us, master it, and be able to predict the results of various kinds of behavior. Lawyers and judges are not the sole aspirants for "known certainty."

³⁵ MODEL PENAL CODE § 207 (Tent. Draft. No. 4, 1955).

³⁶ *Id.* at 4-5 (Tent. Draft No. 2, 1954).

This desire for unambiguousness and clarity, however, may lead to great uncertainty. There are many facets of human behavior which are so complex as to defy simple definition, and it is self-defeating to narrow definitions to such a degree that they preclude consideration of much of that which is defined. For example, we may grow restless with the "uncertainty" of an insanity test such as *Durham*,³⁷ which does not lay out narrow and precise meanings of its terms.³⁸ But when we attempt to regulate and define responsibility in the language of *M'Naghten's Case*,³⁹ we leave out a very large segment of the important information regarding social responsibility. We are not just interested in whether a person "knows" what he is doing and what it means; we are primarily interested in his ability to conform his behavior to the demands of society. This broad and open-ended question is explored under such a rule as *Durham*, and no later alterations in medical nomenclature or psychiatric theory can make nonsense of it. Under *M'Naghten*, however, it is extremely difficult to pursue this question, and the results may end as little short of ridiculous.

It is assumed often at various points in the legal procedure that the clear statement of a verbal formula will communicate complex highly technical ideas. Certainly, modern psychiatric and communication theory underscore the fallacy of this assumption.⁴⁰ To communicate psychological material effectively, it is essential that there be extensive discussion, with clarification and reclarification of terms. It is inappropriate to attempt to bring technical information to a jury through precise formulae, when such formulae have such small likelihood of communicating. Recognition of this fact might eliminate much of the controversy over the use of specific words and enhance the likelihood for more full explanations, as in the charge to the jury. Needless to say, many judges are well aware of this and make no such facile assumptions.

Among its several purposes, the criminal law attempts to define that group of acts which, if committed under certain circumstances, will result in the isolation and treatment of the offenders. The ultimate purpose of this process is to protect society against such persons according to the means which it considers best at any given point in time. While the criminal law serves to set forth a standard of unacceptable behavior, this would not carry it beyond the purpose of a code of ethics or a religious code if it did not invoke also some corrective process. We have alluded to the fact that in the earliest criminal codes, proof of commission of the forbidden act caused the individual to be held liable, and he was summarily punished.

After many centuries of development, there came into the English common law the concept of the *mens rea*.⁴¹ This part of the definition of the crime seems to

³⁷ *Durham v. United States*, 214 F.2d 862 (D.C.Cir. 1954).

³⁸ See Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L. J. 761 (1956).

³⁹ 10 Clark & F. 200, 8 Eng. Rep. 718 (1843).

⁴⁰ See Probert, *Law, Logic and Communication*, 9 WESTERN RES. L. REV. 129 (1958); Hayakawa, *Semantics, Law, and Priestly-Minded Men*, *id.* at 176.

⁴¹ See Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932); see also Lévit, *The Origin of the Doctrine of Mens Rea*, 17 ILL. L. REV. 117 (1922).

have developed partially, at least, out of the growing sense of injustice when either the very young or the mentally-disturbed were punished.⁴² It did not feel just to punish an individual who did not seem to have the means at his command to avoid the forbidden act. It was felt appropriate to punish only when "free will" existed.

The concepts of free will and of *mens rea* lead us to a consideration of a part of the mental apparatus which dynamic psychiatrists call the ego. The ego is that part of the personality which is involved with testing, defining, estimating, judging, remembering, perceiving, synthesizing, and integrating the various aspects of the world of reality.⁴³ The main advances in psychiatry during the past fifty years have centered around the elucidation of these functions and a greater understanding of the way they impinge upon the instinctual forces of the body. Such investigations have gone far to demonstrate the accuracy of the philosophical speculations of Bentham, Mill, and others.⁴⁴ Since it is the ego's function to control behavior, it is only through understanding these functions in any given individual that his *mens rea* can be understood. This, in turn, will answer the question of what correctional approach can be used best to bring him back to a safe relationship with society.

The concept of free will emanates largely from theological thinking, which held that an individual was born with free will and kept it, except when possessed by devils, which itself was an act of will.⁴⁵ The modern dynamic psychiatrist, however, would view this concept of freedom as putting the cart before the horse. Studies of children, as well as of adult mentally-ill patients, emphasize the fact that free will or freedom of the choice in action is something which is developed slowly and progressively from childhood to adulthood. It cannot exist in those situations where the individual, out of psychic necessity, must be unaware of part of his feelings, attitudes, and impulses. True freedom involves choice, and choice is a conscious process. Unconscious forces from within, which dictate behavior without the person being able to alter it, is the hallmark of all neurosis and mental illness, as well as the significant factor for measuring mental health and maturity. In other words, free will is the achievement of maturity.

The capacity to relate accurately to the world of reality and to make free choices is missing in three significant groups of people. First, are children. The law has long realized that children should not be held responsible for their acts, for the self-evident reason that they have not the experience or judgment to make appropriate choices. One of the early examples of a changing sense of justice was the exclusion of individuals of tender years from the sanctions of the criminal law.

The next group which lacks the capacity to make free choices in relation to reality are those whom we designate as "mentally-ill." This concept has been greatly broadened in recent years, as more and more has been learned about psychological

⁴² See Sayre, *supra* note 41, at 985.

⁴³ See FRANZ ALEXANDER, FUNDAMENTALS OF PSYCHOANALYSIS 82-104 (1948).

⁴⁴ See, e.g., I THE WORKS OF JEREMY BENTHAM I (Tait ed. 1843).

⁴⁵ See GREGORY ZILBOORG, A HISTORY OF MEDICAL PSYCHOLOGY 154-63 (1941).

function. Originally, only those designated as psychotic and those so severely neurotic as to have substantially lost the capacity to live realistically were viewed as mentally-ill by lawyers and doctors alike. In recent years, however, the group now called "character neuroses" (which includes those formerly called psychopaths), is also regarded as mentally-ill, since they are just as devoid of free choice as the groups mentioned before, at least in so far as certain kinds of behavior are concerned. While we may not approve of their behavior, there is no significant distinction in their capacity to control and manipulate their own acts, and in this respect, they are no different from children or the frankly psychotic individuals. Retributive reactions to them are, in a very real sense, unjust, since they have no more freedom to alter their behavior than children and psychotic adults. While they must be controlled and incapacitated legally, they need help just as deeply as do the other two groups mentioned, and we know that their behavior will not be altered by retributive or deterrent punishment.⁴⁶

The third group lacking the capacity to manipulate reality includes those who come from cultural settings with limited knowledge about nature and the sciences, at least in the terms in which we conceptualize it. For example, an individual reared in a relatively primitive culture, transplanted into an urban community, will have little understanding of the complex society he perceives about him. He brings into the strange, new environment all of his previous concepts about the nature of the world, such as a belief in the magic of Voodoo. In order to cope with the stress of his new surroundings, he may, without hesitation, put his magic into action, including the procurement of someone's skull.⁴⁷ Few would have a sense of justice if such a person were punished retributively, since he clearly does not understand the nature of the prohibitions which he has broken. Some form of incapacitating and rehabilitative restriction for such individuals is necessary, and that approach in the long run would work social change most rapidly.

There are certain areas of law which, in terms of their current definition, raise difficulty for the psychiatrist. For example, many cases involving "mistake," "provocation," and "insanity" all look suspiciously similar in regard to the mental state in the defendant. Many persons who commit offenses which involve these questions have some sort of defective judgment capacity which leads them to make mistakes, be provoked, and act on some internal stimulus rather than in response to the external world. Since these are differences in the degree of defectiveness, the definition of the crime should relate always to the offender's specific mental state. Culpability would fall in a spectrum ranging from complete responsibility, through not guilty by reason of insanity, to not guilty. The points on this scale would be defined in terms of the offenders psychological capacity to control and conform his behavior to legal

⁴⁶ For contrasting opinions on this subject, compare Bromberg, *The Treatability of the Psychopath*, 110 AM. J. PSYCHIATRY 604 (1954), with Kaplan, *Barriers to the Establishment of a Deterministic Criminal Law*, 46 KY. L. J. 103 (1957).

⁴⁷ The recent New Jersey case of Juan Rivera Aponte illustrates this situation fully. See *The Sunday Bulletin* (Philadelphia, Pa.), July 14, 1957, p. 46.

standards. During the trial, it would be determined if the accused did or did not commit the act he is charged with, and where on the culpability spectrum his mental state would place him. For example, in cases of homicide, once the fact of the killing is settled, evidence would be presented on the mental state, including such factors as misperceptions ("mistake"). These would be tied to psychiatric testimony demonstrating the presence or absence of mental traits making such misperceptions possible. In some cases, such evidence would lead to complete exculpation, and in others, the jury could find not guilty by reason of insanity, depending on where along the spectrum they decided the evidence fell.

The evidence utilized in this process also would indicate clearly what form of sentence should be imposed.⁴⁸ This is similar to the concept of "diminished responsibility" and brings together more clearly the significant elements in the definition of the crime.

One of the eternal problems relating to the process of definition occurs when the definition itself is elevated to the status of a social institution which is sacrosanct and may not be altered.⁴⁹ This is a universal psychological tendency, present in much of the recent discussion regarding the rule of *M'Naghten*. Many courts elaborate at some length the virtue of changing to a *Durham*-like rule, only to conclude by saying that it is not their prerogative to make such a change, that it must come from the legislature. This seems to be rationalization, since in most jurisdictions the law of responsibility is judicial in origin and not legislative. The rule has become an institution, and there is a sense of anxiety about altering it.⁵⁰ In order to maintain the feeling that law is just, it is essential that it remain in close contact with the advance of scientific knowledge. When the educated population is more aware of psychological issues than the law, it is detrimental to the social acceptability of the law. The *parens patriae* is regarded as being mean and tyrannical, and this legitimizes rebelliousness against it.

Needless to say, in the process of defining crimes or anything else, knowledge is essential to working out an accurate definition. Arguments about the number of angels who may stand on the head of a pin are as old as mankind, and are always

⁴⁸ In California, the trial is divided into two stages when the question of mental state is at issue. In the first stage, the question of whether or not defendant committed the act of which he is charged is settled; and in the second, the issue of sanity is adjudicated. CAL. PEN. CODE § 1026.

⁴⁹ ALLEN WHEELIS, *THE QUEST FOR IDENTITY* 180-98 (1958).

⁵⁰ Similar anxiety arose over the adoption of *M'Naghten*. Dr. Bernard Diamond has found an interesting, polemical poem entitled *Monomania*, written by "Wetnurse" and published in 1843 in London, a few months after the *M'Naghten* trial. This poem puts forth the identical arguments for *not* adopting *M'Naghten* as have appeared 110 years later in regard to *Durham*. For example:

"Devils, or Dunces, it is all the same—
They work for evil, though by different means;
The real distinction is but in the name,
As those must know who've been behind the scenes;
Though one sometimes pursues the higher game.
Dunces kill subjects—devils aim at Queens;
And so they will, till by experience taught,
That they'll be hanged, as soon as they are caught."

unanswerable. So long as psychological and emotional matters are largely not understood by the practitioners of the law, we cannot expect that the law will reflect appropriately most of the knowledge in this area. It is often said that psychiatry is not yet advanced sufficiently to warrant its use by the law. The same argument was made against *M'Naghten*.⁵¹ In most jurisdictions, acceptance and understanding of this medical issue has not yet reached the level of Isaac Ray's understanding, let alone that of current concepts. Therefore, it would seem imperative that some means of learning about this subject be provided to the practitioners of law. Psychiatric concepts, though difficult, have more substance than angels, and with proper educative means, most may be advanced in their understanding of this material. This is the only field of medicine about which the more ignorant a man is, the more sure a sense of expertness he has in evaluating the phenomena. Some jurisdictions have even written this into the law, making it clear that lay interpretation of psychological behavior is every bit as valid as that of psychiatric experts.⁵² This attitude is by no means rare, although irrational.

The significant question raised by this symposium is how we may achieve the goal of integrating scientific knowledge with legal principles in the definition of crime and in criminal correction. While it is quite clear that in practice, these two functions may be separated sharply, it is all too apparent that this is an inefficient course to follow. Always remembering that "for the most part, the purpose of the criminal law is only to induce external conformity to rule,"⁵³ in the definition of crimes, it is essential that we pay attention to all of the psychological factors which lead to their commission. These are the significant elements which must be dealt with, both as a protective measure and in the corrective process. For example, the so-called "subjective test" is the only psychologically sound one for determining culpability in those cases where "reasonableness" is an issue. Some jurisdictions, seeking objectivity where none may be had, continue their search for the ever-elusive "reasonable man." While guilt should be tied to the subjective standard, often corrective measures ought to be applied to those found not guilty, since their acts have given manifest evidence of their defective judgment capacity. At the risk of repetition, correction for these persons always should be rehabilitation and/or incapacitation.

This same matter has come to the attention of insurance vendors in the syndrome called "accident proneness." Here, though the individual is guilty of no intentional act, the frequent automobile accidents in which he is involved have made it clear to these vendors that such persons have certain mental characteristics which lead them more frequently into accidents than their fellow drivers. After this attribute has been adequately demonstrated, the vendors take action in their own interest and subsequently refuse to sell insurance to such persons. When such tendencies are manifest in automobile driving, which has such a high potential danger, society

⁵¹ See Diamond, *Isaac Ray and the Trial of Daniel M'Naghten*, 112 AM J. PSYCHIATRY 651-56 (1956).

⁵² See, e.g., *Commonwealth v. Patskin*, 372 Pa. 402, 93 A.2d 704 (1953).

⁵³ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 49 (1949).

well might consider forcing these individuals into some corrective situation in order to protect itself against the high risk they provide. In such a situation, the definition of the "crime" *must* approach the tenuous, psychological issues which lead to the (negligent) acts and which *should* be considered in any corrective measures taken to prevent such risks.

IV

SUGGESTIONS

We have already mentioned the current status of most teaching in the field of criminal law and noted the scarcity or utter lack of materials relating to the dynamics of the corrective process, as well as the dynamics of criminal motivation. In the handling of the substantive law, under considerations of state of mind (a critical part in the definition of many crimes), discussions center largely around legal precedents and legal definitions of these states of mind. These rarely reach the level of psychological reality necessary to work out a rational classification system in terms of social risk. In the name of reason, there is strong justification for incorporating some materials on motivational forces into the education of the law student. Whether or not this should be a part of prelegal education or of the law school curriculum is too complex to be discussed here.⁵⁴ At any rate, it would seem that this kind of understanding is essential to those who define laws, administer them, and carry out the corrective process.

While there is a scarcity of appropriate teaching materials, there are presently several attempts under way to rectify this situation.⁵⁵ Many laws schools have initiated courses involving law with psychology, psychiatry, and other social sciences; but for the most part, these have been elective seminars, with only slight impact on the student body as a whole. Until relevant materials are brought into the teaching of criminal law, lack of understanding will persist and we can anticipate that current anomalies in regard to crime and correction will also persist.⁵⁶

We are told that, for the present, the law must be content to protect society through current means, since to do otherwise would be intolerably dangerous. Is it contended that rehabilitating criminals is against the public interest? It is true that a rehabilitative program extensive enough to deal with all the current apprehended criminals is, indeed, an expensive proposition. Not to embark upon such a program is more expensive, however, not to mention the far greater social cost and disability.

⁵⁴ See Watson, *The Law and Behavioral Science Project at the University of Pennsylvania: A Psychiatrist on the Law Faculty*, 11 J. LEGAL ED. 73 (1958).

⁵⁵ See Watson, *supra* note 54; Foote, *The Law and Behavioral Science Project at the University of Pennsylvania: Family and Criminal Law*, *id.* at 80; Levin, *The Law and Behavioral Science Project at the University of Pennsylvania: Evidence*, *id.* at 87. Yale Law School also is embarked on a program similar to that of the University of Pennsylvania, under the sponsorship of the National Institute of Mental Health, to develop such materials.

⁵⁶ Dr. John M. MacDonald, of Colorado Psychopathic Hospital, in a paper to be published in a forthcoming issue of the *Journal of Criminal Law, Criminology, and Police Science*, states that 32 law schools give lectures on psychiatry or psychology and that the number is increasing.

Merely to state an intention to treat rather than punish could bring about some useful changes. Confinement in a hospital-type setting is not an eagerly sought-after experience, but the atmosphere of acceptance of the individual's problems is far healthier than the atmosphere of hate, fear, and rage that exists in the usual penal institution. In a hospital setting, there is always the stimulus to attempt treatment, and it is in just such settings that treatment techniques will ultimately develop. It will take a long time to train individuals to perform rehabilitative functions on such a large scale, but we may be positive that until suitable institutions exist, qualified individuals will not apply themselves to such training.

It is just not true that we have no knowledge of how to treat the criminal members of our society. All criminal behavior can be understood; almost all criminal individuals can be handled therapeutically with less risk than our current techniques afford; many criminals can be rehabilitated by therapeutic intervention. Purely rehabilitative goals have been set for a few penal institutions. One such notable institution is the Medical Facility of California, located in the picturesque Sacramento Valley, near Vacaville. This institution was built and designed purely for the purposes of rehabilitative treatment for its criminal population. All personnel, from the superintendent to the custodian, are oriented to a treatment process. One of the striking things about this institution, which, on preliminary evaluation, appears to be doing a highly significant and successful therapeutic job with its population, is that its work is carried out mainly by relatively inexperienced personnel, whose principal initial qualifications appeared to be dedication. Most of those performing psychotherapy had no special psychiatric training, but, in fact, have developed their skill while working in group-therapy projects with the prisoners. They have applied psychiatric understanding, coupled with basic interest in treatment, and this has created a hopeful atmosphere which pervades the entire institution. Even the custodians share in the therapeutic enthusiasm, and their relationship to the inmates is manifestly positive. The total operation is dedicated to therapy. There is no prison production, and all activities are educational and therapeutic by design. Such an environment is very different from the tense hostility so familiar to most penal institutions.⁵⁷

Another institution doing significant pioneering work is the New Jersey Diagnostic Center, in Menlo Park. Here, too, a similar therapeutic orientation is present, and significant success has been recorded.⁵⁸

It is in corrective institutions such as these, aided and supported by the judiciary, that we may hope to resolve the problem of crime. There, the principal issue is not what crime has been committed, but rather what the motives of the crime were and what the man needs to help him bring his behavior back into conformity with society.⁵⁹

⁵⁷ See Showstack, *Preliminary Report on the Psychiatric Treatment of Prisoners at the California Medical Facility*, 112 AM. J. PSYCHIATRY 821 (1956).

⁵⁸ See Frym, *supra* note 30, at 454-55.

⁵⁹ See Satten, *The Concept of Responsibility in Psychiatry and Its Relationship to the Legal Problem of Criminal Responsibility*, 4 KAN. L. REV. 363 (1956).

We can state flatly that mere alteration of words in the definitions of crimes will effect no positive changes. Individuals reading books on the subject of mental activity or corrective methods will gain little in their capacity to deal with problems. Learning the nature of the corrective process must also be an emotional experience. How many individuals practicing criminal law understand much of what takes place in a prison? A recent project, carried out by law students of the University of Pennsylvania, permitted the students to work for three weeks as prison custodians in the New York City penal system.⁶⁰ These students have a much better grasp of the nature of the corrective process as it is carried out in prisons than they would have through any amount of classroom discussion or reading. Such experience might well be a part of all law students' exposure to criminal law.

Likewise, there is a common feeling that when a person is sent to a mental hospital, he is let off too easily and thus will not gain understanding into the nature of his criminal acts. Again, this is the assumption of persons who have never had extended contact with a mental hospital. A chance to spend a few days in such an institution would greatly broaden the understanding and insight of law students, lawyers, and judges on the nature of the problems involved in this form of correction. They would bring to the law a better understanding of the issues involved on matters concerning mental illness and its treatment.

One concept which needs much attention is the significance that criminal behavior has for the individuals who practice it. As we have noted earlier, to practice crime and to live the kind of antisocial life which criminals generally exhibit is, in itself, a means of psychological adjustment. Such persons practice criminality in order to balance out their needs, since they have no other means available. Merely criticizing the nature of this adjustment will do nothing but strengthen their dedication to it. These individuals already believe that they are not understood or accepted by society and that they have no stake in its dictates and goals. Moralizing only supports their conviction.

Recently, there has been a great hue and cry about the serious problem of juvenile delinquency and juvenile gangs. While the seriousness of this situation cannot be challenged, most of the comments about it show gross misunderstanding of the nature of this activity. All authorities studying the problem sociologically or psychologically concur that gang activity, or its more socially-acceptable form of group or club activity, is a necessary phase of adolescent development.⁶¹ The fact is that groups of adolescents in socially-depressed areas form gangs which attack the culture around them. Groups of adolescents everywhere form gangs, but only a few are antisocial in their activities. Understanding this fact could lead judicial and administrative authorities to attempt to find appropriate ways for this group activity to be expressed.⁶²

⁶⁰ See Roberts, Palermo, Foote, *et al.*, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 685 (1958).

⁶¹ See Erikson, *The Problem of Ego Identity*, 4 J. AM. PSYCHOANALYTIC ASS'N 56 (1956).

⁶² For a constructive concept, see JOSEPH LOHMAN, *JUVENILE DELINQUENCY* (1957).

Recently, in Philadelphia, a large organization known as the Cadet Corps was organized in a Negro section of the community.⁶³ This group had excellent internal discipline and was apparently directed toward socially-useful goals. Considerable anxiety was aroused among officials when it was discovered, and there seemed to be a fear that some form of fascism was about to spring forth from this organization. While adolescent group activity is a fertile field for the exploitation of political goals, there was no evidence that this organization had any such direction. This group met a powerful social need for a critical age group and might well have provided the basis for study of the means by which adolescent groups could be directed toward socially-appropriate goals. The reaction of authorities was directed primarily toward destroying this group, however, throwing its members back on the streets to find other outlets for their group interests, and overlooking an excellent opportunity for social, psychological, and criminological research.

Today, imagination and adventure is called for, not the reinstatement of the whipping post and other punitive measures. Such correctional measures have proven their inadequacy, and the only basis for supporting them is the indulgence of frightened, anxious, and retributive impulses.⁶⁴

V

CONCLUSION

We can say that while psychiatry and the behavioral sciences cannot provide all the answers to legal questions, there is good reason to believe that a mutual exploration of many pressing legal problems would lead to fruitful results. This is not an easy task, but the knowledge of the behavioral sciences today is sufficiently useful, sufficiently well-established, and widely enough understood that to fail to incorporate it will let the social procession get well out of sight of the law.⁶⁵

This writer is very sensitive to the enormous problems involved in codifying a criminal law and the difficulties of administering equitably a system of correction. Further, he has been impressed with the intellectual power and rare courage displayed by the legal profession in wrestling with these problems that go so deep and touch so many primitive fears and awesome taboos. A statement by Sir James Stephen would seem to summarize the appropriate relationship between law and psychiatry very aptly:⁶⁶

I think that in dealing with matters so obscure and difficult, the two great professions of law and medicine ought rather to feel for each other's difficulties than to speak harshly of each other's shortcomings.

⁶³ The Philadelphia Inquirer, July 18, 1956, p. 25.

⁶⁴ See EDWIN H. SUTHERLAND & DONALD R. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 265-66 (5th ed. 1955).

⁶⁵ Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, reprinted in 8 *BAYLOR L. REV.* 1, 2 (1956): "Law must be stable but it cannot stand still."

⁶⁶ 2 JAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 128 (1883).