THE TECHNIQUE OF PUBLIC ORDER: EVOLVING CONCEPTS OF CRIMINAL LAW*

By GEORGE H. DESSION**

TODAY'S reappraisal of our criminal law was the subject suggested to me as appropriate for the the legal contribution to this university-wide symposium. I agreed, because I think—and hope that as I proceed you may feel—that this is a matter of equal concern to us all. The stimulus to reappraisal derives at least as much from advances in appreciation of the human creative potential and in knowledge of human personality and behavior, emanating from the arts and sciences, as from audits of the social losses and gains attributable to the operations of enforcement agencies.

We have learned that adequate appraisal must take account of the law's impact on the whole range of community interests; and we know that such appraisal is not possible without a pooling of the perspectives and skills of all the disciplines represented in a university. The interest we share in this appraisal, and the magnitude of that interest, are implicit in the basic social role of criminal law in all major cultures and through time. One might define this law as the pattern or cluster of institutional arrangements on which we rely—short of private retaliation and group warfare—for coping with those deviational acts, personalities and conditions which we consider so destructive of the values we hold as to require drastic intervention in the name of the community as a whole.

For these reasons I welcome the opportunity to discuss this subject with such an audience, and particularly on an occasion such as this. The occasion is your inauguration as Chancellor of a man whose career has been dedicated to science. In mentioning this, I have in mind the faith and spirit reflected in such a choice; for I believe that it is on that same questioning spirit and faith in the potential fruits of empirical inquiry and testing of inherited presuppositions, that a reformulation and readjustment of our law adequate to the needs of a community in the contemporary world depend. To my colleagues of your faculty of law I wish also to say that I feel honored, and deeply grateful to them for having thought of me in connection with this subject and occasion.

I

Public Order figures rather prominently in my topic, as I choose to phrase

* Lecture delivered on January 6, 1955 at The University of Buffalo, as the Annual James McCormick Mitchell Lecture.

** The late Lines Professor of Law, Yale University Law School, former member United States Supreme Court Advisory Committee on Rules of Criminal Procedure.

it. It implies a rejection of disorder as a desirable social condition, and I suppose that much is obvious. When we speak of an individual as disordered we mean that he appears to be suffering from some self-destructive process in his personality formation, and when we speak of a person, crowd or community as disorderly we mean that there is a high expectation of destructive violence.

Man, from the beginning, in his slow and fumbling way, appears to have been seeking escape from disorder. He managed to order his experiences and his insights from them to the point of achieving the primitive inventions which initiated his ultimate dominance over the rest of the animal kingdom and his physical environment. The earliest primitive communities within our knowledge reflect a stern ordering of interpersonal and social relationships. The earliest known written code of law—that of Lipit-Ishtar—speaks of putting down enmity and violence. In the earliest known Christian chapel, deep down in a catacomb near Rome, a peace dove amusingly like Picasso's was crudely inscribed on the wall. It was centuries later when one day a week was finally established as a "day of peace." In our own law, the felon was long described in common law indictments as one who perpetrated his offense "vi et armis" (whether he did or not); petty offenses were "breaches of the peace"; and we still describe sheriffs, constables and policemen as "peace officers."

The implication that law is concerned with public order is probably just as obvious. It is the function of institutions generally to facilitate man's pursuit of his interests in community with others—to create and establish that minimum of "form" which is essential as a guide to interpersonal relations, to afford fair warning of what is and what is not wanted, and of what will not be tolerated; the institutions we call "law" are those which we back with community force, exercise-able through formally authorized community agencies; and those on which we particularly focus today—the "criminal" as distinguished from the merely "regulatory" or purely "civil"—are charged with the most delicate role of all, which is to say, relatively severe coercion by the community of nonconforming individuals to the extent deemed necessary to reduce the incidence of coercion generally in the community.

Order thus refers to the total complex of institutions of a given community; and in this sense, I take it that every community has its own peculiar form of order. The order usually includes some statistically substantial competing forms—"counter-mores" in terms of the community's "ideal" preferences, but definitely within the "culture"—and certain statistically rare patterns of behavior, almost universally abhorred, and hence "outside the culture."

Examples of the first category would include bootlegging, professionalized gambling, adultery, tax fraud, and assault with intent to kill. Examples of the second would include kidnapping for ransom, incest in most circles, and the sort of torture murder of a child which we associate with the "sexmaniac." I think you will accept my examples; but, if you do, let us recognize that we are responding out of "our culture." Acceptance of an alcoholic drink, for example, is a capital offense under traditional Moslem law; and I imagine that the public figures we have elevated to our Hall of Fame as great statesmen would be considered subversive deviationists by some contemporary as well as past regimes.

Characterization of a scheme of order as Public, however, implies something more. It implies a complex of social forms widely shared throughout a community, whether through voluntary acceptance by a great majority or effective imposition by a minority; and it implies a probable mobilization of community resources, including force when deemed necessary, to deal with serious nonconformity to the established order.

II

There is probably no area of social process more in need of comparative study than that comprising community responses to individuals who do not conform. Historically, in this area much has always been at stake, for the community and for the individual; and there have usually been significant differences of opinion concerning the appropriateness of any given response. This latter is understandable enough, especially where the non-conformity is so disturbing to such a number that the response takes the form of an invoking of severe legal or at least social negative sanctions. The response is then that of a group in which real anxiety has been aroused, to a person whose suspect behavior engenders widespread fear or hostility. But if the disagreement is symptomatic of the emotional tension which must inhere in such responses, it also reflects the lack of an empirically based and generally accepted body of knowledge concerning the productive use of such sanctions.

I suppose it is no accident that the American Bar Association has recently appointed a special committee to conduct a major survey of the administration of criminal justice in the United States. The late Justice Jackson had much to do with sponsoring this study, envisaging "a thorough, impartial and workmanlike survey of the criminal processes in this country" which he hoped might lay the groundwork for a fundamental overhauling and modernizing of procedures. The American Law Institute is engaged in the parallel enterprise of formulating a new model penal-correctional code.

The critical roles of these community responses to deviation becomes apparent when one considers their strategic impact on the forces constantly at work shaping the pace and direction of social change. If sanctions are wielded on behalf of a minority, sources of tension in the community are enhanced. If they are intended to promote the best interests of the community as a whole, but are ill-devised in respect of know-how and techniques, the community is unlikely to achieve its purpose and may even suffer an unwanted change in structure. If sanctions otherwise unobjectionable are invoked in an arbitrary manner, the liberties of individuals are, to that extent at least, curtailed without compensating benefit to anyone.

These considerations become more pressing in periods of heightened tension, ideological conflict and accelerated social change, just as they recede in periods when a community is enjoying a large measure of external security and internal stability. Our discussion today is necessarily pitched in the contemporary context of continuing world crisis. The stakes involved in the achievement of a widely preferred rather than an imposed form of public order have become sufficiently obvious to focus attention on the thrust and the consequences of sanctioning responses, be they responses in the name of a community with which one identifies or in the name of a hostile or competing community.

Our sanctioning responses are, of course, oriented in terms of our preferences in the matter of public order, so far as we know how; but they are also conditioned by our experience, as we have interpreted it. Does not much of this experience stem from periods in which a relatively high measure of security and stability were enjoyed? Propositions valid in the one context may or may not hold in the other. In this spirit it may be useful, before attempting to appraise trends and formulate standards, to attempt to restate our public order preferences and to re-examine some of our predispositions, both adaptive and unadaptive, in this branch of the art and practice of government. Such effort may help to clarify thinking, and it may assist in communication with a wider audience. Even in our half of this bipolarizing world there are many who do not necessarily assume that the goal values of any one of the component communities are what the community in question thinks they are, and who do not share all of the predispositions of that community.

To persons outside the culture of a community the actions of the community are likely to speak louder than its words. To borrow a concept from the Anglo-American law of Evidence, there is such a thing as "speaking conduct." For the free community—i.e., one where many rather than few participate in important decisions, and in that sense checks and balances obtain—this poses special problems. Such a community necessarily speaks with many voices. For those conversant with the local culture the harmony may not be too dissonant, the design not too uninte-

grated. For a larger audience, or community in the making, this may not be the case. If the community which is to embrace our preferences in the matter of public order is to expand it may well be that the dissonances must be rendered more harmonious, the overall design tightened up. For us that cannot be achieved through suppression of dissonant components. That could lead only to a more primitive pattern, expressing a more primitive concept of public order. Our problem is to achieve a higher synthesis, to find a re-arrangement of the components and of the tensions between them, which will result in a more clear and significant statement, a more dynamic and satisfying design.

Who are the deviates of whom we speak; what are our community sanctioning choices in dealing with them; and against what hazards—in the name of due process, civil liberty and justice—should they be protected by the community? The focus is on persons charged with crime, but just as the criminologists are finding it useful to work toward functional-developmental categories rather than content themselves with the purely legal-symptomatic classification of offenses and offenders, so here I suspect that functional analysis may require some enlargement of the boundaries of discussion beyond the legal concept of crime. There have been developments in American law which render the distinction between criminal and certain "preventive" civil proceedings increasingly technical, and I dare say there have been comparable developments elsewhere.

Some examples from the United States of sanctions which are in fact of a severe negative character but technically not classed as "criminal" would include the denaturalization of naturalized citizens found by a civil court to have misrepresented their allegiance, the stigmatizing and exclusion from public employ of persons whose loyalty is administratively found to be suspect, similar stigmatizing by members of Congressional investigating committees of individuals who are afforded neither due process in the old-fashioned sense of due process and fair hearing nor any other form of legal recourse, proceedings under the antitrust laws wherein such "equitable" relief as dissolution, divorcement and divestiture is sought by the government, and many others in the licensing field. Under recent legislation in a number of our jurisdictions, one may today be committed for an indefinite period to a penal or hospital type institution on diagnosis and adjudication as a "psychopathic sex offender"—and this despite the fact that he may thus far have committed no offense for which he could be imprisoned for more than a short term or, under some of the statutes, no offense at all. Such statutes represent an extension of the sort of preventive and welfare concepts on which are based such more familiar procedures as the civil commitment of the mentally ill or defective, the quarantine of the carriers of contagious diseases, and the juvenile court commitment of delinquent and neglected children.

On a few occasions when they detected a punitive purpose in legislative action purporting to be non-penal our courts have overruled the legislature for failure to conform to the constitutional standards set for criminal prosecution. There was the case of *Wong Wing* in 1896,[1] wherein the Supreme Court held that a provision in the immigration law, that deportable Chinese aliens be imprisoned at hard labor as an incident to deportation, was invalid as an attempt to impose an infamous punishment without benefit of the usual criminal procedure for the ascertainment of guilt. There was the *Lovett* case in 1946,[2] wherein the Supreme Court struck down as a "bill of attainder" a provision in an appropriation act that "no salary or compensation shall be paid" three named employees in the executive branch whose loyalty was questioned in Congress "out of any monies now or hereafter appropriated." The Court has also recognized that the issue and sanction involved in a civil proceeding may be of such gravity, as in the *Knauer*[3] case in 1946, as to impose on the government an exceptional burden of proof—namely, "clear, unequivocal, and convincing" evidence which does not "leave the issue in doubt." This was a proceeding to cancel a certificate of naturalization obtained by fraudulent oath and statements of allegiance in 1936 and 1937.

But these are the exceptional rulings, high-water marks in the ebb and flow of judicial intervention in the activities of the legislature and executive. By and large we still lack any consistently adhered-to objective and operationally formulated set of criteria for distinguishing between "criminal" and "civil" sanctions, or between "sanctions" and "non-sanctions." This leaves an avenue for evasion of the safeguards of the accused prescribed in any constitution and any code of criminal procedure. It may be recalled in this connection that Jeremy Bentham had much to say about the non-functional character of the traditional legal classification of sanctions. I propose that we rebound from Bentham, and consider further this rather challenging juridical problem.

Suppose, then, that we include civil proceedings involving severe sanctions of a "preventive" character as relevant to our agenda. We are not, of course, concerned with the ordinary run of civil actions wherein mere compensation, risk-sharing, or the restoration of a status quo are involved—proceedings like the ordinary contract or tort action which are in no way concerned with alteration of the defendant's character, the making of an example of him, or his incapacitation to misbehave in future, and wherein the court functions primarily as a dispute-settling service agency at the pleasure of the parties. Nor are we now concerned with purely "regulative" proceedings, wherein mere education and discipline of generally decent citizens to comply with new prescriptions dictated primarily by

1. *Wong Wing v. United States,* 163 U. S. 228 (1896).
2. *United States v. Lovett,* 328 U. S. 303 (1946).
3. *Knauer v. United States,* 328 U. S. 654 (1946).

expediency are involved—proceedings like those involving the imposition of a fine for failure to comply with a new automobile parking regulation, for example. (Incidentally, I would exclude the persistent or "wilful" violator from this regulative category.) But perhaps even this does not go far enough for our purpose. All power in our communities is not, after all, concentrated in the formally authorized agencies of government.

What of the many private groups and organizations which in fact wield more or less unchallenged coercive power over individuals? Some of these are areal in their makeup and some are lateral—, not based on or confined to a particular geographical area. Examples of these exist in every country and will readily occur to anyone. Guild Socialism and proposals for the Corporative State have stemmed in part from recognition of this phenomenon, as have our antitrust laws.

Where such de facto aggregated power is exercised by a private group one may take it that government either tolerates or has failed to break up or to regulate such sanctioning power. After all, the power to coerce others is supposed to be a monopoly of government, and even then exercised only pursuant to law. Such sanctioning activities are, moreover, social phenomena, as distinguished from the deprivations which one individual acting on his own and using only his own resources may inflict on another. They are, sociologically speaking, "institutionalized" and hence part of the culture. I suggest, therefore, that we include those against whom severe "social" negative sanctions are invoked among those with whose nonconformity we are concerned.

And now, what are the mistakes in responding to such non-conformity which we wish to avoid? Injustice is the term we normally use to sum these up, its antonym being symbolized by the blindfold goddess holding the scales. The blindfold, I take it, implies objectivity; and the scales that every consideration will be weighed and everyone received his due. When these conditions fail to obtain we speak of arbitrariness; or, to put it another way, decisions taken without good and sufficient reason. Such decisions may stem from a faulty scheme of values or from emotional disturbance, from incompetence or simple negligence, or from nothing more than inadequacy of the information which comes to the attention of whoever has the power of decision. But what, in the concrete contexts of legislation, police work, prosecution and adjudication, are good and sufficient reasons for promulgating a given type of sanction-implemented prescription or for inflicting a given type of deprivation on a given individual? I do not intend to beg this main question. Here we enter the real arena of disagreement and misunderstanding between those who identify more or less with the accused and those who do not, between different groups in the community, and between different communities.

III

Appraisal—and a need for continuing appraisal—of our law also figured prominently in the subject as first suggested to me. A kind of "operations research" somewhat analogous to that which has been found essential in the realms of industry and technology, and a perspective adequate to the purpose, are implied. What are the conditions of such evaluation?

Evaluation implies standards of judgment and measurement, and raises some question as to the sources from which we may and should derive them. Thus far the human race has evolved a variety of forms of public order. It may be that conquest, technological advance, and the diffusion of culture generally are reducing that variety. The "underdeveloped areas" of the world are rapidly being educated or indoctrinated, as the case may be, by societies of more complex culture in whose spheres of influence they fall. We have come to think in terms of a "bi-polarizing" world; and the only alternative, if one desires one, appears to be a trinity composed by adding the as yet "uncommitted." If, in our search for norms, we turn from a scanning of social patterns to consideration of the individual human organism, and ask students of this biological species what conditions are most propitious to his fullest development, we encounter a marked diffidence. One gathers that while the creature apparently requires some kind of air, food, water and shelter, his adaptability beyond that to external conditions, and the ways in which he may respond to one set or another of such conditions, are by no means fully determined.

In approaching this ultimate question of the good, it may be helpful first to consider the relation of sanctioning processes to the total manifold of social process. As in the other areas, here we find man seeking to further his interests, using such material resources as he has at hand and working through the institutional patterns which he has created. Process refers to a sequence of events through time, including both acts and non-acts. Ultimately, whether the subject is a sanction-prescribing response (legislation), a prescription-defying response (crime), or a sanction-invoking response (accusation, prosecution), we are speaking of the behavior of people.

Does not all behavior exhibit attributes in common? However aberrant from reality and the good as conceived by the majority an individual's premises and perceptions may be, or however in conformity, his behavior always appears to be a function of an expectation on his part of a net gain in value position. Value refers simply to the satisfaction of basic human needs, such—to adopt a possibly abridged working list—as physical and psychic well-being, wealth or material resources, power and influence, respect, affection, rectitude, intelligence or access

to information, and opportunity to acquire and use skills. In speaking of expectation sub- or pre-conscious motivation is of course subsumed.

The special attribute of negative sanctioning behavior is that it consists in the infliction of value deprivation for the purpose of achieving a net value gain. When sanctions are misused the process becomes paradoxical, for as instruments they are obviously two-edged. No one seems to doubt, however, that under proper conditions negative sanctions may serve positive and productive ends. All organized societies appear to have employed them in one form or another. We use them today not only against the criminal and the unpopular but also in child-rearing in the home, and in the care of the ill and infirm. They are considered destructive only when the deprivation inflicted appears insufficiently compensated by any realized gain.

Negative sanctions must then be appraised as instruments of total policy. Their use is adaptive when it demonstrably contributes to a net gain in the value position of all of those with whom we are concerned. The common law conception, that criminal prosecution as distinguished from a mere civil action is justified only where the defendant's act has prejudiced the community as a whole, reflects a recognition of this. So do our forms of indictment.

Designation of the majority, or even of all, as the object of primary concern raises the question of the population or culture unit one has in mind. One's identifications may be extremely restricted and local, like the rural type who considers all outsiders "furriners." One may, in a pinch, take the attitude "My country, right or wrong." But one may also feel that the best interests of one's own community are more closely tied up with the interests of some larger community—if not a "world community" at least one transcending the bounds of the national unit.

Conversely, how shall we measure our concern for minorities whose interests conflict with the supposed interests of the majority in whatever unit we may select; and in particular, how shall we measure it for individuals who seem to require sanctioning in one form or another if we are not to reject negative sanctions altogether and adopt a policy of complete laissez-faire?

As lawyers I suppose that our interest is in social rather than personal answers to such questions, and that we must seek them in the culture of the largest unit with which we are able to identify. So far as international agreement exists, as in the less disputed areas of international law, that would seem to afford some revelant data. Beyond that there are the dominant philosophies. In the West I suppose the widest adherence is to what might be called a Christian philosophy.

There are the value preferences expressed in the constitutive documents of the United Nations, and in the constitutions of each nation. From all of these certain generalizations in the matter of goal values seem to emerge.

For one, we are clearly committed to placing a prime value on the individual —any individual, be he citizen or alien, useful or harmful, sane or mad. This does not mean that he may not be negatively sanctioned under appropriate circumstances. It does mean that no prescription will be favored which is not necessary for the establishment or reinforcement of institutional patterns which facilitate the full self-realization of all individuals—and I take it that we have in mind individuals in being rather than some selectively-bred future race, or the inhabitants of some ideal future community. Examples of such favored prescriptions would include the sort which obtain in the better systems of traffic control, and within healthy and enlightened families. These considerations might be characterized as the Equality Principle.

For another, we seem committed to the proposition that punishment is never good in itself. One may speak of rehabilitation, deterrence, and prevention or incapacitation as worthy objectives of the criminal law with some hope of eliciting wide agreement; but this is no longer true of punishment. I think we have learned enough about the consequences of inducing guilt feelings and other dysphoric conditions to be sure of that. The inference is that non-depriving ways of coping with the actual or threatened flouting of a prescription—i.e., "sanction-equivalents"—will be employed where these are available and adequate; and that where they are not, less as against more depriving sanctions will be preferred. This is the Economy Principle. Examples of adherence to it may be found in the most successful community approaches to the problem of labor disputes, and that of race tensions and riots.

For still another, we are clearly committed to the proposition that the power of decision in matters of sanctioning, like satisfactions of other human needs, should be as widely as possible rather than narrowly shared. This preference for wide decision does not seem to me to depend on a positivist rather than an ethical realist orientation. It rests rather on the thought that the knowledge of any particular individual, elite group, or even whole culture, is in this stage of civilization at least too relative to warrant the uninhibited imposition of value judgments on others. This is the Democratic Principle.

Finally, with respect to the appropriate unit of identification, whether for resolving a problem of conflicting loyalty or for defining the community supposed to be benefited as a whole by a given sanctioning response, I suppose that the

preference which would find the most support in the aforementioned cultural data would be one for the largest possible identification, consistent with freedom of a given national community from external dictation or from a minority-imposed internal structural change. This is the Humanitarian Principle.

Such then are the values which set our goal preferences in the matter of public order. Patterns of behavior which work toward them are to be protected and encouraged, not through sanctioning processes alone but with ultimate reliance on these where less depriving methods are unavailable or fail. Similarly, patterns which work against these preferences are to be broken up and discouraged. The sanctioning goals which have been suggested of course find clearer support in the ideal than in the manifest content of the culture of any given community. It is no secret, as any attorney who has represented defendants can testify, that these goals which find expression in our legal safeguards of the accused are still but precariously established, and by no means fully introjected in the personality of contemporary man.

Emotional tensions inherent in the concrete sanctioning situation often result in their being challenged even by those who should know better, and the higher the tension the more likely is this to occur. But so far as our Western communities exhibit any special competence in avoiding the misuse of negative sanctions, and in that regard offer a special advantage to individuals generally, it must consist in adherence to these propositions. Our problem, therefore, is to preserve a maximum of these aspects of our preferred form of public order in the process of the social change and concomitant increase in negative sanctioning which seems inevitable in this crisis society.

IV

Ways of measurement comprise the other condition of appraisal. What we need to measure are the consequences of alternative community responses to the types of nonconformity which concern us. Consequences refer to the impact of a sanctioning response on the social situation which touched it off. The nonconformities we are discussing consist, by definition, in deviational acts, personalities or conditions, present or threatened, experienced by significant segments of the community (or their designated representatives for the purpose) as destructive of the community's preferred values. The community is, in this sense, deprived. One can describe any such deprivation in terms of the values affected, and in terms of the magnitude of the deprivation. The community's response may work no significant alleviation of the situation, have no ascertainable effect other, perhaps, than on one or more immediate participants in the proceeding constituting the

response. It may even augment the deprivation, as where its nature, conduct and outcome are such as to diminish respect for law and authority, or otherwise to spread disillusion. Here we have a net value loss. On the other hand, it may work an indulgence of community values commensurate with the deprivation suffered, in which event the measure of preferred order enjoyed by the community before the deprivation occurred is restored. If highly successful, the indulgence achieved may be even greater, in which event the community will more closely approximate its preferred form of order than before. Here we have a net value gain.

These consequences we seek to measure, as I have chosen to describe them, thus consist in the state of production, shaping and sharing of each of the values in question at such point in time as may be designated as the close of the sanctioning episode. Selection of this point in time will of course involve a judgment in each case resting on considerations similar to those which we are accustomed to take into account in making decisions on "proximate cause." Having selected the time point, we will obviously need some sort of reasonably validated yardstick formula for ascertaining the state of production, shaping and sharing of each of the values which concern us as of that time.

Yardstick formulae of this nature are usually referred to as "operational indices," meaning that they are so formulated as to refer to statements which are susceptible of objective verification on the basis of obtainable empirical data. Have we any such? Let us consider the values with which we will typically be concerned. I know of no standardized formulation or list as yet in general use for this purpose. For purposes of this discussion, I will adopt one devised by my colleague, Harold D. Lasswell,[4] as a manageable working check-list. It includes: well-being, wealth, power, respect, affection, intelligence, skills, and rectitude. I assume it to be clear that I am using the term "value" as roughly synonymous with basic human want or need, and it is understood that individuals very greatly in their value-orientation. Some desire power or wealth more than others, and so on. Some are oriented in terms of a wide balanced range of the values, and some are concentrated on a few.

The spotty character of the operational indices thus far devised will, I suppose, be obvious on a moment's reflection. Economists and statisticians have gone a long way in devising such indices for the wealth value. Consider, for example, the general price index. Political scientists and pollsters have gone a long way in devising indices for measuring the current state of production, shaping and distribution of power. Techniques for guaging trends in consumer preferences are no longer in their infancy. In the profession of public health there have been great

4. Harold D. Lasswell, Professor of Law and Political Science, Yale University Law School. See *supra* p. 8; See LASSWELL, POWER and PERSONALITY, 16-17 (1948).

strides in the development of indices of well-being. These strides have occurred in the areas of heavily sponsored social science research. One might, indeed, say the same for the underlying sciences. I suggest to you that we have no sciences, in a state of development comparable to economics and politics, concerned with the production, shaping and sharing of the other values on our list. Where, for example, in a university curriculum, do we find systematic and disciplined inquiry into the production, shaping and sharing of affection or respect? There seem to be no subject or course, to say nothing of departmental, names for these.

If we were thinking only of the next few years, there would be less point to this part of my discussion. Development of the further social sciences which I am forecasting will take an enormous amount of effort on the part of a great many people; and so will the development of the additional operational indices which may be expected to derive from them. Nevertheless, the immediate implication is not discouraging of effort at objective appraisal of operations. What, indeed, is the alternative? Appreciation of the current crudeness and inadequacy of our intellectual tools should sharpen our sensitivities and the perspectives we bring to the task of current appraisal. Granting that we shall have to make do with the tools currently at hand, such awareness should help us to be less wrong than we might otherwise be. It should help to stimulate the needed research in this critical area of social process. I even suspect that the day is not far off when developmental and operations research will figure prominently in the prestige departments and budget appropriations of administrative and other law enforcement agencies.

V

The speculative model of a sanctioning process or response which is implicit in the foregoing discussion—namely, people speaking for a community, confronted with a supposedly serious deprivation of the community's preferred values, acting through existing institutional sanctioning patterns and on such community resources as may be available for the purpose—may be suggestive at this point. Obviously, whatever the motivation of the participants, such behavior does not necessarily achieve its ultimate goal. This depends on the potential of the institutions and resources which may be at hand, and on the personality as well as culture factors which condition the behavior of the participants. If we would affect the course of events planning-wise and administration-wise through intervention in this process, the task calls for appraisal with a view to manipulation of such factors. Suppose we lump them under the general head of "pre-dispositions" and attempt to separate the adaptive from the unadaptive.

Much of what is adaptive in the case of the United States at least, and notably our legal safeguards of the accused coupled with the traditions of an independent

bar and an independent judiciary, trace back to the earliest period in our history. This is no accident. The constitutional fathers and original legislators had themselves participated in revolution, and smuggling had enjoyed a certain respectability within their memories. Presumably they were able to imagine themselves as subjects of criminal prosecution, and as victims of search on suspicion and arrest.

From the Civil War to World War II, with a brief interruption during World War I, however, the United States had the good fortune to enjoy relative security and stability. As has already been suggested, in such periods of low tension the positive and critical role of negative sanctions tends to be forgotten. This is unfortunate, but understandable. Police activity and the functioning of the criminal courts and penal institutions appear to the bulk of the population as having little to do with activities thought of as productive—e.g. agriculture, industry, child-rearing and education, the sciences, arts and crafts. The role of negative sanctioning in protecting the social patterns which favor general participation in these things, and in discouraging or breaking up those which work against it, is not too obvious. Only in communities which have experienced drastic shifts of power to hitherto counter-culture groups, with the accompanying turning of negative sanctions against those previously protected by them, do we find general appreciation of the strategic importance of Ministries of Justice and of the Interior.

Most of the really troubling nonconformities during these stable periods fall in the categories of common crime, neurosis and psychosis. These are disturbing primarily to the immediate victims and near-misses. So far as the general public is concerned, the penal and state hospital systems are supposed to take care of these deviates with a minimum of participation by the general public. If these responses are relatively inefficient and wasteful of resources the community is not too disturbed, its attention by preference being focused elsewhere. Common crime and mental illness are, after all, unpleasant things. Inquiries into their etiology can embarrass many. The state hospital, the psychiatrist and the social worker do not always receive the member of the family who might be deemed the proximate cause, and the same is often true of the prison. Perhaps this is why we find greater receptivity to explanations of crime and mental illness which stress physical anthropological factors than to those which stress the deviate's early experience and learning. In any case, the community's reaction essentially is that there is no sufficient excuse for these nuisances; they should not happen. There is thus a general loss of identification with the deviates, reinforced by their formal branding as "criminal" or "insane." They are, in effect, expelled from the community, read out of the human race, and become forgotten men and women.

Another characteristic of the period of low tension is an abdication of participation by the community as a whole in the process of making sanctioning decisions.

There is little understanding of the day-in and day-out work of police, prosecutors and lower courts, or of the management of penal institutions and state hospitals, and little interest. Vis-a-vis its sanctioning agencies the community indeed behaves rather like a spoiled child. There is little effort to afford career incentives—and notably prestige—to qualified and trained personnel in the police, prosecution and institutional management fields. We treat them more as we do a peacetime army. There is little tendency to back them up in their day-in and day-out tussles with local politicos and special interest groups, and little tendency to inquire into what they do or how they do it so long as there is no public scandal or emergency. So long as the vagrants are kept off the streets, the burglars away from the financial district, commercialized vice and organized racketeering away from the middle class suburbs, and the occasional spectacular case is somehow "cracked," the community does not seriously object to inefficiency and even graft in the lower echelons of officialdom, or to callousness and brutality in the handling of the deviates with whom the community does not identify, so long, at least, as these things are not brought so closely to the community's attention as to be disturbing.

The natural tendency of officials under such circumstances is to accommodate the community's preferences, and to accommodate special interest groups to the extent that pressures from these are not offset by greater pressures from the community. There is little encouragement in this atmosphere for the long view, be it in planning against future hazards to public order or in inaugurating preventive programs. Police and prosecutors well know that their performance will be measured by the convictions obtained in cases with news value, and legislators are similarly aware that there is little public interest in major legislation short of an actual and generally appreciated emergency.

Under these circumstances, when a disturbing case does occur the aggressions aroused are likely to focus for their target on the particular offender, rather than on the social processes which evolved him and may be assumed to be evolving others like him. There is more interest in making an example of the particular offender than in abating the patterns and conditions of which he is symptomatic. This may be catharsis, as Holmes once suggested in his writings on the Common Law, but it is not epidemiology. Again we have the spoiled child reaction. It would be so convenient if sacrifice of the scapegoat could solve the problem. This is probably why the belief in unselective deterrence is so persistent despite so much empiric evidence to the contrary. (I do not suggest that deterrence has no operation at all. I merely suggest that an example may be expected to deter only where the potential offender has it brought to his attention, where he identifies with the example, where his expectation that the same fate will befall him under similar circumstances is strong, and where his resulting fear of such consequences is stronger than any wants or drives which may be impelling him toward commission

of a similar offense.) In communities where the preference for deterrence is less ambivalent than in our own, and the all-out Terror Principle sought to be justified, it is observable that their apparent necessity for recurring purges appears to be enhanced rather than diminished.

The negative attitude under discussion includes defense counsel, despite the clear policy of our law that any accused should be permitted representation by counsel, that he should be entitled to plead not guilty and put the prosecution to its proof without benefit of compulsory process to wring testimony from him, and that it is the duty of his counsel (short of affirmatively misleading the court concerning a fact within his own knowledge) to present every defense available to the accused under the law and procedure if the accused so desires. There are, of course, exceptions—as where an accusation can be shown to be a complete error, and the true culprit produced instead. The community is then not robbed of its scapegoat. Otherwise, however, defense counsel is necessarily in the position of resisting the release which a conviction as charged would afford of such community tensions as may be involved. He is thus identified with the criminal, and so criminal practice in the United States has tended to become regarded as not altogether respectable. I think this a passing phenomenon. It did not, so far as I can ascertain, hold true in the earlier days of our nation. As our law matures, I doubt that it will continue to obtain.

Turning now from these community attitudes to the material resources which have normally been at the disposal of sanctioning agencies, what can be said of these, and of their allocation? The aggregate in the United States is enormous, and has been estimated—lumping federal, state and local expenditures together—to approximate two billion dollars annually for the law enforcement machine. This is exclusive of federal and state hospital budgets, of losses to families and victims of criminals, and of the productive capacity of hundreds of thousands of institutionalized men and women. The figure compares with expenditures under the Marshall Plan for all Western Europe during a comparable period of time.

These are challenging resources with which to play, but over-all planning and allocation are out of the question, given the extreme decentralization which obtains not only on the municipal and county levels but even, in most cases, on the state level. So, inevitably, there is little co-ordination of effort, considerable inefficiency and waste attributable to jurisdictional and administrative units which are functionally too small for the modern scene, and a striking lack of accountability of local agencies to more centralized authorities. This is the picture which emerges from survey after survey made in recent years by public administration experts under the auspices of state commissions for the reorganization of state government.

Some of the conspicuous errors in allocation which have a bearing on our present inquiry may be briefly noted. We spend a great deal on our police in the aggregate—approximately half of which must be allocated to traffic control—but from a career incentive and personnel management point of view our treatment of most of our municipal police forces leaves much to be desired. Police training and the creation of adequate facilities for scientific criminal investigation are, apart from a few of our larger metropolitan areas, still in their infancy. (This, of course, is not true of some of the better state police forces, or of the F.B.I.) A minimum is allocated for locating the potential offender and the potential mental case at the stage in their development when the least depriving methods and a minimum of preventive and therapeutic expenditure would produce a maximum result—namely, the age of school entrance. The children's courts, to say nothing of reformatories and prisons, get them too late. Turning to the courts, we find the so-called "inferior" tribunals largely neglected in the matter of adequacy of budgets, of facilities, and of dignified interior decoration and atmosphere. Yet these are the courts which handle the great bulk of human traffic with the law, the places where the accused and the first offender get their initial first-hand impressions of our system of justice. They are also the only courts of which the average citizen, whose brushes with the law are likely to be confined to traffic violations, has any experience. As we rise in the judicial hierarchy the atmosphere noticeably improves; but even here something important is lacking. The great majority of the accused in our state tribunals are without adequate legal representation. Let us grant that there are some who do not want it, who take the attitude "All right, you've got me, so let's get it over." There are also the few who can afford expensive representation, and are well advised in their choice of counsel. In a homicide case counsel will be appointed, and in a few of our states we have the public defender system. But neither of these latter serve all defendants. The public defenders do not enter, as a rule, prior to arraignment in the trial court; and unlike the prosecution they do not have at their disposal the investigative resources of the police. I think most observers would agree that neither appointed counsel nor the public defender system fully meet the problem, even so far as they operate.

But perhaps the most conspicuous error in our allocation of resources consists in the disproportionate amount invested in medium and maximum security prisons in contrast with minimum security and out-patient clinic facilities; and in the meager provision in the construction and the budgets of reformatories and prisons for adequate classification and segregation of the different categories of offenders, and for vocational training and productive work. These things affect sentencing, since courts like the rest of us must make do with the resources at hand; and, of course, they affect the development and subsequent careers of those sentenced. Practical prison administrators in the United States seem agreed that a very substantial percentage of those committed to their custody require no such drastic

handling. As one advocate of the more extensive use of out-patient clinical treatment of offenders remarked, on contemplating the cost to the community of keeping one offender in institutions for the greater part of his adult life: "That would buy an awful lot of therapy."

VI

The foregoing may be a sufficient review for our purpose of the least adaptive predisposing culture factors attributable to the large measure of security and stability which we have tended to take for granted, and to the negative attitude toward sanctioning processes which under such circumstances communities feel they can afford. Products of community response to the common criminal in a social context of low tension, they constitute a hard core of community attitudes and practices which are likely to carry over to its sanctioning responses in the quite different contemporary context. Indeed, situations of exceptional tension with which we are already familiar illustrate this. Even in stable periods populations are never without frustrations, and from time to time these erupt in what we call violations of civil liberty: lynchings, race riots, discriminations against minority groups and holders of unpopular beliefs. Under ordinary circumstances the common criminal is the low man on the social totem pole, and as such the most eligible scapegoat; but in these situations of exceptional tension he does not suffice. Is it any wonder, then, that the unpopular minority group or the heretic is substituted for the common criminal, and the hard core of the community's attitudes and practices toward the latter is turned on the new scapegoat? For this reason I have never been altogether satisfied with the conventional distinction between criminal proceedings in general and those deemed to present special issues of civil liberty. I understand and sympathize with the overall policy problem of selectivity in the use of available resources which confronts every individual or organization dedicated to civil liberty. But I doubt that we can tolerate arbitrariness in the one and successfully oppose it in the other.

Still another instance of carry-over of this hard core of attitudes and practices is afforded by the American phenomenon of the crime-wave municipal-reform cycle. (I am not aware that it obtains elsewhere—a circumstance which has led some to attribute it to the high degree of local autonomy and decentralization which obtains in our law enforcement.) The equilibrium in question is that which normally obtains between the mores and counter-mores elements in a community. The former include the respectable segments of the community, and in particular the middle and upper middle classes. They are interested in well-kept residential areas, good municipal services therein, good schools, and in economy in municipal expenditure. But their interest and participation in politics is sporadic, and they pay little attention to what transpires in city hall, lower court, and police precinct

circles. The latter includes those who have a vested interest in counter-mores activities of all kinds, whether because they engage in them as a business or supply the needs of those who engage in them as a business, such as police protection. These latter are continuously preoccupied with politics, and with all the sanctioning activities which directly concern them. In the conflict between their interests and those of the former group this circumstance gives them an advantage, and like legitimate businesses their tendency is to expand. The former group in due course feels the encroachment; it becomes politically activated, and presently a campaign sparked by reform leaders is under way demanding that the rascals be thrown out of office, ringleaders prosecuted, and a new administration sponsored by good government and business groups installed. Some rascals are thrown out, and some prosecuted. The counter-mores elements curtail their activities and pull in their horns. But presently interest dies down. The mores elements revert to their normal negative attitude, and the new administration accommodates to pressures from the counter-mores elements which prove stronger than any opposing pressures from other elements in the community. The equilibrium is restored.

Probably by reason of all the foregoing, negative sanctioning in general and the criminal law in particular have acquired a rather bad name. It is not only that punishment is inherently repellent; the prevailing impression is that the whole system is ridden with inefficiency. Too few of the really serious offenders are caught, and of those caught far too few are convicted and appropriately sentenced, or so our not infrequent crime surveys would have one believe. This is popularly ascribed to criminal procedure, the thought being that the safeguards of the accused operate as unreasonably technical obstacles to conviction of the guilty. The notion is, of course, balderdash, as all who have any experience in the trial of criminal cases well know. To prosecute is far easier than to defend. The prosecutor is normally assumed to represent right and justice, and on top of that he almost invariably enjoys far more investigative assistance and resources generally. But the notion persists. There results a tendency in seeking controls for new or particularly difficult situations to prefer some other form of procedure. In the case of the Nazi Saboteurs who landed on Long Island, for example, trial by military commission was preferred to trial before a United States District Court. In more routine matters there is a marked trend toward the administrative, or at least a civil approach. So far as this works in favor of the Economy Principle there can be no quarrel, but all too often it rather turns out to be a way of making things unduly easy for the public plaintiff despite the fact that severe sanctions are to be invoked.

Up to here we have been focusing on cultural factors which impact on sanctioning processes. Personality factors are, of course, of equal importance. A man may be an excellent official despite the most adverse environmental conditions, just as he may be incompetent or corrupt despite the best. The personality char-

acteristics which may be considered adaptive for purposes of decision-making in the sanctioning field are, I believe, sufficiently suggested by the policy considerations earlier reviewed. Most of the cultural factors which I have classified as unadaptive for other reasons possess the further disadvantage that they work against the recruitment and retention of people with adaptive personality characteristics to fill decision-making positions in this field.

VII

Predispositions affecting community response to nonconformity, including those shaping the evaluation of a given act, personality or condition as conforming or nonconforming, are subject to change. This is the relatively uncharted area of the "psychological culture" of every community. Anthropologists, in their reports on cultures different from our own, have, understandably, tackled this area last if at all. One finds little or no assessment of contemporary differences in such predispositions in the literature of Comparative Law. Research techniques appropriate to such inquiry, while exacting, are quite conceivable; but they have not yet been employed. The practising lawyer, like the politician, operates on intuitive judgments with regard to these predispositions in his own community, and his effectiveness clearly depends on the extent to which his intuitive judgments approximate objective reality.

New elements in these predispositions are our current concern, if we would forecast trends. A variety of factors affecting the predispositions have already been discussed, and notably that of the current tension level in any given community. That, like the others, is not new. I have stressed them because they are as important now as they ever were. That being understood, are there other yeasts working in the current social brew?

One such new element which has been injected into our culture and hence into the personality constellation of modern man seems to me to require mention in this context. I have in mind a trend generally recognized by jurists and criminologists around the globe—a trend in the experiencing and evaluation of nonconformity which on a very general level has been attributed to Christ, which in empirical criminology has been attributed to Lombroso, which in literature was explored and expressed by Dostoevsky, and which today in the law is epitomized by the so-called "psychiatric approach." The trend is that toward focusing on the nonconformist or deviate as a concrete individual human being, and toward trying to understand and treat him as such rather than as an abstraction.

The increasing participation of psychiatrists, clinical psychologists and psychiatric social workers in every phase of the educational, welfare and correc-

tional activities of our government is, I suppose, obvious. We know the profound influence they have exerted on child-training and public school education. We take it for granted that no major criminal trial will be complete without the appearance of at least one psychiatrist on the stage. The emphasis of contemporary psychiatry (and, for that matter, of psychology, physiology and neurology) on unconscious determinants of behavior has naturally stimulated a re-examination by lawyers of those aspects of law which were influenced by earlier, but now discarded, concepts and perspectives of these same sciences and technologies. It has also sensitized us all to the complexity of our own motivations, whether as law-makers, clients or complainants, prosecutors or defenders, jurors or judges, or otherwise. We seem, as one of my most esteemed psychiatrist colleagues once put it, to have entered upon the Age of the Self-Conscious Man.

The current interaction between these respective professions does seem to be grinding out something new. An historian speaking of this country might date the interaction back to the collaboration between Judge Doe of the New Hampshire Court and Dr. Isaac Ray about three generations ago, culminating in the classic decision in criminal responsibility handed down by that Court in the murder case of *State v. Jones*[5] in 1871. You may recall that Dr. Gregory Zilboorg's lectures, delivered in the Yale Law School last year, were given and published[6] under the auspices of the Isaac Ray Memorial Fund, and that the Yale Law Journal recently published the Doe-Ray correspondence.[7]. Judge Doe glimpsed some insights and posed some issues in the *Jones* opinion which today are among the most controversial in the field.

The first is being agitated in the District of Columbia, since the decision of the United States Court of Appeals there in the *Monte Durham*[8] and related criminal cases a few months ago. The court, speaking through Judge Bazelon, after intensive consideration of the recommendations of committees of the psychiatric profession and of interested lawyers, decided that the law concerning criminal responsibility should be re-formulated along the lines which originally emerged out of the collaboration of the two professions, beginning with Judge Doe and Dr. Isaac Ray; that the essence of that decision was that the existence and diagnosis of mental disorder or defect is—as in the case of any other ailment or disability for which people are accustomed to consult a doctor—primarily a medical question; and this decision has touched off a good deal of controversy.

---

5. *State v. Jones*, 50 N. H. 369, 9 Am. Rept. 242 (1871).
6. ZILBOORG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT (1933).
7. Reik, *The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease*, 63 YALE L. J. 183 (1953).
8. *Durham v. United States*, 214 F.2d 862 (D. C. Cir. 1954); see Comment, *The Durham Decision: A Recognition of Medical Concepts in the Determination of Criminal Responsibility*, 4 BUFFALO L. REV. 318 (1955).

The prosecutor in the District of Columbia who handled the case, and the trial judge who was reversed in the main case, appear to view these decisions with alarm. The interesting propositions are the alarms expressed, and I think they can be reduced to two questions, both worthy of serious consideration.

The first is this: Is it possible to go all the way with the psychiatric orientation to deviate individuals without scrapping all ethical standards based on the assumption that a person, under some conditions at least, can be responsible and exercise a significant measure of self-determination? To put it another way, is there an answer to this question which will not either excuse all criminals, or force us to recognize that our traditional tolerance for mentally ill or insane trouble-makers is sheer sentimentality? The question suggests itself because psychiatrists appear to consider us all significantly conditioned by experience in early childhood. If this is true, what is the moral distinction between a murderer who is diagnosed as psychotic and one who is not? Isn't the latter whom we treat as responsible just as much pre-determined by early experiences (and perhaps even hereditary endowment) over which he had no control, as the former whom we treat as irresponsible? Samuel Butler, if I understood him, raised this question in "Erewhon."

Put in that ultimate form, the question appears difficult. I think it involves several, and I would like to break it down. In both of the cases put, we have acts of murder. The community cannot afford to tolerate such conduct. It has a practical objective, which is to reduce the frequency of such conduct and the inclination of persons to resort to it. We have learned enough about the dynamics of human behavior to know that there are relevant differences in the way in which one type of person or another will respond to a given disposition or correctional measure, be it educative, disciplinary or therapeutic. Assuming that each case should be so handled as to advance the community objective I mentioned a competent psychiatric diagnosis of the offender will help in selecting the disposition in a given case which is most likely to achieve the end. Existing clinical knowledge and experience do seem to have progressed, and to have been validated, to that extent.

Within the common range of nonconforming persons there are some whose personalities are so disorganized, or otherwise handicapped, that they cannot respond as desired to either discipline or education, though some could to therapy; there are others not so handicapped, but whose prior exposure has left them with perspectives and expectations that need to be altered by discipline before they can assimilate a freer and more permissive kind of education; and there are still others who may come in conflict with the community, but who would respond quite favorably to mere education. I think it follows that what the community needs in each case is an informed selection of the measure indicated, according to that sort

of appraisal of the offender; and that the adequacy of a legal correctional system can be measured by the extent to which it facilitates and provides for that.

VIII

Psychiatric diagnosis and prognosis have, to the extent above indicated, already been assimilated into our law, statutory and otherwise. What of their adequacy for these purposes? And what are the conditions of such adequacy? These questions suggest themselves for several reasons: First, it is not clear that the issues involved in an individual's aquisition of insight into and arbitration of his own conflicting drives and wants, to his own greater satisfaction and that of his therapist, are identical or coextensive with those involved in a community's acquisition of insight into and arbitration of conflicts between the individual and the community; Second, it is observable that psychiatric opinions ordered or accepted by courts are often based on examination and study confined to a few hours, in somewhat marked contrast to standards and procedures apparently obtaining in the private practice of psychiatry; and Third, psychiatrists drawn into participation in the legal decision-making process have typically protested the procedure on the ground that what they thought they had to contribute and communicate tended to be lost or, even worse, distorted. I think that these questions underlie the second source of alarm expressed by some enforcement authorities in the District of Columbia when the decisions in the *Monte Durham*[9] and related cases were handed down. I do not share the alarm, because I think that these questions are on the verge of resolution, and that their appropriate resolution will be facilitated by these decisions.

We have in our law two major types of hospital commitment resting on medical diagnosis of the potentially dangerous. The older form is that for the commitment of the mentally ill thought to be dangerous to themselves or others. The newer form is that represented by recent legislation in a good many states and the District of Columbia, providing for the indeterminate commitment, until cured, of so-called psychopathic offenders. Many but not all of the statutes of the latter type are limited to sex offenders. Indeterminate commitment under either type does not depend on the seriousness of the overt offenses which the subject may have committed thus far. It depends on a psychiatric prediction of his probable future behavior.

That kind of prediction raises the questions I have suggested in their most acute form. When a psychiatrist functions as expert witness to a court or as recommending agent to a correctional authority in respect of such questions, he is

9. *Ibid.*

stepping into a role and assuming a function somewhat different—and perhaps more exacting—that those involved in his private medical practice. He moves outside the private relation of physician and patient. He has to consider something quite different from the question whether a patient voluntarily seeking help (and who can pay for it, or for whom the state will pay) needs and may benefit from the sort of help he thinks he or his hospital can give. He has to take the interests of the community as a whole into account, and he has to recognize that his recommendation (whether it be for indeterminate hospitalization or imprisonment) will be by legal coercion, without regard to the wishes of the patient.

This means, among other things, that when a psychiatrist labels a person as psychotic, psychopathic, neurotic or normal, this sort of classification in a legal proceeding may have a quite different significance and result than it would have in the private practice of medicine. One cannot carry a classification and terminology fashioned for one purpose over into another order of situations wherein the issues and purposes are quite different. Psychiatrists who participate in the administration of law, and the correctional authorities, courts and legislators who seek and try to evaluate their advice, have had to learn that. I think the learning has progressed pretty far on both sides. We now ask such questions as: Is this person dangerous? If so, how will he respond to this or that form of disposition or regime? On what do you base this prediction? What opportunities have you had to validate such a prediction in respect of such a person in the past? On what level of probability can you pitch your prediction?

IX

Fuller understanding of the personality out of which the nonconformist responds implies deeper insight into ourselves and our responses to him, and vice versa. So it is that the advances in knowledge of the dynamics of personality formation and behavior which generated the trend toward individualization in correctional policy have stimulated a reappraisal of our own motivations in the shaping and application of corrective measures. Here again we have a trend—one which I cite to you as the best evidence that we have entered upon the "age of the self-conscious man"—and on which I would like briefly to touch in conclusion.

What is the healthy and intelligent adjustment to destructive behavior? This is the basic problem, whether we are speaking of an individual confronted with a purely interpersonal threat or of a group faced with a threat to its community of interests. Here, I suppose, we meet the supreme test of values, and the frontier of cultural advance. The trend I have in mind is that away from punishment and toward correction. It is toward action out of understanding

and objective appraisal of alternatives, rather than out of fear and hate. The trend has been most marked in the gradual alteration of our attitude toward those we call mentally ill, and has made considerable inroads on the older punitive approach to the juvenile delinquent and adult common criminal. How soon it will carry over to our ways of experiencing and responding to the more disturbing forms of deviation—and I have in mind, of course, the heretic ideologies—is still an open question.

Difficulties of a subtle order are obviously involved; for, assuming that laissez-faire and withdrawal are rejected, we are speaking of interaction with destructiveness or evil. Interaction means exposure. While so interacting, one is not doing something else—something more productive which might be possible under more peaceful conditions, for example. The exposure becomes an irrevocable part of one's experience. That to which one has been exposed, to that extent, becomes part of one. In this sense destructiveness, whether we call it mental illness or crime, is contagious.

Avoidance of a symbiotic relationship with what one combats thus presents itself as a critical goal in coping with deviation and nonconformity. Phrased in older terms, the problem is to minimize the tendency of evil to beget evil. The soldier knows this problem; his mission is to kill, but not to become a murderer. The policeman faces it; his duty is to coerce where necessary, but not to be a brute. The prosecutor also faces it; his role is to advocate the imposition of deprivations where necessary, but not to become an evangelist of vengeance. The judge experiences it; he carries the responsibility of imposing community force where necessary, but coupled with the obligation of avoiding tyranny. The responsible press and other media of mass communication are confronted with it; their role includes full reporting of police and judicial proceedings amongst other things of concern to the public, but does not include the exploitation of accused persons to pander to the vicarious satisfaction of latent criminal tendencies of persons in their audience. Examples could be multiplied, and all sorts of particular implications drawn. I imagine, however, that they will suggest themselves.

The general implication which seems to me to emerge, and on which I will rest in this discussion, is that it is about time that our substantive codes of law, starting with the penal, were redrawn more adequately to reflect the aspirations, spirit and learning of our people. Along these lines, I suggest to you that the term "penal" no longer has an appropriate or even useful place in our culture. Let us have a civilized Code of Correction; and let us devise some sort of legislative mechanism to ensure its continuing revision in the light of continuing reporting and appraisal of operations. If public order and our preferences in respect thereof

are as important as we think, we need these things. We must come to devise our laws and prescribe our sanctions on a basis of informed forecasting and planning, and this in order that we may choose our own timing, strategy, levels of engagement, and weapons. The only alternative is to defer in respect of all these terms of combat to aggressors against our preferred order, by continuing to respond to them in the traditional *ad hoc* emotional fashion.