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PUNISHMENT, CORRECTIONS AND THE LAW

Gerhard O.W. Mueller* †

*Carcer enim ad continendos homines
non ad puniendos haberi debet.
(Prison should serve the purpose of con-
fining people, not of punishing them.)¹*

I. PRISON AS PUNISHMENT OR CORRECTION

Man's rapid technological progress has destroyed his trust in any of his institutions which is more than a generation old. Brains conditioned in the mathematics of technological obsolescence cannot believe that previous generations have invented any-

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† *Bibliographical Note*: The reader may also wish to consult the superb recent discussions in point by Andenaes and Silving, both of which the writer had the privilege of editing and which, thus, have influenced (though not determined) his own thinking. See Andenaes, *The General Part of the Criminal Law of Norway*, esp. §§ 1, 6, 7 & 8, (3 PUBLICATIONS OF THE COMPARATIVE CRIMINAL LAW PROJECT 1965); Silving, "Rule of Law" in *Criminal Justice*, in *ESSAYS IN CRIMINAL SCIENCE* ch. 5 (1 PUBLICATIONS OF THE COMPARATIVE CRIMINAL LAW PROJECT, Mueller ed. 1961). For background materials, see HALL & MUELLER, *CASES AND READINGS ON CRIMINAL LAW AND PROCEDURE*, ch. 1 (2d ed. 1965). My own views have previously been stated in Mueller, *The Public Law of Wrongs—Its Concepts in the World of Reality*, 10 J. PUB. L. 203, 204-214 (1961).

The debate of this symposium is by no means the only one taking place. Some of the views here represented were analogously and effectively presented by Professor Hall-Williams, *Must Criminal Justice be Either Punitive or Preventive* (Paper presented at the 5th International Criminological Congress, Montreal, Canada, 1965), in answer to Lady Barbara Wootton's call for a preventive system which would discard all reference to guilt and retribution. WOOTTON, *CRIME AND THE CRIMINAL LAW* (1963). In this connection see also Edwards, *Diminished Responsibility?—A Withering Away of the Concept of Responsibility?*, in *ESSAYS IN CRIMINAL SCIENCE* 301 (1 PUBLICATIONS OF THE COMPARATIVE CRIMINAL LAW PROJECT, Mueller ed. 1961), and Hall, *The Purposes of a System for the Administration of Criminal Justice* (175th Anniversary Lecture, Georgetown University, Monograph, Oct. 9, 1963). For Professor Hall's views in general see HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 296-324 (2d ed. 1960).

¹ Ulpian, *Digest XLVIII, 19.8, § 9 (A.D. 228)*.

thing which can possibly be of more than historical interest for today's society. But the fact is that man's advance on the plane of ideas has proceeded at a snail's pace—compared with his lightning-like technological progress—and does not at all justify such a confidence bordering on arrogance.

In the sphere of criminal law this point is well demonstrated by such phenomena as the usually uninformed attacks on the established rules of incapacity, the principle of *mens rea*, and other embodiments of the fundamental value system of civilized man. At the moment, attacks of this sort have focused on *punishment* as a social institution, more particularly, the punishment of imprisonment. What is meant, is, obviously, the idea and method of imprisonment as a consequence of wrongdoing, as determined by a court under application of (almost exclusively) the statutory law which society has enacted to govern itself. Of course, imprisonment is not the only type of punishment which our law today employs. There are, after all, a considerable number of United States jurisdictions which employ capital punishment,² though their number is happily decreasing, as are the crimes for which such punishment may be imposed.³ So, too, the actual number of executions in the capital punishment states is decreasing rapidly.⁴

² The federal system, the District of Columbia and 40 states still provide for capital punishment. Abolitionist states, with the year of abolition, are the following: Alaska, 1957; Hawaii, 1957; Iowa, 1965; Maine, 1887; Michigan, 1846—for all but treason, 1963—totally abolished; Minnesota, 1911; Oregon, 1964; Vermont, 1965; West Virginia, 1965; Wisconsin, 1853. O'Halloran, *Capital Punishment*, Fed. Prob., June 1965, pp. 33, 35.

³ New York, for example, has abolished the death penalty except for intentional murder of a peace officer during the performance of his duties, or intentional murder by a defendant under a sentence of life imprisonment or indeterminate term, with a minimum of 15 years and a maximum of life, or by a defendant during escape or flight from such imprisonment, in which cases the jury may, in most instances, impose capital punishment. N.Y. PEN. LAW, § 1045(4). North Dakota still imposes capital punishment for treason, N.D. CENT. CODE § 12-07-01 (1960), and for first degree murder, N.D. CENT. CODE § 12-27-13 (1960). Rhode Island also retains the death penalty for murder while under life sentence. R. I. GEN. LAWS ANN. § 11-23-2 (1957).

⁴ In 1961 there were 42 executions, the second lowest figure between 1930 and that year. In 1962, executions jumped to 47, but in 1963 there were only 21, and in 1964 just 15. O'Halloran, *supra* note 2, at 35. See National Prisoner Statistics, No. 28, April, 1962; No. 32, April, 1963; No. 34, May, 1964. See also BEDAU, *THE DEATH PENALTY IN AMERICA* 23 (1964): "Whereas there is now about one execution a week in the nation, with a population of 180 million people, in 1900, with a population half that size, executions were held on an average three times as often."

As is well known, most nations of civilized western traditions have abolished this form of punishment,⁵ France being the most glaring major example to the contrary.⁶ Capital punishment has become so insignificant—in theory and practice—from the point of view of criminal policy that we may here well be pardoned for ignoring it altogether.⁷ This holds true for the institution of corporal punishment, surviving in a single state of the United States, Delaware, and, as a true oddity or weirdness hardly worthy of discussion as a matter of criminal policy.⁸

The remaining forms of genuine criminal punishment include such institutions as fines, forfeitures and confiscations,⁹ withdrawals of licenses,¹⁰ revocation of privileges and charters,¹¹ imposition of burdensome conditions in the form of probation and parole,¹² and similar detriments, not all of which are readily admitted to be punishments. But we must be realistic enough to regard every detriment imposed on a human being found guilty of crime, because he has committed such a crime, as a punishment. Obviously, some of these punishments are much less burdensome than others but that does not remove them from the category. Capital execution by shooting may well be preferable to hanging,¹³ and probation with a condition not to frequent taverns may well be preferable to imprisonment, but all of these impositions are nevertheless detriments imposed for having committed crime and are

⁵ UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ancel Report), 7, 8 (1962): Nations recently abolishing death penalty: Austria, 1945 (except if national emergency proclaimed); Denmark, 1930; Federal Republic of Germany, 1949; Finland, 1949; Greenland, 1954; Iceland, 1940; Italy, 1944; New Zealand, 1961; Switzerland, 1937. The United Kingdom has abolished capital punishment on a five year moratorium basis. See N.Y. Times, Oct. 29, 1965, p. 18, cols. 3-4.

⁶ UNITED NATIONS, *op. cit. supra* note 5, at 7.

⁷ I have discussed the issue elsewhere, with documented rejection of capital punishment as a social tool. Mueller, *Of Liberalism and Conservatism in American Criminal Law*, 3 DUQ. L. REV. 137, 159-165 (1965).

⁸ DEL. CODE ANN. tit. 11, § 3908 (1953): "The punishment of whipping shall be inflicted publicly by strokes on the bare back well laid on."

⁹ CAL. PEN. CODE, §§ 68, 330.4, 672; N.Y. PEN. LAW, § 2(3); MODEL PENAL CODE § 306.2 (Proposed Off. Draft, 1962).

¹⁰ CAL. PEN. CODE, § 535.

¹¹ MODEL PENAL CODE § 306.3 (Proposed Off. Draft, 1962) as to disqualification from voting and serving on juries.

¹² MODEL PENAL CODE §§ 301.1, 305.13 (Proposed Off. Draft, 1962).

¹³ *Wilkerson v. Utah*, 99 U.S. 130 (1878); UTAH CODE ANN. § 76-30-4 (1953).

therefore punishments, whether or not less onerous than alternatives.

We are left with the further definitional problem of ascertaining the meaning of imprisonment. I should think that regardless of its official designation, as jail,¹⁴ workhouse,¹⁵ reformatory,¹⁶ penitentiary,¹⁷ state prison,¹⁸ house of correction,¹⁹ or whatever else,²⁰ every place of detention at which convicts are restrained as a consequence of having been found guilty of crime, is a place at which the punishment of imprisonment is being executed. This naturally excludes places at which persons other than convicts—however dangerous they may be—are being detained, such as juvenile delinquents or dangerous mental patients (who may have produced harm which, if produced by a responsible agent, would have been criminal harm).

Of all punishments known to contemporary law, that of imprisonment has come to be regarded as the virtual synonym of punishment. And indeed, with relatively few—and, for the grand sweep insignificant—exceptions, what must be said of the punishment of imprisonment is equally applicable to other forms of punishment. Thus, we shall hereinafter concentrate on imprisonment.

It may be contended that so far I have unduly emphasized form, to the detriment of substance, meaning the amalgamation of ideas embodied in the concept of punishment—primarily, punishment by imprisonment. Is it possible at all to define the punishment of imprisonment, or any other punishment, without considering the purpose of such a measure?

Let us, therefore, ask the question: Why do we imprison a convict? It will not do, for the classicists,²¹ to answer: "for the purpose of punishment." That begs the question, since imprisonment is practically synonymous with punishment. On the other

¹⁴ PA. STAT. ANN. tit. 61, §§ 402-455 (1964).

¹⁵ ILL. REV. STAT. ch. 38, § 758 (1961); PA. STAT. ANN. tit. 61, §§ 751-759 (1964).

¹⁶ MINN. STAT. ANN., § 609.105(2) (1964). See also TAPPAN, CRIME, JUSTICE AND CORRECTION 648-652 (1960).

¹⁷ PA. STAT. ANN. tit. 61, §§ 340.1-384 (1964).

¹⁸ N.Y. PEN. LAW, § 2187.

¹⁹ PA. STAT. ANN. tit. 61, §§ 671-685 (1964).

²⁰ E.g., houses of detention, PA. STAT. ANN. tit. 61, §§ 781-789; medical correctional facilities, TAPPAN, *op. cit. supra* note 16, at 406.

²¹ For definitions, see Canals, *Classicism, Positivism and Social Defense*, 50 J. CRIM. L., C. & P.S. 541 (1960).

hand, it may well be contended that this apparently classic answer to the question is quite wrong by classical authority. The renowned Roman jurisconsult Ulpian,²² whose writings constitute a full third of Justinian's entire Digest, and who therefore can lay claim to having been mankind's most influential jurist, uttered the famous words:

Carcer enim ad continendos homines non ad puniendos haberi debet. (Prison should serve the purpose of confining people, not of punishing them.)²³

This ancient wisdom had the force of a rule of law in classical Rome, though subsequent civilizations, our own included, seem to have forgotten it. If Ulpian feels that confinement is not punishment, what is it then? Ulpian's view seems to clash frontally with the idea of prison as an institution of punishment. Can we reconcile these two seemingly conflicting propositions that (1) imprisonment (by confinement) and punishment are virtual synonyms and that (2) imprisonment (by confinement) is not meant to serve the purpose of punishment? We would have to justify the construction that punishment may be implied in imprisonment, although it may not be desired. But this *tour de force* would leave the imprisoning mankind subject to the charge that when they do something not intending its consequences, but well-knowing that these consequences will follow, they are hypocritical when they deny the intention.

The trouble is that only one of our two contentious terms is certain: confinement, while the other is a completely uncertain term: punishment. That not every confinement is imprisonment is learned by the child, who soon begins to understand that confinement to the house when he suffers from the measles is one thing (however intolerable), while confinement to the house for having been insolent and disobedient is quite another. But can this childhood experience be turned into adult wisdom? That, in any event, is constantly being attempted. Confinement to a hospital bed with a broken leg differs strongly from confinement in a prison for having committed a crime. Naturally, there are shady areas in between the two extremes in which neither the confiner nor the confined is quite certain about the purpose of and motivation for the confinement, *e.g.*, the confinement of the so-called criminally insane.

It may well be contended that the difference between punitive

²² 228 A.D., advisor to Emperor Alexander Severus (222-235 A.D.).

²³ Ulpian, Digest XLVIII, 19.8, § 9 (228 A.D.).

and non-punitive confinement lies entirely in the extent to which the confined enjoys amenities of freedom not inconsistent with the minimal deprivation of liberty of the confinement itself. Superficially, this does seem to be a proper criterion of distinction. In purely physical terms, there is a vast difference between a hospital and a prison—though, here too, there is the shady zone of, e.g., medical institutions with maximum security features. But, in reality, the presence or absence of amenities is an unsafe criterion of distinction, since it is more dependent on the wealth of a jurisdiction, the personal views of wardens—or hospital executives—and other factors of greater or lesser chance. Nevertheless, the absence in prison of those amenities, which are ordinarily associated with the comfortable life of a free person, is regarded as of the very essence of punishment. Punitiveness is associated with a high degree of deprivation of comfort. Thus, imprisonment (confinement) as punishment—as distinguished from confinement for whatever other purpose, e.g., medical—is marked by the presence of factors capable of imposing hurt, suffering, discomfort, or detriment, such being not just accidental or incidental, but intended by the confining sovereign.

But while this rationalization may well describe the actualities of imprisonment, does it also *impliciter* describe the realities of non-punitive confinement, especially in the shady-zone of detention of “dangerous” persons, e.g., criminally insane, who have not been found guilty of crime? The pedophile who could not help molesting little boys may have been acquitted of a criminal charge, but now finds himself confined in a medical detention facility for life, that is, until cured (which may never happen).²⁴ Will it make much sense to him to tell him that he is not being punished but is merely being detained? Suppose this pedophile had previously been charged with the same offense. On that occasion the jury convicted him, and he was sentenced to the short term imprisonment which the statute envisages. At that time, we told

²⁴ In *People v. Jackson*, 20 App. Div. 170, 245 N.Y.S.2d 534 (3d Dept. 1963), defendant was convicted under the New York “sex offender statute” (N.Y. PEN. LAW, § 483-b), and sentenced to a term of from one day to life in lieu of the regular fixed sentence with a ten year maximum. The “sex offender statute” envisages “therapeutic treatment, to the end that such offender may be rehabilitated and released whenever it may appear that he is a good risk on parole.” *Id.* at 536. In the case at bar, “[a]ppellant contends, and it has not been disputed by the People, that in the whole period of over eleven years he spent in prison he received no psychiatric treatment. Nor is there any proof that he would not respond to psychiatric treatment. . . .” *Id.* at 537. The court ordered a psychiatric study and report.

him that the one year confinement constituted punishment. Now we tell him that the life-time confinement does not constitute punishment. Will that make sense to him?

It may, of course, be contended that the duration of a confinement cannot serve as a yardstick of its punitive quality, but rather that it is the attitude of the institutional staff toward the confined person, *i.e.*, the manner of execution which is determinative: Friendly therapy in a medical setting versus unfriendly execution of a detention order in a nontherapeutic setting. But if that is the difference it may amount to no more than good practice in the one case and bad practice in the other. Why? Because there is no such thing as confinement for the purpose of punishment in the sense of inflicting hurt and suffering for the sake of inflicting hurt and suffering. Whatever the theory and practice of the law may have been in bygone centuries, the very earliest source of law dealing with the topic of imprisonment properly stated the right attitude of the law: Prison should serve the purpose of confining people, not of punishing them. To put it as bluntly as possible: If by punishment we mean the intentional infliction of hurt for the sake of hurting, the law today does not punish. Confinement, then, can only serve purposes other than punishment, whether this be a legal or a medical confinement. Medical confinement serves the purpose of restoration of physical or mental normalcy and the prevention of continued or additional illness. Legal confinement serves the purpose of restoration of social normalcy and the prevention of continued or additional breach of communal norms (criminal laws).

But if that be so, why have we all along called imprisonment a form of punishment? Simply because in times past the pain and suffering associated with imprisonment have been its most pronounced features. Why do we still call imprisonment a punishment when we are striving so hard to alleviate all unnecessary pain and suffering associated with imprisonment? Because we are traditionalists, because we are lethargic, and because we are realistic enough to appreciate that this confinement which the criminal law provides for is always bound to be an unpleasant experience (quite apart from the fact that the message of the modern humane approach has not yet penetrated into all jurisdictions). Nevertheless, we might well wish to disassociate ourselves from past undesirable practices by dropping the term "punishment" entirely, and by finding a term more descriptive of the intended purpose of all "punishment"—namely, *prevention* or *correction*, terms corresponding to their medical equivalents, *prophylaxis* and *healing*.

But, does this switch of designations, from punishment to prevention or correction really lead us any place? If we ask ourselves, how is this prevention to be achieved, will we not obtain the old answer, by punishing the wrongdoer?

It is at this juncture of the debate that the protagonists of two conflicting points of view usually clash squarely. The punitively-oriented debaters espouse the virtue of the infliction of pain and suffering as a preventive; the therapy-oriented debaters deny that the punitive approach yields any beneficial results and claim virtually magic power for the therapy-oriented, non-punitive approach.

My description is a simplification of realities only in the sense that there are relatively few purist exponents of either theory left. Nearly all partisans do make a few concessions to the other side. But a few concessions are not enough, and the insistence on punishment as a preventive, on the one hand, or on therapy as a preventive, on the other, is plainly wrong, whether viewed as a description of reality or as a demand of criminal policy. The fact is that the specific means for obtaining preventive goals are not capable of division into two antitheses. The means are manifold.

II. THE SPECIFIC AIMS OF OUR CORRECTIONAL SCHEME

The correct choice of punishment—punishment in its widest sense of 'treatment,' which may be unpleasant or may not—usually consists in a wise blending of the deterrent and reformatory, with the retributive well in mind, and with a constant appreciation that the matter concerns not merely the Court and the offender, but also the Public and Society as a going concern. Punishment is therefore an art, a very difficult art, essentially practical and related to the existing state of Society. A punishment which is appropriate today might have been quite unacceptable a couple of hundred years ago, and probably would be absurd two centuries hence. It is, therefore, impossible to lay down hard and fast permanent rules, though the theoretical normae should remain.²⁵

A. THE THREE ALLEGEDLY NON-UTILITARIAN INGREDIENTS OF THE CORRECTIONAL SYSTEM.

I should like to begin by discussing those aims or methods for achieving crime prevention of which it is usually said that they are not designed at all to achieve prevention—in fact, that it would amount to a perversion of high ideals to use them in a utilitarian manner. I am talking, of course, of the ideas of vindication, retribution and penitence.

²⁵ Coddington, *Problems of Punishment*, 46 ARISTOTELIAN SOC'Y, PROCEEDINGS 155, 178 (N.S. 1945-46).

It is not customary for contemporary American writers in the field of correction to espouse or even discuss these theories. Where these theories are mentioned at all, they are usually dismissed as archaic and irrational. If, however, we endeavor to discuss the state of affairs of current law in matters of corrections—as distinguished from lofty ideals—we must at once admit that these three theories are very much with us, and are likely to remain with us for some time.

(1) *Vindication.*

Vindication of the law, as implied in the imposition of punishment for wrongdoing, simply means the restoration or re-assertion of the law-protected value which the perpetrator has destroyed. It is an abstract emphasis on both the value itself and on the rule embodying it and prohibiting its destruction. In a purely objective manner—or, in any event, that was its original meaning—²⁶ the wrong must be righted by imposition of yet another detriment. The roots of this theory may have to be found in the sacrifice which primitive and archaic man had to bring in order to appease the gods who had been outraged by the evil-doer. As I understand the concept of vindication, however, it is of its very essence that it is neither the law-giving society nor the perpetrator who is the addressee of the vindicative sanction, but rather the law itself—*justitia* (viz. the goddess of justice herself). Few philosophers have espoused vindication as strongly as Kant, particularly in the hypothetical example of a political island society that wishes to dissolve itself with mutual consent. The society still detains a convicted murderer awaiting execution. Kant maintains that perfect justice requires this murderer to be executed before the society carries out its resolve to dissolve, for in no other way can the wrong be righted, and the balance of that imaginary scale of justice be restored—else all members of that society would share the guilt of the murderer.²⁷ This concept of vindication naturally corresponds to a deep-seated instinct—the vindictive drive—of man to hurt back whenever hurt, regardless of the blameworthiness of the original hurt. Thus, the child kicks the door against which it has run and which therefore produced a hurt. As if by magic, the wrong of the hurt is wiped out by the imposition of the counter-hurt.

As mankind has matured from philogenetic infancy to philogenetic adulthood, its behavior has become a bit more rational.

²⁶ DREHER, *UBER DIE GERECHTE STRAFE* 23 (1947).

²⁷ KANT, *THE PHILOSOPHY OF LAW* 195 (Hastie transl. 1887).

Consequently, relatively little is left in practice of the original vindictive drive, rationalized as appeasement of the gods. But vindication has retained some meaning in the sense of the simple reassertion of the law-protected value, following its temporary violation by a law breaker. Today this reassertion has a much more subjective significance than it once had, because it is—or has that always been the case?—a public demonstration that society's statement of commands is not an idle gesture, but is a matter of continuing validity. Thus, the majesty of the law is vindicated whenever, following its violation, the law machinery is set into motion. While the purpose of this setting in motion of the machinery of justice may have much more direct crime-preventive objectives today, there is implied, nevertheless, the vindication of the law. And while at one time vindication had to be bloody and drastic—or perhaps proportionate to the wrong done—we have sufficiently matured to regard the law as vindicated whenever an official step to counter the wrong is taken.

Few criminologists of today have attacked the idea of vindication, for few have been able to view it as an idea separate from that of retribution, to be discussed shortly. The principal argument against vindication has been the slogan that "two wrongs do not make a right."²⁸ There are two answers to this: (1) The detriment imposed by society upon the wrongdoer is not a wrong, because it is not imposed in guilty violation of a prohibition. To the contrary, it is imposed in conformity with the politically expressed desire of the society. (2) Even viewed apart from its legal garbs, the detriment imposed by law is imposed for beneficial purposes and may well even have all the appearances of a benefit. In any event, usually nowadays, it is not a detriment as grave as that which the perpetrator has inflicted upon his fellow man. But for purposes of serving its *modern* vindictive aim, the severity of society's counteraction is quite insignificant, compared with the superior significance of the fact that society has taken steps at all in consequence of the wrong committed.

As archaic as the idea of vindication may be, as here understood it is a completely unavoidable one. If vindication is practiced whenever society takes any step in consequence of the violation of any of its penal laws—arrest, supervision, trial, verdict, probation, imprisonment, whatever it may be—then it is a phenomenon with which we are stuck. Nor is this a useless phenomenon. The reassertion of the protected value implicit in

²⁸ Leopold, *What Is Wrong With the Prison System*, 45 *NEB. L. REV.* 33, 36 (1966) *supra* this volume.

the taking of any such official step is as useful for our correctional system as is the "barometer" function of any societal action against wrongdoing, *i.e.*, its function as an indicator for the continued need to prohibit (and how to prohibit) a given type of conduct.

(2) *Retribution.*

Closely related to the aim of vindication is the aim of retribution. But the addressee of retribution is a different one. It is not the law itself; it is, rather, the organized group whose rules have been violated and whose sense of security has been disturbed. This society includes, of course, the direct victim of the wrong (or his immediate relatives, in case of a homicide). Perhaps, at one time the demand of retribution was purely that of the direct victim of the homicide, namely the family. But as the law community grew from the family to the state or nation, it was that larger body which became the recipient of the retribution. Here, more than in the case of abstract vindication, do we find the satisfaction of the urge to "get even" for every hurt. The inner peace of the victim or the victims was not restored until the wrongdoer had suffered his "just" dessert. The "justness" of the dessert has undergone considerable amelioration with the growing maturity of mankind. At one time, the outraged society did not just get even. It did better than that, if it could. For each kinsman killed, a goodly number of the killer's kinsmen would have to be killed in order to right the wrong, with consequent feuds capable of depopulating entire lands.

When, with the Mosaic laws, we encounter the idea of measured response, *i.e.*, talionic punishments, we find a much progressed society. And when, today, most civilized nations react to homicide with detriments of lesser form than capital punishment, such as terms of imprisonment ranging in practice from ten to twenty years, we find little resemblance to the pre-retaliatory law of the unmeasured blood feud. One may well be emboldened to predict the emergence of a human being, of the Christian ideal, without retributive drive. But it might not be in the interest of mankind's security to develop such a new man.

Retribution is rarely attacked as retribution, but rather as retaliation. As such, Mr. Leopold has called it *bankrupt on two grounds*: "Getting even" is not a very mature motive;²⁰ and "the second reason why it appears to me that retaliation is not a

²⁰ *Ibid.*

proper ground for imprisonment is that we are not consistent. We could be much more drastic in the severity of imprisonment. . . . [w]e no longer whip felons. . . . [t]he public conscience has grown too tender to permit drastic punishments."³⁰ These two supposed grounds for the "bankruptcy" of "retaliation" are in fact one and the same argument against retribution, carrying its own refutation within it.

In giving retribution *legal standing*, society does admittedly support an urge that is not very mature. Indeed, it is one of man's primeval urges. Yet it is so powerful within man that it would be more irrational to ignore than to admit its existence. The drive is there, and we might as well make the best of it. In fact, mankind has made the best of it all along. More and more, mankind has been able to bridle its retributive urge until today it is a mere shadow of its former self, modified not only by ethical convictions, but also by a rational adjustment in accordance with other correctional ideas, *e.g.*, reformation, all in line with the utilitarian premise of accomplishment of one's goals by the least burdensome means. We have largely outgrown the retaliatory phase. To charge mankind with inconsistent squeamishness for having become more rational, more utilitarian, more efficient, and more ethical, amounts to a perversion of progress. A moment's reflection will tell us that the retributive drive serves, or can serve, very useful purposes. The feeling of outrage, coupled with a desire to inflict hurt on the wrongdoer, which follows each instance of crime, is a useful indicator of the amount of regard in which society holds a given value: Grave crimes—strong retributive feelings, small crimes—weak retributive feelings. Take away all retributive feelings and you virtually condone the conduct in question. Thus, for both society and perpetrator, the retributive feeling, put into practice, is a guard against violation of the protected interest. Shoham and Slonim recently put their finger on the continued value of retribution when they wrote of

the currently growing realisation of many criminologists that the normative barrier against proscribed behaviour (including crime) is strongly linked with the depth of the internalisation of norms and values by a certain person. The extent to which the non- (or anti-) criminal norms have been incorporated into the personality of a certain person, *i.e.*, his being *morally orientated* may largely determine his chances of becoming an offender and his subsequent 'reformation' or his becoming a recidivist.³¹

³⁰ Leopold, *Imprisonment Has No Future in a Free Society*, Key Issues, Vol. 2, 1965 p. 24, 25-26.

³¹ Shoham & Slonim, *The Moral Dilemma of Penal Treatment*, 1963 *JURIM. REV.* 135, 138. (Footnotes omitted.)

Similarly, one of the foremost American criminologists, Dr. Donald Cressey, exhorts us that

the concern must be for the fact that criminal conduct is *wrong*. 'Guilt' and 'shame' are contained in the verbalizations that make up a culture, and the problem of changing criminals is a problem of insuring that criminals become active members of intimate groups whose verbalizations make all criminality as guilt-producing, shameful, repulsive, and impossible as, say, cannibalism.³²

If further evidence is needed from behavioral scientists we may wish to turn to psychiatrists of the reputation of Dr. Melitta Schmideberg, who have long insisted on the social utility of internalized values. The average offender, says Dr. Schmideberg,

is maladjusted because his sense of responsibility, his social attitudes, and his controls are underdeveloped. The task of psychiatric treatment, probation, or any other form of rehabilitation is to develop them, and this is not done by exonerating the offender to himself or to others. . . . The framework of the legal system is necessary if offenders are to be treated at all.³³

There could hardly be a better endorsement for the continued reliance on the correctional purpose of retribution, as long as it is understood that this and no more is meant by retribution; the urge to punish has, thus, lost its unbridled power and its mystique.³⁴ It is directed into ethical channels, and it continues to be productive of social good. Retribution, as understood in this sense, is a far cry from the picture of bloody retaliation which the antagonists of our current system point to as the bugaboo of the law.

(3) *Penitence.*

The last member of the seemingly non-utilitarian trio of correctional aims is that of penitence. A whole movement—namely the penitentiary movement of 19th century Pennsylvania and New York—was dedicated to the proposition that all a law breaker needs is the opportunity to make peace with himself, to search his soul, and to come to terms with his Creator. As Judge Dent put it, affirming a conviction: Penitentiary confinement places the offender "where the all-seeing eye of his offended Creator may either drive him to moral suicide or repentance of his iniquitous life. May the latter be the result."³⁵ The idea of peni-

³² Cressey, *Theoretical Foundations for Using Criminals in the Rehabilitation of Criminals*, Key Issues, Vol. 2, 1965, p. 87, 99.

³³ Schmideberg, *The Psychiatric Treatment of Offenders*, 15 *NEW YORK MEDICINE* 11-12 (1959).

³⁴ For general discussion see WEIHOFEN, *THE URGE TO PUNISH* (1957).

³⁵ *State v. Kohne*, 48 W. Va. 335, 338, 37 S.E. 553, 554 (1900).

tence, while first given the form of brick and mortar in 19th century America, can be traced back in history, over Blackstone and the clerics, to antiquity. There is every reason to believe that this penal aim is still with us today.

Penitence as an ingredient of modern corrections has been severely attacked by criminologists and laymen alike, principally for reasons of the supposed incompatibility of a prison environment with the vision of the hopefully adjusted personality of a successful penitent. Perhaps the model of the monastic penitent in his austere surroundings is not a correct model for the prisoner who has not exactly chosen his austere surroundings. Or has he? One of today's more renowned penal reformers, and a principal draftsman of the new German Draft Penal Code, speaks of the queer phenomenon of the perpetrator who seeks punishment as penitence. After bemoaning the fact that society itself has (in his view, unfortunately) largely abandoned the idea of the "cleansing function" of punishment, Dr. Dreher continues:

Oddly, it is the criminal himself, who vividly preserves the idea of punishment as penitence. Numerous surrenders to the authorities, and frequent spontaneous confessions, attest to that fact. Dostojevski's masterly depiction of Raskolnikov's inner urge to confess does not at all concern an isolated case.³⁶

Dr. Dreher ultimately speaks of the criminal's "yearning for penitence."

How real is this yearning for penitence in the average perpetrator? Does it deserve to be preserved? Should the law take continued cognizance of it? Police officers may know more about any spontaneous desire to confess than criminal law policy makers. And analytically-oriented criminologists have long operated with the concept of the penitence-yearning perpetrator. Alexander and Staub devoted an entire book to the topic,³⁷ and more and more phenomena related to a conceivable desire to suffer punishment are coming to light.³⁸

Little tangible data is available from which to draw inferences as to the extent of the existence of a penitence craving. Denials of the existence of this phenomenon are as unrealistic as the claim that most offenders act from unconscious motivations representa-

³⁶ DREHER, *op. cit. supra* note 26 at 25.

³⁷ ALEXANDER & STAUB, *THE CRIMINAL, THE JUDGE, AND THE PUBLIC* (rev. ed. 1956).

³⁸ See von Hentig, *Return to the Scene of the Crime*, in *ESSAYS IN CRIMINAL SCIENCE* 53 (1 PUBLICATIONS OF THE COMPARATIVE CRIMINAL LAW PROJECT, Mueller ed. 1961).

tive of the penitence craving. Alexander and Staub's convincing demonstrations in a few cases constitute little or no justification for generalizations as to criminals in general.

In any event, it is quite demonstrable that penitence produces emotional peace and, consequently, behavior not in disharmony with public mandates. And while it is impossible to say whether penitence considerations are applicable to any major segment of law violators, it is safe to say that, whenever they do play a role, such a role is probably not inconsistent with an overall preventive aim. I have to be cautious enough to speak of only a probable consistency with preventive aims, because there remains the argument that the penitence-craving criminal from a sense of guilt could hardly fulfill his yearning if the proposed line of conduct were perfectly proper and lawful. It has, therefore, been suggested that by setting up prohibitions in the first place, the law is criminogenic in virtually stimulating law violations.³⁹ Nobody would suggest, I suppose, the repeal of all criminal laws—although such would terminate all crime, and take all the drive out of actors craving for penitence. But such reasoning may well amount to a reasonable suggestion for the repeal of those penal statutes which serve no useful purpose, *i.e.*, which protect no significant social value, or which do so only at disproportionate cost, especially where this cost includes the commission of the offense by whatever penitence cravers our society may harbor. In sum, however, penitence may well be permitted to remain an adjunct of our correctional aims. It is not a useless mysticism, but is apt to serve useful, *i.e.*, preventive purposes in an enlightened system of penal laws. But penitence does not seem to play a significant role in our modern correctional system.

At this point, it should be readily conceded that if our correctional system could serve no better purposes than those discussed, it deserves to be scrapped. But our system does serve better and greater purposes. Indeed, the purposes just mentioned are merely "implied," while those to be discussed are "express", to use terminology familiar to the lawyer.

B. THE THREE UTILITARIAN INGREDIENTS OF THE CORRECTIONAL SYSTEM.

To the retribution purist of Kant's bent,⁴⁰ the idea of utility in punishment is anathema. To the advocate of modern criminal

³⁹ Carrington, *The Moral Quality of the Criminal Law*, 54 Nw. U.L. REV. 575 (1959).

⁴⁰ See KANT, *op. cit. supra* note 27.

policy, only what is useful in society's ethical setting can possibly be absorbed by a correctional system. At least three major aims with utilitarian character can easily be discerned: Neutralization, resocialization, and deterrence, the latter being divided into individual deterrence and general deterrence. We shall begin our discussion with the least controversial of these.

(1) *Neutralization.*

Any correctional system operating with restraint, particularly that involved in imprisonment, relies *impliciter* on the idea that restraint has an incapacitating effect. The child molester removed from the company of little children, *e.g.*, by institutionalization, can no longer molest little children. The offending corporation whose charter has been revoked, can no longer engage in the fraudulent business practice of selling forged securities. The dangerous assaulter is deprived of the opportunity of assault while in solitary confinement, etc. Even among the staunchest advocates of a so-called non-punitive system, society's right and obligation to incarcerate dangerous offenders is generally conceded. Thus, Dr. Elmer Barnes recently wrote:

It is obvious that there are dangerous and non-reformable convicted criminals who must be caged for long periods, perhaps in many cases for life, but in such instances rehabilitation is for the most part a forelorn hope⁴¹

Naturally, the principle of utility would dictate that, solely as far as neutralization is concerned, no more force should be employed than is necessary for the preventive purpose. That means also that the restraint should not last longer than the danger emanating from the restrained person persists. (Though, as we shall see later, other considerations may force us to either extend or limit such a period.)

Rarely has the idea of neutralization been attacked, except, of course, for our faulty, excessive or unwise and indiscriminate employment thereof. Here, as elsewhere, a theory is one thing, its practice—so much dependent on frail and lethargic man—another.

But recently the idea of neutralization itself has been attacked on ethical and utilitarian grounds. Leopold wrote:

Crimes are committed in prison; crimes have been alleged to be committed by men serving time in prison, who managed to slip away at night long enough to commit a robbery or two, returning in time for the morning count. Whether this latter category

⁴¹ Barnes, *The Contemporary Prison: A Menace to Inmate Rehabilitation and the Repression of Crime*, Key Issues, Vol. 2, 1965, p. 11, 15.

is genuine or whether the stories are apocryphal, the former category is certainly valid. Robert Stroud, the famous 'Birdman of Alcatraz,' who died recently after spending some fifty-three years in the Federal prison system, is only one of many who have committed murder in prison.⁴²

I have nothing to say to this other than that an occasional airplane crash is hardly an argument against the idea of aviation—though it may be an argument for better airplane maintenance or navigational devices.

(2) *Deterrence.*

The principal and most established utilitarian ground for corrections is that of deterrence which, in recent years, has frequently been designated as prevention. European criminologists, for generations, have placed so much trust in the policy of deterrence that they have regarded deterrence and prevention as virtual synonyms. Deterrence simply refers to the prospect (or the memory) of pain as a psychological stimulus posited by society in anticipation of the response of abstention from gaining illicit pleasure, whether such pleasure be the convenience of parking next to a nearby fire hydrant or accelerating the possession of an estate by producing the death of the testator.

The term deterrence seems to refer to the employment of *terror* as such a stimulus. In fact, there was a time when mankind was so brute and uncouth that only drastic demonstrations seemed to suffice as stimuli against proposed crime. By now, we have learned that excessive terror backfires in many ways: It makes men oblivious rather than alert to suffering; it renders men brutish and thus contributes to aggressiveness, instead of reducing it. In any event, it is safe to say that terror has vanished from the concept of deterrence. What is left is the anticipation (or memory) of a detriment to be avoided, such detriment usually being loss of one's freedom (completely or in part) for a considerable stretch of time.

(a) *General Deterrence*

One generally speaks of two forms of deterrence, general deterrence and special deterrence. General deterrence is the employment of a public notice that a given detriment will follow wrongdoing. Thus, everybody who parks next to a fire hydrant faces the prospect of a 25 dollar fine. Everyone who in an unex-

⁴² Leopold, *supra* note 28, at 41.

cusable, unjustifiable, unmitigated manner kills another human being, faces the prospect of a long term confinement in prison.

A command of the law employing general deterrence is only theoretically directed at the entire population. Practically, only a limited group is meant to be reached. The prohibition of deer hunting out of season is obviously aimed only at deer hunters, more particularly at those deer hunters who are inclined to violate the Code of St. Hubertus, as much as the gaming law. Prohibitions against short weight selling are aimed at those who are engaged in weighing and selling, and particularly those who do not have enough conscience or natural restraint and who, thus, need an additional crutch of the law, an additional reminder, that to do the wrong thing will lead to negative consequences.

This all sounds terribly reasonable. But, the theory of general deterrence is nevertheless subject to considerable attack. It is not easy to understand these attacks, for the principal objection seems to be rather that deterrence works too well and is, therefore, unfair. The great penal reformer Harry Elmer Barnes—for whom I have nothing but the highest respect—puts it thusly:

As physical beings, the members of the human race are an active and 'free-wheeling' species, along with others of the simian group from some of which we are descended. Our ancestors roamed about freely, some of them swinging freely from tree limbs, although anthropologists now believe that our immediate ancestors became land rovers at a very remote period. In any event, they roved freely over the territory they inhabited. Humans are also a playful species, as is proved by the popularity of physical games throughout human history. . . .

In short the human animal does not suffer caging gladly, even at the hands of the most genial and sympathetic keepers or trainers.⁴³

This is exactly the point. In search of the most effective stimulus for purposes of preventing wrongdoing, organized society has seized upon deprivation of liberty. Few deprivations are sought to be avoided as diligently by nearly all mankind as this one.

In scanning the penological literature for attacks on general deterrence, I have come across only one type of attack against the idea itself. Certain psychoanalysts have pointed out that convicts actually yearn for the "womb" of society, i.e., prison, which takes them out of the rat-race life of competition, while certain others seek punishment from a sense of guilt. I have discussed the matter in connection with the theory of penitence and therefore now

⁴³ Barnes, *supra* note 41, at 13-14.

wish to point out only that there is absolutely no evidence to the effect that any appreciable number of convicts react thusly, i.e., counter to the normal experience of mankind that deprivation of liberty is an evil to be avoided.

But the opponents of general deterrence also gleefully point their fingers at the rising crime rate and contend that if our threats of punitive reaction (proposed imprisonment) had any positively stimulating effect, the crime rate ought to drop, rather than rise. This is a difficult line of argumentation. Let us consider, for the moment, the fact that the crime rate is increasing as much in the virtually non-punitive societies (e.g., Sweden) as it is in the more punitive societies (e.g., United States, German Federal Republic), and that, on the other hand it is dropping in some very punitive societies (e.g., German Democratic [sic] Republic). Parallel thereto, it has been observed that a decrease in punishments has actually increased the number of convictions and has, thus, resulted in a decrease of the crimes being committed. The point is simple enough: Much more important than the severity of punishment is the certainty of apprehension. A legal system incapable of detecting its criminal perpetrators can hardly hope to discourage the commission of crime, even if it threatens severe penalties for the convicts it will never convict. But once the problem of certainty of detection is solved, the problem of severity of sanction plays some role. This can easily be demonstrated: If the city fathers decide to prohibit the parking of automobiles along the curb of various streets, they will have to consider what punishment to impose. Should they impose capital punishment for violators—if they had the power to do so—or will a fifty cent fine do? Certainly, capital punishment would be much too outrageous for such an offense. No police officer would tag cars; no motorist would take the prohibition seriously; no court or jury would convict. On the other hand, if the punishment were a fifty cent fine, all motorists would conclude that the situation is ideal, for it costs one dollar and seventy-five cents to park on the public parking lot next door. Hence, the right amount of punishment lies somewhere in the middle.

Unfortunately, there are practically no large scale scientific studies to "prove" the theory of general deterrence. But every chance observation on deterrence available to mankind points to its utility. Many of these observations have been gathered and expertly reported by Professor Andenaes of Norway,⁴⁴ and it

⁴⁴ Andenaes, *General Prevention—Illusion or Reality?* 43 J. CRIM. L., C. & P.S. 176 (1952); Andenaes, *The General Part of the Criminal Law of*

would only duplicate a splendid collection of chance observations to reiterate any of Professor Andenaes' points here. Suffice it to say that criminologists have not yet reached the point at which posed research into general prevention is quite possible, though occasions for research of the demonstration type are plentiful.

The major attack on general deterrence or prevention always focuses on the failure rate, especially in connection with serious crime. Colleagues in the field have tried to relate deterrence failure to the seriousness of the crime, thusly: Serious crime—little general deterrent effect; petty crime—strong general deterrent effect. I doubt this correlation. Rather, it seems to me that the failure rate is related to the emotional or psychopathological involvement of the perpetrator in his crime. Thus, since by far the largest number of homicides are acts of passion or emotional short-circuit, the deterrent effect of a relatively remote punishment is bound to be small. On the other hand, general deterrence is likely to be effective in crimes where rational considerations and intellect play the dominant role, e.g., burglary. This is amply borne out by the Copenhagen experience of 1944, when the German occupiers arrested the entire Danish police force (and thus removed any effective sanction machinery) with a resulting rise in the number of burglaries, ten times over its original figure.⁴⁵

All other attacks on general prevention are merely directed against its frequently inhuman concomitants, i.e., the "caging psychosis [which] not only establishes the pattern for the personal demoralization and brutal treatment of convicts but [which] also creates the worst conceivable background of experience for the rehabilitation of discharged prisoners."⁴⁶ The simple answer to this is that brutal treatment by the prison staff may well indicate that these staff members themselves need some correctional influence. Modern corrections call for an understanding and sophisticated attack upon the criminality among men, not a naive and brutish one.

(b) *Special Deterrence.*

Let us suppose, now, that general deterrence has failed. A perpetrator has committed a crime and has been apprehended.

Norway 67-73 in 3 PUBLICATIONS OF THE COMPARATIVE CRIMINAL LAW PROJECT (1965); Punishment and the Problem of General Prevention (Paper Presented at the 5th International Congress of Criminology, Montreal, Canada, Sept. 1965, mimeo.); *Choice of Punishment*, 2 SCANDINAVIAN STUDIES OF LAW 54 (1958).

⁴⁵ TROLLE, SYV MAANEDER UDEN POLITI (Copenhagen, 1945).

⁴⁶ Barnes, *supra* note 41, at 15.

Now what? At this point we bring to bear on him the theory of special deterrence. Here, too, "deterrence" has shed its terror aspect and simply relies on the relatively unpleasant side effects which any deprivation of freedom carries with it. This deprivation of freedom is necessarily accompanied by a certain regimentation that is unavoidable whenever human beings are placed into an enforced community—whether this be an army unit, a merchant vessel, or a prison. Few criminologists would disagree with the proposition that any additional amount of deprivation imposed on prisoners is unnecessary or even detrimental and should, therefore be avoided. The loss of freedom alone is unpleasant enough to fill a long memory which fact, hopefully, is dispositive of future temptations to break the law.

But is it? It is impossible to discuss this question without consideration of the theory and practice of resocialization or rehabilitation. But let us arbitrarily ignore this issue for a moment and focus on imprisonment as we have it today, with whatever little (or no) resocialization efforts we may have in our institutions.

The charge is made that special or individual deterrence apparently does not function effectively.

A very large percentage of inmates of our penal institutions are recidivists. On these individuals, previous imprisonment has failed to act as a deterrent to further criminal activity. Many prisoners are third offenders, fourth offenders, men with even more than three prior convictions. With these men, imprisonment has failed repeatedly to deter.⁴⁷

Mr. Leopold was careful enough to speak only of "an enormous percentage". Criminologists in general have frequently estimated the number of recidivists to be around two-thirds of all convicts.⁴⁸ Until recently, such assertions were deemed plausible, because no major reliable research on the question had been available.⁴⁹ Since then, Dr. Daniel Glaser and his associates at the University of Illinois published their formidable research results on "The Effectiveness of a Prison and Parole System."⁵⁰

⁴⁷ Leopold, *supra* note 28, at 39.

⁴⁸ MARTIN, BREAK DOWN THE WALLS 233-234 (1954); Crieter, *Progressive Amelioration of Punishment*, 15 (2) NEW ERA 54 (U.S. Penit. Leavenworth, Kans., 1961).

⁴⁹ Galway, A Measurement of the Effectiveness of a Reformatory Program, 1948 (unpublished thesis at Ohio St. U.) was not generally accessible.

⁵⁰ GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964); and see the debate on its research method, between Rubin and Glaser, *Letters to the Editor*, Fed. Prob., March 1965, pp. 56-58.

In this work, Dr. Glaser examined "the basis for common assertions that about two-thirds of the men released from prison return there." Dr. Glaser, per contra, "found that the available facts support an opposite assertion, that about two-thirds of the men released from prison do not return there."⁵¹ Careful research resulted in the following proposition: "At least ninety per cent of American prison releasees seek legitimate careers for a month or more after they leave prison."⁵² The research "strongly suggests that if one places a felon in a prison, he is more likely than not to come out no longer a felon, and he is especially likely to come out not immediately a felon."⁵³ The Glaser study suggests

that prison does deter men from crime, and in this sense is a punishment. Our data also indicate that the men released from prison generally have had little reward for behavior that is an alternative to crime. Consequently, from the learning theory frame of reference . . . one would not expect criminal response patterns to be extinguished unless some gratification in legitimate occupational and social pursuits is experienced in the postrelease world.⁵⁴

Most importantly, Glaser's research data permitted him to formulate the following final proposition:

The correctional treatments of maximum reformatory effect are those that enhance a prisoner's opportunities in legitimate economic pursuits and those that improve his conception of himself when he identifies with anti-criminal persons.⁵⁵

These are the conclusions of the first intensive scientific study of the question of the effectiveness of a prison and parole system, a study, incidentally, which received world-wide public acclaim at the Third United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in Stockholm, Sweden, in August, 1965.

There is no reason, in light of such findings, to further tolerate the nihilism or pessimism in matters of correction to which we have been exposed by many of our brethren from the behavioral sciences. The important thing, rather, would seem to be to continue an institution which has proven its effectiveness, but to render its use even more effective, particularly (1) by abandoning its use in categories and cases not requiring an imprisonment—and

⁵¹ GLASER, *op. cit. supra* note 50, at 475.

⁵² *Ibid.*

⁵³ *Id.* at 476.

⁵⁴ *Id.* at 486-87.

⁵⁵ *Id.* at 493-94.

this would seem to constitute a considerable percentage—and (2) by making the best of the time of detention through efforts at resocialization.

(c) *Resocialization.*

I know of no American criminologist or lawyer who does not subscribe to resocialization or rehabilitation as a foremost aim of our correctional approach. The very use of the word correction—when in earlier times the term punishment was preferred—seems to indicate the modern emphasis on rehabilitation of the perpetrator.

A correctional system must start with the proposition that everybody placed within its jurisdiction, *i.e.*, every convict, is a fit subject for rehabilitation. It may soon turn out that a given individual has already been "resocialized", *e.g.*, through the shock effect of trial and conviction, or any other event preceding service of his sentence. Obviously, such an individual would be a fit subject for release were it not for the fact that other considerations, *e.g.*, general prevention or retribution, require his continued detention. But in such cases, the creators and administrators of a correctional system must take care that such an overemphasis on one penal theory, to the exclusion of another, does not have the undesirable effect of promoting asocialization!

By the same token, it may well turn out that a convict is not a fit subject for rehabilitation because he is a thoroughly non-reformable human being. For such cases Dr. Barnes warns us that "in any rational penal system even the most apparently hopeless convict must be provided with the opportunity to prove that this harsh diagnosis is mistaken."⁵⁶ That in practice it is not easy to make provision for the range of cases extending from reformable to non-reformable, under consideration of all of the goals of correctional theory, is demonstrated by a recent New York case:

[T]he County Judge under pertinent statutes had a choice between two kinds of imprisonment. He could have ordered confinement in a penal institution for not more than one year (Penal Law, §§ 600, 1937) or in a reformatory type institution for an indeterminate term not exceeding three years (Correction Law, § 203). The latter alternative, however, was forbidden for any convicted person who was 'mentally or physically incapable of being substantially benefited' by reformatory treatment⁵⁷

⁵⁶ Barnes, *supra* note 41, at 15.

⁵⁷ *People v. Gross*, 5 App. Div. 2d 878, 172 N.Y.S.2d 432 (S.Ct., App. Div. 1958).

Finding that "you can no more change [the defendant] the longest day he lives tha[n] you will take the spots off a leopard," the judge sentenced a non-reformable convict to the longer "rehabilitation" sentence since, according to his view of the retribution scheme, the shorter term should be preserved for the deserving type of offender, *i.e.*, the reformable.

Where, thus, the aim of resocialization requires a longer term of confinement, retributive demands for a "just" shorter term of "punishment" may well stand in the way of reform.

But, above else, many efforts at reformation require the convenient presence of the convict. That usually means confinement. Moreover, such efforts require the prolonged availability of the convict, and that means relatively prolonged confinement. All of our educational experience tells us that attitudes, character and behavior patterns are changeable, but that change becomes more difficult, the older the subject.

But it is not for the law, or for us, as lawyers, to decide upon specific methods of rehabilitation. Lawyers lack that expertise. This is the realm of the behavioral scientist. A large variety of rehabilitative methods is currently being practiced. For most, empirical verification of claimed success is wanting. Dr. Glaser favorably reported on treatment by treatment teams and the work of pre-release placement and guidance centers.⁵⁸ There is no limit to human imagination. It seems to me that we have barely begun to scratch the surface in our search for the most effective treatment methods. For example, the method of individual psychotherapy—so effective with neurotic non-offender business executives and housewives—has not been reported to have been successfully used on psychopathic offenders, except by a single organization, the Association for the Psychiatric Treatment of Offenders.⁵⁹

Another new approach may lie in the recognition of restitution to the victims of crime by their perpetrators, as a method of rehabilitation. Conceivably, the exclusive "club" of correctional ideals will open up to admit victim compensation as a new and important member, looking toward more effective crime prevention.⁶⁰

⁵⁸ GLASER, *op. cit. supra* note 50, chs. 9, 16.

⁵⁹ See Barnett, *Ten Years of APTO*, 7 *J. OFFENDER THERAPY* 1 (1963); Halleck, *American Psychiatry and the Criminal: A Historical Review*, 121 *AM. J. PSYCHIATRY*, No. 9 (1965), reprint pp. xii-xiii.

⁶⁰ In this connection see Childres & Mueller, *Should Society Pay the Victims of Crime?*, *The Rotarian*, Sept. 1965, p. 22, at 25.

There is nothing static about the reformatory aim of corrections or, for that matter, about any of the correctional aims. With the evolution of mankind through cultural phases, the aims of correction are bound to undergo change, and at any given time, there must be a dynamic interplay between the various correctional aims recognized to be valid. Just as one cannot operate an automobile with just one control, say, the steering wheel, just as one cannot work a television set with just one button,⁶¹ one cannot operate a correctional system with just one aim in mind.

All correctional methods and aims must be considered, on three levels: The legislative level of creation, the judicial level of imposition, and the administrative level of execution. The legislature, to begin with, must devise a sentencing framework for each crime type, which is rigid enough to incorporate the values held by society, *i.e.*, the retributive consideration, but is flexible enough to accommodate general deterrence and neutralization, as well as reformation, penitence, and special deterrence. It is too early to tell—for research in point is as yet wanting—which of the various aims will require the “harsher” sentences in terms of longer confinement. In the past it has been thought that retribution, vindication, and general deterrence require the longest, harshest reaction to crime. It may well turn out that the supposedly more humane goals of rehabilitation and simple neutralization require the longer and more stringent sanctions.

Of one thing the careful observer of world-wide developments in corrections can have little doubt: We have in the past deceived ourselves by believing that the harsher and the longer the confinement of the convict, the greater is the security of the community. All indications are that there is a point of diminishing returns in confinement, or even a point of no return, from which the security of the community (measurable in terms of recidivism) seems to decrease rather than increase, not even to mention the fact that in a great many cases deprivation of liberty is not called for to begin with. There is, thus, every reason to believe, that a further humanization of our correctional system is bound to take place, that our inmate population will further decrease,⁶² that the

⁶¹ I am alluding to my previous publication on the topic, in which I used the model of a television set to demonstrate the interplay of the theories of punishment. See Mueller, *The Public Law of Wrongs—Its Concepts in the World of Reality*, 10 J. PUB. L. 203, 205-14, esp. 208 (1961).

⁶² In 1960 the prisoner-population ratio stood at 121.7 for 100,000, as compared with 137.6 for 100,000 in 1939. See U.S. Bureau of Prisons, *National Prisoner Statistics Bulletin*, No. 30 (1962).

legislatures will reduce the sentence durations, and that the courts will do likewise. More emphasis will be placed on rehabilitative efforts, especially those enhancing the self-esteem of the convict, and particularly those providing him with the emotional and vocational equipment for successful competition in the market of free society. Lastly, the all important change from a life of custody to a life of freedom will be considerably eased, a matter to which the mushrooming half-way house movement attests.

All this is a far cry from saying that our correctional system with its emphasis on deprivation of liberty is bankrupt. Our correctional system is as little bankrupt as is the criminal law to which it is attached and of which it is an integral part. But is it really an integral part of the law? Is it not a kingdom within a kingdom? Is not everything I have said so far a matter outside of and apart from the law?

III. PUNISHMENT OR CORRECTION AS LAW

Everything I have described above is opinion, not law. Strictly speaking, there is no law of retribution or of vindication, of penitence or of deterrence, of neutralization or of resocialization. The law has been ignorant of such matters and has simply provided a "punishment" or "correctional measure" for each transgression of the penal code. Strictly speaking, the common law codifies no principles or theory of corrections. What I have described, then, is simply my own interpretation (influenced by the interpretations of many others) of those correctional theories which were held by the creators of our penal laws, as they are in force today, or by those who interpret them. Perhaps more particularly, I have endeavored to describe those correctional theories which seem to justify the continued existence of the correctional system basically as we know it. All this is theory, not law.

Insofar as positive, active law is concerned it may be asserted with a considerable amount of validity, that once the legal sanction is imposed, there is no further law. There is no law?

The "supervision of inmates of . . . institutions rests with the proper administrative authorities and . . . courts have no power to supervise the management of disciplinary rules of such institutions."⁶³ Here is a prisoner alleging "that his head was split

⁶³ Sutton v. Settle, 302 F.2d 286, 288 (8th Cir. 1962), affirming denial of habeas corpus, on attack for unconstitutional deprivation of certain rights during medical institutionalization following conviction. This assertion that the law will not interfere with the management of pris-

open,"⁶⁴ and there is one who claims "that his right eye was knocked out of its socket."⁶⁵ After referees found that these physical restraints on the part of guards were not excessive or permanently disabling, relief was denied in both cases.

When we speak of the detriment of imprisonment we hardly mean the hazard of life in a savage society, in which a kangaroo court condemns a fellow prisoner to be branded on the buttocks,⁶⁶ in which inmates die from strangulation at the hands of fellow inmates, or of pneumonia on a prison concrete floor.⁶⁷

Is this what we mean when we speak of the missing law in penology?⁶⁸ Hardly. But it may well be what the convict primarily thinks of when he learns that the law has left him at the prison entrance.

The remedies for all the cruelty, excess, incompetency, neglect, nearsightedness, and outright inhumanity in the execution of judicial sentences in the administration of the correctional system

ons requires elaboration. As a matter of positive law, in most states the wardens and other correctional officers are subject to statutory regulation, governing the faithful and conscientious performance of their duties. See MODEL PENAL CODE § 403.2, comment (Tent. Draft No. 12, 1960). But remedies for prisoners have largely been available in theory only. See Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962). The shortcomings have been particularly glaring at the federal level. See *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963), until recently, the Supreme Court of the United States wrought considerable changes by extending the coverage of the Federal Tort Claims Act to injuries sustained by federal inmates through the negligence of government employees. *United States v. Muniz*, 374 U.S. 150 (1963). The American Law Institute has remedied the situation by a firm statutory stand on the duties of correctional executives, subjecting them to the "supervisory authority" of the "Director of Correction," but leaves the prisoner subject to whatever remedies existing law may offer him. See MODEL PENAL CODE § 403.2 (Proposed Off. Draft, 1962).

⁶⁴ *In re Riddle*, 57 Cal. 2d 848, 850, 372 P.2d 304, 305, 22 Cal. Rptr. 472, 473 (1962).

⁶⁵ *In re Jones*, 57 Cal. 2d 860, 861, 372 P.2d 310, 311, 22 Cal. Rptr. 478, 479 (1962).

⁶⁶ *State v. Gillespie*, 336 S.W.2d 677 (Mo. 1960).

⁶⁷ See Mueller, *Criminal Law and Administration*, in 1959 ANN. SURVEY AM. L. 111, 142 (1960); 35 N.Y.U.L. REV. 111, 142 (1960).

⁶⁸ The report of cruelties could be extended *ad infinitum*. For further cases, and the failure to remedy most grievances despite the existence of a constitutional provision against cruel and unusual punishment, see Sultan, *Recent Judicial Concepts of "Cruel and Unusual Punishment"*, 10 VILL. L. REV. 271 (1965).

are obvious: The system needs the all-seeing eye of criminal-procedural legality, of due process of law, as much as any other phase of the criminal law process. The fantastic reform efforts of many enlightened and devoted correctional reformers and administrators are not enough, even though these efforts have wrought admirable improvements already.⁶⁹ The law must enter!

But how can the law enter? Where is the door? Should the law begin by taking an express stand on penal philosophies, on correctional aims and methods?

Of course, implied stands are taken virtually every time a new sanction is provided for, or every time any sanction is selected for a new or reformulated crime. Thus, when a new statute provides for life imprisonment without the possibility of parole for every person convicted of his third felony, it is quite obvious that this choice of sanction does not cater to the theory of rehabilitation.⁷⁰ It is not even a species of retributive justice. Rather, it appears to be an implied acceptance of the theories of neutralization and of general deterrence. Indeed, it is by such deductions from implicit specific choices that we can characterize an entire penal system as retribution oriented—as is the new German Draft Penal Code—⁷¹ or as deterrence oriented—as was the 1926-1934 Soviet Russian Penal Code—,⁷² or as rehabilitation oriented—as is the new Swedish Penal Code—,⁷³ or as neutralization oriented,—as

⁶⁹ The list of devoted American practitioners of penal reform is too long to be included, but one should be mentioned above all, Mr. James V. Bennett, the recently retired Director of the United States Bureau of Prisons. For an anthology of his writings, published by Congress in his honor, see *OF PRISONS AND JUSTICE, A SELECTION OF WRITINGS OF JAMES V. BENNETT*, prepared for the Subcommittee on National Penitentiaries of the Committee on the Judiciary, United States Senate, Doc. No. 70, 88th Cong., 2d Sess., (April 16, 1964). See especially the bibliography, at 391-400.

⁷⁰ "The nature and quality of the act, its relation to the interests of society, whether therapy by removal from society and during confinement will aid the individual and, in the long run be of social benefit, become of minimal importance when there is an automatic increase in severity of sentence conditioned upon the numerical order of the offense." Stevens, J., in interpreting the N.Y. "fourth offender law" (N.Y. PEN. LAWS § 1942), in *People v. McKay*, 21 App. Div. 2d 142, 143, 249 N.Y.S.2d 291, 292 (1st Dep't 1964).

⁷¹ See Dreher, *Introduction, The German Draft Penal Code E 1962*, 11 AMERICAN SERIES OF FOREIGN PENAL CODES (1966).

⁷² See FELDBRUGGE, *SOVIET LAW—GENERAL PART 199* (1964). The current code considers all goals of correction.

⁷³ *THE PENAL CODE OF SWEDEN*, Effective January 1, 1965 (Sellin transl., 1965). See Simson, *The Sanctions Against Adult Law Breakers in the New Swedish Criminal Code*, 9 J. OFFENDER THERAPY — (1965).

is the Model Sentencing Act of the National Council on Crime and Delinquency,—⁷⁴ or as embodying a “mixed approach,”—as does the Model Penal Code of the American Law Institute.⁷⁵ It is, of course, important to observe that, to a considerable extent, all codes mix their predominant aim with others.

The Model Penal Code is one of the relatively few codifications to take an express stand on penal theory, by proclamation of these guiding principles:

- (2) The general purposes of the provisions governing the sentencing and treatment of offenders are:
 - (a) to prevent the commission of offenses;
 - (b) to promote the correction and rehabilitation of offenders;
 - (c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;
 - (d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense⁷⁶

The listed purposes are seemingly correlated as equals. In fact, of course, (a) states the overall purpose of prevention, while (b) merely states one of several methods of achieving that overall end, namely resocialization, while (c) is devoted to one aspect of retribution (namely a guard against retributive excesses), and (d) states the policy of general deterrence, which likewise amounts to prevention.

The exhortation to keep resocialization, retribution, and general deterrence in mind is less helpful than omission of mention of special deterrence. But, then, special deterrence is implicit in any deprivation, whether mentioned or not. I cannot help being somewhat skeptical about the express codification of any specific correctional policy. Nevertheless, I feel that the Model Penal Code is on the right track. By having codified correctional policies, it has broken with a long American tradition of a legal hands-off policy toward corrections. Thus, the virtual “Monroe Doctrine” of American criminal law toward penology seems to have been repudiated. The law has found its entry into penology, and more and more doors are being opened.

The now diminishing refusal of the law to concern itself with penology must be understood as a triple phenomenon:

(1) In the past, lawyers rarely participated in the shaping of correctional policy. Correctional policy makers have represented

⁷⁴ See Rubin, *The Model Sentencing Act*, 39 N.Y.U.L. REV. 251, 252-53 (1964).

⁷⁵ MODEL PENAL CODE (Off. Draft 1965).

⁷⁶ MODEL PENAL CODE § 1.02 (Off. Draft 1965).

a social work or behavioral science approach and have often ignored the tenets of criminal law.

(2) In the past, lawyers, and that means here particularly appellate courts, have paid scant attention to the application of correctional theories. This means that, upon conviction, it was left to the whim of the trial court (or, occasionally jury) to impose any sentence within the framework of the statutory provision. Such exercise of discretion was, on the whole, not reviewable because, as a matter of law, there was no official correctional policy.

(3) In the past, once sentence was imposed, the "law" practically ceded jurisdiction to the correctional services, *i.e.*, despite the availability of habeas corpus, convicts from that point on have been subjected to the good will, whim, neglect, beneficence, or caprice of the correctional staff.

I shall briefly discuss these points with possible suggestions for improvement in mind.

A. LEGISLATIVE PARTICIPATION IN THE SHAPING OF CORRECTIONAL POLICY.

Correctional policy or penal philosophy cannot be decided by committee, nor can any given policy be legislatively decreed to be the most effective one. But it is the legislative duty to determine, upon decision that some conduct ought to be prohibited, which sanction might serve the purposes of corrections best. Rarely in legislative halls have such discussions taken place; rarely have legislative committees been charged with the task of ascertaining empirically which sanction might serve the purpose best. Litany-like, new penal statutes are equipped with the "customary" punishment provision.

The discussions on the Model Penal Code and the Model Sentencing Act have been much more rational. But here, too, the debaters had little empirical data from which to make the most rational determination of a sanction. Thus, nobody knows how long it might take to resocialize a typical hit and run driver, or how serious the threat must be to induce persons involved in a traffic accident to stop and identify themselves. Surely, empirical studies for purposes of obtaining such data are entirely possible. Behavioral scientists, for one reason or another, have found no interest in these problems which are of considerable interest to the law. Should it not therefore be incumbent upon the lawyer to finally take an interest in correctional policy, to convince the behavioral scientists of the relevancy of our questions, and to stimulate the research which only they can undertake successfully?

As shopworn and suspect as the call for "interdisciplinary teamwork" has become, here is an appropriate occasion to utter it. Correctional policy can be shaped only by the guardians of the law and the behavioral scientists acting jointly.

B. SUBJECTION OF CORRECTIONAL THEORY AND PRACTICE TO THE RULE OF LAW.

The low point in legal attitude toward corrections was reached when Mr. Justice Frankfurter, in *Gore v. United States*, stated: "In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. . . . This Court has no such power."⁷⁷

As Professor Silving has documented in her superb article in point: "[T]he substantive law of sentencing and the procedure of meting out sentences have remained to a large extent unaffected by constitutional safeguards," resulting in "a steady transformation of the judicial process of criminal justice into an administrative process."⁷⁸

The reason for the absence of a *legal interest* in justice beyond the conviction stage, *i.e.*, the reason for the large-scale absence of constitutional protection in post trial criminal justice, is purely historical, as Silving pointed out: "Sentencing has assumed a significance not anticipated by the framers of our civil rights."⁷⁹ When a fixed, predetermined punishment automatically followed each conviction, there was indeed little occasion to exercise penological policy or to supervise the activities of any sentencing judge. But such is no longer the case. The trial for a legally prohibited conduct nowadays is followed by an inquiry into the personality needs of the actor who has engaged in this conduct, so as to arrive at a sentence which, within the framework established by law, is best suited to protect society by treatment (ranging all the way from neutralization and penitence to reformation) of the actor. Under those changed circumstances, a great deal of human discretion and ingenuity are called for and, in fact, applied. And such exercise of discretion requires legal supervision. Not to extend the minimum standards of law to such proceedings would do violence to the principles of the constitution and to every maxim of constitutional interpretation.

⁷⁷ 357 U.S. 386, 393 (1958).

⁷⁸ Silving, "Rule of Law" in *Criminal Justice*, in *ESSAYS IN CRIMINAL SCIENCE*, 77, 81, 82 (1 PUBLICATIONS OF THE COMPARATIVE CRIMINAL LAW PROJECT, Mueller ed. 1961).

⁷⁹ *Id.* at 89.

Maintenance of the 'rule of law' in our society necessitates reconsideration of all [modern correctional devices, proceedings and] institutions with a view to such reformulation of the pertinent rules as to make our law consistent with the spirit of our Constitution.⁸⁰

Fortunately, evidence is mounting to the effect that the shortcomings of our contemporary "lawless" correction system have been discovered, and that remedial steps are being taken. Silving's initiation of the trend of critical appraisal was followed by several other scholarly efforts in this direction.⁸¹ On a grand scale, Sol Rubín and his associates have pulled together the available information and much of the hitherto isolated case law which, as an aggregate, now constitutes a body of knowledge they appropriately choose to call "The Law of Criminal Correction."⁸² Moreover, a number of law schools now offer seminars or courses on the law of criminal correction.⁸³

In positive law we have noted a desirable trend toward recognition of the principle of reviewability of legal sentences claimed to be excessive under the circumstances, with now sixteen jurisdictions granting such review.⁸⁴ But the development of a legal machinery of sentence review is bound to remain inadequate as long as we lack legal criteria by which the review court can ascertain whether the sentence imposed was proper. What makes for the propriety of a criminal sentence? In some American jurisdictions there is not even certainty about the extent to which the parties may argue the theories of correction when sentencing is in issue.⁸⁵

The best of all possible correctional systems would seem to require a firm stand of the law as to the goals to be pursued by corrections, with a decision as to the weight to be given to each one of a list of factors. It would also require a detailed judicial opinion in each case, embodying all considerations on the part of the judge which effected his sentencing decision so that—and that

⁸⁰ *Id.* at 82-93.

⁸¹ Among them the previously cited, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 *YALE L.J.* 506 (1963). And see other secondary literature, there cited.

⁸² RUBIN, *THE LAW OF CRIMINAL CORRECTION* (1964).

⁸³ Rubín, *The Law Schools and the Law of Sentencing and Correctional Treatment*, 43 *TEXAS L. REV.* 332 (1965).

⁸⁴ Mueller, *Penology on Appeal: Appellate Review of Legal But Excessive Sentences*, 15 *VAND. L. REV.* 671 (1962); and see Mueller & Wall, in 1964 *ANN. SURVEY AM. L.* 33, 55-56 (1965).

⁸⁵ See the cases discussed by Mueller, Pieski and Ploscowe, in 1963 *ANN. SURVEY AM. L.* 31, 49 (1964).

is another requirement—an appellate tribunal could review the propriety of the sentence. Lastly, such a system would require constant judicial supervision of the execution of the sentence in accordance with the correctional criteria of the law, and the principles of constitutional legality.

Actually, if we look at foreign law, we find efforts to meet nearly all of these demands. Merely by way of example, under the German Code of Criminal Procedure, an appeal, on a question of law (so-called revision), lies for the failure of the sentencing judge to give proper weight to the official theories of punishment on which the code is based, *i.e.*, primarily retribution in accordance with the perpetrator's guilt, secondarily the vindication of the authority of the law, tertiarily special prevention.⁸⁶ Moreover, under many foreign codes, *e.g.*, the French and the German, the sentencing judge is obligated to write a thorough opinion justifying the particular sentence imposed in terms of the aims of correctional policy.⁸⁷ Only such a detailed statement of the grounds for sentencing seems to permit an intelligent appellate review of judicial sentencing discretion, as it is now possible in sixteen American jurisdictions.

Lastly, in an effort to bring law into corrections, we would be well advised to investigate the Italian idea of a special judge, detailed to supervise the execution of the sentence in accordance with the law, and possibly to take care of other legal matters affecting the inmate.⁸⁸ In a similar vein, the German Draft Penal Code envisages supervision of release and similar matters by a special "enforcement court" (*Vollstreckungsgericht*). This court would be staffed by both judges and experts in corrections and social work, and would, thus, be in a position to perform a more professional service than the trial judge, with continuing jurisdiction over the offender, is capable of exercising under existing law.⁸⁹

But all these reforms which we can borrow from foreign legal systems would solve only a part of our problem. The big puzzle

⁸⁶ See KERN, STRAFVERFAHRENSRECHT 208 (5th ed. 1959).

⁸⁷ See 2 ENCYCLOPEDIE DALLOZ, REPERTOIRE DE DROIT CRIMINEL ET DE PROCEDURE PENALE, judgment No. 194, at 297 (1954), as cited by Silving, *supra* note 78, at 124. For German law see Niebler, *The German Code of Criminal Procedure* § 267, I, III, at 127. 10 AMERICAN SERIES OF FOREIGN PENAL CODES (1965).

⁸⁸ See the Appendix by Robert G. Seewald, *infra*.

⁸⁹ Wahl, *The Re-Adaptation of Prisoners to Normal Life in the German Federal Republic*, Trés ASPECTS DE L'ACTION PENITENTIAIRE 336, 342 (Cornil ed. 1960).

remains: What is to be the official legal-correctional policy; what aims of corrections are to be officially embraced; what weight is to be given to these various aims? I have my own preferences, carefully culled, so I think, from observable phenomena in life itself. But these questions are scientifically well-nigh unanswerable at this point. Codification of broad principles bears the risk of ossifying propositions that require constant dynamic readaptation.⁹⁰ I would hate to see my own correctional aims enacted as positive law, or, for that matter, any other combination of correctional aims. Our culture has not yet reached the point at which this can be done with any degree of firmness and conviction.

Hence, we cannot create the best possible world of corrections and must settle for second best. That is a system which *implicitly* selects and pursues correctional aims primarily by hunch, that is to say, value judgment, guided and influenced, insofar as possible, by empirical data bearing on the effect of each choice. That alone will not make for a major break with our present correctional approach. But change is in the very nature of things, and it is taking place even without utilitarian foundations. Our society has become more humanitarian—not “squeamish” as Mr. Leopold would have us believe.⁹¹ The new humanity is invading our correctional system even absent proof positive that it will make for surer correction. The use of imprisonment will decrease, the length of sentences will decrease, the manner of execution will improve. The convict will be made to feel more human than ever before. Treatment in relative freedom will increase. Insistence on a restored self-image of the man who erred will become more pronounced. Who is to predict that the failure rate will increase? Admittedly, this is blind experimentation, but it bears watching. Through blind experimentation the alchemists wished to produce gold, and they discovered porcelain. Perhaps we shall fail to find correctional gold, but we should be willing to accept correctional porcelain!

But even this experimentation will not make for a drastic breach with our traditions. Nor will it really amount to a “legalization of corrections.” Nevertheless, in one respect even that yearned-for “legalization of corrections” is taking place, right at this moment. Law is entering the realm of penology, in the sense that the principle of legality, or rule of law, is being extended to

⁹⁰ In this connection see the discussion of the International Penal and Penitentiary Foundation, *Three Aspects of Penal Treatment—A Synthetic Report*, II ANCEL AND HERZOG, 41-44 (1962).

⁹¹ See Leopold, *supra* note 28, at 36.

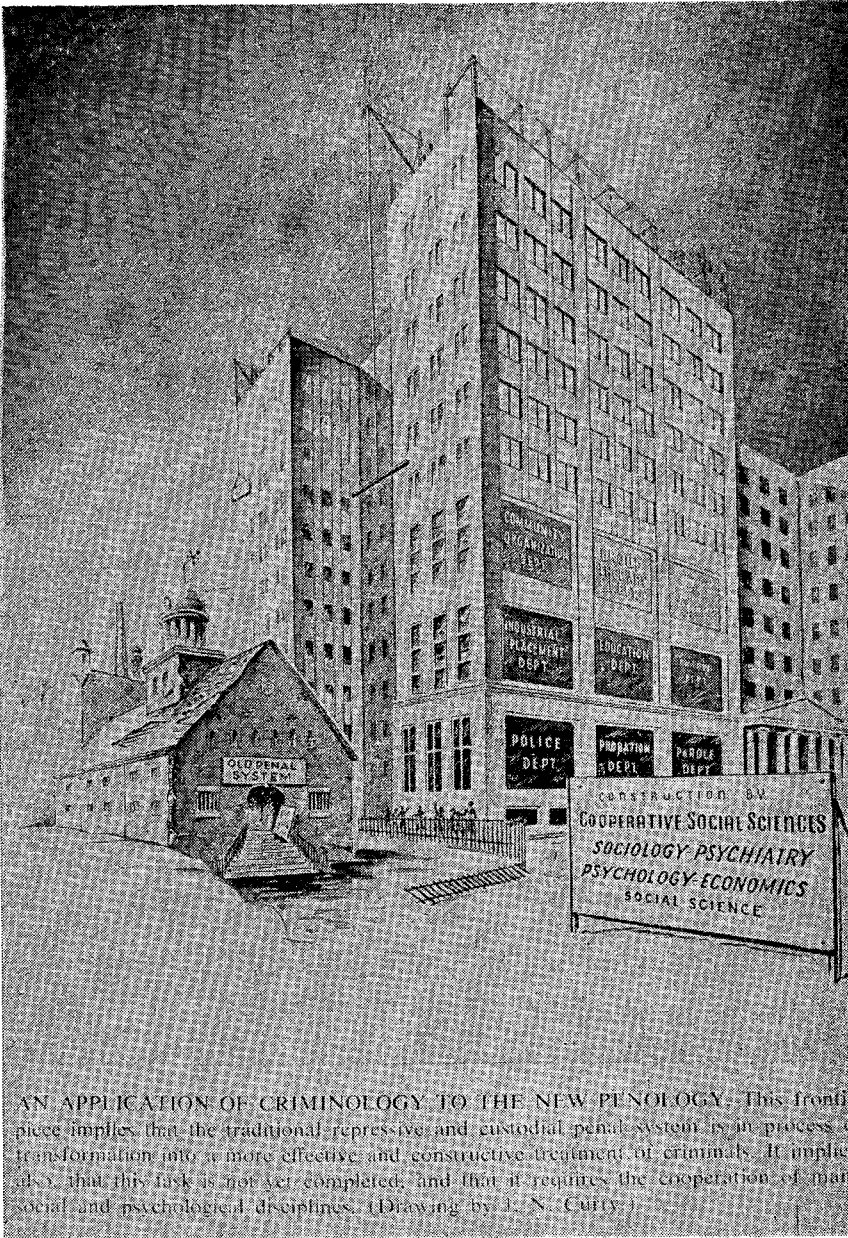
the criminal-procedural phase following the law's traditional terminal point, conviction.

I would like to conclude my discussion with two pictures which, I hope, are worth more than the proverbial 1,000 words each: Mankind has grown sick and tired, physically and emotionally, of the old penal system which rejected any intervention by the behavioral sciences. The reaction to the old penal system was strong and world-wide. The cover of a Spanish-Argentine criminological work depicts this yearning for a modern behaviorally-oriented correctional system.⁹²

⁹² G. LASALA NAVARRO, *LA MUJER DELINCUENTE EN ESPAÑA Y SU TRATAMIENTO CORRECCIONAL* (Buenos Aires, 1948).



But the reaction was too strong, as the frontispiece of the late Professor Taft's criminology text demonstrates:⁹³



AN APPLICATION OF CRIMINOLOGY TO THE NEW PENOLOGY.—This front piece implies that the traditional repressive and custodial penal system is in process of transformation into a more effective and constructive treatment of criminals. It implies also that this task is not yet completed, and that it requires the cooperation of many social and psychological disciplines. (Drawing by J. N. Cuffy.)

⁹⁸ TAFT, *CRIMINOLOGY* (Rev. ed. 1950). Picture reproduced with the kind permission of the MacMillan Company of New York.

Note that the new skyscraper of criminology had no space for law. Perhaps law, in this exaggerated view of the new penology, was to reside in the olympic temple—or dog house—next door. But that will not do. Law and the behavioral sciences together form the field of correction. They must reside under one roof!

Do not build a house of correction in which law is not on the ground floor.

Do not build a house of correction in which the behavioral sciences are not under the same roof.

Do not build a house of correction that fails to accommodate all comers with a right of tenancy.

Do not build a house of correction which does not blend in with the other buildings of our town—the values, beliefs and realities of our society.

APPENDIX

THE ITALIAN SURVEILLANCE JUDGE (GIUDICE
DI SORVEGLIANZA)

MEMORANDUM BY ROBERT G. SEEWALD*

The Italian surveillance judge¹ has jurisdiction over convicted offenders in two different categories: Those undergoing punishment and those subject to measures of security. His work in both categories is similar.

Within these categories, the surveillance judge works on three levels: Investigative, determinative and advisory. Although he is a state judicial authority, the surveillance judge may also act at times as an advocate for convicted offenders, and at times he may act in a judicial-administrative capacity.

To him belongs the responsibility of regularly visiting the penitentiaries within his jurisdiction and seeing that they are being administered according to law. The surveillance judge, for example, finds out whether prisoners are being paid for their work when they are supposed to be paid. Thus, his investigations protect the inmates' rights. The visiting judge, however, cannot order the prison administrators to change their procedures. Irregularities and defects in prison administration can only be reported by the surveillance judge to his superior, the minister of justice.

As one would expect, the surveillance judge's power is substantially greater when he is exercising his determinative functions. He decides what is to be done within the institutional system with certain troublesome offenders. In this area, the surveillance judge must consult with the institution's director, but the judge's decision is final. He decides, after consultation, how to treat a prisoner who is not adapting successfully to community

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¹ ITALIAN PENAL CODE, art. 144 (1931); ITALIAN CODE OF CRIMINAL PROCEDURE, arts. 585, 634-52, 654 (1931). The functions of the Italian surveillance judge are described in Jauch, *Bedingte Verurteilung und Bedingte Entlassung*, in 2 MATERIALIEN ZUR STRAFRECHTSREFORM, RECHTSVERGLEICHENDE ARBEITEN, I ALLGEMEINER TEIL 125 (Bonn, 1954). For a recent assessment of his participation in the correctional process see Tartaglione, *La Readaptation du detenus a la vie libre*, in I THREE ASPECTS OF PENAL TREATMENT 286 (Pub. of the Int'l Penal & Penitentiary Foundation, Strassbourg, 1960).

life in the institution. Also, he decides whether a prisoner is to be transferred to an institution for mentally defective persons, to an institution for social readjustment, or to an agricultural labor camp. The surveillance judge also decides whether youthful offenders over eighteen years of age should be admitted to special sections of adult institutions.

The judge may also consider claims from convicts for financial compensation for work performed, and, to put it negatively, whether a petition for parole is "manifestly unfounded."²

The surveillance judge's advisory powers center upon questions of conditional release and pardon of prisoners. Here the opinions of the judge, arrived at with information furnished by the institution's director, police, and by the surveillance judge's own investigation, must be considered by the Ministry of Justice, though they need not be followed.

In dealing with persons subject to non-punitive, correctional measures, the surveillance judge also operates on three levels in similar fashion. He decides whether to grant or revoke home leave for an offender, as well as parole. Since these measures may also be detentive, the surveillance judge also considers such possibilities as admission to agricultural labor camps. If the sentencing judge has not done so, the surveillance judge may declare a convicted offender a habitual criminal, and impose appropriate measures.³

If the institution of the surveillance judge were to be transplanted into the American system, there would arise the danger that he would swiftly be overcome by too many cases,⁴ since our prison populations are proportionally larger than they are in Europe. When overwork sets in, the surveillance judge can no longer give the offender the individual attention demanded by the system. The surveillance judge might become a virtual rubber stamp for the findings and conclusions of institutional authorities.

Another problem is that the system would require a large number of specially trained judges, well-versed in penology, criminology, sociology, psychology, and psychiatry. Of course, in

² Silving, "Rule of Law" in *Criminal Justice*, in *ESSAYS IN CRIMINAL SCIENCE* 77, 133 (1 PUBLICATIONS OF THE COMPARATIVE CRIMINAL LAW PROJECT, Mueller ed. 1961).

³ ITALIAN PENAL CODE, art. 639 (1931).

⁴ In his early years in Italy, the surveillance judge was overloaded with cases. Monachesi, *The Italian Surveillance Judge*, 26 J. CRIM. L., C. & P.S. 811, 819 (1936).

many states, an American surveillance judge would be able to call on a staff of probation and parole experts to aid him.

On the positive side, the presence of a surveillance judge on the prison grounds would undoubtedly reinforce the rights of prisoners. And the prisoners' morale might be boosted considerably by the knowledge that a prestigious judicial official is striving to protect their rights and interests. This situation might, at the same time, improve prisoners' chances for successful rehabilitation. At least some inmates might not feel that society has put them away and then forgotten them.

Similarly, the surveillance judge system might eliminate the evil of the "jailhouse lawyer," the prisoner who has acquired a small and misleading dose of legal information, and then caused himself or his colleagues to think that his purported legal finesse suffices to procure their release. When the legal gambit fails, disillusionment, even bitterness, toward the legal system might result.

It is noteworthy that the French have created an institution similar to the Italian surveillance judge (*judge de l'application des peines*).⁵

⁵ FRENCH CODE OF CRIMINAL PROCEDURE, art. 721. Kock (transl.), *The French Code of Criminal Procedure* 227 (7 AMERICAN SERIES OF FOREIGN PENAL CODES 1964).