

# CRIME WITHOUT PUNISHMENT: A PSYCHIATRIC CONUNDRUM

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## CRIME WITHOUT PUNISHMENT: A PSYCHIATRIC CONUNDRUM

EDWARD DE GRAZIA\*

*"Punishment is a sort of medicine"*  
—ARISTOTLE

More than sixty-five years ago, Sir James Stephen in his *History of the Criminal Law of England*, wrote: "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."<sup>1</sup> Time has not buried these words, but has given them virulent life. "The reasons usually given to justify punishment do not explain why it exists. They serve only to conceal the truth, that the scheme of punishment is a barbaric system of revenge, by which society tries to 'get even' with the criminal" (Karl A. Menninger).<sup>2</sup> "Punishment is really a present way of expressing what is at bottom vengeance and retaliation. It is the Mosaic law of an eye for an eye, a tooth for a tooth, which has been modified by intellectualistic processes, or what we call 'rationalizations' so that we now believe these various acts of punishment to be inflicted for beneficent reasons, namely, for the protection of society and for the reformation of the criminal" (William A. White).<sup>3</sup> The words are those of psychiatrists, but it was Justice Felix Frankfurter, who in 1945 asked: "What have we better than a blind guess to show that the criminal law in its present form does more good than harm?"

Whence arose these charges, these doubts as to the validity of criminal punishment—an institution whose foundations reach to civilization's ancient past? The answer lies within the modern science of psychiatry, which, having erased the heavy line between the insane and the normal individual, now wishes to expunge that between the criminal and his law-abiding counterpart. It is from the psychiatrist and the psychiatric-minded criminologist that the criminal law is most pressed; it is towards them and their evidence that the defense must be directed.

### I. THE PSYCHIATRIC ARGUMENT FOR ABOLITION OF PUNISHMENT

#### A. *The Criminal is Sick*

The psychiatric-minded criminologists have, through research and theory, constructed an image of the criminal. They have found him to be "sick;" their underlying observations and theory deserve amplification.

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The author wishes to record his indebtedness to Professor Harry Kalven and the Legal Research Program of the University of Chicago Law School.

1. GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 99 (1863).

2. MENNINGER, THE HUMAN MIND 448 (1945).

3. WHITE, CRIME AND CRIMINALS 160 (1933).

Two outstanding criminologists, Sheldon and Eleanor Glueck, made early inquiry into the predominant physical, mental, social and economic characteristics of the criminal.<sup>4</sup> Examination of thousands of persons "constantly fed into, and ground out of, the mills of justice" disclosed the following elements as significant: familial mental defect; foreign-born and unschooled parents; parental disharmony and broken homes; a fifty percent incidence of criminality among other members of the family; an almost "tribal tradition" of criminality; marginal economic circumstances and "unwholesome" household and neighborhood conditions.

The offender himself was found by the Gluecks to be generally: of sub-normal intelligence; unschooled; of poor industrial habits; unreliable; unstable or of the vagabond, wayward and ambitionless type. In sum, for the Gluecks, "The usual situation is . . . a clustering of deleterious traits and circumstances in a demoralizing dynamic interplay."<sup>5</sup> It is this, "rather than, or at least more than, the grossly oversimplified 'free will' and 'criminal intent' of tradition, that generates delinquency and crime."<sup>6</sup>

A psychiatric probe by William Healy and A. F. Bronner went deeper to uncover the basic emotional causes of criminality.<sup>7</sup> Through utilization of delinquent and non-delinquent siblings, they sought to determine why, if environmental factors and forces generate delinquency, there are persons who have escaped such insidious forces and developed into adjusted citizens. Healy and Bronner found the delinquent invariably to have been blocked in his needs for satisfying relationships in his family circle. His failure to form sufficient inhibiting forces was due to poor ego-ideal formation. The child had never had an affectional identification with one who seemed to him a good parent.<sup>8</sup> That the non-delinquent sibling's ego-impulses and desires for affection could at the same time have been satisfied, was explained by the great disparity in the parents' feelings and behavior toward the different children.<sup>9</sup> The delinquent, then, was found to be an individual driven into anti-social behavior by the frustration of ego and affectional desires. Delinquency is a response in terms of attempts to achieve compensatory satisfactions, to bolster the ego through obtaining status as a delinquent, to obtain revenge, or as the giving way to instinctual urges felt to be thwarted.<sup>10</sup> Ideas of delinquency are derivable from many sources in society: companions, observation of special temptations, reading, etc. The frustrated youth

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4. S. AND E. GLUECK, *AFTER-CONDUCT OF DISCHARGED OFFENDERS* (1945); *ONE THOUSAND JUVENILE DELINQUENTS* (1934); *500 CRIMINAL CAREERS* (1930).

5. S. AND E. GLUECK, *AFTER-CONDUCT OF DISCHARGED OFFENDERS* 16-17 (1945).

6. *Ibid.*

7. HEALY AND BRONNER, *NEW LIGHT ON DELINQUENCY AND ITS TREATMENT* (1936).

8. *Id.* at 10.

9. *Id.* at 9.

10. *Id.* at 132-34, 204.

is deemed fertile soil for their virulent growth.<sup>11</sup> Thus the image painted by Healy and Bronner shows a hapless youth, abandoned in a turmoil of frustration, clinging desperately to the only driftwood available—delinquency.

Karl A. Menninger expressly endorses the Healy and Bronner analysis of criminality.<sup>12</sup> Despite his own more limited experience with the subject, he attempts an historical analysis.<sup>13</sup> Punishment was levied historically against those wrongdoers whose misdeeds could be "understood" by the public as deeds which everyone at one time did or desired to do, but which conflicted with social convenience and comfort. Those "criminals" whose motives were not "understood" were regarded with a certain awe and eventually turned over to the doctors. This relegation was justified by the legal term "insanity." Thus, with the passage of time, the "insane" have been scientifically studied and treated, whereas the "criminals" have been punished. The lesson for today is that our "criminals" are really "insane," i.e., not really understood by the public, and should be handed over to the physician, rather than punished.

Perhaps the most recent endeavor to merge psychiatric theory with the problem of the criminal is Walter Bromberg's *Crime and the Mind*.<sup>14</sup> Formerly the director of the Psychiatric Clinic of a New York Court, he gathered his material from the study of hundreds of criminals. The presence of criminal impulses in all men is postulated: "Antisocial impulses which are completely buried slumber deep in the minds of everyone."<sup>15</sup> That which restrains us from carrying out these impulses are the "powerful forces within us—the conscience, and equally powerful institutions within our social structure: morality, religion, law, and attitudes like that of 'common decency.'"<sup>16</sup> The trouble with the criminal is that "the forces of control have never been under his domination, either because unconscious urges were too strong or his conscience (superego) was too weak. . . ."<sup>17</sup> Again, "a criminal act results when an impulse contrary to the expressed restrictions of civilized life cannot be withstood."<sup>18</sup>

William A. White, perhaps the most distinguished of American psychiatrists, also viewed crime as a product of psychological determinism.<sup>19</sup> Crime is only action historically determined by society as detrimental to its existence. Man was born a criminal and his entire development necessitated a repression of those evil desires injurious to his society. The criminal act

11. *Id.* at 5-8.

12. *THE HUMAN MIND* 443-60 (3d ed. 1945).

13. *Id.* at 445-46.

14. *BROMBERG, CRIME AND THE MIND* (1948).

15. *Id.* at 19.

16. *Id.* at 20.

17. *Id.* at 25.

18. *Id.* at 177.

19. *WHITE, INSANITY AND THE CRIMINAL LAW* (1923); *CRIMES AND CRIMINALS* (1933).

is "conduct which for some reason or other has escaped the control of the individual or of society as stamped into the pattern of the Super-ego systems in the forms of beliefs, traditions, customs or what not."<sup>20</sup> Criminals are members of the social group who, "being of defective development or through illness or otherwise, have had their capacity for the more difficult requirements of the complex social group more or less impaired, and who consequently tend to lapse to these more primitive, simpler, direct ways of reacting, which, because they are to the disadvantage of society and tend to the disruption of the bonds which hold it together as a functioning unity, are regarded as criminal and as calling for punitive measures."<sup>21</sup>

Benjamin Karpman, psychotherapist at Saint Elizabeth Hospital and disciple of William A. White, has culled from his experience with thousands of criminals the following conclusion: "Criminal behavior is an unconsciously conditional psychic reaction over which [the criminals] have no conscious control." Indeed,

We have to treat them as psychically sick people, which in every respect they are. It is no more reasonable to punish these individuals . . . than it is to punish an individual for breathing through his mouth because of enlarged adenoids, when a simple operation will do the trick.<sup>22</sup>

This picture of the sick, the maladjusted criminal, painted by the psychiatric-criminologists cannot be reassuring to the jurist. For it is he who would throw the culprit into a cell to meditate upon his sinfulness. It is he who is charged, in the words of the Gluecks, with the wisdom "to apply the awful measuring-rod of retribution to the soul of the individual at the bar of justice."<sup>23</sup>

#### B. *The Theoretical Justifications for Criminal Punishment Fail*

The theoretical justifications for criminal punishment may be conveniently differentiated as punitive or retributive, reformatory or corrective, deterrent, and incapacitating.<sup>24</sup> The distinctions lie within the social motive underscoring each: *retribution* against the criminal, *reformation* of the criminal, *deterrence* of the potential criminal, and *incapacitation* of the criminal.

20. WHITE, *CRIMES AND CRIMINALS* 49 (1933).

21. WHITE, *INSANITY AND THE CRIMINAL LAW* 20 (1923).

22. Karpman, *Criminality, Insanity and the Law*, 39 J. CRIM. L. & CRIMINOLOGY 584, 605-6 (1949). See Karpman, *CASE STUDIES IN THE PSYCHOPATHOLOGY OF CRIME* (1933); *THE INDIVIDUAL CRIMINAL* (1935).

23. S. AND E. GLUECK, *AFTER-CONDUCT OF DISCHARGED OFFENDERS* 94 (1945).

24. For a negativistic, scholastic analysis of criminal law and philosophy, see MICHAEL AND ADLER, *CRIME, LAW AND SOCIAL SCIENCE* (1933); For a positivistic statement of the Criminal law, see HOLMES, *THE COMMON LAW* (1881).

The psychiatric-criminologists reject all justification for criminal punishment, and castigate each of the theories in varying degrees.<sup>25</sup>

### *Retribution*

The critics unanimously denounce the punitive-retributive theory of criminal punishment as unjustifiable vengeance. Thus the Gluecks proclaim:

Vengeance is a destructive and shortsighted emotional basis for coping with the biological and social problems of crime. Not only is it the expression of an infantile way of solving problems, but unjust and destructive of the very purpose of protecting society. The official social institutions of criminal law and penal treatment should not be occupied with the futile quest of making the criminal "expiate" his sins.<sup>26</sup>

For Menninger, "[r]esponsibility in the legal sense means punishability . . . an echo of the antiquated legalization of primitive and infantile reactions known as the talion law." In other words, "he hits me, so I hit him." Criminal punishment stems from the "impulse to take out on the criminal what we unconsciously fear and expect for our own guilty wishes and intentions—the old 'whipping-boy' principle in short. . . ." <sup>27</sup> So Bromberg finds criminal punishment "a vindictive treatment, where the 'intent' to commit a crime is taken at face value—as defiance meriting punishment. . . ." <sup>28</sup> He finds the existing system characterized by "punitive attitudes and unconscious prejudices of everyone toward lawbreakers. . . ." <sup>29</sup>

For White, the retributive theory embodies the Mosaic law of an eye for an eye, a tooth for a tooth.<sup>30</sup> According to his analysis of the factors underlying the call for vengeance and retaliation, most criminal conduct lies "very close to the desires of the average person . . . and because they are easily stirred to action, and because we have that within us which makes us feel . . . that we should not yield to them . . . we resent their activation. Their activation means that we must bring to bear our efforts at controlling them very definitely and strenuously. This is an uncomfortable process and

25. Besides the literature noted in the text, consult S. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* (1925); *CRIME AND JUSTICE* (1936); E. Glueck, *Contemporary Issues in the Relationship Between Psychiatry and Law*, 1 *JOURNAL OF CRIMINAL PSYCHOPATHOLOGY* 91-102 (1939); 81 Joint Meeting of the New York Neurological Society and New York Academy of Medicine 192-212 (1935); G. ZILBOORG, *ONE HUNDRED YEARS OF AMERICAN PSYCHIATRY* (1944); *MIND, MEDICINE AND MAN* (1943); *Murder and Justice*, 5 *JOURNAL OF CRIMINAL PSYCHOPATHOLOGY* 1, 1-25 (1943); B. Karpman, *Criteria for Knowing Right from Wrong*, 2 *JOURNAL OF CRIMINAL PSYCHOPATHOLOGY* 376 (1949); *An Attempt at Reevaluation of Some Concepts of Law and Psychiatry*, 38 *J. CRIM. L. AND CRIMINOLOGY* 206 (1947), 206-17; See also the many articles dealing with the "psychopathic" criminal in *J. CRIM. L. AND CRIMINOLOGY* and *JOURNAL OF CRIMINAL PSYCHOPATHOLOGY*.

26. S. AND E. GLUECK, *CRIMINAL CAREERS IN RETROSPECT* 288 (1943).

27. MENNINGER, *THE HUMAN MIND* 449-55 (3d ed. 1945).

28. BROMBERG, *CRIME AND THE MIND* 178 (1948).

29. *Ibid.*

30. WHITE, *CRIMES AND CRIMINALS* 160-61 (1933).

we resent the individual who thus adds to or increases our discomfort. And so it is understandable how the average person will turn with hate against the person who, as it were, discovers the weak point in his armor. . . ."<sup>31</sup>

### *Reformation*

The critics are unanimous in their denunciation of the corrective-reformative theoretical justification of criminal punishment, as having failed to achieve the end avowed.

The Gluecks assert:

Prevention of recidivism as the chief aim of punishment has, under existing methods and regimes, miserably failed; as witness the high proportion of recidivism on the part of those already punished one or more times.<sup>32</sup>

As to the delinquents studied by Healy and Bronner, it is

self-evident that processes of dealing with the delinquent by admonition, threat, compulsion, or punishment are almost bound frequently to be failures because such treatment is repressive in character rather than reconstructive.<sup>33</sup>

Menninger states:

[A]t the end of their terms prisoners are likely to be more dangerous men than they were at the beginning . . . the persons whom punishment is intended to deter are incapable of the proper appreciation of deterrence.<sup>34</sup>

So White proclaimed that prisons are literally horrible places wherein the criminal suffers and undergoes general frustration. They are, moreover, undoubtedly responsible for much of the psychotic reactions among prisoners, for much of their reactions of hate and vengeance. "As soon as they get out of prison and get the opportunity they at once resume their habitual modes of conduct. . . . No amount of prison experience changed them a particle."<sup>35</sup>

Benjamin Karpman indicts the corrective theory for disregarding as a consequence of punishment the antipathetic emotion of hate, which is the strongest reaction to punishment and constantly seeks release in anti-social behavior. We punish, "thus adding hate to hate, which grows, as it were, in geometrical proportion. . . . Punishment, therefore, is not a deterrent of crime; on the contrary, it is a most powerful stimulant for further crimes."

31. *Ib.* at 121-22.

32. S. AND E. GLUECK, *AFTER-CONDUCT OF DISCHARGED OFFENDERS* 96 (1945).

33. HEALY AND BRONNER, *NEW LIGHT ON DELINQUENCY AND ITS TREATMENT* 205 (1936).

34. MENNINGER, *THE HUMAN MIND* 447 (3d ed. 1945).

35. WHITE, *CRIMES AND CRIMINALS* 161-66 (1933).

And Karpman finds "no probability of anything like penitence" to support the reformatory theory of criminal punishment.<sup>36</sup>

#### *Deterrence*

The critics have, for the most part, neglected this theory of criminal punishment or confused it with reformation of the criminal. Deterrence properly has reference to the potential criminal, the public at large. The Gluecks claim "the deterrent approach is an appeal to but one constituent of personality, the fear instinct. The frightening effect of a routine infliction of heavy painful suffering has been grossly exaggerated. It is but one small item in the large number of forces that restrain most men from doing evil. . . . The history of punishment shows that there is no necessary correlation between the severity of punishment and the incidence of crime."<sup>37</sup> Menninger asserts "the spectacle of punishment possibly deters no one, and assuredly does not deter everyone or crime would have ceased long ago."<sup>38</sup>

#### *Incapacitation*

Although little attention is directed by the critics to the incapacitative-protective theory of criminal law, the omission appears one of expression only. Few disavow that incarceration of the criminal serves to protect society during the period of incarceration. Menninger, however, pertinently points out that the sentencing of prisoners for essentially arbitrary periods consistently operates to allow recidivists free in society.<sup>39</sup> White notes that although it may be stated with certainty that while the prisoner is locked up in prison, society on the outside is free of his depredations, "it can advantage no social group to maintain within itself a center where hate and cruelty rule even though such a center be surrounded by stone walls."<sup>40</sup> And Karpman adds that in confinement, the criminal preys indirectly on society by his pollution of youthful offenders brought into contact with him. He becomes a teacher and a guide to a rising generation of criminals.<sup>41</sup>

#### *C. Criminal Punishment Should Be Replaced by Corrective Therapy*

If the psychiatric-criminologists have been unflinching in their castigation of criminal punishment, they are unflagging in their advocacy of corrective

36. KARPMAN, *THE INDIVIDUAL CRIMINAL* 292-99 (1935).

37. S. AND E. GLUECK, *AFTER-CONDUCT OF DISCHARGED OFFENDERS* 95 (1945).

38. MENNINGER, *THE HUMAN MIND* 447 (3d ed. 1945).

39. *Ibid.*

40. WHITE, *CRIMES AND CRIMINALS* 162 (1933).

41. KARPMAN, *THE INDIVIDUAL CRIMINAL* 292-99 (1935).

therapy for criminals. The directive is simple and revolutionary: we must not punish, but treat; for the criminal is not evil, but sick.

The Gluecks announce that:

The correctional aim, nevertheless, furnishes the best basis of the desirable objectives of the State in exercising social control through criminal law. It can be modernized into a theory based on the view that crime and recidivism are caused by a complex interplay of forces and factors inside and outside the offender; and that just as the physician aims to remove symptoms by getting at root causes, so the modern administrator of criminal justice should probe for causes and remove them if possible.<sup>42</sup>

Simple punishment as the basis of moral and legal "guilt" should [therefore] be replaced by causal therapy . . . the traditional imposition of sentences by judges must be replaced, or supplemented, by the doctor, the social worker, the research scientist.<sup>43</sup>

Karl A. Menninger rhetorically inquires whether "the lawyers [must] still continue solemnly to apply medieval stupidities in the name of 'established precedent,' 'public policy,' and other mouthy archaisms?"<sup>44</sup> "Is pneumonia just? Or cancer? Or gravity? Or the expansion of steam? What criteria of justice can be applied to a broken arm or a weak mind? And to what good end?"<sup>45</sup>

Bromberg recommends "a process of treatment through legal, social and psychiatric agencies which operate through an understanding of the causes of misbehavior. Only a technique that . . . emphasizes the motives behind crime can be of lasting benefit to the offender."<sup>46</sup>

Karpman states:

"There can be no question of responsibility where there is no evidence of conscious guilt. . . . there can be no question of premeditation if the individual is a victim of his impulses and instincts. In the future it is the hope . . . that the guard and the jailor will be replaced by the nurse, and the Judge by the psychiatrist, whose sole attempt will be to treat and cure the individual instead of merely to punish him."<sup>47</sup>

White had a more refined scheme which took into account the "anti-pathetic emotion of the herd." He suggested that "after the prisoner was condemned and the key turned upon him, so to speak, the public would promptly forget him, as now, and any constructive scheme of social therapeutics could then be worked out in peace and quiet. . . ."<sup>48</sup>

42. S. AND E. GLUECK, *CRIMINAL CAREERS IN RETROSPECT* 290 (1943).

43. *Id.* at 293.

44. MENNINGER, *THE HUMAN MIND* 449 (3d ed. 1945).

45. *Ibid.*

46. BROMBERG, *CRIME AND THE MIND* 178 (1948).

47. Karpman, *Criminality, Insanity and the Law*, 39 J. CRIM. L. & CRIMINOLOGY 584, 605 (1949).

48. WHITE, *INSANITY AND THE CRIMINAL LAW* 168 (1923).

## II. THE ISSUE

The psychiatric argument has the forceful ring of science and the persuasive resonance of humanitarianism. It is manifestly a "modern," an "enlightened" argument. For all this, it fails.

The quarrel between the psychiatrist and the jurist is not new to the United States. Since 1823 the former has demanded of the latter an alteration in the legal attitude toward the criminal.<sup>49</sup> The jurist's lack of response has been termed stubborn and stupid, yet there may be wisdom in his torpor. For while the psychiatrist rests content to view the criminal as a patient, the jurist must view him as a member of society whose actions profoundly affect every other member.

The social aspects to punishment have, for the most part, been ignored by the critics; their medical orientation served to preoccupy them with the criminal *qua* patient. They forget that he is first a social unit and that although he may ultimately be handed over to the doctor, the demands of society ought first be met. He does not have cancer, or flu, or dyspepsia; he has committed a crime, has injured someone, has damaged society according to its own definitions. Because of this, and irrespective of any moral taint, the criminal is obligated, and must answer to society.

The criminal law is not primarily concerned with the individual; its concern, and properly so, is with society. Its purpose or end is to serve the welfare of the state, the common good.<sup>50</sup> That individuals may be injured in the process is, perhaps, inevitable. Although the individual must be considered, the state is supreme. For, in the words of Holmes,

"the dogma of equality makes an equation between individuals only, not between an individual and the community. No society has ever admitted that it could not sacrifice individual welfare to its own existence."<sup>51</sup>

Assuming that the specific design of the criminal law is the prevention or elimination of crime, the psychiatric argument may be outlined as follows: criminal punishment finds no justification as retribution, for vengeance is indefensible; it finds no justification as reformation, because reformation is not achieved;<sup>52</sup> it finds no justification as deterrence, for no deterrence has been proven; it finds small justification as incapacitation, for punishment is not necessary to effective incarceration. On the positive side the argument claims that treatment, in the place of punishment, would vitiate retribution against criminals, would more effectively reform criminals, would not de-

49. See ZILBOORG, ONE HUNDRED YEARS OF AMERICAN PSYCHIATRY 507-89 (1945).

50. See HOLMES, THE COMMON LAW 39-76 (1881); MICHAEL AND ADLER, CRIME, LAW AND SOCIAL SCIENCE 333-84 (1933).

51. HOLMES, THE COMMON LAW 43 (1881).

52. But see note 56 *infra*.

crease deterrence of criminalism, would as effectively incapacitate criminals.<sup>53</sup>

To join issue more easily with this argument, we will grant, as it were in passing, the validity of the psychiatrists' claims on three points:<sup>54</sup> retribution per se is an unjustifiable end;<sup>55</sup> psychiatric treatment of criminals would reform better than punishment does;<sup>56</sup> incarceration for treatment would as effectively incapacitate as incarceration for punishment.<sup>57</sup> The residual issue, then, upon which (for the purposes of this paper) the psychiatric argument must stand or fall, is: could treatment assume the role, which the criminal law insists only punishment can play, in deterrence of criminality?

### III. THE JUSTIFICATION OF CRIMINAL PUNISHMENT

Criminal punishment obtains its clearest justification (as will be seen) from its deterrent effect<sup>58</sup> upon the potential criminal. Ironically, perhaps,

53. The reduction of their argument is, of course, this author's. Apparently nowhere have the psychiatric critics really joined issue with the jurists.

54. The grant of the three propositions can only be "arguendo" since each is seriously challengeable. A considered challenge of each, however, would require a paper four-fold the length of this. In lieu thereof, the more obvious doubts to the three propositions are set forth in notes 55-57 *infra*. This paper's major challenge, then, is to the psychiatric proposition regarding *deterrence*; although in the process, the *retributive* theory gains some incidental justification. See III *infra*.

55. This appears as little more than a humanitarian assumption by the critics. Logically, the critics could be required to justify their prejudice against vengeance and retribution, just as they would require the jurists to justify their prejudices against crime and criminals. Moreover, the critics could find virtue in retribution for the doctrine disallows over-punishment of criminals (e.g., death penalty for thieves), regardless of its utility (e.g., the incurable thieves). And, indeed, the retributive psychology may well underlie the deterrent effect of punishment, thereby obtaining indirect justification. See discussion *infra* III.

56. Although this is the proposition best supported by the critics, it may easily be questioned. First, they attempted no actual inquiry into the reformatory effects upon criminals of psychiatric treatment. Indeed, existing evidence strongly indicates that present methods of psychotherapy cure only a very few select criminal cases. Second, the critics gave no justification for their proposed expenditure of great sums of money by the state for the benefit of persons who, if not "evil," are at best parasitic. Third, the critics never faced the question whether punishment would reform better if it were thought to be more certain, i.e., if methods of criminal apprehension were improved. It may well be the case that the primary weakness in criminal justice stems from the well-known fact that some criminals go unpunished.

57. It may be that incarceration of criminals until cured by treatment would better incapacitate criminals. If punishment largely fails to reform, the present system undoubtedly releases dangerous persons. However, the use of a psychiatric test to determine whether a criminal has been cured, would pose real problems of restraining discretionary release and non-release of prisoners. And there is doubt whether most criminals would, under the psychiatric-cure test, ever obtain release from incarceration. The question may be posed: why not, quite cheaply, put all such criminals to death? The answer would lie chiefly in the retributive-punitive view which does not tolerate punishment not fitting the crime. See note 55 *supra*.

58. An interesting illustration of the critics' confusion of reformation and deterrence is supplied by BROMBERG, *CRIME AND THE MIND* 190 (1948). He reasons that "the deterring effect of punishment on a given offender does not spread to others who came after him, as is attested by the irreducible number of inmates confined in penitentiaries and prisons at all times." Dr. Bromberg fails to realize that the deterrent objective to which he refers contemplates many potential offenders who never reach prison and who quite possibly are deterred by the threat of punishment.

deterrence of crime is best explained by, and appears to be significantly dependent upon, the punitive-retributive element in punishment. Indeed, the psychological key to criminal punishment may be that deterrence is achieved through promise of retribution.

Punishment has been theoretically justified as retribution for wrong, and finds philosophical support in Hegel and Kant.<sup>59</sup> More significant, however, is the doctrine's popularity among the masses,<sup>60</sup> to which the psychiatric critics, by their very vehemence, supply reluctant credence. The doctrine finds expression in the belief that crime must be punished, that punishment is just retribution, that punishment rights a wrong.

#### A. *Punishment and Conscience-Formation*

The association of wrong with punishment is so strongly bred into the individual<sup>61</sup> from his cradle to his grave as to be conditioned. When a wrong is committed we inevitably expect punishment.<sup>62</sup> Prior to the formation of the superego, the child's wrongs are met with punishment, i.e., either the infliction of physical pain or withdrawal of love by the parents. It is this very process of punishment which is the basis for the later formation of the superego through identification with the parents. The introjection of the parental prohibitions results in superego formation, so that commission of a wrong, thereafter, creates feelings of guilt and the expectation of punishment. Just as the child's wrong was followed by parental punishment, so the wrong of the adult is followed by feelings of guilt and expectation of punishment. Moreover, the feeling of guilt is abated by punishment, for there is experienced a sense of relief following deserved punishment. Flugel thus describes this phenomenon:

Guilt implies a condition of tension between the ego and the superego, which in turn corresponds to tension between child and parent, and in both cases punishment is the natural method of relief.<sup>63</sup>

It cannot, then, be surprising to find wrong and punishment merged in the mind of man as an equation requiring punishment for every crime. The retributive aspect of punishment has its roots deep in the psyche of man.

#### B. *Conscience, Punishment and Deterrence*

Psychiatrists have long realized that the bonds of conscience are powerful deterrents to criminality. The prohibitions of the superego are manda-

59. KANT, *PHILOSOPHY OF LAW* 194-204 (Hastie's transl., 1887); HEGEL, *PHILOSOPHY OF RIGHT* 90-103 (Dyde's transl., 1896). But see MICHAEL AND ADLER, *CRIME, LAW AND SOCIAL SCIENCE* 347-52 (1933).

60. See BRADLEY, *ETHICAL STUDIES* 1-41 (2d ed. 1927).

61. See ALEXANDER, *THE PSYCHOANALYSIS OF THE TOTAL PERSONALITY* 16 (1930).

62. See FLUGEL, *MAN, MORALS AND SOCIETY* 145 (1945).

63. *Id.* at 145-46.

tory and violation of its commands commonly result in severe feelings of shame and worthlessness. For the person with a healthy superego, it is in fact much easier to do right than wrong, even in the absence of an external threat of punishment. Though the external authority and its heavy hand are gone, its rightful heir—the superego—sits in awful judgment. The independence of the superego explains the absence of criminal acts in the many situations where a realistic possibility of punishment is lacking.<sup>64</sup> It has also led psychiatrists to view the institution of legal punishment as unnecessary. Continual manifestation of the great power exercised by the superego, knowledge of the leading role played by a retributive superego in neuroses, and renewed evidence that man is not nearly so immoral as he sometimes thinks he is, explain, perhaps, the psychiatrists' belief that "[t]he law punishing the criminal has as much to do with the prevention of crime as the prohibition of the sale of firearms with the prevention of homicides."<sup>65</sup>

But the superego, or "conscience," is by no means of equal strength or severity in all individuals. Beyond certain limits it may vary considerably due to the diverse influences and factors brought to bear on any one individual and his reaction thereto. Other than a few specific "wrongs" upon which there is, practically speaking, no diversity of degree of disapprobation, that which is "wrong" for one person may be easily acceptable to another. The individual's moral code is, perhaps, primarily dependent on early parental dictates, and variations in parental morality are widespread. Given, therefore, an area of morality wherein the superego dictates are not sufficiently severe, the superego sanctions may, perhaps, be evaded.

There is, however, that area of morality so secure that it is apparently seldom disturbed. This area embraces the three great wrongs holding some claim to universality: cannibalism, incest, and murder (especially, patricide and matricide).<sup>66</sup> They are crimes whose repression has been so successful as to remove them completely from the consciousness of all but the severely neurotic; they need for support no threat of external punishment. But it is

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64. Compare the analysis found in S. DE GRAZIA, *THE POLITICAL COMMUNITY* 85 (1948). "The moral standards of a religion or the laws of a nation-state or the taboos of a primitive community rest on the commands, prohibitions, and rewards of the guardians of childhood. Violation of directives not only arouses the fear of the punitive power of the ruler but automatically touches off the anxiety connected with the withdrawal of parental affection. What therefore prevents a wholesale flouting of morals or laws at each opportunity of escaping undetected is the unrecognized influence of separation-anxiety. Through the intensive probing of psychiatric interviews the result of violating directives is most clearly seen. The person who, while engaged in a theft, suddenly 'saw' his father looking at him sadly or the person who 'heard' his mother weeping as he paid a visit to a house of prostitution or the one who in his dreams 'could not escape the searching glance of a hovering searchlight,' one of many symbolic variants of the parental 'evil eye'—each of these could be cited in illustration. If most people are honest and loyal and good, it is not because they have been given proof that being dishonest, traitorous, and evil does not pay."

65. ZILBOORG, *MIND, MEDICINE AND MAN* 283 (1943).

66. See WHITE, *CRIMES AND CRIMINALS* 72-88 (1933).

submitted that these crimes are the only ones whose moral repugnance is so great as to insure against the deed. For the rest, the threat of punishment is necessary to secure avoidance.<sup>67</sup> In many individuals the prohibitions of such lesser crimes as theft may be so stringent as to render the threat of punishment unnecessary, but the number of such persons is indeterminate and they are almost certainly in the minority. The pressure of such a superego attitude is individual, and not universal in the sense of the three great wrongs.

Although most people are morally restrained from such lesser crimes, the restraint is weak and can under many circumstances be circumvented, if not directly overturned. The child who filches money from his mother's purse, the waitress who dips into her employer's cash register, the student who cheats at exams, the taxpayer who omits a source of income—all may rationalize their crimes. But it is submitted that if the parent, or employer, or proctor, or Bureau of Internal Revenue were somewhat more perspicacious, the crime would not be committed. The criminal of deeds such as these is not the criminal who is "sick" or driven by his character to crime. He is, for the most part, the normal individual, the man whose superego is not strong enough to preclude the expression of an anti-social impulse where a justification is handy or the threat of punishment remote. Most men, quite simply, are not so moral as the psychiatrists at times appear to believe; and in the absence of the threat of punishment, this latent amorality will express itself in crime.

Studies by Aichhorn<sup>68</sup> and Alexander<sup>69</sup> have disclosed a group of delinquents and criminals in whom the superego is so weak, *i.e.*, non-restrictive upon the id impulses as to be classified as a "criminal superego." Such individuals do not exhibit the neurotic conflict between ego and superego present, according to Alexander, in almost all other criminals. They betray no tension between their instinctual drives and social demands. They have adjusted to a criminal environment, have become identified with the interests of a criminal community and live in accordance with the dictates of a special criminal morality. This "true" criminal is a person whose psychic organization is similar to that of the adjusted individual, except that he identifies himself with criminal prototypes. According to Alexander, "this criminal, when and if he does restrict his anti-social tendencies, does so without any inner urge and unwillingly; he does it merely because he is afraid of the outside authorities."<sup>70</sup> Moreover, Alexander says as to these "true" criminals that "we must admit that only fear of painful consequences, in other words, the mainstay of all the penal codes of today, may prevent their

67. See ALEXANDER, FUNDAMENTALS OF PSYCHOANALYSIS 38 (1948).

68. AICHORN, WAYWARD YOUTH (1935).

69. ALEXANDER AND STAUB, THE CRIMINAL, THE JUDGE, AND THE PUBLIC (1931).

70. *Id.* at 55.

committing anti-social acts, or may at least reduce the number of the latter."<sup>71</sup>

Because this class of criminals exhibits a clear conflict between the individual superego and societal values, the threat of punishment is readily found necessary to obtain conformance to societal dictates. But this conflict is not, by any means, restricted to such criminals. They are the logical extreme of complete identification with anti-social elements; but equally logically and indeed, factually, an element of this conflict is present in all normal individuals, who comprise the vast intermediate body of individuals between the "true" criminal and the completely socially-adjusted individual.<sup>72</sup> The presence of this element of conflict may be accounted for by deviational identification objects. Most adults deviate to some degree from the morality prescribed by society due to the presence of a faulty superego structure, i.e., minor "criminal superego." The superego being somewhat out of line with the social morality, the sanction of punishment is necessary to subdue the license otherwise given to anti-social impulses not condemned by the superego.

We have thus two areas where the threat of punishment is necessary to deter normal individuals from entering into crime. The first is where lesser crimes, not having been severely condemned by the child's education, may obtain expression with individual justification. The second is due to the presence in the superego of most individuals of defects, "criminal" elements in varying degrees, which permit criminal acts without superego condemnation.<sup>73</sup> The importance of these criminal potentialities is their prevalence in the majority of the populace. If the psychiatrist would maintain that punishment is unnecessary as a deterrent to crime, he must be held to demonstrate the presence in most individuals of a superego strong enough to deny all criminal impulses, irrespective of any threat of punishment. The evidence is contrary to such a contention.

It may here be noted that nothing hitherto said is to be taken as a depreciation of the importance of the superego dictates, in evaluation of the deterrents to criminality. Without the internal moral sanction upon crime, the legal machinery of apprehension and punishment would be grossly inadequate to prevent widespread crime and social dissolution. Both are

71. *Id.*, at 209.

72. See *id.*, at 55.

73. These two elements are, of course, closely interrelated. A projection of a "normal" individual from this view may be helpful. He cannot conceive of cannibalism, incest, patricide or matricide. These crimes have been so successfully condemned and repressed as to be outside his conscious thoughts. Thoughts of theft, cheating, etc., enter his conscious mind at times, and if the possibility of being caught and punished is absent, he may commit the crime—because the crime is one of which the superego disapprobation is not severe enough to prevent the commission of the act with justification, or the crime is not one which was blamed or condemned by his identification objects.

necessary. The superego dictates provide the foundation, placing an internal stigma on most criminal activity; the legal threat of punishment bolsters this stigma by promising punishment where the superego is deficient. Together these internal and external threats of retribution operate to deter the universal "criminal" impulse.

### C. *Justice, Retribution and Deterrence*

There is, however, another function of legal punishment, which concerns that entire psychological equilibrium, termed "justice."<sup>74</sup> Given the occurrence of crime there must follow the administration of punishment—be it at the hands of parent, teacher, society, law or superego. It is this balance of crime with punishment which provides the basis of the common concepts of justice and morality. Right begets reward; wrong begets punishment. The simplicity of the expression is deceptive; its profundity must obtain recognition. When it is realized that "wrongs" are impulses whose satisfaction is desired by the individual but denounced by parent and society, and as a consequence, renounced by the individual, it is clear why an individual cannot tolerate a "wrong" in another without that other's paying for it through punishment. The individual has suppressed certain anti-social impulses because he expects compensation. The child is taught to suppress his wrongful desires by the infliction of pain and withdrawal of love; he learns that if he abstains from wrong-doing he will be compensated by the withholding of punishment and the receipt of parental love. If, however, the compensation is not forthcoming, or if the wrongs of another are not greeted with punishment, a feeling of injustice is provoked. A man who has agreed to bargain away instinctual desires at no small psychic cost to himself, is incensed that another may pursue his anti-social impulses without being punished. Here, indeed, is injustice.

Alexander and Staub find a sense of injustice cropping up where (1) a person having done no wrong is punished, and (2) a person having done wrong, is not punished.<sup>75</sup> When the sense of justice is injured, "the Superego loses its inhibitory power over the Ego; the Ego then unopposed follows the tendencies of the Id."<sup>76</sup> The authors see this reaction as the greatest block to the development of a "purely rational criminal law." It creates anxiety

74. See note 55 *supra*. The following pages are, in fact, a discussion of the retributive element in criminal punishment. (This element might more properly be termed "requitil.") As was previously indicated this element has no place in the analysis of the objective function of punishment (the objective function of punishment being the elimination of crime). It is of crucial importance, however, when viewing the subjective function of punishment. It comprises, in fact, the meaning of "justice" for the masses (and for Hegel and Kant). Bradley has said that it represents the uncultivated opinion of most men. BRADLEY, *ETHICAL STUDIES* (2d ed. 1927).

75. ALEXANDER AND STAUB, *THE CRIMINAL, THE JUDGE, AND THE PUBLIC* 47 (1931).

76. *Ibid.*

that one's own superego may be overturned and that one's own impulses, having been curbed with so much difficulty, may break through to expression. The anxiety is justified, for our superego has been set up to avoid the painful conflict between our unbridled impulses and reality. Its demise is feared as a return to this painful state. Moreover, throughout the lives of most adults there always remains a certain dependence of the superego on its external prototypes. Any unjust act by the external authorities is seen as a disavowal of the superego, and the anxiety arises that anti-social tendencies may break through. When this anxiety is evoked by an unpunished crime, the internal equilibrium can be restored only by the criminal receiving his deserved punishment. "The demand that the lawbreaker be punished is thus a demonstration against one's own inner drives, a demonstration which tends to keep these drives amenable to control: 'I forbid the lawbreaker what I forbid myself.'"<sup>77</sup>

This, then, is the psychology underlying the dual principal of retribution-expiation. The reaction is, in fact, directed not only against the offender but against our own forbidden impulses as well.

Perhaps no one has painted a more vivid picture of the public's interest in criminal punishment than Flugel:

The criminal by his flouting of law and moral rule constitutes a temptation to the id: it is as though we said to ourselves, "if he does it, why should not we?" This stirring of criminal impulses within ourselves calls for an answering effort on the part of the superego, which can best achieve its object by showing that "crime doesn't pay." This in turn can be done most completely and conveniently by a demonstration on the person of the criminal. By punishing him we are . . . holding him up as a terrifying example to our own tempted and rebellious selves. . . . [O]ur whole notion of justice is threatened when we observe that a criminal has gone unpunished. The primitive foundation of this notion . . . lies in an equilibrium of pleasures and pains, of indulgence and punishment. This equilibrium is disturbed, either if the moral rewards of good conduct are not forthcoming. . . or if the normal punishments of crime are absent or uncertain. . . . It is to prevent disturbance of the latter kind that we insist that those who have broken the law shall be duly punished.<sup>78</sup>

77. *Id.* at 215. Alexander and Staub distinguish two other motives underlying punishment. The first, revenge, "is an instinctive demand which is active in every living being and is independent of social agencies, like the Super-Ego, which was created later. Every animal strikes back with hate the one who attacks it." Although the authors have conveniently differentiated this motive from the expiatory one, it would seem that the feeling of injustice which gives rise to a demand for expiation also involved a desire for revenge against that which caused the injustice and the resultant psychic anxiety. (See White's statement *supra* note 31.) Anxiety is a painful state, and so the criminal act provokes revenge on that account as well as for the direct threat or injury the criminal act is felt to be. The second motive suggested for criminal punishment is the socially acceptable outlet it provides for aggression. "(T)his living out of one's aggressions diminishes the amount of aggressive hostility one has to repress; it therefore makes the work of repression much easier." Flugel reiterates the three motives *infra* note 78.

78. FLUGEL, *MAN, MORALS AND SOCIETY* 169-70 (1945).

Here, then, is a psychiatric answer to the psychiatric critics of criminal punishment. Here, then, is justification in a most realistic form for the punitive-retributive theory of punishment. Who would dare gauge the mass conscience deterioration and the increase in crime which would follow public awareness that the criminal goes unpunished? Who would care to calculate the spread among the public of the criminal edict, "If he does it, why should not we?" were criminal punishment abolished? And who could contemplate the resulting social disorder, if not only the public conscience were thus abused, but the external threat of criminal punishment were removed?

#### D. *Morality and Punishment*

In addition to the foregoing threats to social order engendered by the abolition of criminal punishment, there is one other whose implications reach beyond the confines of this paper. Morality is contingent upon punishment of criminals.

The critics of criminal punishment have stoutly proclaimed the criminal to be not a "sinful" person, but a "sick" person. He is irresponsible and thus not to be punished. Although admitting the question of "free will" or "determinism" to be yet subject only to metaphysical conjecture, they proceeded to resolve the question by an adherence to "determinism."<sup>79</sup> They are of course justified, inasmuch as scientific inquiry into the human mind can proceed only upon that assumption. It is upon this basis that the criminal is declared "sick." Were we, however, to ignore the fact of the assumption and concede the criminal his "sickness," there would still appear no alternative but to stigmatize "sick" people as "sinful." Society can no more exist without morals than the human body without bones; and morals are nothing more than an acknowledged distinction between that which is "right" and that which is "wrong." "Wrong" again, is that which is "evil," "bad," "reprehensible"; it is not that which is "incorrect," or "mistaken."

79. It can perhaps best be indicated here, why the concept of "free will" has played so small a part in our discussion. It has no place in what has here been termed the objective function of punishment. (See note 74.) It plays a vital role in the subjective function. For the many, it is "just" to punish only the "wrong" person; to punish the person who is not "wrong," i.e., not morally culpable, the minor or the insane, would be felt as "injustice." These persons, not being "wrong" may go unpunished without the general deterring effect of punishment being impaired. In fact, to punish such persons would, since felt to be an "injustice," probably impair the general deterrent effect of punishment. For these reasons not punishing such persons is defensible, and in accord with the objective function of punishment. On the other hand, were it possible for the public to view the criminal as "not-wrong," and the socially disruptive effects of non-punishment of the criminal were absent (this paper, in effect, indicating the opposite) then punishment should (and would) be abolished, for punishment of the criminal would have lost its deterrent effect upon the public and thus its objective justification (and its subjective function). For a discussion of the concept of "free will" in relation to criminal punishment see: MICHAEL AND ADLER, *CRIME, LAW AND SOCIAL SCIENCE* 350-61 (1933); HOLMES, *THE COMMON LAW* 51 *et seq.* (1881). For an extended criticism of the psychiatric argument on criminal responsibility, see Hall, *Mental Disease and Criminal Responsibility*, 45 *COLUMBIA L. REV.* 677 (1945).

The psychiatrists and criminologists have been asking for little less than Utopian men whose only reaction to harm is a rational consideration of its causes. Whether another hurts one's feelings, breaks one's arm, steals one's purse, murders one's mother or destroys one's home and nation, the offender is not to blame; one must simply ascertain the causes and attempt their removal in a rational manner. For man to achieve such a state, however, he needs be so rational that there would be no possibility of such offensive acts.

But leaving such ingenuous speculation, it must be apparent that morals imply right and wrong, require right and wrong, are right and wrong. The characterizing of the criminal as "sick" and not "wrong" would remove the concept of "wrong" from morality. For the criminal, of all persons, is the most "wrong." Without "wrong," there can be no morality; without morality, no social structure. Without criminal punishment, we would feel that the whole psychological and social structure upon which morality depends is gone.

The demands which the critics make on society are grossly unrealistic. It is virtually impossible that society could ever progress to such a state that moral blame would be absent. The structure of society being what it is, such an absence is psychologically and sociologically untenable.

We have seen that Bromberg advocates an enlightened public that would view crime as an uncontrollable impulse manifestation,<sup>80</sup> and would not inject the concept of evil. Yet, in much the same breath, he assures us that ethical teachings sufficiently guard against the expression of most anti-social impulses.<sup>81</sup> But, the concept of evil which Bromberg rejects, underlies almost all ethical doctrines. A strong concept of evil or sinfulness pervades Christianity, the most powerful ethical doctrine today.

Again, Menninger proclaims that the criminal is not "evil" but "sick"—no more morally wrong than the sufferer of pneumonia, or cancer, or a broken arm.<sup>82</sup> But looking to that element prescribed by him as sufficient to deter normal people from criminalism, we find this:

In serious offenses there is another element, itself ordinarily powerful enough, perhaps, to control those capable of being influenced by deterrents of any sort. That is the profound feeling of social disapproval, involving moral disgrace, manifested toward crimes really considered grave.<sup>83</sup>

A most hypocritical public is sought—to express extreme distaste and disapprobation towards the crime and any potential perpetrators, and bestow

80. BROMBERG, *CRIME AND THE MIND* (1948).

81. "Ethical teaching was and is a sufficient curb on antisocial impulses to prevent the largest majority of people from committing criminal acts." *Id.* at 178.

82. MENNINGER, *THE HUMAN MIND* 445 *et seq.* (3d ed. 1945).

83. *Id.* at 447.

sympathetic understanding upon the convicted, but "sick" and morally blameless criminal. He, unhappy fellow, is to be delivered into the gentle hands of some excellent institution, where "(u)nkindness will be as taboo for (him) as it now is for a woman in delirium."<sup>81</sup> It is feared that the public will disagree with Menninger, and for good reason. To the public the criminal has always been the "badman" and without him there is no "badman." Perhaps, as was suggested, they want their badman for a scapegoat; but perhaps, too, they want him so that they can keep straight who is good and who is bad.

Neither can it be to any avail to alter the stance, and suggest that treatment might be viewed as punishment.<sup>85</sup> Either the criminal is not evil and thus not to be punished, or the criminal is evil and to be punished. He cannot be not evil and yet punished. There appears no choice.<sup>86</sup> The criminal should continue to be punished because society appears to require it.

What remedy there is available for crime must be applied to the sources. It is to the diseased social elements whence our criminality springs that correction and reformation should be directed.<sup>87</sup> If, however, individual reformation is desired, the juvenile delinquent is the proper object. The public will not mind his not being punished; he, after all, small chap, "couldn't help it." The alienists may take him where they will; the public will not quarrel. But the public must be left its "badman"; for it needs him rather badly.

81. *Id.* at 451.

85. White suggested this. See WHITE, *INSANITY AND THE CRIMINAL LAW* (1923). But at best such public deception on a mass basis would be highly dangerous, granting even that it were conceivable.

86. Compare note 56 *supra*.

87. In a recent article William Healy would appear to endorse this view. And if his words may be taken as indicative of a new perspective on the part of psychiatrists towards the social and psychological problems of criminal behavior, we may be heartened. It may be that the psychiatrists are beginning to recognize that which the moralist long ago would have said—that the real roots of all crime lie in the immoral pits of the mind of society. Healy, Book Review, *Recidivism in Juvenile Delinquency*, 19 U. OF CHI. L. REV. 138 (1951).