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Barriers to the Establishment of a Deterministic Criminal Law

By SIDNEY J. KAPLAN*

DESPITE THE compelling appeal of a criminal law based upon a deterministic framework, there are considerations which suggest caution.¹ Several of these considerations have to do with the functional value of the traditional framework in maintaining social control. Still others are of a practical kind and are noteworthy because they point up the concrete problems which stand in the way of any immediate implementation of a criminal law founded upon a framework of determinism.² While both the practical and theoretical "barriers" to a "rational" legal framework demand appraisal, only the theoretical "barriers" will be examined within the scope of this paper.

In what sense, then, can the "legal fiction" and the "metaphysical jargon"³ of moral responsibility function to maintain social control? And in what sense might determinism hinder the maintenance of social control?

One of the more astute rationales for the retention of moral responsibility is to be found in the writings of Thurman Arnold.⁴ Even though Arnold recognizes the scientifically indefensible "folklore" of responsibility and its trappings, he nonetheless argues for its "wisdom" on pragmatic grounds. According to Arnold, the "folklore" of responsibility serves as a system of integrating values

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¹ See Sidney J. Kaplan, "Criminal Responsibility," 45 Ky. L.J. 236 (1956-57).

² Some of these "practical" barriers are (1) gaps in scientific knowledge, (2) safeguarding individual rights, (3) lack of trained personnel, (4) expense, (5) political and legal resistance, and (6) public resistance.

³ See Henry Weihofen, "The Metaphysical Jargon of the Criminal Law," 22 A.B.A.J. 267-270 (1936).

⁴ Thurman Arnold, *The Symbols of Government* (1935). For an appraisal of Arnold's position see Warren P. Hill, "The Psychological Realism of Thurman Arnold," 22 U. Chi. L. Rev. 377-396 (1955).

which functions to maintain a stable moral order. Among the Navaho, for example, the very important curing chants serve to lend security to a hazardous and ephemeral existence. Even though the curing chants, calculated to prevent or cure disease, do not do so, they are nevertheless of marked value in maintaining social stability by reaffirming cherished ideals, lending meaning and continuity to life, developing social rapport, and by providing an outlet for aggressions and other socially dysfunctional tensions.⁵ In short, despite the "nonsense" or "mythology" of the Navaho curing chants, very important functions attach to them. Scientific validity, then, is quite irrelevant. What is significant, is that the chants are socially functional.

It is not without meaning to American society to note that when the anthropologist appraises the problems of Navaho acculturation he recommends gradualistic policies to mitigate the possible effects of social disorganization. Similarly, in appraising the relationship between the "folklore" of moral responsibility and science, Arnold simply acknowledges that the legal institution is most effective when it keeps peace with public morality. Indeed, he goes further by suggesting that the nature of public morality is such that too great an incorporation of sciences may be incompatible with the social welfare. Were the doubt and skepticism of science introduced into the criminal law "it would tend to undermine the popular faith in legal order and certainty."⁶ As Arnold so persuasively argues:

It is child's play for the realist to show that the law is not what it pretends to be and that its theories are sonorous rather than sound; that its definitions run in circles; that applied by skillful attorneys in the forum of the courts it can only be an argumentative technique; that it constantly seeks escape from reality through alternate reliance on ceremony and verbal confusion. Yet the legal realist falls into a grave error when he believes this to be a defect in the law. From any objective point of view the escape of the law from reality constitutes not its weakness but its greatest strength. . . . If judicial institutions became too "sincere," too self-analytical, they suffer the fate of ineffectiveness which is the lot of all self-analytical people.⁷

⁵ See Clyde Kluckhohn and Dorathea Leighton, *The Navaho* 159-181 (1948).

⁶ Hill, *op. cit. supra* at 380.

⁷ Arnold, *op. cit. supra* at 44.

Thus a framework of responsibility embracing a court dispensing "justice" provides for a dramatic reaffirmation of social ideals. The punishment given the criminal serves to give society the assurance that the good life is worth living, that good triumphs over evil, and that he who obeys the law will win society's rewards. The moral backdrop of praise and blame, reward and punishment, then, provides an integrating principle around which society may orient itself. Thus, ". . . the fear of punishment is not the significant value in punishment but rather the legal sentiments, legal conscience, or moral feelings which have developed in the general public by the administration of the criminal law by the previous generations, and which have become so organized that they regulate behavior spontaneously almost like an instinct."⁸

But one need not embrace Arnold's extreme "psychological realism" to acknowledge that the framework of moral responsibility and its concomitants may serve socially desirable ends. For instance, it may be maintained with some social-psychological justification that punishment tends to restore the community's sense of social solidarity. The criminal act, then, makes for a psychic disequilibrium and the punishment acts as a catharsis which reinstates society's integrity.

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The specific psychological mechanisms which operate to restore society's sense of integrity have been dealt with at length.⁹ Even though some theorists deplore the "irrationality" of the criminal law and its catering to "primitive impulses," they nonetheless indicate that public morality at a given time may require appropriate psychological outlets. Alexander and Staub, for example, suggest that only at such time as the general masses recognize the nature of their "irrational impulses" toward the criminal, will a change in the criminal law be possible.

. . . [O]nly then will the general sense of justice change sufficiently to be in harmony with rational measures to be

⁸ Edwin H. Eutherland and Donald Cressey, *Principles of Criminology* 291 (1955). This appraisal is ascribed to A. V. Lundstedt, *Superstition or Rationality in Action For Peace?* (1925).

⁹ See Franz Alexander and Hugo Staub, *The Criminal, The Judge and One Public*, particularly at 207-225 (1931). See also John C. Flugel, *Man, Morals and Society* (1945).

undertaken against the criminal; and will give up its demand for the gratification of irrational emotions.¹⁰

But what are these "irrational impulses" in the criminal law and in what sense are they linked with social order? In appraising the punitive aspects of the criminal code, Alexander and Staub have pointed up three functions of punishment which in part derive from unconscious motivations.¹¹ These functions are to be understood in relation to expiation, retaliation, and aggression.

Why does society demand expiation of the criminal? "To put it in psychoanalytic language, the failure to punish an offender means a threat to our own repressive trends."¹² Thus, the criminal commits an act which members of society forbid themselves. If the offender is not punished for doing what "good citizens" would themselves like to do but inhibit, anxiety is evoked.

We may say, then, that what creates the public demand for atonement is one's own anxiety lest his own Super Ego be overturned and one's own impulses, which have been curbed with so much difficulty, might break through to expression.¹³

In other words, the imposition of a criminal sentence serves to reinforce the Super-Ego demands of the law-abiding citizen. The demand for expiation by punishment, then, functions less for the criminal than it does for the general public. "By punishing him we are not only showing him that he can't 'get away with it,' but holding him up as a terrifying example to our own tempted and rebellious selves."¹⁴ What the public obtains from the punishment is proof that it is law-abiding. The public's inhibition of its own anti-social impulses is thus vindicated through the punishment of the criminal.

Revenge (retribution) may also function to restore social equilibrium. When the criminal commits a crime he threatens the security of one's person. "While the demand that a transgression be expiated serves as a protection against our identification with the violator of the law, the impulse to revenge serves as a self defense against our enemies."¹⁵ Now even though retaliation

¹⁰ Alexander and Staub, *op. cit. supra* at 212.

¹¹ *Id.* at 209ff. Compare Flugel, *op. cit. supra* at 169.

¹² Alexander and Staub, *op. cit. supra* at 213.

¹³ *Id.* at 214.

¹⁴ Flugel, *op. cit. supra* at 169.

¹⁵ Alexander and Staub, *op. cit. supra* at 220.

may not in fact be protective for society, it may still, however, from the viewpoint of the "psychoeconomics" of mental life, reduce the tension which the crime (attack) aroused. In short, the retribution functions to maintain the integrity of the individual in a secure world by providing a kind of psychological closure. Thus the myth of protection, one might whimsically add, is not a myth.

A third function of a punitive criminal law has to do with aggression. As Flugel puts it, ". . . the criminal provides an outlet for our (moralized) aggression. In this respect, he plays the same role as our enemies in war and political scapegoats in time of peace."¹⁶ Such aggressions, then, as are called up in the day-to-day struggle for existence, and which are not socially acceptable, may be channelized in a socially acceptable manner through the medium of criminal punishment. While punishment is by no means the sole vehicle for the ventilation of aggression, it does permit expression which might otherwise be socially "dysfunctional."

According to Alexander and Staub, these "three unconscious, affective sources of the institution of punishment . . . present serious obstacles to the development of a purely rational criminal law."¹⁷ Moreover, they add, "We must make clear that we consider human society still very distant from the realization of this ideal state."¹⁸

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In addition to the foregoing arguments for a punitive criminal law, further justification is often attached to its deterrence value. Despite a large literature which shows a lack of relationship between punishment and deterrence there is, nonetheless, acknowledgement of the "general" deterrent effects of a punitive criminal law. Sutherland and Cressey, for example, offer the following pertinent comment:

In a broader perspective, the criminal law and its application by police and courts probably have great effects upon public morality. Although specific severe punishments may have little immediate demonstrable effect in deterring specific criminals the existence of the penal code with its penal

¹⁶ Flugel, *op. cit.*, *supra* at 169.

¹⁷ Alexander and Staub, *op. cit.*, *supra* at 222.

¹⁸ *Ibid.*

sanctions probably has a long-run deterrent effect upon the development of criminalistic ideologies. By means of the criminal law and the procedures for implementing the criminal law, including the imposition of swift and certain punishments, the undesirability and impropriety of certain behavior is emphasized.¹⁹

One may raise the question, however, of how this general deterrence operates. In other words, how is the impetus "not to do wrong" incorporated by the individual, and how is it maintained in the general public which does not commit crimes? This is a question of enormous significance.

De Grazia maintains with considerable confidence that "Criminal punishment obtains its clearest justification from its deterrent effect upon the potential criminal."²⁰ The deterrent function of punishment, he asserts, has its origin in the early development of the individual. Associated with the formation of the Super Ego is the development of guilt and its assuagement by punishment. Thus, "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."²¹

Furthermore, adds de Grazia, in our contemporary society where the boundaries of what is "wrong" varies so widely, the Super Ego's demands are weak. In such instances the Super Ego must be necessarily reinforced by the threat and imposition of punishment. For many people who may be disposed to commit a crime, the threat of punishment serves as a restraining force. Says de Grazia:

Most people deviate to some degree from the morality prescribed by society due to the presence of a faulty superego structure, i.e., "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 the anti-social impulses not condemned by the superego. . . . The superego dictates provide the foundation, placing an internal stigma on most criminal activity; the legal threat of punishment bolsters this stigma by prom-

¹⁹ Sutherland and Cressey, *op. cit.*, *supra* at 289.

²⁰ Edward de Grazia, "Crime Without Punishment: A Psychiatric Conundrum," 52 *Colum. L. Rev.* 755 (1952).

²¹ *Id.* at 756.

ising punishment where the superego is deficient. Together these internal and external threats of retribution operate to deter the universal "criminal" impulse.²²

It may also be argued that deterrence is linked to the public concept of justice. Justice and morality, suggests de Grazia, are founded upon a balance of crime and punishment. "Right begets reward; wrong begets punishment."²³ Since this conception of justice has been incorporated by the individual, he will be resentful if "the wrongs of another are not greeted with punishment."²⁴ In circumstances when the individual during his early socialization had been "good" parental approval had been as a reward. On the other hand, when the individual had been "bad" he learned that parental disapproval (punishment) would be forthcoming. In short, given such a psychological base stemming from early socialization, a sense of injustice will develop unless "moral expectations" are realized. Justice, then, demands either reward or punishment. In Flugel's words, "Our whole notion of justice is threatened when we observe that a criminal has gone unpunished."²⁵

Were not the public's sense of justice continuously sustained by punishment (and reward), it is claimed, social disorganization might ensue. De Grazia, overdramatically perhaps, maintains that this sense of justice must be continuously reinforced lest society be reduced to chaos. In de Grazia's words:

Here, then, is justification in a most realistic form for 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 the public conscience were thus abused, but the external threat of punishment were removed?²⁶

Now while this analysis may appear unduly alarmist, some social disorder might not be completely outside the realm of possibility. In any event, the possibility itself would appear to de-

²² Id. at 759-760.

²⁴ Ibid.

²⁶ De Grazia, op. cit. supra at 762.

²³ Id. at 760.

²⁵ Flugel, op. cit. supra at 169-170.

mand, if changes in the criminal law were contemplated, gradual implementation.

4

Quite commonly, arguments (or explanations) for the retention of a punitive criminal law, such as those offered above, are called rationalizations for vengeance. Weihofen, for example, says, ". . . these retribution theories appear as mere armchair sublimations by kindly and intellectual philosophers of a primitive and vindictive law—an eye for an eye, and a tooth for a tooth."²⁷ Other critics, however, are less kind to the "apologists" for retribution.²⁸

But one might well ask upon what grounds are these retribution theories called rationalizations? One might conceivably call the anti-retribution arguments rationalizations for humanitarianism even though they are usually couched in the terminology of science.

When one examines the assertion that punishment is retribution, and for that reason primitive and undesirable, one is hard put to understand why the argument stops there. What, after all, is retribution? Can it not be reduced further psychologically? Is its meaning exhausted in "an instinct to strike back"? Or can it not be claimed that retribution serves some psychological end which, even though at the expense of the individual, may possibly be salutary for society? So at least argue the responsibility-punitive theorists.

Similarly with regard to deterrence, Barnes and Teeters say, for example, that deterrence ". . . is simply a derived rationalization of revenge . . . [T]he apologists for the punitive regime are likely to bring forward in their argument the more sophisticated, but equally futile, contention that punishment deters from crime."²⁹

But why, one may ask "derived rationalization"? Why "sophisticated"? Why "futile"? Despite the fact that deterrence may not operate "specifically," is it sophisticated, or futile, or a rationalization to argue that punishment may have a general deterrent effect? The fact that behavior is "determined" does not militate against deterrence. It rather supports it since what has led to an

²⁷ Henry Weihofen, *Mental Disorder As A Criminal Defense* 484 (1954).

²⁸ See, for example, Harry E. Barnes and Negley K. Teeters, "New Horizons In Criminology," chap. xvi (1951).

²⁹ *Id.* at 337.

inhibition of the criminal act in the general public may well be the incorporation of the moral framework of right and wrong, reward and punishment, during early socialization.³⁰ The statistics on the failure of punishment as a deterrence do not at all preclude this possibility.³¹

If the foregoing observations are sound, perhaps the label "rationalization" may be a misnomer. A more appropriate label for these theories of punishment may be "rationale."

Summary

While determinism as a framework for the criminal law appears to be scientifically more defensible than a framework of moral responsibility, there are a number of considerations which suggest, even were establishment of a deterministic penal code immediately possible, a policy of gradualism.

Some of the "barriers" to a deterministic criminal law relate to the "functional value" of the concept of personal responsibility. Still others have to do with the psychological outlets that a punitive criminal law provides, the contemporaneous level of public morality, the concept of justice, and the deterrent value of a punitive penal code.

Whether or not theories of punishment are rationalizations or sound rationales appears to be, for the most part, a matter of assertion. Since, in the conflict between the individual and society, the protection of society is the primary consideration, any recommendations for the establishment of a deterministic criminal law should be tempered with the acknowledgement that (1) the traditional framework of moral responsibility may in many respects be socially advantageous, and (2) that a framework of determinism may have consequences of a deleterious nature.

³⁰ Compare Robert A. Fearey, "Concept of Responsibility," 45 J. Crim. L., C. and P. S. 25 (May-June, 1954). Says Fearey,

"The on-balance good behavior of the majority of men is not due to desire for praise and reward or to fear of blame and punishment but to the discovery over the course of human history that 'proper' living, in a cooperative rather than selfish relationship to one's fellow men, is most conducive to happiness."

To this writer this observation seems to be a singularly naive view of "human nature" and social control.

³¹ *Supra* note 21.

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