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PSYCHIATRY AND THE CONDITIONING OF CRIMINAL JUSTICE

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"De plus, le roi et ses ministres jugeaient commode de procéder par décisions individuelles, plus souples qu'une loi générale, plus faciles à adapter aux circonstances de fait." Thus Boyer, in his *La Liberté individuelle sous L'Ancien Régime,* rather delicately sums up the more appealing motivations and the contemporary justification for that now prominent exhibit in the criminological chamber of historic horrors — the king's *lettres de cachet.*[1] But if that particular variety of legal process is now dead, the urgencies adduced to support it survive. Not only is individualization of the disposition of offenders inscribed on the banner of many a modern school of criminology. It is a primary article of faith in a movement which, when it becomes possible to look back on the present stage in the evolution of what we call criminal justice, will probably be recognized as overshadowing all other contemporary phenomena in its influence on that evolution. The movement consists in the infiltration of psychiatry — and of psychiatrists — into the administration of the criminal law. It is of course understood that participants in this movement look to individualization for the fulfillment of perfectly reputable ends which have nothing in common with that malevolent despotism commonly attributed in our schoolbooks and on the Fourth of July to the *lettres de cachet* and similar royal prerogatives. But so, if Boyer and other informed interpreters of the *Ancien Régime* are to be believed, were many contemporary proponents of the *lettres de cachet.*[2]

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1. Faculté de Toulouse, LES GARANTIES DES LIBERTÉS INDIVIDUELLES (1933) 1, 21.

2. As justification for a great number of *lettres de cachet* Boyer lists: (1) the situation where the social rank or influence of the offender might have precluded a conviction by an ordinary court; (2) the desirability of avoiding the scandal of a public trial in certain instances; (3) the existence of cases with respect to which the courts which would normally have exercised jurisdiction were avowedly biased; (4) the inadequacies and delays of the regular criminal procedure; (5) the utility of the *lettre de cachet* in cases where the offender would have taken flight before an ordinary warrant could have been procured; (6) cases where application of the general laws would have

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The situation was simply that the *lettres,* justifiable for many purposes, unfortunately lent themselves under pressure to certain unfortunate abuses.

This suggestion of a parallelism of rationale between the discredited *lettres de cachet* and the individualization of disposition sponsored by the representatives of psychiatry in their dealings with criminal law raises some interesting questions. Can the practice of individualization be so conditioned as to escape the abuses with which it became associated during the *Ancien Régime,* and if so what factors will determine the outcome? Has psychiatric participation to date been characterized by an adequate awareness of these critical factors, or must its role still be considered ambiguous?

The participation has proceeded thus far in an atmosphere frequently receptive, at times suspicious, but rarely critical. Perhaps because its relevance has appeared so obvious, or perhaps because a different mood would be so alien to the whole temper of the group responses which comprise criminal law and its administration, there has been a disinclination toward close study of the contributing role of this fresh ingredient. The beneficent effects of cross-fertilization have been assumed. For reasons which will appear, however, it is high time that the process of appraisal were begun. To that object this inquiry will be devoted. The terms employed to characterize the subject—psychiatry and criminal justice — are of course freighted with diverse meanings, not all of which are here intended. Some preliminary indications may therefore be in order. Let psychiatry denote not merely the medical specialty as such, along with its agents, but also the various and sundry lay attitudes and orientations which are popularly and effectively, if indiscriminately, associated with the field of medicine in question. Criminal justice may be understood as shorthand for that group of dominant culture-patterned responses to what we call crime. The subject of these responses, which is to say crime, means simply those varieties of behavior or of manifest allegiance which are so experienced by dominant group elements as to touch off the ultimate or primitive defensive responses in question.

I.

An introductory hint of some of the possibilities implicit in the situation may be afforded by a brief review of certain differences in tradition

resulted in excessive rigor (parliamentary revolts during the eighteenth century which might have been punished as rebellion and lèse-majesté, had less rigorous punishments not been possible by *lettres de cachet;* the cases of writers and pamphleteers who criticized the regime, and of duellists, with respect to whom punishments more lenient than those applicable under the general laws were similarly made possible); and (7) the lack of legislation authorizing the commitment of insane persons by regular court proceedings. *Id.,* at 19–20.

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and professional conditioning as between representatives of the law and of psychiatry. The medically trained expert, in his first contact with the problems involved in disposing of offenders, must inevitably find himself confronted with situations and issues essentially different in kind from those with which he, as a physician engaged in private practice, is familiar. He is called upon to make adjustments foreign to his prior professional conditioning, to develop awarenesses for which he has previously had little need. Consider, for example, the adversary character of the criminal proceeding. In ordinary medical practice the physician contends for the most part with the malevolent processes of nature. The germ or disease which threatens his patient is not represented by another physician. Mankind in general cheers on the doctor's one-sided struggle. But in a criminal proceeding, the medical expert, even as the lawyer, is confronted by another representative of his own profession. His client's medico-legal difficulties are now fostered and aggravated by that other physician. A jury or some other equally human arbiter sits as final judge, and its whims, however lacking in scientific comprehension, must be satisfied. For a second point of difference, consider the issue of individual liberty and the appropriate limits to governmental coercion. In ordinary medical practice the physician deals with his patient by invitation. It is customary to obtain consent to an operation. There seems to be little occasion for the taking of positions on the very issue which is paramount in every criminal proceeding. A third point of difference arises out of the circumstance that the administration of criminal law has long since become a state enterprise, whereas the distribution of medical advice and treatment is still largely a matter of private initiative and charity. From the circumstance of state enterprise, in conjunction with the coercive character of criminal justice, there arises in that realm a certain necessity for treating like offenders alike. Special therapeutic possibilities open to the physician in private practice when dealing with a luxury patient who can afford them — as, for example, psychoanalysis — are not likely to be available as incidents of a penal regime.

With these preliminary observations let us proceed to examine the record. For participation by psychiatrists in every phase of its administration, while still far from a standard procedure, has ceased to be altogether a novelty. In some sections of the United States and in certain circles within the law enforcement hierarchy of any state it is less familiar than in others. But the history of its growth, here as abroad, already presents a rather comprehensive experience. The literature growing out of it is probably more bulky than any other, excepting the strictly legal, comprised in our criminology. More and more frequently its imprint is discernible in the day by day disposition of ordinary criminal cases as the associated point of view seeps down into the trial and police courts, editorial pages and popular magazines. This is not to say that the psy-

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chiatrist has as yet attained as secure and commonly accepted a place in the administrative process of any jurisdiction as the older categories of participant, notably the police, prosecuting attorney, judge, jury, and press. Nor it is suggested that psychiatry, in its application to the problems and business of criminal law administration, as yet affords anything approaching a highly developed and stable technique. Suffice it for purposes of this discussion that psychiatric participation has progressed beyond the status of an utterly untried idea and may now be thought of as a tentatively appraisable actuality.

The participation in question has assumed a great variety of forms. For a long time alienists have been permitted to give in evidence their expert opinions with respect to the sanity of any accused person who may seek to establish his irresponsibility; or of anyone who, whether acquitted of a criminal charge on grounds of insanity or never charged with any crime, faces a challenge to his right to remain at large rather than be committed to a state institution as insane or feeble-minded. Being dissatisfied with the type of investigation conducted and the mode of trial of the issue where these are left to such alienists as the parties litigant may be able or see fit to engage, some state legislatures have sought ways and means of insuring more impartial and competent psychiatric assistance to trial courts charged with the adjudication of such issues. Resulting legislation has usually taken the form of a direction that, in any case where an issue of responsibility is raised, the accused shall be examined before trial by members of the staff of a state hospital, or by court-appointed medical experts or "lunacy commissions." The Massachusetts Briggs Law of 1921 went further, requiring a routine examination, by psychiatrists appointed by the Department of Mental Diseases of the Commonwealth, of all persons indicted for a capital offense and of all persons bound over or indicted who have previously been convicted of a felony or who have previously been indicted more than once for any offense.[3]

Even where there is no question of complete irresponsibility, which is to say of "insanity," we find law enforcement officers, be they prosecuting attorneys, judges, members of parole boards or governors with

3. Mass. Acts 1921, c. 415. As amended [Acts 1923, c. 331; 1925, c. 169; 1927, c. 59; 1929, c. 105] the Act no longer provides for the admissibility of the psychiatrists' report in evidence, but does provide that it shall be "accessible to the court, the probation officer thereof, the district attorney and to the attorney for the accused." MASS. GEN. LAWS (1932) c. 123, 100A. For a discussion of this law in operation see Glueck, *Psychiatric Examination of Persons Accused of Crime* (1927) 36 YALE L. J. 632–648; Overholser, *The Practical Operation of the Massachusetts Law Providing For the Examination of Certain Persons Accused of Crime* (1928) 13 MASS. L. Q., No. 6, 35–49; Overholser, *The Massachusetts Statute For Ascertaining the Mental Conditions of Persons Coming Before the Courts of the Commonwealth in the Light of Recent Decisions* (1931) 16 MASS. L. Q., No. 6, 26–34.

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the power of pardon, seeking psychiatric advice with increasing frequency, quite informally, and without reference to any particular statutory mandate. In certain courts this occasional practice has been institutionalized and made a standard feature of the investigation of every case. In New York County, New York, for example, a psychiatric clinic has been established in connection with the Court of General Sessions to examine, before sentence or other final disposition, persons convicted of felony in that court. Similar clinical facilities have been made available in connection with some of our more modern juvenile and family courts. Many penal and reformatory institutions now have one or more psychiatrists to assist in the classification of prisoners for purposes of handling them within the institution and of determining their eligibility for parole.

What is the significance of the foregoing developments? In one aspect they reflect a growing tendency to utilize a new and fascinating branch of medico-legal expertness. Insofar as we ask no more of the psychiatrist than we do of other forensic experts, namely, that he supplement the information otherwise available to law enforcement officers in connection with particular cases by contributing pertinent "scientific" or generalized facts presumed to be beyond the common knowledge and understanding of laymen, his participation can scarcely fail to be of value. The advantage of a more precise understanding in any given criminal case of the sort of person the offender is, of how and why he came to commit the offense in question, and of what may be expected of him in the future, in order to promote a more intelligent exercise of discretionary powers already vested in the authorities, may be deemed self-evident. Where psychiatric inquiry and report come to be legally recognized and required as standard phases of the investigation of a case, they may often have in addition a highly desirable collateral effect. An objective sanction may be afforded whereby the authorities may justify their action if it happens to run counter to unintelligent popular emotions aroused by the case or pressures of factional prejudice. The transformation wrought in the emotional atmosphere surrounding a manhunt when an idea spreads that the perpetrator of the horrible crime may be mentally "sick" is a familiar case in point.

But the significance of the official representation accorded psychiatry and psychiatrists in the administration of criminal law cannot be limited to the consequences outlined above. Consider the simple provision for the preparation and presentation of case histories and psychiatric reports to be taken into account by the court in disposing of an offender after plea or verdict of guilty. How much of the sort of information which will normally be included in such a report have our courts been accustomed to have before them in all but the few cases where a plea of insanity is interposed? How much of it, in the absence of the ad-

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ministrative innovation in question, have they been accustomed or compellable to entertain? The Loeb-Leopold hearing on sentence, much publicized years ago, was far more elaborate and covered much more territory than the ordinary hearing. In that sense it was and remains definitely exceptional. If the information is entertained, what standards or practices exist with respect to the weight and effect to be accorded particular factors in the personality make-up or social picture of an accused who is not to be denominated "insane"? What, in short, is the court to do with the information in the ordinary case? With respect to most of these questions the answer is ready. Our courts and legislatures have conspicuously, if understandably, avoided committing themselves. There are no comprehensive standards. In some instances the legislatures have imposed a flat penalty applicable to all convicted of a given offense. More often they have been content to prescribe minima and maxima — frequently far removed — leaving to the trial court the problem of determining what particular disposition within the statutory frame may be most appropriate in any given case. Trial courts have used their own judgment, without compulsion to retrace its exercise or rationalize the result in their memoranda of decision; and in any case these memoranda are generally not published in printed, available form. Appellate courts usually refuse to review the discretion of the trial court in matters of sentence, preferring to put reversals on other grounds save in the very occasional extreme case deemed to cry aloud for invocation of the Constitutional prohibition against "cruel and unusual" punishments. Our parole boards likewise operate without any but the vaguest of statutory standards, and their decisions are in practical effect beyond the scope of judicial review.[4] Mention should of course be made, by way of

4. The terms of the Connecticut statute, to cite but one example, provide that: "Any person sentenced to the State Prison, after having been in confinement . . . for not less than the minimum term, or, if sentenced for life, after having been in confinement . . . for not less than twenty-five years, may be allowed to go at large on parole in the discretion of a majority of the board of directors of said prison and the warden thereof acting as a board of parole, if in their judgment such prisoner will lead an orderly life if set at liberty . . . " CONN. GEN. STAT. (Supp. 1931–1935) § 1730c, amending CONN. GEN. STAT. (1930) § 6509. Under § 6510 the Board is authorized "to establish such rules and regulations as it may deem necessary, upon which such convict may go upon parole, and to enforce such rules and regulations and to retake and reimprison any convict upon parole, for any reason that shall seem sufficient to said Board."

Over and above the utter vagueness of such standards, the convict who would litigate his eligibility to parole is confronted with the further obstacle that the granting of parole is treated as a highly discretionary act. State *ex rel.* Kay v. LaFollette, 222 Wis. 245, 267 N. W. 907 (1936). The United States Supreme Court has indeed characterized it as "an act of grace" in a decision indicating that there is no constitutional right to a hearing on an issue of parole violation. See Escoe v. Zerbst, 295 U. S. 490, 492 (1935). See also Gausewitz, *The Proper Role of Legalism In the Administration of the Criminal Law* (Paper presented at the Round Table on Crimes, Association of

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exception, of those cases where the jury is entrusted by statute with discretion as to the sentence to be imposed. The question of what evidence, if any, may be relevant and admissible on the issue of sentence, though not on the issue of guilt, then becomes more difficult to avoid. But even with reference to such cases the legislatures have preferred to remain silent; and the courts, left to legislate for themselves, have tended to avoid any comprehensive consideration of the subject insofar as may be gleaned from their opinions.[5]

It follows that provision for routine psychiatric examination and report carries with it a considerable broadening of the scope of the hearing on sentence, or of the hearing on parole, as the case may be. New elements for consideration are injected, and they are elements whose import and place in the sentencing picture have yet to be appraised and assimilated. The problem presented by each case becomes more complicated from the point of view of those charged with rendering the decision. This means substantive change. So it is that the participation of the psychiatrist cannot be compared with the much more subordinate role of other technical "experts" who are from time to time called in to give opinion evidence in the course of trials and hearings. Utilization of the services of those others — ballistics experts, medical examiners, chemists, examiners of questioned documents, engineers, and so on — is entirely compatible with a continuance of the status quo insofar as penal objectives and general policies are concerned. The psychiatrist, on the other hand, is commonly understood to represent a generalized approach with respect to problems of personality and of human behavior quite at variance with the attitude finding expression in our criminal law as a whole. He carries this distinctive attitude with him when called upon to participate in the administration of criminal law. The result is ferment, for he naturally finds the issues as legally drawn somewhat irrelevant and for the same reason inadequate. He is moved to express his discontent and, being a physician and a scientist, wields the authoritative weight of his strongly entrenched profession. He has in consequence become the popular symbol of a growing demand for far-reaching transformation in our methods of dealing with convicted offenders. Psychiatry is looked to as the implement whereby this demand may be realized, and herein lies the major significance of the development noted at the outset of this article. Let us first examine the popular demand.

American Law Schools, Chicago, Dec. 31, 1937), wherein some provision for more adequate and impartial hearings, held publicly and on due notice, for the orderly settlement of disputes arising in connection with applications for parole and similar release procedures, is urged.

5. For an interesting discussion of sentencing policies, based on a review of the decisions, see L. Hall, *Reduction of Criminal Sentences on Appeal: II* (1937) 37 COL. L. REV. 762.

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II.

Just as the political ideology of industrialization has provoked a widening of the regulatory spheres assigned to penal control, so the seeping of psychological and psychiatric conceptions into every-day thought has provoked a comparable expansion of penological expectations. One need hark back no further than the recollection of a generation still living to recall the period when decent and humane treatment of prisoners, the separation of juvenile from more hardened and older offenders, the elimination of excessively severe sentences and provision for prison work, comprised the platform of liberalism on this salient. It was the period when great things were expected from the institution of reformatories. Those were important reforms. The improvements on the existing regime envisaged were substantial and, for that matter, remain far from accomplished in their entirety at the present day. But they were of a conservative modesty compared with the perspectives shortly thereafter to take possession of the criminological imagination.

The new phase opened officially in this country with the juvenile court movement early in the present century. In the nature of practically engineered reform the administrative implications of this development were not overstressed. Reliance was placed upon such appealing considerations as that offenders of tender years should be treated differently; that, they having been caught while still young and presumably impressionable, the procedure should be oriented toward their rehabilitation rather than mere punishment; and that educational and therapeutic forms of processing requisite to that end were accordingly indicated. The whole program being thus conceived in the delinquent's own interest, with the state moreover acting *in loco parentis,* the procedure was considered not at all "criminal" in character.[6] Questions as to the exact nature and limits of the power exercised, having a tendency to invoke "technicalities" and thus cramp the progressive idea before it had been allowed time to work out in practice, were felt to be captious and out of order.

Imbued with an entirely fresh ideology and terminology, the cultural ferment which divorced from the criminal law and its administration this great group of juvenile offenses, has for some time been working quite as visibly in the realm of adult offenses. Clarence Darrow's successful invocation of the psychiatric version in the Loeb-Leopold hearing on sentence afforded a straw to indicate the direction of the wind. Then came the recommendation so often since repeated that the whole function of passing sentence upon convicted offenders be taken out of the hands of courts of law and entrusted to commissions of experts or "treatment boards," composed of psychologists, psychiatrists, and perhaps others,

6. The leading authorities are collected in Lou, *Juvenile Courts in the United States* (1927) 5 *et seq.*

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to be guided by diagnosis of the offender rather than by statutory sentence frames and orthodox judicial reaction within those frames. In New York State Dr. Thayer, a psychiatrist appointed Commissioner of Correction during President Roosevelt's period of governorship, advocated a genuinely indeterminate sentence for felons, to avoid having to turn loose prospectively dangerous and incorrigible criminals "merely because a certain day on the calendar has come round," and to make it possible to let out on parole many who, while seeming to warrant such a chance, are under the present system foreclosed by life or long minimum sentences even though they happen, in some instances, to be first offenders. Probation success and failure have become favored themes for criminological research, inspired by the hope of arriving at scientific indicia to aid in the determination of parole eligibility.

This shift of emphasis from the legal category of the offense to the personality of the offender, from mere insistence that criminals be caught and made to "pay their penalties"—preferably some happy mean between the sentimentally lenient and the revengefully harsh—to the more exacting standard that dispositions be rehabilitory where possible and otherwise preventive, is, of course, integrally tied up with what is gradually becoming the general approach to problems of human conduct and personality. It has been absorbed into everyday thought to such a point that when a youthful offender against whom action has once been taken subsequently gets in trouble, the tendency is to see in this an indication that the first disposition made was at fault. When an adult, after serving one or more sentences, goes on to commit further crimes there is the same tendency to see in this recidivism evidence of penological failure. The process comes, in short, to be judged by standards ever closer to those of formal education and medical therapy combined, and ever more far removed from the crude standards of criminal justice as we have known it.

These new demands of course far outstrip any record of performance in the field. Individualization of disposition and rehabilitation of offenders, if by these slogans we mean something more than ordinary leniency, have to date been hatched out of idea into realization only in scattered instances and then usually under especially favorable conditions such as the concurrence of privately endowed welfare organizations. Not that this discrepancy should be particularly surprising; it is in the inherited tradition to assign a great deal more work to our agencies of criminal law administration than we would ever dream of equipping them to perform. Whenever a new regulatory program is enacted, or some new offense prohibited, a criminal penalty is usually provided as a matter of course and quite regardless of the subject matter and personnel to be regulated. For the criminal penalty is the only ultimate sanction we know. But it has rarely been our custom when thus giving

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new assignments of work to existing agencies of law enforcement to make corresponding provision at the same time for additional equipment, personnel, and operating expenses wherewith to carry out the assignment.

In a sense, therefore, what we have traditionally sought of criminal justice has been not so much actual as symbolic performance. We have long made provision for police agencies to apprehend offenders, but only on a scale to insure the apprehension of a random sample. We have for an even longer time provided a judicial machinery for their trial in accord with our best traditions, but again on a scale so limited that the great majority of those apprehended are relegated not to what the public and even law students are customarily taught to think of as the courts, but to perfunctory police tribunals rather meagrely endowed and technically termed "inferior." We have set up reformatories and correctional homes for the supposedly less hardened offenders; but we have not thought of equipping them for their much more difficult educational task on anything like the scale of the public schools which deal with relatively well-adjusted young people. Some extremely ambitious and social-minded policies with respect to the handling of child offenders have graced our statute books for many years. State courts have vied with one another to sustain these Juvenile Court Acts in terms of the broadest and most advanced penological objectives of individualization and rehabilitation.[7] But when the smoke cleared away it developed in many jurisdictions that the extremely ambitious and exacting function of administering the Acts had devolved as an incidental and almost *ex officio* duty upon part-time judges of preexisting "inferior" tribunals who had neither the time, training, nor equipment to qualify for the novel and highly specialized work which the Acts and supporting constitutional decisions purported to contemplate. Much the same theme has predominated in the realms of probation and parole.

Comparably inconsistent attitudes on the part of an individual, if at all persistent, would of course be labelled psychopathic. This suggests the disturbing aspect of the situation. For we find an ever widening discrepancy in this field of government between what our society insists on expecting and the burdens which it is willing to assume to realize those expectations. That it is an unhealthy discrepancy is amply evidenced by the atmosphere of mutual recrimination and distrust which envelopes the processes of criminal law administration, and by the increasing tendency of our communities in recent years to seek diagnoses of themselves in the form of crime surveys. The patient has come to

7. *In re* Daedler, 194 Cal. 320, 228 Pac. 467 (1924); Cinque v. Boyd, 99 Conn. 70, 121 Atl. 678 (1923); *Ex parte* Januszewski, 196 Fed. 123 (C. C. S. D. Ohio 1911); Commonwealth v. Fisher, 213 Pa. 48, 62 Atl. 198 (1905).

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regard himself as a problem case. But if the situation has its dangerous aspect there may also be implicit in it an opportunity. Maladjustment generates tension; and such tension affords what is probably the only known impetus for social growth. The condition is that impetus must be given direction. Dissatisfaction must be focussed upon what is basically at fault rather than upon the scapegoats of defense mechanisms.

How, then, is the impetus being directed? We have already observed that psychiatry appears to be popularly accepted both as the symbol of the desired new order and as the instrument for its attainment. We have noted numerous provisions for the appointment of psychiatrists as adjuncts to juvenile and criminal courts, and to penal institutions; and for routine examination by them of various classes of offenders before final disposition. Much criticism has been concentrated on the substantive criminal law and, what is probably the same thing, the much bedevilled "legal mind." The M'Naghten formulae[8] for instructing a jury on the issue of criminal responsibility and the formulae employed in the law of Mens Rea have likewise come in for a particular barrage, being again and again compared with the concepts of current schools of psychology to the supposed great disadvantage of the legal formulae. There has been much deploring of the "metaphysical jargon of the criminal law." It has been repeatedly urged that the function of fixing sentences be transferred from legally trained judges to "treatment boards" imbued with psychiatric and sociological points of view; and that indeterminate sentences take the place of existing statutory minima and maxima in order that individualized dispositions may be more feasible. Are these the appropriate points of focus?

III.

No one state has as yet conducted a thoroughgoing experiment along the lines suggested to demonstrate what may be expected from routine psychiatric diagnosis, treatment board sentences and institutional therapy within the framework of existing channels of disposition. In the meantime, however, much that is suggestive can and has been learned from the scattered experiences of psychiatrists and clinics functioning here and there in connection with criminal law administration. In a few universities experimental studies have been carried on by collaboration between lawyers and psychiatrists, employing as clinical material persons charged with a crime and awaiting trial, or persons already convicted but with respect to whose disposition difficult questions may have arisen. Such experimental clinics, when regularly conducted with a view to arriving at conclusions and recommendations concerning the disposition of the offender to be made by the court, naturally afford samples of the

8. M'Naghten's case, 10 Cl. & F. 200 (Eng. 1843).

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experiences and problems which a "treatment board" might be expected to encounter. The following observations are very largely based on the samples gleaned from one such experimental clinic conducted at Yale University over the past six years.[9]

At the very outset it must be recognized that offenders can be disposed of only through existing public institutions and other available social and charitable agencies, and that the number and variety of these channels open to prosecutor and court in any given jurisdiction are extremely limited. This is not to say that there is not a considerable amount of leeway within the institutional limitations. A broader understanding on the part of the prosecutor will in some instances lead him to discontinue a prosecution which he might otherwise have pursued, on condition that the offender, assuming that he is not without means, voluntarily seeks some indicated course of treatment at an appropriate private sanitarium. Similarly the sentencing authority may be led to suspend sentence on appropriate conditions in cases where, with a less comprehensive grasp of the situation, a short jail or prison commitment would have been imposed with perhaps quite undesirable results. In other situations where comparative leniency is at present the rule, a better understanding of the offender's maladjustment and potentialities might lead to incarceration for a period approaching the statutory maximum, as revealed by the subsequent records of some of those released on suspended sentences or paroled as soon as eligible suggest. But the possibilities along these lines are easily over-estimated. Many offenders most in need of psychotherapy are without means, and few if any state or charitable institutions are equipped to afford anything approaching such treatment as a matter of penal routine. All too frequently the comprehensive and searching picture of an offender revealed by psychiatric case history and diagnosis will serve chiefly to bring out in bold relief the essentially primitive character of all the alternatives open for his disposition within existing institutional frames.

To put it otherwise, the most cramping restrictions are not those encountered in the "substantive" law, which is to say in the statutes and decisions defining offenses and prescribing maximum and minimum penalties. The history of the juvenile courts thus far is a leading instance in point. In those Acts removing youthful offenders from the jurisdiction of the criminal courts and decreeing for them a special regime, substantive definition of offenses was reduced to a minimum. The principles of individualization and rehabilitation received full sanction. The whole approach of the traditional criminal law was repudiated, and discretionary

9. This clinic is conducted as a seminar, in collaboration with Dr. Eugen Kahn, Professor of Psychiatry and Mental Hygiene in Yale University. It is of course to be understood that the views here expressed are but a by-product of that venture and the sole responsibility of the writer.

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powers over the lives of the children such as had never before been conferred on any tribunal were vested in the juvenile courts. But in most jurisdictions no new courts were created as a matter of fact. No new and specially qualified judges were appointed. The administration of these revolutionary Acts was simply assigned as a more or less *ex officio* duty to existing petty criminal or probate courts. Appropriations for the investigative work and probationary supervision assumed in the Acts have more often than not been nominal. Rarely have public works purchase and building programs for child welfare accompanied enactment of the declaration of substantive policy. What has been the result? Where charitable welfare services of great variety and healthy endowment have been lacking, juvenile court judges have found the problem of working out common sense dispositions for the children brought before them scarcely minimized by the broad provisions of the Acts.

The dissatisfaction of psychiatrists and social workers brought into contact with the criminal law is therefore a by-product of an issue which cannot be adequately represented as a mere discrepancy between eighteenth century legal-psychological dogma and modern conceptions of psychology and psychiatry. Those who appear to have assumed that it could be, have proceeded upon a curiously superficial understanding of the meaning and function of the legal formulae of responsibility and of intent, motive, deliberation, premeditation, wilfulness, heat of passion, adequate provocation, and the like, inherited though they are from the Common Law of a more primitive day. For the law is not, and never was, designed as a treatise on psychology or any one of the social sciences. Its formulae, while couched in terms of outmoded psychological concepts, reflect an underlying social policy with respect to the disposition of offenders and the degree of collective responsibility toward the underprivileged and maladjusted which American communities are accustomed to assume, and which appears to be by no means as outmoded as the concepts in which it is expressed.

One must, therefore, venture beyond the realm of medical science and of psychology and seek sanctions or justifications which they cannot supply, in an effort to determine not merely what can be done with a given offender as a practical matter of the moment but even what should be done with him under more satisfactory hypothetical conditions. The psychiatrist may be able to describe a given offender. He may shed considerable light on the factors which conditioned his development and present state. It is within his province to indicate to what extent the offender may prove amenable to treatment, and to what kind of treatment. For the offender is a human being — and therefore like and in the same sense as other human beings, a problem for the psychiatrist. But there existing science stops. What varieties of personality the community shall take the trouble to maintain even though they have demon-

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strated their inability to get along with the group, what individuals it shall undertake to rehabilitate at public expense, what forms of treatment shall be made available, what types of special environment shall be created for the purpose, and how any given program shall be set up, are primarily questions of social values and of politics very much akin to such major issues of recent years as those raised by unemployment and the care of the aged.

Viewed in this light, what are the political and social implications of the demand that offenders be rehabilitated where possible, and in any case prevented from repeating? Satisfaction of this demand is of course dependent upon the possibility of making indeterminate commitments. These are sought to be justified on the assumption that "treatment" as opposed to "punishment" would be the order of the day; and that, in accord with the creed of the juvenile court, the compulsory process would therefore be as much in the offender's own interest as in that of the state. If it be considered further that it would be necessary to ignore the gravity or lack of gravity of the offense which happened to bring an offender into custody, inasmuch as the earlier offenses committed by persons who subsequently turn out to be the most incorrigible and dangerous offenders are often relatively insignificant from the point of view of the injury wrought upon others, it is evident that the inauguration of indeterminate commitments would entail an extremely heavy responsibility on the part of organized society. Before one can weigh the advisability of delegating to local government agencies so pervasive a power over the private lives of the unfit, it is necessary to consider what is meant by "treatment" as applied to the problems of behavior and personality.

The offenders with whom the criminal law has to deal are almost by definition far less adjusted to the dominant cultures and competitive strains of our society, and far more difficult to educate, than are the great majority of students served by such public educational institutions as we have been able to develop. Substantial percentages of these offenders are mentally disordered if not defective. To complicate matters further, moreover, the data indicate that there are more borderline cases of psychopathic and mentally defective personality than of psychosis or "insanity" in this group; and unfortunately psychopaths and defectives appear, generally speaking, to be on the one hand the least susceptible to treatment and, on the other, the most difficult to label as prospective recidivists or not with any great assurance. But such are the people who, taking the new penal demands at their face value, would have to be "treated."

What, then, are the probabilities of rehabilitation through education and psychiatric therapy, and what institutional equipment does it presuppose? Perhaps the simplest and most familiar form consists in the

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sort of educational regime associated with grade school and manual training classes, but specially adapted to the needs of retarded pupils. In the case of juvenile delinquents, for example, the misconduct which brought many to the state institution is closely allied with schoolroom and truancy difficulties. Special classes at the institution will sometimes serve to get them back on the track and enable them to catch up with their age group in the public school. In the Belgian women's prison at Brussels the simplest and most practical sort of training in how to "keep house" has been found rather efficacious in the cases of a good many mentally subnormal inmates who previously had not known how. But even these simpler forms of treatment require facilities which are the exception rather than the rule in our penal institutions. Teachers capable of handling these most difficult and retarded pupils are not the easiest to find. Orphan and reformatory colonies do not afford the most pleasant of environments to attract the teacher. Few states have sought to attract them, and certainly the public has manifested little interest, sentimental or financial, in prison education.

With many offenders maladjustment is too complicated or deep-rooted to yield to any educational regime so simple as those described, even if we had them. What then? Numerous hospitals and sanataria, public and private, have existed for some time which purport to treat mental patients. These, and in particular the private institutions which take in patients who can pay their way, should afford some data to indicate the possibilities of therapy as applied to various types of patient. When such data or estimates have been so assembled as to provide a basis for discussion of penal administrative problems — something which has not yet been done — it will probably develop that "treatment" as distinguished from diagnosis is a more complicated matter than is generally appreciated. More often than not an extremely lengthy process is involved, stretching over years, and possible only in specialized environments or communities created for the purpose. Ultimate results are often quite unpredictable at the outset, and many subjects will never qualify for unconditional release. The process is not one which offers any immediate promise of being reducible to stereotyped procedures and fixed time schedules like formal education in the public schools. Clear-cut "cures" comparable to those produced within a short time by the application of the more familiar medical procedures to ordinary and better understood ailments are still beyond the reach of available psychiatric and neurological techniques.

How difficult would be the resulting situation of a treatment or parole board operating under a genuinely indeterminate sentence law is apparent. The board would almost always be obliged to recognize that the psychopath or defective whose infractions to date were of a decidedly minor character might nevertheless conceivably commit more serious

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offenses if released at any given time. But it could rarely predict this on a plane of reasonable certainty. The population includes a great many of these handicapped and potentially dangerous people, not all of whom by any means give trouble. Whether any given one of them will, or once having committed an offense, will go on to commit others of a more serious character, seems to depend largely on incalculable future patterns of environmental strain. Consider, for example, a case in New York City which attracted a great deal of attention about a year ago. The defendant was a seemingly puny and insignificant upholsterer's assistant with a petty police record of thefts, one of which had brought him a term in the Elmira Reformatory. On May 8, 1935, he plead guilty in the Court of General Sessions to stealing an automobile, and the Court had before it his record, including the report of a psychiatrist attached to the clinic mentioned in the beginning of this article. Excerpts from the report are as follows:[10]

> "He reveals no evidence of psychosis at the present time. This man is pleasant, agreeable and cooperative, and gives an adequate, coherent, relevant account of himself. Mood shows no abnormal variations. Hallucinations and delusions are not elicited. Attention is well sustained. Orientation is intact. Memory for remote and recent events is good.
>
> "No evidence of mental defect. His average intelligence comprehension is normal. Judgment is somewhat distorted at times by his personality deviations. He is able to reason fairly adequately on indifferent material in which his personality is not concerned. School knowledge is fairly well retained. Contact with current events shows a limited circle of interest. His ability to profit by experience is somewhat handicapped by his personality.
>
> "A detailed analysis reveals he is a neurotic type of personality deviate. Apparently from early age this boy has lived in a world of unreality, built up largely from his own imagination, strengthened and fortified by the circumstances under which he lived as an only child. Father died at a critical period in child's psychological development.
>
> "He goes about in some ways without regard for circumstances or surrounding conditions, having a loose contact with reality. He shows numerous narcissistic tendencies and unusual fantasy formations."

Given this picture it is not surprising that the defendant received a suspended sentence and probation, and for a time nothing occurred to alter that picture. During the ensuing year he might have been found working at his trade in an upholsterer's shop, and engaged to be married. Then suddenly, and quite without warning, the picture changed. The proba-

10. N. Y. Times, April 22, 1936, p. 12, col. 5.

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tioner, one Fiorenza by name, committed a brutal rape on a stranger who came to his notice as a customer of the shop, and then murdered her.

It would be easy to say in retrospect that Fiorenza should never have been permitted to go at large on conviction of his earlier offense of theft. But to what institution could the court have committed Fiorenza with any assurance that its regime would transform him within a few years into a rehabilitated personality? His criminal record as of that date was, moreover, insignificant. There was no history of sex offenses. Even if he could have been transferred to a state hospital, is it not probable that he would soon thereafter have been let out "on furlough," if not simply released to make room for patients of a more obviously dangerous character? As for the alternative, any policy and practice which would have made possible the indefinite removal of Fiorenza from circulation on May 8, 1935, would presumably have meant similar treatment for thousands of others with not dissimilar records who have not yet committed atrocious crimes. The great extension of governmental power with respect to the ordinary run of offenders implied in the current new penal demands is acknowledged by Dr. Winfred Overholser, a psychiatrist prominently identified with practical public health administration in the field of mental diseases in Massachusetts:

> " . . . As a rule the psychopathic or otherwise pathological offender is subject to confinement for a shorter time, whereas perhaps he is the very one who should be confined for a wholly indefinite period! The popular notion that the psychiatrist wishes to see the offender turned loose upon society is far from the truth; many of those who are released at the expiration of sentence he would urge as candidates for prolonged segregation."[11]

IV.

The result of the foregoing considerations is that the case for the indeterminate commitment at any given time must rest on the contemporary state of three related variables. Two of these—the degree of perfection and availability of diagnostic facilities (or means for the scientific determination of parole eligibility), and the state of current resources for rehabilitation available in the jurisdiction — have been discussed. The third, partly because its bearing is so obvious and partly because any extended inquiry into its meaning had better be reserved for independent treatment, has not here been enlarged upon. It consists in the degree of scruple and enlightenment exhibited by the current selection of activities which may be experienced as criminal. For the repressive sanctions of criminal law are and will continue to be applied not only to those who

11. *The Place of Psychiatry In the Criminal Law* (1936) 16 B. U. L. Rev. 322, 326.

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should by anyone's standards be considered dangerously unfit for society, but also to those whom organized majorities may choose at any time to treat as so unfit.

Narrowing the discussion to the problem of rehabilitation, we have considered the social costs involved. These costs have here been stressed, but not for the purpose of reflecting adversely on any effective policy of rehabilitation. So to infer would be to miss the whole point. For we have also observed a certain prevailing and inherited lack of enthusiasm on the part of our communities for any substantial incurring or payment of these costs. This does not mean that these selfsame communities are reconciled to the end products of existing non-rehabilitory regimes. To conclude thus would be to deny the evidence of one's senses. The status of this particular penal objective as it emerges from the discussion seems rather to resemble that of the ideal of peace, of which it has been said that all men desire it, but very few desire those things which make for it.

The resemblance of this conflict in our culture, considering the group emotional disturbances and behavior problems to which it gives rise, to what in an individual would be regarded as a psychopathic condition if not a progressive maladjustment, has already been noted. It seems not improbable that the future of criminal justice in our culture may be dependent on the extent and timing of recognition of this very maladjustment for what it is. This suggests the issue now confronting psychiatric participation. To focus dissatisfaction on the substantive law — be it the formulae of responsibility and of criminal intent or the relatively fixed penalty frames — or, for that matter, on procedure, while encouraging the new popular penal standards, is to persist in the very confusion which makes this maladjustment possible. The psychiatrist, representing as he does in the popular mind a symbol of the more exacting new penal expectations, and of current dissatisfaction, must take care lest he find himself unwittingly sponsoring a psychopathic culture pattern.

Nor is this hazard for the psychiatrist speculative and remote. Like all the rest of us he lives within and is subject to the pressures of a culture group. The history of medicine is replete with instances to demonstrate that it has been no easier for medical men in the past than for others to run counter to what dominant elements in the particular culture wanted to believe. Contemporary social and political adjustments on the part of the profession reinforce the trite observation that history has a way of repeating itself. One such adjustment — the role played by representative psychiatrists to date in the trial of accused persons who defend on the ground of irresponsibility — being still a live issue, affords a warning peculiarly pertinent to the present discussion. Let us consider the situation which arises when an accused interposes this defense.

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In most of our jurisdictions the issue as legally framed stems from the doctrines laid down in *M'Naghten's* case, mentioned *supra.*[12] This means that the psychiatrist is asked to answer questions phrased in terms of "sanity" and "insanity", quite irrespective of the fact that these terms no longer correspond to valid medical or psychological concepts. And what is meant in the law by "insanity"? He is told that the question is whether the party accused, at the time of commission of the alleged offense, was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, whether he knew that it was wrong. The psychiatrist is thus confronted with what appear to him to be "criteria of responsibility which, as we have seen, are based upon antiquated psychological concepts and which are essentially metaphysical rather than psychiatric."[13] One can but conclude that, legal precedents notwithstanding, these are questions which cannot be answered by a psychiatrist, as a psychiatrist, and without shifting his role from that of a duly qualified expert to some other for which he has not been qualified as a witness. Such, indeed, appears to be the verdict of many of the medical profession.

How, then, have psychiatrists adjusted themselves to this seemingly impossible situation? One possibility would be to stand pat when brought into court, and simply refuse to commit oneself on such non-medical issues. This might have the advantageous effect of forcing the jurisprudential issue. Another possibility is to take the view that the responsibility for this anomalous situation must rest on "the law". The psychiatrist would then consider what appear to be the penal policies of the society wherein he is functioning, as expressed in that law and elsewhere. He could then conform his answer to those supposed policies. This course promises less friction, but involves the disadvantage of lending an irrelevant sanction to the policies in question. As observed by Dr. Overholser: "So long as medical men are compelled to answer questions on such non-medical topics as 'malice', 'right and wrong', and 'criminal intent', so long will the expert be placed in a false light, and full justice at times fail to be done the accused."[14]

As this quotation implies, in its assumption that medical men are "compelled to answer," the latter of the alternative possible adjustments has thus far commended itself to the profession as the lesser of two evils, apparently pretty much as a matter of course. One might, indeed, query the compulsion. There is no law which requires an expert to render an opinion on a matter which he may consider outside the scope of his

12. *Supra* note 8.
13. Overholser, *op. cit. supra* note 10, at 329.
14. *Ibid.*

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expertness, and as to which he has in consequence no special knowledge. It is difficult to imagine a psychiatrist who chose not to answer questions such as these being punished for contempt. But in all probability Dr. Overholser did not have compulsion of this order in mind. There is unquestionably a more diffuse social compulsion to answer, and the point of the matter is that that pressure has shaped the psychiatrist's role.

But in thus emphasizing the ambiguity of psychiatric participation, with its consequent hazard, there should be no question of minimizing the fact that criminal jurisprudence has been *particeps criminis*. Much the same conformity to the same cultural maladjustment has characterized its record. Much the same issue now confronts it. Consider how the popular insistence on professed standards of a high order, coupled with a prevailing unwillingness to pay for more than symbolic performance or to be otherwise bothered by the matter, has shaped the whole conception of this jurisprudence. The mechanism of conformity consists in the preservation of insulating distinctions between substantive law, procedure, and laws governing the set-up, personnel and resources of the agencies which are supposed to administer that substantive law. The first of these classes of law has always been emphasized in the law schools. To it, and usually to it alone, attention is directed when any question as to the penal policy of a state is raised. The second class of law — procedure — has received somewhat less scholarly emphasis. The third has received little or none, being set apart as of interest chiefly to politicians, administrators, and taxpayers associations concerned with the reduction of budgets.

These anti-synthetical segregations of the legal subject matter obviously lend themselves to a glossing over of the maladjustment under discussion. For a legislature can say what they like in terms of substantive law. If there be a glaring disproportion between the policy or enforcement assignment announced in the substantive enactment and the pertinent wherewithal provisions above grouped under Class III — which is more often than not the case — the professed policy or assignment simply becomes to that extent a dead, but unacknowledgedly dead, letter. Formal redefinition of the professed policy or regulatory assignment in terms of the limiting conditions imposed by enactments of Class III has not been the rule in jurisprudential formulation any more than it has been in popular attitude. This tacit compromise by jurists, like the compromise by psychiatrists in the trial of insanity issues, of course serves to avoid considerable friction. But it runs counter to the spirit if not the letter of the legal canon of construction with reference to statutes *in pari materia*. It has had the disadvantageous effect of misrepresenting the law and misleading psychiatrists and the public as to the issues involved, just as lawyers and the public have been

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mislead as to the precise bearing of psychiatry on the issue of criminal irresponsibility.

On the assumption that maladjustments of this sort in a culture may well warrant a prognosis not dissimilar from that which would be suggested by a comparable maladjustment in an individual personality — namely, progressive deterioration failing some resolution of the conflicts in question — the resulting issue must be whether or not an appreciation of the conditions precedent is likely to become coupled in our culture with the desire for the ultimate result. The healthy penal adjustment — unless, indeed, our culture can still afford the privileges of infancy — would thus consist in professing policies looking toward the rehabilitation of offenders, and employing such professed policies as a premise, only to the extent to which we may be willing at the same time to assume collective responsibility for the welfare of that whole segment of human subnormality, wreckage and underprivilege, which we experience as crime or delinquency. Let us make no mistake about this. Given such cultures as we know, the welfare in question would have to include material as well as spiritual elements. Any very extensive program of rehabilitation would require an assumption of responsibility of a degree to which our communities are unaccustomed. For the strains and conditions which account for the deviational personalities and behavior in question run the whole gamut of human inequality and need. The criminal or delinquent, viewed as a subject for treatment, does not differ as greatly in his processing needs from representatives of the other categories of social maladjustment and inequality as we have liked to believe.[15] Nor

15. A somewhat different point of view is suggested by the Gluecks. See PREVENTING CRIME (1936) 1–5. This symposium depicts a variety of agencies and programs concerned with underprivileged and delinquent children in metropolitan areas. One third of those with whom the Lower West Side program in New York City was concerned lived in homes where the breadwinner was unemployed. Probably the same would have been true of those involved in the other studies. The children themselves would before very long have to face the problem of finding employment, and about that time they would pass out of the age group with which the agencies and programs described can concern themselves. Presumably these children, being by definition the least fit, would have more trouble than most in finding and holding jobs. It is scarcely to be supposed that such precarious adjustments as these agencies may be able to foster will weather unemployment for very long. But there is no discussion of the problem of unemployment in general nor even of specific relief and work relief programs of the present and recent past. The families with which the same Lower West Side program was concerned averaged almost four children each, but the symposium contains no discussion of the problem of birth control. Most of these same families lived in the poorest grade of "old-law" tenement buildings, but the symposium is lacking in any consideration of slum clearance, low-cost housing, and resettlement programs. The editors concede that those administering the programs included "apparently recognize that the broadest and deepest attacks upon crime are beyond their control. They are therefore content to cultivate their own corners of the vineyard; to do as much good as lies within manageable territory." *Id.*, at 5.

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would it be easy to justify a rehabilitory policy toward criminals more generous than whatever may be the prevailing policy with respect to the other classes of unfortunates at any given time. As Walton H. Hamilton observes in his *In Re the Small Debtor*: "It is surprising that so much less has been said about the financial re-education of the bankrupt than the personal reform of the criminal."[16] Failing the adjustment outlined, the professing of policies of rehabilitation coupled with a pressure for increasingly indeterminate sentences (like the far-removed maxima and minima of many existing penalties for which the creation of parole boards has served as an excuse, and like the commitments authorized by the Juvenile Court laws) can mean nothing more nor less than a scrapping of those rather precious, if imperfect, guarantees of individual liberty which represent a substantial percentage of the profit of centuries, and which are summed up in the maxim *"Nulla Poena Sine Lege."*[17]

Why, then, is the symposium broadly entitled *Preventing Crime?* On what principle have national programs addressed to the very conditions typically found associated with delinquency, though much wider in their objectives, been excluded? The editors have anticipated this question and by way of answer proffer an analogy between fire control and crime prevention. Poverty, broken homes, ill health and other forms of underprivilege are termed "criminogenic combustibles." It is then pointed out that so far as fire prevention is concerned most of the places where combustibles are stored will never burn, and that in many instances an intervening influence between the inflammables and the conflagration is necessary. The implication for crime-preventive efforts then suggested is that the removal of criminogenic combustibles, while it would undoubtedly decrease the possibility of "criminalistic conflagration", depends after all upon "community and societal planning in the social and economic realms"; and that "there is another aspect to the matter—that which is concerned with the translation of criminogenic inflammables into the fire of delinquency and crime, or the transformation of conditions into causes . . . " The conclusion advanced is that crime preventive programs "ought to stress means of avoiding fires (delinquency and crime) in a highly combustible (criminogenic) world", and that here mental hygiene and psychotherapy must play the chief roles.

But the most striking feature of the various programs presented in this symposium as representative of crime preventive efforts is that they do seem to be instances of "community and social planning in the social and economic realms". They are, to be sure, of an extremely modest, uncontroversial and fragmentary character. But so are their results by the most sympathetic evaluation of their own sponsors. It is of course possible that we shall yet learn through the medium of mental hygiene and psychotherapy to prevent more completely disturbances of the peace by the victims of social and economic inequality without substantially ameliorating their social and economic lot. But the programs included in the symposium, while extremely interesting in other connections, seem neither to afford illustrations of the course suggested nor to greatly advance the question as to how it shall be pursued.

16. (1933) 42 YALE L. J. 473, 485.

17. For an intensive study of the several meanings of this maxim, and of their history, see J. Hall, *Nulla Poena Sine Lege* (1937) 47 YALE L. J. 165.

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