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### Science, Common Sense, and Criminal Law Reform

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## SCIENCE, COMMON SENSE, AND CRIMINAL LAW REFORM\*

Jerome Hall\*\*

*Professor Hall advocates a reappraisal of the current trend in criminal law of substituting expert psychiatric testimony for common-sense determinations of insanity based on the long experience of the criminal-law tradition. Holding that the average layman is as competent to recognize extreme mental illness as the psychiatric expert, the author discusses the doctrine of the "irresistible impulse" and submits that the current departures from the M'Naghten rule tend to "substitute the ideology of a particular group of psychiatrists for the principle of moral responsibility." Professor Hall suggests that realistic reform cannot be achieved without considering the "moral life and its connection with the criminal law."*

Lawyers, like historians and philosophers, construct a more or less organized view of the world about them; the nature of our profession and the temper of the times incline us toward doing this in terms of basic conflicts. Viewing the contemporary scene from the perspective of a common lawyer, I see a fateful conflict between a powerful movement of thought and the common sense of law, especially the criminal law, for it is there that the human drama is centered.

The current intellectual movement is arrayed in the prestigious mantle of science. But a lawyer may be allowed some misgivings about the reduction of ideas and values to facts. Is it an advance in understanding to interpret philosophy and the lives of great men in terms of the Oedipus Complex, or does that merely confuse meanings with facts and problematic origins? Similar doubts arise concerning a prominent school of ethics which hardly touches what most people regard as ethical principles, and also about a behavioral social science which takes physics as its model.

Science is a system of high-level generalizations of the co-variation of factual variables, and its method is primarily that of external observation. The progress of the physical sciences is ample evidence of the potency of scientific method in the realm of inanimate matter. But in

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the human sphere, no remotely comparable knowledge has been acquired despite the attraction of the theories of Hume and Comte; even if it were available, its relevance to problem-solving in a democracy would be far from evident.

Nevertheless, the trend seems increasingly toward reliance on experts in affairs which have long been regarded as the domain of common sense.<sup>1</sup> It was not a lawyer but a psychiatrist who warned: "Modern psychology can become a tremendous danger for man!"<sup>2</sup> The tangled issue in which we are involved, stated baldly in its ultimate implication, is whether one will be able to continue to trust the elementary processes of his mind and his daily experience or whether he will be reduced to dependence upon experts to tell him what he "really" sees, feels, and thinks, why he acts as he does, and what his personal experience means.

If one appraises the potential counterweights among institutions and disciplines, especially ethics and philosophy, it seems no merely professional predilection to conclude that how this issue will be resolved depends largely on whether the criminal law can survive the current criticism of its moral foundation. For the criminal law is not a mere happenstance or a technology remote from the main stream of human history. It is an institution which represents more than 700 years of thoughtful experience in dealing with the primary problems of society. It was not imposed by a hereditary elite, but is instead the product of the commerce of many keen minds with popular ideas. Not only were custom and public opinion the original sources of the common law, but laymen also participated in the processes of criminal law as members of legislatures, grand and petit juries, and the police force. Lawyers, judges, and the writers of treatises mediated between science and the flow of daily life. Unlike the physical sciences and technologies, the law of crimes therefore represents the layman's thought and values clarified by the sensitivity of bench and bar to the progress of knowledge.

This law expresses the meaning of freedom and responsibility in careful distinctions among such concepts as intention, recklessness, act, negligence, mistake, and coercion. It clarifies the values of personality, property, and association in its classification of types and degrees of harm-doing; and in its systematic side it represents a high achievement of disciplined imagination. So long as that legal institution

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<sup>1</sup> "Scientific dogmatism is more alive, chiefly in 'intellectual' circles; one can only hope that it is the innate good sense of the public which prevents its gaining social influence, and that this will continue to operate." Knight, *Intelligence and Social Policy*, 67 *ETHICS* 155, 164 (1957).

<sup>2</sup> BERGLER & MEERLOO, *JUSTICE AND INJUSTICE* 169 (1963).

survives in its essential rational and ethical character, even the least of men is given some assurance of human worth. By like token, if people come to believe that the foundation of the criminal law is unsound, a new strange era in our history will have arrived.

Common sense has always had its defenders among scholars who thought philosophy should be brought down from the clouds and applied to everyday problems, and in this century it found a particularly resourceful advocate in G. E. Moore.<sup>3</sup> Moore called attention to certain philosophical statements: there are no material things, time is unreal, nothing exists unperceived, and so on; and he proceeded to refute them by giving examples of the persuasive use of everyday language which flatly contradicted them. To the thesis that there are no material things, he replied, "here's one hand, and here's another, two material things; therefore, that thesis is certainly fallacious." Concerning the statement that time is unreal, he said, "after lunch I went for a walk, and after that I read a book; obviously, events follow or precede one another in time." And regarding the statement that nothing exists unperceived, he said, "How absurd! No one saw my bedroom while I was asleep in it; yet it certainly did not cease to exist." In order to appreciate the force of Moore's position, one might expand his illustrations and assume that 5,000,000 persons were looking on under every imaginable condition, that they all agreed that Moore had two hands, was holding a pen, that these were material things, and so on.

What must be directly added, however, is that the philosophers who made the statements criticized by Moore would agree that for ordinary purposes, it is correct to say that hands are material, that one is absolutely certain he is holding a pen in his hand, and so on. But, they would insist, this does not alter the fact that from a logical viewpoint factual propositions are only probably true while the implications of compendent propositions are certainly or absolutely true. Nor did Moore refute the idealist epistemology that sense-data, not "ultimate realities," are perceived. Some writers have therefore said that although Moore was correct if philosophy is appraised in terms of ordinary speech, the issue only concerned the use of words.

But much more than the correct use of words in everyday speech is involved. If common sense must be distinguished from pure science and philosophy by virtue of its practical intention, it is also true that these types of knowledge are closely connected. Lawyers and judges have always studied science and ethics with a view to improving the law; and on the other hand, scientists and philosophers began with common sense knowledge, proceeding thence to suit their theoretical

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<sup>3</sup> Moore, *A Defence of Common Sense*, in *CONTEMPORARY BRITISH PHILOSOPHY* 193 (Muirhead ed. 1925); see *THE PHILOSOPHY OF G. E. MOORE* (Schilpp ed. 1942).

requirements. What is particularly significant is that common sense is not simply dependent on or subordinate to philosophy and science. If one were told, for example, that science has discovered that red is really green, he would still decide that he had better stop when what he saw was a red traffic light, especially if the traffic policeman did not seem a likely candidate to win over to the higher truths of physics! There is an everyday world in which desks and sidewalks are solid material things; and the fact that physicists say they are unstable, moving clusters of atoms does not detract from the significance or the validity of the common sense perception of these matters in the everyday world. Indeed, in the perspective of daily life, the common sense view is the correct one, and theories of the structure of matter are irrelevant.

We must go farther than that when we compare expert knowledge with common sense in the broad areas of politics, social life, and law. Until recently, the hardly challenged view was that the fact that a man is an expert in a particular field does not equip him with the knowledge required to draft a code of law, and that with reference to political and legal policy, the expert is apt to be singularly unhelpful, committed to a narrow outlook and lacking the balanced judgment of intelligent laymen.<sup>4</sup> This, of course, is one of the grounds upon which the superiority of democratic government is based, quite apart from its ethical appeal. Common experience is also the foundation of social morality, including that of criminal law; and the fact that psychiatrists and behavioral social scientists translate "right" and "wrong," "good" and "evil" into factual terms may conform to a theoretical requirement, but it does not touch the validity of these concepts in daily life.

The late Judge Learned Hand said that the function of the expert witness was not to state facts but to draw general inferences from them, in effect, to state scientific laws.<sup>5</sup> But expert testimony has been extended far beyond those limits; and while I will not deal with the niceties of this problem, I wish to raise one or two questions relevant to this discussion.

In most states (Massachusetts, Maine, and New York seem to be exceptions) laymen who have observed a defendant may testify that in their opinion he was insane at a certain time. A psychiatrist who has never seen a defendant is also permitted to give his opinion regarding his sanity and to base it upon hypothetical questions.<sup>6</sup> The premise is

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<sup>4</sup> LASKI, *THE LIMITATIONS OF THE EXPERT* 9-10 (Fabian Tract No. 235, 1931).

<sup>5</sup> Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40 (1901).

<sup>6</sup> *State v. Turner*, 126 Me. 376, 138 Atl. 562 (1927); *Commonwealth v. Gordon*, 307 Mass. 155, 29 N.E.2d 719 (1940); *Commonwealth v. Wilson*, 67 Mass. 337 (1854);

that there is a science of psychiatry, or at least that it comprises a field of expert knowledge which validates this procedure.

Conditioned, as we have been, to thinking of mental illness and psychiatrists as we do of physical illness and doctors, it may seem iconoclastic to say that psychiatry is very unlike medicine and that mental illness, if not a myth, as an able psychiatrist maintains,<sup>7</sup> is so different from diseases of the body as to make even a distant analogy dangerous if not misleading.<sup>8</sup> In Europe, psychiatry is often a separate type of practice, and it is recognized here that at least the practice of psychoanalysis is very different from that of medicine.<sup>9</sup> Unlike the situation in physical science, there are many schools of psychiatry—Freudian, neo-Freudian, Jungian, Adlerite, Rankian, Reichian, existentialist and others—and they are frequently at war with each other.<sup>10</sup> Critical study of the literature on “mental disease” has shown how amorphous this notion is in comparison with “physical disease.”<sup>11</sup> If “mental disease” is taken to connote a standard, as seems widely agreed, the question becomes, which or whose standard? Minorities, artists, and heroes have deviated from the statistical pattern of normality. A psychiatrist’s advice to adapt is often dismissed as an individual preference or as implying that expediency should still the voice of conscience. Some psychiatrists have concluded that there are no pathological facts or functions to which “mental disease” refers, but only different personal problems about which psychiatrists, rather than clergymen and family doctors, are now consulted.

It is not my purpose to labor the fact that psychiatry is not a science or to deny that psychiatry has contributed a great deal to our knowledge of human nature and that it can be very helpful in the trial of issues involving mental disease and in relieving the tensions of distressed

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People v. Kohlmeyer, 284 N.Y. 366, 31 N.E.2d 490 (1940); WEIHOFFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 280-83 (1954).

<sup>7</sup> SZASZ, *THE MYTH OF MENTAL ILLNESS* (1961).

<sup>8</sup> “. . . the model of physical disease does not adequately apply to the neuroses and to antisocial reactions. Moreover, the moment one shifts from the model of physical disease, one faces the problem of value judgments.” Editorial Discussion of Redlich, *The Concept of Health in Psychiatry*, in *EXPLORATIONS IN SOCIAL PSYCHIATRY* 159, 160 (Leighton, Clausen & Wilson eds. 1957).

<sup>9</sup> “Psychoanalysis has little resemblance to most forms of medical treatment; its methods are educational and its goals prescribe a new pattern of living and a reorientation in many basic values.” *Id.* at 158. “. . . *only* in the United States has psychoanalysis been defined as a medical specialty. Although physicians seem to be the preferred candidates everywhere, a significant proportion of European psychoanalysts are medically untrained.” SZASZ, *op. cit. supra* note 7, at 95.

<sup>10</sup> SZASZ, *id.* at 93.

<sup>11</sup> JAHODA, *CURRENT CONCEPTS OF POSITIVE MENTAL HEALTH* (1958); WOOTTON, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* (1959).

persons. The present point is that whatever *expertise* psychiatrists have, it does not inhere in any special competence to recognize persons suffering from extreme mental illness.<sup>12</sup> While able psychiatrists are expert in discovering hidden facts about the personality, in tracing the course of a mental illness, and, one hopes, in the therapy of neuroses, the recognition of psychotics is not a matter of placing symptoms in a technical or scientific classification. It depends largely on a value-judgment based on knowledge and experience of everyday life.

In view of the importance of this question and the diffidence of laymen regarding what is assumed to be a matter of science or expert knowledge, I should like to quote several distinguished psychiatrists in support of these statements. Dr. Frederick C. Redlich, head of the department of psychiatry at Yale University, said: "I think we know what the seriously ill person in a given culture is. That we do know. In this respect we agree, incidentally, with policemen, with the clerk in the drug store. Our crude diagnostic criteria are reasonably similar."<sup>13</sup>

The Royal Commission on Capital Punishment stated in its Report:

Even if it were on other grounds desirable to do so, it would, in the present state of medical knowledge, be out of the question to remove the issue of criminal responsibility from the courts and entrust its determination to a panel of medical experts, as has sometimes been suggested. In our view the question of responsibility is not primarily a question of medicine, any more than it is a question of law. It is essentially a moral question, with which the law is intimately concerned and to whose solution medicine can bring valuable aid, and it is one which is most appropriately decided by a jury of ordinary men and women, not by medical or legal experts.<sup>14</sup>

Recently, Dr. Manfred S. Guttmacher, long associated with Baltimore courts, wrote:

Contrary to the belief held by many lawyers and judges, psychiatrists do not want to take over the business of making the decisions in regard to responsibility, in cases pleading insanity. The suggestion frequently made, that special blue-ribbon juries composed of psychiatrists should do this, has met with no enthusiasm among psychiatrists. It is their feeling that intelligent laymen, representing the community conscience, should decide, since the verdict is not dependent solely on the presence or absence of significant psychiatric deviations, but on even more subtle and complex factors, essentially sociological in nature.<sup>15</sup>

<sup>12</sup> "It is unlikely that toxicologists would be tolerated in courts of law if one would assert that he found a large quantity of arsenic in the body fluids of a deceased person, and another would state that he found, by the allegedly same operations, none. Yet this sorry spectacle is commonplace in regard to psychiatric findings." Szasz, *Psychiatric Expert Testimony—Its Covert Meaning and Social Function*, 20 *PSYCHIATRY* 313, 314 (1957).

<sup>13</sup> Redlich, *Definition of a Case for Purposes of Research in Social Psychiatry*, in *INTERRELATIONS BETWEEN THE SOCIAL ENVIRONMENT AND PSYCHIATRIC DISORDERS* 120 (Milbank Memorial Fund 1953).

<sup>14</sup> ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953 REPORT No. 283, at 100 (1953).

<sup>15</sup> Guttmacher, *What Can the Psychiatrist Contribute to the Issue of Criminal Responsibility?*, 136 *J. OF NERVOUS & MENTAL DISEASE* 103, 105 (1963). Cf. the

And Dr. Frederic Wertham, one of our leading forensic psychiatrists, said: "I think it would be a calamity if the disposition of criminal cases would be taken out of the hands of judges and given into the hands of psychiatric and other experts."<sup>16</sup> Other able psychiatrists have expressed similar opinions.<sup>17</sup>

These are not opinions regarding constitutional or other legal requirements of trial by jury. They reflect a factual agreement among psychiatrists who, it should be noted, represent various, sometimes sharply opposed, positions on other issues, for example, regarding the M'Naghten rule. The significance of this must also be especially distinguished from the usual one where a jury is needed to make decisions regarding conflicting but admittedly expert testimony.<sup>18</sup> The above statements are based on the simple ground that laymen are at least as competent as psychiatrists in recognizing persons suffering from extreme mental illness. The impression given by current rules of evidence, that a psychiatrist's opinion on the issue of insanity is a matter of expert knowledge, is therefore an unwarranted influence on the jury's decision. That more than that is involved is evident in the importance some appellate courts have attached to psychiatric testimony.<sup>19</sup>

There are other areas where psychiatry is wrongly applied. For example, underlying much of the receptivity toward current criticism of criminal law is the belief that repressed traumatic experiences dominate human conduct to the point of invalidating common distinctions among conscious action, inadvertent movements, and accidents. The "Unconscious" was employed by Freud as a special theory to account for lapses of memory and mistakes;<sup>20</sup> unfortunately, it has been given

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contrary opinion of Dr. Dale C. Cameron, Superintendent of St. Elizabeth's Hospital, reported in the *Washington Post*, October 16, 1963. Dr. Cameron, testifying before a Senate Committee, urged that the jury be restricted to finding whether the defendant committed the act charged against him and that a panel of psychiatrists be authorized to decide the question of responsibility and what should be done with convicted defendants.

<sup>16</sup> Wertham, *A Psychiatrist Looks at Psychiatry and the Law*, 3 *BUFFALO L. REV.* 41, 48 (1953).

<sup>17</sup> "Perhaps the law is wise in leaving this to a jury of twelve laymen . . ." Cleckley, *Psychiatry: Science, Art, and Scientism*, in *PSYCHIATRY AND RESPONSIBILITY* 98 (Schoeck & Wiggins eds. 1962). See *supra* note 12 and *infra* note 32.

<sup>18</sup> "The expert has something different to contribute. This is a power to draw inferences from the facts which a jury would not be competent to draw." McCormick, *EVIDENCE* 28 (1954); cf. "I think it follows from the foregoing that psychiatrists may not testify as to their conclusions as to the ultimate questions of insanity and causality which must be decided by the jury." *McDonald v. United States*, 312 F.2d 847, 861 (D.C. Cir. 1962) (Miller, J., dissenting).

<sup>19</sup> See the cases discussed by Miller, J., in *McDonald v. United States*, *supra* note 18, at 859-61, and Reid, *Disposition of the Criminally Insane*, 16 *RUTGERS L. REV.* 75, 78 n.17 (1961).

<sup>20</sup> *MACINTYRE, THE UNCONSCIOUS* (1958).



a much wider application. But when a normal adult says, for example, that he killed a man for money or because of jealousy and the situation makes that persuasive to intelligent laymen, the fact that a psychiatrist says, "no, he killed him because of the repressed traumatic experience of his mother's rejection of him" is no ground for abandoning common sense and supinely accepting what the psychiatrist says is the "real truth" of the matter. If the Unconscious is opposed to common experience, that can be refuted in the way Moore criticized the philosophers. One can say, for example, "I decided yesterday to write a letter to X, and today I wrote that letter." One can say, "Y, who had been working for twenty hours, was driving his car and, just as he began to nod, he ran into a pedestrian." One can say, "Z, driving at an ordinary speed, ran over an icy spot and at the same time, a man slipped on the sidewalk and fell into the path of Z's car." Emulating Moore, one may add, "it is absurd to say there is no important difference between these cases. People distinguish them every day, and in law very different consequences are attached to them. Besides, I had a reason to write X, and the assertion that this is a mere rationalization and that, in fact, I was made to do it by unconscious forces is not only unsupported, it also confuses physically caused movements with action for reasons," and so on.

In sum, if the question is asked—How can a layman, however intelligent, presume to set his opinion against that of an expert?—the answer is not in the indiscriminate terms that the so-called expert is not really an expert because his discipline is not a science, for there is the realm of informed insight. It is that the layman is not challenging the expert in areas where the latter may properly claim expert knowledge. Where the issue depends mostly on ordinary experience and the common morality expressed in the criminal law, it is a very different matter.

The thesis outlined above is applicable to much of current thought. But because of the particular importance of psychiatry in the current struggle for power to control the lives of men without limitation by the rule of law, this is the discipline which has been selected for special attention in the time available. Psychiatry covers a vast field, touching almost every department of thought, and its literature includes not only very informed insights, but also sheer nonsense. Accordingly, as I have already indicated, no sweeping appraisal of that discipline is intended.

The crucial point of contact in the encounter between psychiatry and the common sense of criminal law is the "irresistible impulse" hypothesis. This is sometimes phrased in terms of "inability to conform," as in the Model Code of the American Law Institute; but there is no significant difference between either formula and the Durham rule except

that the latter also places on the prosecution an impossible burden of proof of negative "causation."<sup>21</sup> The net result of each of them is to substitute the ideology of a particular group of psychiatrists for the principle of moral responsibility. The "irresistible impulse" thesis had its origin in the psychology of separate mental faculties, implying that one of them, say, volition, can be seriously disordered while intelligence remains quite normal. Of course, psychiatrists who advocate the abandonment of the M'Naghten rule do not accept this outmoded psychology, but they do not criticize this phase of it because that can be suited to their program to eliminate criminal responsibility as well as to their theory that intelligence and morality are negligible factors in human action.

In current advocacy of the "irresistible impulse" test, a great deal is made of some remarks by Cardozo in an address to a medical academy in 1928.<sup>22</sup> With great respect, I submit that this address plainly indicates that Cardozo had not gone thoroughly into this question; for example, he did not cite any critical discussion of the subject.<sup>23</sup> Nor does there seem to be any decision or other work by Cardozo which indicates that he was much interested in psychiatry. It is also rather clear that in this address Cardozo was raising questions rather than urging definite reforms. For example, he said: "I do not say that either psychology or medicine or penology has yet arrived at such a stage as to make a revolution in our system of punishment advisable or possible." And he added: "One takes a large order when one offers to reshape from its foundations a scheme of penal justice." In this address, Cardozo, discussing the *Holmes* case decided in 1842 (where several men were cast overboard to save persons in a sinking boat from drowning), said that if no one volunteered to sacrifice himself so that the others might survive, or if too few volunteered, "the human freight must be left to meet the chances of the waters."<sup>24</sup> The opinion in *Holmes* referred to the priority of passengers, except the minimal crew required to man the life-boat and, also, to casting lots or some other method of fair selection of those to be sacrificed; and I believe the law almost everywhere recognizes the defense of state of necessity within the above conditions. I mention these matters only to suggest the dubious validity of some of Cardozo's remarks and that the issue of "irresistible impulse" should not be decided on the basis of authority.

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<sup>21</sup> HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 512-18 (2d ed. 1960).

<sup>22</sup> Cardozo, *What Medicine Can Do for Law*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 371 (1947).

<sup>23</sup> E.g., Waite, *Irresistible Impulse and Criminal Liability*, 23 *MICH. L. REV.* 443 (1925).

<sup>24</sup> Cardozo, *op. cit. supra* note 22, at 381, 382, 390.

Nonetheless, there seems to be a current tendency to accept the "irresistible impulse" thesis without thorough study of this complicated problem. In an address in March 1963, to the Holdsworth Club of Birmingham, Lord MacDermott said: "There is, today, little doubt that a disease of the mind may so affect the will power of the afflicted person that he can no longer resist his impulses, and it seems odd that this consequence should not, when proved, suffice to absolve the accused from criminal responsibility."<sup>25</sup> The distinguished Lord Chief Justice of Northern Ireland did not say what had induced this definite opinion, nor did he adduce any evidence of the expressed view of "will-power." More troublesome still is that the general significance of the "irresistible impulse" thesis was not considered. The reasons are not difficult to surmise, and they have no doubt influenced able lawyers and judges in this country despite the fact that the law of England, Canada, most of Australia, and a large majority of the American states has stood firm against the insistence of psychiatrists in this respect.

The issue is apparently believed to concern only a particular defense that is infrequently raised, mostly in murder cases. Then, there is the publicity given the philosophy of psychiatrists and social workers that "sickness, not sin," is the root of harm-doing; indeed, it has been said that Freud has more influence in this country than any other modern thinker.<sup>26</sup> There is, next, the moral principle that "ought implies can" which, applied here, means that although capacity to recognize the difference between right and wrong is a presupposition of moral responsibility, there must also be ability to conform to what is recognized as right. There is also the experience which many persons have had, of doing something under temptation which they knew they should not do, exemplifying the invalidity of the Socratic theory that virtue is knowledge (but not the irresistibility of the temptation!). There are also popular misconceptions of kleptomania and pyromania.<sup>27</sup> To all this must be added the fact that, just as laymen hesitate to challenge the competence of psychiatric testimony on the question of insanity, so, too, is such a challenge even more difficult to raise when reputable psychiatrists insist that there is a psychosis, popularly called "irresistible impulse."

Only a chance study of this subject twenty years ago<sup>28</sup> and continued, if sporadic, interest in it since then have made it possible for me to question the opinion of judges whom any academic lawyer must greatly respect. The plain fact is that it takes a long time and considerable

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<sup>25</sup> MACDERMOTT, *MURDER IN 1963*, 18 (1963).

<sup>26</sup> RIEFF, *FREUD: THE MIND OF THE MORALIST* xi (1959).

<sup>27</sup> Davidson, *Irresistible Impulse and Criminal Responsibility*, J. FOR. SCI., April, 1956, p. 1.

<sup>28</sup> Hall, *Mental Disease and Criminal Responsibility*, 45 COLUM. L. REV. 677 (1945).

reading to recognize the many facets of this problem.<sup>29</sup> There is, of course, no assurance that all who have read in this field, including the present speaker, have profited from their study, nor any that general agreement on it will be eventually reached. The underlying factors are extremely diverse and complex. But if it is true that very few lawyers and judges have been able to devote the required time to this difficult, far-ranging subject, it may surely be hoped that if and when they do that, the area of disagreement will be considerably narrowed and that solutions will be considered which have hardly been thought of thus far. In any case, it seems to me that the "irresistible impulse" theory is a dangerous fallacy which strikes at the heart of moral responsibility; this raises an issue which unfortunately does not lend itself to compromise or expedient solution. Accordingly, I am bound to submit, with deference, that acceptance of the "irresistible impulse" thesis in any of its formulations is a serious mistake.

In the first place, when a psychiatrist testifies in terms of "irresistible impulse," it cannot be assumed that his meaning is understood. He may be referring to certain behavior or he may be referring to a theory, an explanation of that fact. If it is a fact or a dysfunction, why is it impossible for very able psychiatrists to discover or observe it? If it is a theory, it cannot be understood unless further inquiries are made.

His statement may mean that an impulse was irresistible because in his theory all human conduct is the necessary consequence of certain causes. The defendant's act was only an instance of that pervasive determinism. The theory may be that all "criminals" are sufficiently diseased to be irresponsible.<sup>30</sup> The defendant was only a member of that class of persons. The psychiatrist's statement may mean that he assumes that repeated harm-doing proves serious mental illness and that the act in question, a repetition of previously committed harms, was irresistibly performed in that sense. The statement may mean, consistently with the M'Naghten rule, that the defendant was seriously disordered in his cognitive functions and that this affected his capacity to control his conduct. It may mean: "I dislike the criminal law, I reject criminal responsibility, and I abhor punishing anyone. By saying that the impulse in issue was 'irresistible,' I help an unfortunate person get treatment in a hospital." There is also the bias of some experts resulting from their employment, and the statement that the defendant was driven by an "irresistible impulse" may be an expression of partisan loyalty.

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<sup>29</sup> A plan and program of study of this problem are presented in Hall, *The M'Naghten Rules and Proposed Alternatives*, 49 A.B.A.J. 960 (1963).

<sup>30</sup> MENNINGER, *THE HUMAN MIND* 448, 449, 451 (3d ed. 1945); Karpman, *Criminal Psychodynamics: A Platform*, 1 ARCHIVES OF CRIMINAL PSYCHODYNAMICS 96 (1955).

There are, no doubt, other meanings of psychiatric testimony to the effect that an impulse was "irresistible," that substantial capacity to conform to law was lacking, and so on. How, then, can anyone be confident that he knows what he is accepting when he approves the "irresistible impulse" test or an equivalent formula?

In the second place, acceptance of the "irresistible impulse" test is based on the assumption that those terms refer to a very severe mental disorder. But, as was pointed out above, the recognition of persons suffering from extreme mental illness is within the at least equal competence of laymen. In daily experience, control of conduct means control by normal intelligence. Ought implies can, but if there is normal intelligence, there is capacity to refrain from the commission of serious harms. This common-sense psychology is supported by able psychiatric opinion,<sup>31</sup> and if it is challenged, if it is asserted, for example, that this particular type of psychotic person can be recognized only by psychiatrists, there should be proof of that. Medically acceptable proof is not likely to be forthcoming if, as a forthright psychiatrist recently said, "The psychiatrist merely makes it sound as if he is dealing with scientific information by using technical psychiatric jargon to describe behavioral events which could be described with ordinary language."<sup>32</sup> Other able psychiatrists say very emphatically that clinical evidence does not in the least support the "irresistible impulse" hypothesis, but only shows that there is compulsive action as regards such harmless matters as frequent handwashing and that, in sum, the "irresistible impulse" hypothesis is a throwback to pre-Freudian psychology.<sup>33</sup> There is the circularity of the reasoning from repeated crimes to a compulsive psychosis and from that to the behavior,<sup>34</sup> which means that a psychosis was merely assumed. Since behavior alone—for example, a series of robberies or homicides—is no proof of psycho-

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<sup>31</sup> "[T]he moral judgments of the schizophrenics were significantly different from those of the nonschizophrenics; . . . largely in being one of rejecting responsibility for the welfare of others. Through detachment, social relations are judged in terms of efficiency and orderliness instead of sympathy and compassion. People were viewed and judged as mere objects, hardly different from inanimate objects." Johnson, *The Moral Judgment of Schizophrenics*, 130 J. NERVOUS & MENTAL DISEASE 278, 285, 283 (1960). "If I wish to do something but will not, it is because I anticipate the result—I am aware of the consequences—I am conscious of the implications." Benda, *Emotions and Freedom of Will*, 2 J. LIBERAL MINISTRY 52 (1962). See *infra*, note 33.

<sup>32</sup> Liefer, *The Competence of the Psychiatrist to Assist in the Determination of Incompetency: A Sceptical Inquiry into the Courtroom Functions of Psychiatrists*, 14 SYRACUSE L. REV. 564, 573 (1963).

<sup>33</sup> Wertham, *The Psychiatry of Criminal Guilt*, in SOCIAL MEANING OF LEGAL CONCEPTS—CRIMINAL GUILT 153, 164-65 (N.Y.U. Law School 1950).

<sup>34</sup> WOOTTON, *op. cit. supra* note 11, at 233, 237-38.

sis, the evidence of that must be sought in criteria independent of the behavior. What is sometimes read into the "irresistible impulse" hypothesis is an archaic notion of "will power," but "the will" is a myth in current psychology.<sup>35</sup> There is the contradiction of the widely accepted psychology of the integration of the functions of the personality and its corollary that a serious disorder of one of them affects all the others. It is not surprising, therefore, that, to my knowledge, there is not a single book or article which reports the verification of the hypothesis of a psychosis expressed in a compulsion to kill or rob and so on, despite normal intelligence, in ways even remotely like those by which empirical statements and theories about physical diseases are verified. All of this points to one conclusion—there is no such psychosis.

Thirdly, it must be realized that if the "irresistible impulse" hypothesis is unsound, the harm caused by its acceptance cannot be restricted to the improper exculpation of a small number of defendants. There is another very important side of this question—what is recognized in a society as moral and legal responsibility and what this implies about the prevailing view of human nature. The pertinent question, especially among lawyers, is how do we discharge our responsibility if we treat normal criminals, or even very neurotic ones, as though they were insane? An able psychiatrist said at a recent Annual Meeting of the American Psychiatric Association that psychiatry is being used "to issue . . . criminal elements in our population . . . an insurance policy against . . . punishment."<sup>36</sup>

The moral life, like any work of art or science, is not an unorganized gush of sentiment. It, too, has form, manifested in the system of legal ideas which express the meaning of "responsibility" with reference both to harm-doing and to those who not only ought to preserve social values from the attack of harm-doers, but are also obliged to act appropriately when those values have been harmed. The rule of law now guards the innocent, but its protective wall would not survive the dissolution of criminal responsibility. We cannot have it both ways, and if we want morality and law, we must preserve the structure of ideas and the discipline that are essential in them.

But suppose one has not had an opportunity to study the literature of psychiatry sufficiently to form a critical appraisal of contradictory psychiatric theories with reference to proposed basic changes in the criminal law. In that situation, it seems to me that once it is recognized that criminal responsibility is a moral-legal problem, not a medical or psychiatric one, one's decision should conform to the principles of

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<sup>35</sup> Lewis, *Health as a Social Concept*, 4 BRITISH J. SOCIOLOGY 119 (1953).

<sup>36</sup> Dr. Sidney Bolter, quoted by Thomas, *The Dangerous Offender*, 14 SYRACUSE L. REV. 576 (1963).

criminal law. One need not be deterred by the fact that the "irresistible impulse" test has been accepted in a number of states and federal jurisdictions. I believe any lawyer who takes a careful look at the *Smith* decision, upon which the federal law on this subject is based, will agree that it rests on the flimsiest imaginable foundation.<sup>37</sup> The same is true of recent Massachusetts decisions<sup>38</sup> interpreting Chief Justice Shaw's opinion in *Rogers*<sup>39</sup> as an acceptance of the "irresistible impulse" test. And the law of most of the states which do recognize this test dates from the 1840's and the psychology of separate faculties.

Finally, we may directly face the assumption that the "irresistible impulse" test would work to the advantage of accused persons because it would exculpate many who, it is claimed, are found guilty and punished under the M'Naghten rule. Even if we pass over the unproved charge of present injustice, there are several reasons to believe that the abandonment of the M'Naghten rule would be harmful rather than beneficial to accused persons. The fact is, as Lady Barbara Wootton has observed, that once the M'Naghten rule is abandoned, there is no stopping place short of the complete abandonment of criminal responsibility. Without exploring the full implications of this,<sup>40</sup> we may note that if the cognitive criteria of insanity are abandoned (and that is implied in the prevailing American interpretation of the word "or" between the M'Naghten rule and the "irresistible impulse" formula) "mental disease," "psychosis," or "insanity" cannot be validly defined in any terms relevant to criminal responsibility. This is evident in the voluminous literature on "mental disease" which, because irrationality is ignored, has only culminated in such empty formulas as "adjustment," "lasting happiness," and the like as tests of normality.<sup>41</sup> The admission by psychiatric critics of the M'Naghten rule that they cannot formulate any test of criminal responsibility and the expedient superficial mixing of oil and water in the law of a few American states and the American Law Institute's Code (which, while giving the impression that the M'Naghten rule is retained, actually provides that inability to conform is a sufficient, alternative test) support the position that no significant test of insanity can be formulated or discovered if the function of intelligence is ignored. The pertinent question to ask, therefore,

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<sup>37</sup> *Smith v. United States*, 36 F.2d 548 (D.C. Cir. 1929), discussed in HALL, *op. cit. supra* note 21, at 503-04.

<sup>38</sup> *E.g.*, *Commonwealth v. Chester*, 337 Mass. 702, 711-12, 150 N.E.2d 914, 919 (1958).

<sup>39</sup> *Commonwealth v. Rogers*, 48 Mass. 500 (1844).

<sup>40</sup> Hall, *The Purposes of a System for the Administration of Criminal Justice* (lecture delivered at Georgetown University on October 9, 1963).

<sup>41</sup> WOOTTON, *op. cit. supra* note 11, at 211-14.

is, what will probably happen to persons who plead insanity if the M'Naghten rule is abandoned?

The only alternative to legal adjudication of the issue of insanity is determination of that question by psychiatrists, either directly or indirectly, if no legal rule or instruction limits their influence on the jury. In the midst of a dozen schools of psychiatry, clashing theories and values, and untestable opinions remote from common experience, the only foreseeable result is the unfettered authority of the particular psychiatrists who win the struggle for power. It would not be pleasant to recall facts showing that the ominous connotations of the "tyranny of experts" have been grim realities in some countries in the recent past.

But most psychiatrists in this country are extremely permissive, kindly persons. Should we not therefore set aside the barbaric use of psychology and drugs by doctors and psychologists in dictatorial states and have faith in our psychiatrists?<sup>42</sup> Faith springs eternal, but if we wish to base an opinion on knowledge and the common sense of criminal law, we must discover how much these psychiatrists do not know, and we must also attend to centuries of Western history which preferred the rule of law to the blandishments of wise and benevolent dictators. If recent American evidence of abuse is required, the treatment of General Walker in a federal court should provide food for thought for those who think that only persons who kill, rape, or rob will be involved in the expanding power of psychiatrists. There are psychiatrists who think moral responsibility is a fiction, who cavalierly announce that it may take many years to cure petty thieves, that other countless thousands are "dangerous," although they have committed no crime, and that many more cannot be cured and should be permanently segregated from contact with the community. We already have "sexual psychopath" laws<sup>43</sup> which can lead to the indefinite incarceration of persons most of whom are indistinguishable from other offenders except by their relative harmlessness, and who have not committed any crime or, in some states, only a minor offense. There is the situation in the District of Columbia and many states where acquittal on the ground of insanity opens not the door to freedom but to a mental hospital,<sup>44</sup> which has apparently led many persons believed to be suffering from a mental illness to

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<sup>42</sup> Meerloo, *The Crime of Menticide*, 107 AM. J. PSYCHIATRY 594 (1951); Meerloo, *Medication Into Submission*, 122 J. NERVOUS & MENTAL DISEASE 353 (1955).

<sup>43</sup> *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940); Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. CR. L., C. & P.S. 215 (1960).

<sup>44</sup> "Nowhere is the defendant [acquitted on the ground of mental irresponsibility] simply set at liberty." WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 365 (1954). For the various rules on this subject, see *id.* at 366-76.



refrain from raising a plea of insanity.<sup>45</sup> If a hearing were required after acquittal to decide the question of commitment, the psychiatric theory relied on in the trial would presumably again prevail.

If the above are cogent indications of what lies in the offing for persons accused of crime, not to speak of countless others who may be found "dangerous" or lacking in "adjustment" or not enjoying "lasting happiness" or falling short of other concepts of normal health which reputable psychiatrists have formulated, the assumption that substituting an "irresistible impulse" test for the M'Naghten rule would be to the advantage of defendants in criminal cases deserves critical study. It is possible that such an abandonment of law might save an occasional psychotic person from prison, although able forensic psychiatrists report that in many years of experience with the present law, they did not learn of a single case of such injustice.<sup>46</sup> The immediately relevant question, formulated realistically and, I trust, in neutral terms, is—Which is better, to send an occasional psychotic person to a penitentiary where his illness may be discovered and cared for, or to send normal persons to insane asylums? Knowledge of what goes on in some mental hospitals might make the choice very easy. Beyond that loom the wider questions: If the legal test is abandoned in the criminal law, how will this affect other legal relations and procedures? If unfettered administration by psychiatrists supplants the rule of law, what will be the consequences for civil liberties and other presently protected values?

At the root of current criticism of criminal responsibility is a conflict between the values of a very small minority of the 15,000 or more psychiatrists in this country and the values of the criminal law. The values of these psychiatrists are shared by many other scholars and the implications are serious. For example, a current school of ethics, impressed by the philosophy of science and rejecting anything put forth as knowledge of morality, interprets ethical principles in terms of psychological facts; they hold that a value-judgment is only an expression of emotion or desire. One of the representatives of this positivist ethics said that the statement, "Stealing money is wrong . . . expresses no proposition which can be either true or false. It

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<sup>45</sup> D.C. CODE ANN. § 24-301(d) (1961). Because this provision may now so operate as to impose upon acquitted defendants sanctions far more severe than those attached to conviction, the defense attorney may believe that in spite of the admonition of Canon 5, he will better serve the interests of his client by avoiding the insanity defense entirely. Halleck, *The Insanity Defense in the District of Columbia—A Legal Lorelei*, 49 GEO. L.J. 294 (1960); Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J. 905, 926 (1961).

<sup>46</sup> HALL, *op. cit. supra* note 21, at 519, 520.

is as if I had written 'Stealing money!!' " And he added, "[T]he function of the relevant ethical word is purely 'emotive.' It is used to express feeling about certain objects, but not to make any assertions about them."<sup>47</sup>

This seems singularly unpersuasive when tested by reference to the moral principles expressed in criminal law. A desire or emotion is a fact, a particular phenomenon; but a law is a generalization, an idea. A fact has no meaning apart from an idea or a set of ideas, and the law of homicide or theft, for example, imparts certain meaning to facts. Desires and emotions can be controlled by thought and thoughtful action; criminal law guides them into approved channels. There is no point in arguing about the fact of having desires or emotions, but there has been much thoughtful discussion of penal policy carried on, evidently, on the premise that there are better and worse solutions of moral-legal problems. If positivist ethics were sound, criminal law would consist of meaningless exclamations and grunts but not even of growls. We could never say that any crime was harmful in the ordinary sense, since that would imply a value-meaning, not a merely factual characteristic. We would have to suppose that the classification of crimes in terms of degrees of culpability and degrees of harm is an arbitrary contrivance and that any other classification would be equally lacking in validity. The meticulous care taken to elucidate the meaning of the various crimes and their components, the construction of a self-consistent set of principles, and the decision of cases according to law must also be meaningless if they were reduced to the expression of emotional attitudes.<sup>48</sup>

The ethical theory reflected in the criminal law is that values exist or subsist in an intelligible sense, that they differ in importance, and that they can be harmed in various ways and degrees. This implies that ethical-legal rules and principles say something descriptively even if they are not purely descriptive in the way factual statements are.<sup>49</sup> While the generality of penal law does not alone establish its ethical validity, since an entire class may have been unjustly chosen or the punishment may be excessive and so on, the universality of a sound law, its equality and fairness, are basic attributes of justice. This also suggests a function of comparative criminal law in revealing large areas of similarity in the legal rules and principles of many cultures, which cannot be explained in terms of common origin.<sup>50</sup> Principles of criminal law support the actions of officials; for example, the punish-

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<sup>47</sup> AYER, *LANGUAGE, TRUTH AND LOGIC* 107, 108 (1954).

<sup>48</sup> HALL, *LIVING LAW OF DEMOCRATIC SOCIETY* ch. 2 (1949).

<sup>49</sup> EWING, *SECOND THOUGHTS IN MORAL PHILOSOPHY* (1959).

<sup>50</sup> HALL, *COMPARATIVE LAW AND SOCIAL THEORY* (1963).

ment of any convicted person is based on a rule of law which is implied by certain principles, and these in turn rest on the basic proposition that voluntary harm-doing proscribed by criminal law should and must be punished. This system of rules, doctrines, and principles makes it relatively easy to test the coherence and validity of any particular law or proposed reform.

Although the central basic part of the criminal law is one of the greatest achievements of Western civilization, that law in its entirety is, of course, far from being a perfect work. One need only compare the criminal law of Bracton's day with what it has become to recognize its capacity for growth consistent with its foundation in moral responsibility. From hardly more than a list of crimes and a rudimentary *actus non facit reus, nisi mens sit rea*, a system of law has been constructed expressing a refinement of moral ideas which finds no equal in any other discipline or department of human activity.

It is not difficult, however, to discern several possible lines of further actualization of its potentiality for improvement. There are, first, certain existing rules, especially those concerned with strict liability, negligence, and the felony-murder rule, which are plainly inconsistent with the main thrust of the common law of crimes proscribing voluntary harm-doing. This seems to me to be a sufficient reason to exclude these rules from the criminal law. But since these are moot issues, it is worth considering whether factual research might be helpful, for example, in testing the opinion of some scholars that strict liability in the so-called public welfare offenses influences the operation of business to the public advantage. There has been some study of this question but the results are far from supporting the assumption of deterrence. There is, however, wide agreement that the public welfare offenses are not properly within the field of criminal law. The relevant issue is therefore narrowed to the question whether they should be excluded from any type of legal control. If some form of regulation is thought desirable, what is the best use that can be made of nonlegal and nonpenal legal controls?

Whether negligent behavior should be excluded from penal liability is also being discussed in many countries. Scholars are more sharply divided on this question; one of the principal grounds upon which the case for criminal liability is based is the assumption that punishment deters such behavior, especially homicide by automobiles driven negligently. It seems unlikely that rarely inflicted penalties can change the personality of insensitive or awkward persons and alert them to danger and to their duties, and the common law of crimes has almost wholly eliminated at least avowed liability for negligence. But some form of control is necessary and the pertinent question, again, is whether in the large armory of legal and nonlegal controls, apt instruments can be

found to deal with the underlying causes of negligent behavior.

For those who hold that negligent behavior should be excluded from criminal liability,<sup>51</sup> there are other important aspects of this question, for example, the distinction of recklessness from negligence. This is part of the problem of clarifying the present case law regarding the difference between the "reasonable man" test as a method of inquiry, which is necessary because it is impossible to see into the "hearts of men," and objective *liability*, especially when it is imposed on persons who are impaired in various ways short of insanity. The case for subjective guilt (which is also the case for insisting on recklessness as the minimal requirement of *mens rea*), is simply that liability should be determined on the basis of the actual state of a particular person's mind, not on that of the supposed "reasonable man." It seems to be increasingly recognized in England and Australia, due, perhaps, to the unfortunate *Smith* decision,<sup>52</sup> that the instruction to the jury should be not in terms of what a "reasonable man" would have known, which is apt to encourage reliance on hindsight of what happened, but in terms of what this particular defendant knew or believed at the time of his action. This is the rule in much, perhaps most, of the criminal law and the indicated inconsistency of some rules, especially those on homicide, as well as the feasibility of the principle of subjective fault, merits careful consideration.

There is, next, the felony-murder rule which was terminated in Britain by the 1957 Homicide Bill, but which persists in American law. In some states the rule is retained in its ancient rigor so that even the most unexpected accidental death occurring in the course of committing a felony is held to support liability for first-degree murder. If distinction among degrees of guilt and consistency with sound principles are desirable, it is time to abandon this archaic rule.

With reference to the law on mental incompetency, it may be added that the fact that a jury can reach better decisions regarding the issue of insanity than most psychiatrists does not support the view that the jury should be left wholly uninstructed and unaided by sound rules of law. Our system proceeds on the opposite premise. One may appreciate the jury's competence and at the same time not wish to leave them wholly subject to the influence of whatever theories, philosophies, and reforms psychiatrists of the various schools espouse. There is no escape from the obligation to decide that some theories and prefer-

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<sup>51</sup> Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632 (1963).

<sup>52</sup> *Director of Public Prosecutions v. Smith*, [1961] A.C. 290 (1960); *Williams, Constructive Malice Revived*, 23 MODERN L. REV. 605 (1960); Dixon, C. J., in *Parker v. The Queen*, 37 Aust. L.J.R. 3, (1963); Lord Denning quoted in 79 L.Q. REV. 318 (1963).

ences are so unsound or so far from being established that they must be excluded or, at least, limited in their influence by recognized legal tests. Nor is there any reason why this general practice should not also prevail as regards the vast new stretches of psychiatry.

It seems to me both unproved and highly doubtful that psychiatric testimony is limited by the M'Naghten rule or that injustices occur in the administration of that rule in this country. On the other hand, it is true that the terms of the M'Naghten rule are restricted to cognitive functions. It is also clear that there is very wide agreement regarding the psychology of the integration of the various functions of the personality and that control of conduct is, therefore, as important as is understanding its nature and consequences. (In stating the facts in this way one must not forget that there are not two separate independent variables—knowledge and control—but only a single process in which knowledge and control are fused.) It plainly follows that the solution is not abandonment of the M'Naghten rule but its supplementation in terms of control or other mental functions. It should not be difficult to formulate a test on the above widely agreed bases, which aptly combine these factors.<sup>53</sup>

Other important problems which merit careful study can only be referred to here. We have still to deal adequately with intoxication as regards criminal liability and, also, as a social problem. There are obvious changes that should be made in the field of sexual offenses, especially in their prevailing severe punishment, even if recent recommendations regarding homosexuality are not accepted.<sup>54</sup> Finally, although it would require heroism bordering on martyrdom to challenge the current theory of what may be expected of or done to juveniles, there is an obvious need for realistic study of the operation of juvenile courts and treatment programs.

I should like to turn from these specific problems to a brief consideration of some wider matters concerned with criminal law reform. In planning a program to improve the criminal law, one could learn much from European experience. In Europe, a project to reform the criminal law is a national undertaking directed by the Minister of Justice. It is therefore under relatively neutral direction because it is not a question of persuading the Minister to accept a proposal, nor is he expected to press for the acceptance of his views. His function is to encourage the presentation of all competently maintained positions. One of the most thorough recent Continental projects was completed in Germany three years ago, and I have seen at least fifteen bulky volumes reporting

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<sup>53</sup> HALL, *op. cit. supra* note 21, at 521-22.

<sup>54</sup> DEVLIN, *THE ENFORCEMENT OF MORALS* (British Academy 1959).

the progress of that undertaking.<sup>55</sup> Many discussions are reported in great detail, and it is easy to discover which lawyers and scholars advocated particular changes and what the supporting reasons were. Not only the majority positions but also those of the minority are set out in detail. In a field like criminal law, where opinions are often sharply divided, it is extremely important to have this information. The fact that the national government sponsors such a project does not mean that early legislation can be expected. In some European countries, there has been a series of projects and sometimes none of the drafted bills were enacted.<sup>56</sup> But such methods provide full records of continuity of effort which increase in value as time goes on and other persons engage in similar undertakings.

The nature of the problems of criminal law suggests that psychiatrists and criminologists, as well as thoughtful laymen, should be invited to participate in the reform of that law. But it cannot be assumed that this is always desirable. There are many psychologies and theories of psychiatry and some of them are not only compatible with the morality of criminal law, they can also assist the jury by adducing facts about the defendant's personality, which will help to determine his culpability, if any, and by guiding peno-correctional treatment. There are many social problems regarding which a knowledge of the relevant facts would help determine what laws should be enacted or what changes in existing ones should be made; for example, knowledge of facts in the field of receiving stolen property shows plainly that professional receiving is very different from ordinary receiving.<sup>57</sup>

But there are also pseudo-factual problems raised, for example, by the thesis that punishment has failed because after thousands of years of punishing criminals, many crimes are still being committed. The assertion amounts to saying that the human race would have been better off without any criminal law, but there is no way of testing such a statement. Even more plainly does the thesis of all-pervasive determinism raise a pseudo-factual problem.

When such problems are raised, facts are often confused with qualities. In criminal law, for example, "guilt," expressed in terms of the principle of *mens rea*, must be distinguished from the sense of guilt, a state of mind with which psychology is concerned<sup>58</sup> and which is some-

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<sup>55</sup> NIEDERSCHRIFTEN UBER DIE SITZUNGEN DER GROSZEN STRAFRECHTSKOMMISSION (Bonn).

<sup>56</sup> Jescheck, *German Criminal Law Reform: Its Development and Cultural-Historical Background*, in *ESSAYS IN CRIMINAL SCIENCE* 395 (Mueller ed. 1961).

<sup>57</sup> HALL, *THEFT, LAW AND SOCIETY* (2d ed. 1952).

<sup>58</sup> Ivimey, *Neurotic Guilt and Healthy Moral Judgment*, 9 *AM. J. PSYCHOANALYSIS* 8 (1949).

times taken to mean tension between id and super-ego. Some guilty persons lack a sense of guilt, as is sometimes said of sociopaths, and, on the other hand, a neurotic sense of guilt may be very disproportionate to actual guilt or even be found in persons who are not guilty of having committed any harm. The substantive criminal law, built on the moral guilt of voluntary harm-doing, does not require the support of the psychiatric theory of the super-ego to be intelligible.<sup>59</sup> A man who betrays his country, a paid killer, and other criminals are guilty in a moral sense; and that is not to be confused with any feeling they may or may not have regarding their harm-doing.

Accordingly, one must ask: what is to be gained, for example, by inviting three or thirty psychiatrists to assist in a project to improve the criminal law if all of them represent a point of view which contradicts the moral foundation of that law? This applies also to criminologists who hold doctrinaire views on punishment, who think, for example, that rehabilitation is the only justifiable objective of social control. Although punishment alone would be a very inadequate policy, it is also true that the permissiveness of psychiatrists and academic penologists is no substitute for criminal law and its enforcement.<sup>60</sup> There should, of course, be freedom to air all opinions, if only to sharpen the issues; but the inclusive penal policy of current criminal law in which retributive punishment, deterrence, and rehabilitation are each given careful consideration is the guiding premise of realistic reform.

It would seem to follow that the standard for evaluating criminal procedure and administration is the fullest possible actualization of those objectives.<sup>61</sup> At present, however, we know very little of what happens in the procedure and administration of the criminal law, and it is impossible to bring together the various fragments of present knowledge in a way which gives a general view of the entire process. There are various limitations placed on the police and their acquisition of evidence. There are differences regarding the burden of proof, for example, as regards the plea of insanity. There is wide variation in the ways appellate courts appraise the facts in the records and control the respective roles of jury and experts. There are wide differences in sentencing and in the administration of peno-correctional institutions, as well as in the operation of probation and parole laws.

We do know, in a general way, that the arrest of suspects and

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<sup>59</sup> Buber, *Guilt and Guilt Feelings*, 20 *PSYCHIATRY* 114-20 (1957).

<sup>60</sup> WEST, *CONSCIENCE AND SOCIETY* (1942); Schmideberg, *The Promise of Psychiatry: Hopes and Disillusionment*, 57 *NW. U.L. REV.* 19, 27 (1962).

<sup>61</sup> Silving, "Rule of Law" in *Criminal Justice*, in *ESSAYS IN CRIMINAL SCIENCE* 77 (Mueller ed. 1961).

their prosecution is a highly selective process,<sup>62</sup> and that the police are influenced by public attitudes and the trial of criminal cases. We know that felonies are frequently waived and pleas accepted to minor offenses, and we have learned that this cannot be explained simply on the political grounds which Raymond Moley emphasized thirty years ago. We know that the time served in prison is often a small fraction of the sentences imposed.<sup>63</sup> But we are still far from having adequate records of the facts and grounds of administrative actions. In our present lack of knowledge, it is impossible to determine whether anything more than lip-service is paid retributive justice or deterrence or if any rehabilitation is actually achieved. The net result is that we do not know whether there is any significant coherence between the purposes of the system of substantive criminal law and what actually happens in the administration of that law.

I have carried the common sense of criminal law into the procedure and administration of it with a view to envisioning a single legal process. But if we stop even there, we remain within the orbit of professional interest and fall short of realizing the potentialities of our subject. We acknowledge the origin of the common law of crimes in popular custom and belief. But those ideas, patterns, and goals did not cease to exist when the legal profession set out to construct a system of law. They are operative today, influencing and being clarified by the criminal law. The final emphasis must therefore be on the social reality of the criminal law, manifested in the conduct of the members of society. Once the perspective is thus enlarged, it becomes evident that one does not comprehend the full significance of criminal law if he views it only in terms of prohibitions or commands or as a coercive apparatus or even in the usual connotations of "protection of society." All of this is significant, but what is most important is the moral life and its connection with the criminal law. I have been suggesting that when lawyers defend these social values from the criticism of experts and academic specialists, they stand on the solid foundation of knowledge acquired during 700 years of thoughtful experience.

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<sup>62</sup> Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 543 (1960); LaFave, *The Police and Nonenforcement of the Law*, 1962 *WIS. L. REV.* 104, 179.

<sup>63</sup> FEDERAL BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS—PRISONERS RELEASED FROM STATE AND FEDERAL INSTITUTIONS (1960).