

The Moral Quality of the Criminal Law

Paul D. Carrington*

THROUGH the years, most of the many critics of modern rehabilitative criminology have been advocates of the Colliseum or woodshed approach to penology. Much more arresting and much more in need of reply, however, is the criticism which has been recently championed by Professor Henry M. Hart, who forcefully asserts that our single-minded bent on rehabilitating criminals has blinded us to the importance of preserving the moral quality of the criminal law.¹ It is the burden of his challenge that modern criminology, in mitigating the vengeful features of the law, may have achieved much the same result as the dentist who pulled too hard and extracted his patient's entire skeleton:² it has left the criminal law a boneless jelly which poorly serves its most important purpose of lending moral vigor to society.

Rehabilitators and their critics share the assumption that the ultimate purpose of the criminal law is to discourage anti-social conduct, and criticism is generally limited to the view that the criminal law would be more effective in serving this purpose if greater emphasis were placed on the moral aspect of the judgment of criminality. An issue is thus clearly drawn: is moral condemnation a useful tool which should be freely employed in discouraging unwanted conduct? However, the methodology of the criminal law has an impact not only on the individual members of the community whose anti-social instincts it seeks to curb but also on the community at large and the attitudes of the community toward the individual. Thus a second question presented is whether it is desirable that the criminal law should attempt to stimulate the community's preoccupation with the morals of its individual members.

The Criminal Law and Individual Conduct

First consider the issue where the battle lines are clearly drawn. The present trend toward a curative-rehabilitative technique of criminal law tends to depreciate the significance of the moral quality of the commands and directives which are addressed to individuals.³ The focus is upon the individual rather than his wrong.

* Assistant Professor of Law, Univ. of Wyoming. B.A. 1952, Univ. of Texas; LL.B. 1955, Harvard Univ. The writer acknowledges the helpful criticism of Kenneth L. Karst, Asst. Prof. of Law, Ohio State Univ. and Sanford J. Fox, Asst. Prof. of Law, Boston College.

1. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958).

2. Owen Wister has it that the patient was carried home in a pillow case. *In Homage to Mark Twain*, THE FAMILY MARK TWAIN xvii (Harper).

3. A similar tendency to depreciate the moral quality of the law can perhaps be seen in the area of torts. James, *Tort Law in Midstream: Its Challenge to the*

The advocates of rehabilitation find this necessary and generally express the view that there is a fundamental inconsistency between rehabilitation and emphasis on the moral element of the judgment of criminality—which, it may be conceded, is implicit in the very existence of the criminal statute which is violated. Their belief is that treatment and condemnation each tend to neutralize the effect of the other.⁴

Although the inconsistency may be subject to exaggeration, there is some apparent truth in the conviction and, to the extent that there is truth in it, our lawmakers are forced to a choice between treatment and condemnation. In order to employ moral condemnation, they must abandon, or at least relegate, the effort at rehabilitation. What would be lost by such a decision? It presently appears that some progress is made in curing some criminals and that there is hope of better progress in the future. It is nevertheless true that there have always been criminals who, like Dostoevsky's Raskolnikov, "found religion" and "went straight" after suffering the pains of criminal punishment, and it is hard to be certain that those who appear to be helped really needed help. There is also the danger which Professor Hart points out: an emphasis on treatment may lead to the treatment of people for what they are, or appear to be, rather than for what they have done (or appear to have done) and this may produce cruel results.⁵ It is true that some moderns have gone so far as to suggest that those who do not respond to treatment must be incarcerated for life, irrespective of the crimes they have committed.⁶ Dry logic could carry us that far. On the other hand, one who confides in the criminologists and their efforts to cure need not, because of this confidence, suppose that we must all put ourselves in their

Judicial Process, 8 BUFFALO L. REV. 315, 316-18 (1959). *But cf.* Keeton, *Conditional Fault in The Law of Torts*, 72 HARV. L. REV. 401, 404-05 (1959).

4. "one cannot apply successfully all three penological principles at the same time—retaliation, intimidation, and reconstruction—as is done at present in our institutions One cannot make the prisoner hate his authorities, fear them, and at the same time expect the prisoner to trust them and accept from them advice and guidance." ALEXANDER & STAUB, *THE CRIMINAL, THE JUDGE AND THE PUBLIC* 239 (Rev. Ed. 1956).

5. Primary focus on the state of the individual defendant

has in it always a double danger—to the individual and to society. The danger to the individual is that he will be punished, or treated for what he is or is believed to be, rather than for what he has done. If his offense is minor but the possibility of his reformation is thought to be slight, the other side of the coin of mercy can become cruelty. The danger to society is that the effectiveness of the general commands of the criminal law as instruments for influencing behavior so as to avoid the necessity for enforcement proceedings will be weakened.

Hart, *supra* note 1, at 407-08.

6. BARNES & TEETERS, *NEW HORIZONS IN CRIMINOLOGY: THE AMERICAN CRIME PROBLEM* 953 (Rev. Ed. 1945).

hands and let them decide when we need treatment and when we may be safely left at large. There is nothing so absolutist about the curative-rehabilitative approach that it prevents us from recognizing that the best treatment is still unpleasant and that no one should be required to suffer it who has not clearly demonstrated the need of it.

And even though some intermediate passage might be found between treatment and condemnation, the advocate of rehabilitation would urge that moral condemnation should be resisted on its own merits. Psychiatrists tell us that, so far as they are now able to tell, the root source of anti-social conduct is emotional starvation of the individual by his family and social environment.⁷ If this is so (and how can we assume that it is not), then it would seem that the increased use of community hatred, contempt, and ostracism as instruments of influencing behavior will surely aggravate the problem and assure us of more, not fewer, criminals. Furthermore, the directives of the criminal law are not only addressed to the members of the community but, at least where there is a representative government, they are also addressed on behalf of the members of the community, individually as well as collectively. All of us participate in the condemnation of our criminals. Thus the practice of moral judgment and the imposition of moral sanctions is an exercise in antagonism which positively fosters emotional starvation and resultant criminality.

Furthermore, if we accept the psychologists' analysis that the causes of crime are largely social and not personal, then the imposition of a moral judgment against the offender must blur the fact of community guilt and thereby contribute to the defeat of any effort to remove social causes. If we are committed to the practice of moral judgment, we will resist the suggestion that the cause lies in the community and not the individual, for the recognition of social cause then requires self-condemnation.

Crime prevention is also hindered by moral preachments in another respect. Dostoevsky suggested that criminals find their motivation in a felt need for punishment. A psychologist explains it thus:

There are, in fact, rebels dedicated in their opposition to law. These are the persons, denominated criminal for most part, who have not come to terms with their basic conflict. Opposition to law symbolizes their struggle for independence and theirs is a constant effort to deny their dependency. Dependency is, however, their basic condition and, notwithstanding the opposition, their basic expectation. Their actions belie

7. BROMBERG, *CRIME AND THE MIND* (1948); ABRAHAMSEN, *WHO ARE THE GUILTY?* (1952). See also TANNENBAUM, *CRIME AND THE COMMUNITY* (1951).

their professed attitudes, as they provoke the law to make decisions and arrangements for them. Mostly, they cannot overcome the law and do not expect to. Their criminal acts, the evidence of protest against their weakness, are the simultaneous admission of dependency. In the end, they have "no more pressing need than the one to find somebody to whom they can surrender."⁸

If the criminal is motivated by a desire for public disgrace, moral condemnation will improve the opportunities for satisfaction of that desire through criminal conduct and is again not a deterrent, but a stimulus to criminal conduct. Professor Hart's answer to this is that at least most of us are responsive to moral condemnation and that the criminal law should be employed with a view to deterring all of us, and not just a few undeterrables.⁹ The psychologists' reply seems to be that most of us do not need deterring; those who are responsive to moral condemnation are not "emotionally starved" and are not rebels, hence they are unlikely to commit crimes in any event, except for occasional self-asserting traffic violations. It seems, therefore, that, in this regard, the proposal to employ moral sanctions as a deterrent has validity largely in deterring those petty offenses which the "nicest" people commit.

Still to be answered is the contention that de-emphasis of the moral quality of the criminal law "would undermine the foundation of a free society's effort to build up each individual's sense of responsibility as a guide and a stimulus to the constructive development of his capacity for effectual and fruitful decision."¹⁰ It is argued that this is so because the criminal law teaches the individual the minimum standard of his responsibility to his fellows and holds him responsible for his decision to abandon that standard. But if we assume that individuals learn responsibility by being held to the consequences of their conduct, it is hard to see why the moral judgment is necessary to that end with respect to criminal conduct. Under the most advanced and kindly rehabilitative practices, the offender must still face an unpleasant rehabilitative experience as the consequence of his criminal activity. It would seem rather that the making of a moral judgment by the community will tend to relieve the offender of the responsibility of making his own moral judgments. And the only real protection from anti-social conduct lies in an ingrown responsibility whereby each individual

8. Redmount, *Psychological Views in Jurisprudential Theories*, 107 U. PA. L. REV. 472, 505-06 (1959).

9. Hart, *supra* note 1, at 408-09.

10. *Id.* at 410. Accord, Waite, *The Legal Approach to Crime and Correction*, 23 LAW & CONTEMP. PROB. 594, 596-97 (1958). Cf. MILL, ON LIBERTY 77 (Liberal Arts Ed. 1956): "To be held to rigid rules of justice for the sake of others, develops the feelings and capacities which have the good of others for their object."

supplies the primary restraints on his own conduct. This cannot be taught by condemnation, but rather by a fraternal forbearance of misconduct and repeated and enlarging opportunities for the exercise of responsibility with the concomitant experience of the satisfactions brought by the practice of such self-restraint.

The Criminal Law and Community Attitudes

Efforts to sharpen the moral preachments of the criminal law must also be resisted on the ground that this would have an unhappy effect on the conditions of individual freedom which obtain within the community. This assertion is premised upon two conclusions. The first is that each individual should be as free as possible to choose for himself a course of thought or action, consistent with the like freedom of his fellows. The second is that the use of moral sanctions is generally inconsistent with the pursuit of the objective of such individual freedom.

There was perhaps a time, not too long passed, when the first of these premises required no defense.¹¹ It has of late, however, been the subject of some criticism, most broadly on the ground that it contemplates a utopia in which the individual is unhindered by "social arrangements" and is therefore obligated to choose everything for himself without guidance from the community.¹² It must be conceded that this would be a false ideal, that the burden of unguided choice would overwhelm the individual, and that some social arrangements are essential to the meaningful exercise of individual choice. But social arrangements are of two kinds: those that guide and those that prohibit. It is one thing to advise

11. For a full defense, see MILL *supra* note 10.

12. Fuller, *Freedom—A Suggested Analysis*, 68 HARV. L. REV. 1305, 1310-12 (1955). Professor Fuller uses Mill as his antitype: he attacks Mill's view that it is an unjustified invasion of personal liberty to require a government license for the practice of any profession, observing that to a prospective patient the licensing requirement for physicians is a welcome facilitation of choice and thus an expansion of liberty, not a restriction of it. Mill, however, does approve legislation to prevent predatory practices such as fraud, and he would therefore condone reasonable restrictions on the misleading use of words indicating a claim to special competence, such as "physician." It is only insofar as the licensing statutes go beyond the facilitation of choice and forbid healing by those making no claim to competence that they come into real conflict with Mill's dictum. To the extent that our legislators have permitted the practice of Christian Science healing and such pseudosciences as naturopathy, we have shared Mill's view that free choice should be protected even though exercised against the better judgment of the majority. It is nevertheless true that most of us would agree that incompetents should not be free to perform appendectomies on their friends, even where that is the victim's choice. But a law expressing our view cannot be defended on the ground that it best assures the pursuit of freedom. Such a law plainly serves other purposes, and Mill's position with reference to such laws must be criticized not on the ground that it fails in this respect to serve the freedom which he reveres, but rather on the ground that it fails to concede that freedom of choice is not the only objective of our society.

a suburbanite that most of his fellows have found it a comfort and a saving of time to use transportation in going to and from work; it is another to impose sanctions upon him because he chooses to walk. The pursuit of freedom does not require that each suburbanite learn for himself the virtues of motor vehicles, but it does require that we not punish him if he fails to conform in their use.

Most critics of the individualistic concept of freedom have been economists;¹³ this is easy to understand for an empire of specious reasoning about freedom of contract and economic legislation has piously clothed itself in the frock of individualism. But there is no need for economics to reject the cause of individualism. The individual has an interest in restraining private economic sanctions which may restrict his freedom as surely as the political sanctions applied by his government, and all that individualism requires is that the freedom acquired through proposed economic regulation be weighed against the freedom that will be lost by the individuals regulated.¹⁴

It was our second premise that any deliberate use of moral sanctions is harmful to the cause of freedom and thus unwise. The reason for this is clear: the freedom to despise our fellows may be a liberty which is entitled to protection, but when this freedom is exercised conspiratorially by the community, powerful sanctions are unleashed which are just as capable of destroying individual freedom as any sanctions of law or economics. The creativity of the individual is as effectively quashed by the hatred, contempt and rejection of the community as by a jail sentence or the loss of a job.

There is furthermore a special problem which arises in the use of moral sanctions; this is so because they exercise an irrational force which, once beckoned, is seldom subject to deliberate human control. Hatred, contempt, and ostracism, even in their milder forms, are very blunt tools for the social planner and they cannot be used to prevent any human conduct without a substantial effect beyond the intended bounds of restriction. These moral sanctions depend for their force not on any formal institution which can be regulated and shaped to need, but rather on a broad attitude of man toward man which cannot be readily directed at a narrow social target. A lawmaker who chooses to encourage moral preachment

13. Hear, for instance, Karl Polanyi's complaint that "The freedom which regulation creates is denounced as unfreedom; the justice, liberty and welfare it offers are decried as a camouflage of slavery." POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 256-57 (Beacon Ed. 1957).

14. Thus, the individual merchant's right to refuse to sell his wares to another must be restrained where the exercise of that freedom imposes greater restraints on the economic freedom of the community. See, *e.g.*, *Fashion Originators' Guild of America v. FTC*, 312 U. S. 457 (1941).

must expect the same sort of result as that achieved by the young lady who instructed her Lutheran betrothed in her own Catholic faith so persuasively that he became a monk. Logically it would seem at least possible to direct moral sanctions only against anti-social conduct and not against the individual wrongdoer. But the spirit of tolerance cannot be honed fine. It is a habit of empathy which we must persist in or abandon. And we dare not abandon it, for tolerance is not merely a result of freedom,¹⁵ it is essential to freedom's ideal. Regardless of the development of economic and political security in the community, freedom cannot exist in an intolerant climate where the community thirsts to indulge itself in the titillation of despising its members for their deviations from the community's standards of conduct.

This is not a conclusion which finds general favor. The skeptic will observe that moral sanctions are as needful to the conduct of a social order as nutrition to the existence of life and that to deplore their use is as futile as to deplore the loss of time we spend each day taking food and water. This conclusion may well be doubted. Must our society run on a fuel of hate and intolerance? Even one pessimistic enough to think so would surely agree that we need not carry an emergency ration of such a fuel for it always abounds. Society tends everywhere to conspire against its members; there is no need to encourage this tendency. And there is no intent here to encourage the sort of sweepingly radical reform that has been so effectively condemned as "Utopian engineering":¹⁶ a recognition of the problem of moral freedom does not require that we wipe the canvas clean of all moral restraints. One need not deny the inevitability of a system of folkways and of some implementing moral sanctions to assert that the use of such sanctions should be avoided where possible and that one measure of freedom is the sloth with which the community exercises moral sanctions against offenders to the system. The same skeptic may as well object to efforts to minimize the economic and legal restraints imposed on individuals, for the problem of freedom is never one of achieving an absolute. It is a Confucian aphorism that although we may not hope today to be saints, we may yet aspire to be gentlemen.

A moralist might likewise object to a retreat from the use of moral sanctions on the ground that morals, like laws, cannot continue to exist without sanctions, that an atrophy of the power of moral sanctions must necessarily lead to an atrophy of the com-

15. BARBU, *DEMOCRACY AND DICTATORSHIP: THEIR PSYCHOLOGY AND PATTERNS OF LIFE* 99-102 (Evergreen Ed. 1954).

16. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 154-64 (Rev. Ed. 1950).

munity's capacity for moral judgment. It is also said that tolerance is the virtue of those who believe in nothing. Freedom and morality, thus viewed, become inconsistent objectives, but this ruthless logic mistakes moral imperialism for morality. A society in which morals are individualized, whose members reserve their moral judgments each for his own conduct, is not for that reason amoral. Such an individualized morality, and not amorality, is the projected result of the pursuit of freedom. There is surely nothing shocking to an avowedly Christian society about a legislative program to encourage such an individual morality.¹⁷ Nor is an individualized morality peculiar to Christianity.¹⁸ The dangers of citing scripture in support of any contention are obvious and it must be conceded that contrary references may be found, but it seems safe to assert that almost every system of ethics ever propounded which has recognized a deity has regarded the imposition of moral sanctions as peculiarly the function of the deity.¹⁹ The pursuit of moral freedom now urged is therefore at least consistent with these moral precepts.²⁰

Some modern sociologists may suggest that the pursuit of moral freedom conflicts with the search for a cure to a disease abroad in the land. This disease has been arrestingly described as Uprootedness²¹—it is the need for stability and for participation. It may be true that the integration of the individual and not his release is the social problem of the day, and that most individuals need more association and less individualism.²² But surely compulsory association is not the answer to the need. It cannot provide stability

17. It would indeed seem to be required by the familiar injunction to "judge not" and the parable of the mote and the beam, which are contained in the Sermon on the Mount, *Matthew* 1:15. Also familiar and pertinent is the challenge of Jesus to those who would stone the adulteress. *John* 8:7. Less familiar, but perhaps more direct, are the words of St. Paul: "Wherein thou judgest another, thou condemnest thyself." *Romans* 2:1. The process of imposing moral judgment on our fellows is one of egocentric self-congratulation which is debilitating to our capacity for selfless conduct, which is the end purpose of Christian morality.

18. Consider the warnings of the Buddhist Dhammaphada: "If a man look after the faults of others and is always inclined to be offended, his own passions will grow and he is far from the destruction of passion." BROWNE, *THE WORLD'S GREAT SCRIPTURES* 183 (1946). And compare the advice of the Hindu Puranas that tell us Vishnu is best pleased with him "who does not vilify another either in his presence or in his absence." *Id.* at 120.

19. The earliest clay tablet of ancient Babylonia, which is the first moral exhortation remaining to us, commences with the following injunction:

Slander not, but speak with kindness;
Speak not evil, but show good will;
Who so slanders and speaks evil—
Unto him will Shamash requite it by . . . his head.

BROWNE, *supra* note 18, at 5.

20. *Accord*, Katz, *Christ and Law*, 12 OKLA. L. REV. 57, 64 (1959).

21. WEIL, *THE NEED FOR ROOTS* (Wills Trans. 1952).

22. NISBET, *THE QUEST FOR COMMUNITY* 229-32 (1952).

because conformity obtained by repression and intimidation is always, as John Dewey tells us:

superficial; and whatever is superficial is in continuous flux. The methods employed produce mass credulity, and this jumps from one thing to another according to the dominant suggestions of the day. We think and feel alike—but only for a month or a season. Then comes some other sensational event or personage to exercise a hypnotizing uniformity of response. At a given time, taken in cross section, conformity is the rule. In a time span, taken longitudinally, instability and flux dominate . . .²³

And if modern men need association to express their social instincts and to best develop their capacities for useful life, it must be recognized that the effectiveness of any association in filling that need must be largely measured by the freedom of its members to abandon it. There can be no expression of the individual in serving a cause through compulsion, even moral compulsion. Only an association of voluntary, self-disciplined members can provide the soil necessary to the growth of social roots.²⁴

Furthermore, the conformity or "association" which is induced by application of moral sanctions against dissenters gives rise to a yet more grave peril to individual freedom. The individual who is robbed of his own creative energies presents a threat of another kind to the remaining individualist who resists the pressures to conform. Erich Fromm explains the reaction of the conformist thus:

The loss of the self and its substitution by a pseudo self leave the individual in an intense state of insecurity. He is obsessed by doubt since, being essentially a reflex of other people's expectation of him, he has in a measure lost his identity. In order to overcome the panic resulting from such loss of identity, he is compelled to conform, to seek his identity by continuous approval and recognition by others. Since he does not know who he is, at least the others will know—if he acts according to their expectation; if they know, he will know too, if he only takes their word for it.

The automatization of the individual in modern society has increased the helplessness and insecurity of the average individual. Thus he is ready to submit to new authorities which offer him security and relief from doubt . . .²⁵

Thus, Fromm tells us, authoritarianism results.

23. DEWEY, *INDIVIDUALISM OLD AND NEW* 84 (1930).

24. The concepts of "groupism are useful correctives of an earlier solipsism. But if they are extended to hold that conformity with society is not only a necessity but also a duty, they destroy that margin of freedom which gives life its savor and its endless possibility for advance." REISMAN, *INDIVIDUALISM RECONSIDERED* 38 (1954).

25. FROMM, *ESCAPE FROM FREEDOM* 206 (1941). Cf. MILL, *supra* note 10, at 72-73.

The individualization of morality also presents a severe problem for those who insist that the lawmaker "must have recourse to the principles of morality."²⁶ Cardozo claimed to have regard for the public morality in making decisions²⁷ and certainly most of our elected representatives claim to follow suit. But as the community's tolerance for the conduct of its members is increased, "the will of the people" becomes increasingly difficult to ascertain.

Obviously the judge or legislator, as a part of the community, will reflect the influence of the public morality, but beyond that can he successfully follow its dictates as distinguished from his own moral judgment? Even Cardozo does not explain a satisfactory method for divining the public will to the end that a lawmaker may effectively aspire to be an accurate reflection of it. A cynic has said that a person who talks of the "opinion of the world at large" is really referring to "the few people with whom I happened to converse." And in the words of Mr. Justice Jackson, we who attempt to reflect a public judgment must "usually end by condemning all that we personally disapprove and for no better reason than that we disapprove it."²⁸ If this is as true as it seems, and judges and legislators are necessarily invoking their own morality as a source of law, it is important to put the matter in a true light so that their judgments will be responsible and their efforts at decision not misguided.²⁹ The ignorance and bigotry of judges and legislators is less a danger than is their felt compulsion to be a mouthpiece for an unknown and unknowledgable public will. The sanctified notion of The Rule of Law finds its deepest and most important meaning in the law of what Archibald MacLeish has called "the inward country": it is the self-restraint of humility and tolerance which affords a free society its best protection against over-reaching governors.³⁰ Thus, the pursuit of moral freedom is

26. GRAY, *THE NATURE AND SOURCES OF THE LAW* 302 (2d ed. 1921).

27. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 108 (1921). Cardozo points out that it is a rare case in which there is a difference between the judge's morality and the public morality as he views it, but asserts that, where they differ, the judge has a duty to conform. He hypothesizes a judge who regards theatre-going as sin and asks, can such a judge rightly impose this view on litigants? The hypothetical is unfair in that the public morals relative to theatre-going are much easier to discern than those relative to the moral issues raised in the run of cases presenting the problem, and regardless of the moral judgment, it would be an unreasonable invasion of private liberty to impose any judicial sanction on theatre-goers. The basic question would be raised more squarely if the idiosyncratic judge were more tolerant than the community at large; would he be justified in imposing sanctions on theatre-goers whose conduct he approved on the ground that he felt that most of the community disapproved?

28. Dissenting in *Jordan v. DeGeorge*, 341 U.S. 223, 242 (1951). And see L. Hand, J., in *Johnson v. United States*, 186 F.2d 588, 589-590 (2d Cir. 1951).

29. CURTIS, *A Natural Law for Today and the Supreme Court as Its Prophet*, 39 B.U.L. REV. 1, 44 (1959).

30. HAND, *THE BILL OF RIGHTS* (1958). Compare Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 156 (1893);

consistent with the search for responsible government and does not leave our leaders either rudderless or becalmed.

We should therefore face the problem of moral freedom as squarely as we have faced the problems of political and economic freedom. As we do so, we must recognize that there can seldom if ever be a justification for the deliberate use of moral sanctions, hatred, ostracism, and contempt, as instruments for the advancement of the public welfare. A humane and compassionate law of crimes is necessary to the promotion of moral freedom in our society.

Conclusion

It would seem that Professor Hart has attacked the rehabilitation approach to the criminal law on its strongest ground. He has criticized it for its most significant contribution to the public welfare: the down-staging of the moral quality of the criminal law. The moral judgment is not a beneficial feature of the criminal law. It obstructs the friendly relation necessary to the rehabilitation of many criminals. It clothes the enforcement officials with the righteous authority against whom many criminals are moved to protest—it provides the rebel with his cause. It tends to promote irresponsibility and obstructs the development of self-restraint, which is the ultimate means of protecting society from anti-social behavior. The moral judgment of the criminal law may therefore be a positive encouragement of criminality. And perhaps worse, it broadcasts an odium, a readiness to condemn deviationists, which brings us to moral imperialism, legislative irresponsibility and unfreedom.

It is not to be supposed that an emphasis on rehabilitation can take all the moralizing out of the criminal law. Some moral judgment is a logical result from the use of any force against offenders, and, anyway, the social urge to condemn is too strong to be so easily eradicated. Neither is it to be supposed that if we could take all this moral imperialism out of the criminal law we would soon accomplish a new and complete freedom from the moral restraints of hatred and its companion sentiments.³¹

Nevertheless, cure and rehabilitation as a predominant end of criminal law is servant to the cause of freedom. It can cause the

RICHARDSON, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1, 51-54 (1951).

31. Even so benign a scholar as Reinhold Niebuhr finds little cause to hope that society can progress toward a collective selflessness. "There is not enough imagination in any social group to render it amenable to the influence of pure love." NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* 272 (1932). *But compare GANDHI, SATYAGRAHA IN SOUTH AFRICA* 113-15 (American Ed. 1954). Gandhi suggests that the difference between his pacifist technique and that of Thoreau is the dedication of the Satyagrahi to the moral uplifting of his adversary.

criminal law to reflect a contagious empathy, which is born of an understanding of the common frailties of man. This tolerance is a condition of freedom; it prevents the energetic public morality which is the cause of social rigidity and which deprives us of the values of individualism. For this service, the criminologists who have nurtured the rehabilitative philosophy are to be commended.