

COMMENTS

THE SWEDISH PENAL CODE OF 1965*

ON December 21, 1962,¹ the Swedish parliament completed the passage of a new criminal code (*Brottsbalken*),² the first overall revision of the criminal code of 1864 (*Strafflagen*).³ *Brottsbalken* stands as the culmination of a century of piecemeal revision and reform of *Strafflagen*, which itself was the product of many years of reform work.⁴ The new code offers an important opportunity to study the development of Swedish criminal law and the values under-

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¹ NYTT JURIDISKT ARKIV, AVDELNING II, TIDSKRIFT FÖR LAGSTIFTNING (1962) [hereinafter cited NJA II]. This publication, edited by justices of the Swedish Supreme Court (*Högstra Domstolen*), provides an authoritative collection of legislative reports on new statutes. NYTT JURIDISKT ARKIV, AVDELNING I presents all cases from the Supreme Court. See generally R. GINSBURG & A. BRUZELIUS, CIVIL PROCEDURE IN SWEDEN 42-43 (1965).

² The text of the code as passed is to be found in SVENSK FÖRFATTNINGSSAMLING [hereinafter cited SFS], a yearly collection of all legislation passed during the previous year. All Swedish statutes in force are published in one volume yearly on January 1st. This volume is entitled SVERIGES RIKES LAG [hereinafter cited SRL]. For an English translation of the code see T. SELLIN, THE PENAL CODE OF SWEDEN (1965).

³ 1864 SFS II. For the sake of convenience, the penal code of 1864 will be referred to as "*Strafflagen*," while the penal code of 1965 will be handled under the term "*Brottsbalken*." These are the terms by which they are designated in Sweden. Literally translated, "*Strafflagen*" means "criminal law," while "*Brottsbalken*" means "criminal section" (referring to *Brottsbalken's* position as a section of SLR). However, the term "*straff*" alone, as will be discussed later, means "punishment," while the term "*brott*" denotes "crime." Thus, although the titles of both codes mean "criminal law," the earlier code uses a word that has a stronger implication of punishment.

⁴ See I AGGE, STRAFFRÄTTENS ALLMANNA DEL 89-93 (1959). Viewing the new code in the context of other penal statutes in Western Europe and the United States, it seems rather surprising that some Scandinavian scholars have described it as conservative. Professor Knud Waaben of the Institute of Criminology in Copenhagen, Denmark, characterized *Brottsbalken* as conservative, particularly in its categorization of crimes, in an interview with the author on July 9, 1966. In addition, criminologist Bengt Börjeson has asserted that there exists a surprising disproportion between the amount of preparation for *Brottsbalken* and the degree of change in the system of sanctions. BÖRJESON, OM PAFÖLJDERS VERKNINGAR 196 (1966). This reaction can be attributed, at least partly, to the fact that Swedish criminal law legislation has kept abreast of developments throughout the years in scholarly fields of relevance to the formation of legal norms, while most other nations have lagged far behind. Even a moderate codification and extension of earlier reforms in Sweden, when compared with other criminal codes, is quite the opposite of conservative.

lying that system.⁵ In addition, some of the reforms which *Brottsbalken* codifies and extends have already influenced the legislative process in Germany,⁶ and one can expect the new Swedish code to continue to provide an important example to those involved in criminal law reform in other nations.

THEORETICAL BACKGROUND

The development of Swedish criminal law has been strongly influenced by the shifting currents of criminal law theories on the continent.⁷ The continental schools can be roughly divided into two categories—the absolutists and the relativists.⁸ For the absolutists, punishments are not a means to an immediate practical goal, but rather, they flow as logical consequences from a well-defined view of society and the nature of "justice."⁹ The relativists, on the other hand, regard the law solely as a means to prevent certain undesired social activities.¹⁰

The primary influence on *Strafflagen* was exerted by the last of

⁵ The process of preparation and the passage of *Brottsbalken* provoked a lively debate within academic circles and in the Swedish press concerning the basic purposes and methodology of a modern criminal code. See, e.g., Strahl & Olivecrona, *Aktuella Spörsmål*, 42 SVENSK JURISTTIDNING 561, 561-83, 649 (1957); Svensson, *En Nyromantiker som Kriminolog*, 51 SVENSK JURISTTIDNING 199 (1966). SVENSK JURISTTIDNING [hereinafter cited SvJT] is a Swedish legal periodical edited by a board of national authorities on criminal law.

⁶ German reforms in 1953 that instituted conditional sentencing and parole used Swedish legislation that is now a part of *Brottsbalken* as an example. See Simson, *Straffrättens Utveckling i Tyskland och Förslaget till Ny Strafflag*, 48 SvJT 583, 594 (1963).

⁷ The identifiable effect which criminal law theory has had on Swedish legislation stands in sharp contrast to countries like the United States and France. One need only compare the text of *Brottsbalken* with the criminal laws of any American state or with the French CODE PÉNALE to become aware of the differences in the level of influence of modern criminology.

⁸ The classification proposed here is admittedly oversimplified. One must bear in mind, of course, that elements of both categories must enter into any comprehensive theory of criminal law. Nevertheless, the categorization is useful analytically, despite its limitations.

⁹ The absolute theories tend to emphasize a process of societal integration and idealistic balance in which the injury to society wrought by a crime can only be compensated by the suffering and punishment of the individual criminal. Exacting "just retribution" is thought to restore balance to the community. Originally, this theory rested upon a religious foundation, but with Immanuel Kant its basis descended to secular authorities. Although Kant's thinking had little direct effect upon *Brottsbalken*, its impact upon the criminal law of Western Germany is pronounced. See generally Simson, *supra* note 6, at 594.

¹⁰ The primary relative theory is advanced by the advocates of individual prevention. The most unique theoretical contribution made by this approach is the idea that punishment should improve the criminal by reforming him.

the absolute theories to enter upon the scene, the "classical" school.¹¹ The classicists accepted the basic outlines of the theory of just retribution but complemented it by explaining that deterrence or "general prevention"¹² lies behind the theory of balance and that just retribution is necessary to maintain obedience to the laws. A Swedish variation of the classical school was provided by the Uppsala school¹³ which stressed the formative influence of the law on morality by assuring regularity and certainty of punishment.¹⁴ Although Swedish criminal law has abandoned the classicists' idea of retribution based upon an abstract ideal of justice,¹⁵ remnants of the classical theory are present in Part Two of *Brottsbalken*, which defines crimes and provides ranges of punishment.¹⁶

The earliest Swedish relativists were philosopher Christopher Bostrom (1797-1866) and Professor Johna Hagstromer (1845-1910).¹⁷ Although Hagstromer's version of the relative school stressed individual prevention, he rejected both the goal of scaring a potential criminal and the objective of reforming the offender.

¹¹ The primary theorist of the classical school was Karl Binding (1841-1920) of Germany.

¹² The current Swedish debate over the goals and values of the criminal law process centers around two terms: "*allmanpreventiva*" functions and "*individualpreventiv*" functions. These two terms most closely correspond respectively to the English categories of "deterrence" and "rehabilitation." In order to emphasize the shades of difference between the Swedish and English categories, this article will utilize a literal English translation of the terms, namely, "general preventive" and "individual preventive." Two other terms figure prominently today in American criminal law debates—"retribution" and "prevention." The Swedish equivalent of the term "retribution" is "*vedergallning*," but it no longer occupies any place whatsoever in Swedish discussions. The term "prevention" as used in the United States refers primarily to the prevention of crime by an individual offender through having him remain in prison or executing him. Sweden has no death penalty, except in time of war, and the detention of a person in prison to prevent his further criminality does not enter into general debates, except to the extent they concern the sanction of internment. See notes 81-84 *infra* and accompanying text. This function might be considered to be included within the "individual preventive" function.

¹³ The leader of the Uppsala school was Professor Wilhelm Lundstedt (1882-1955).

¹⁴ This notion produced a problem for those who recommended such measures as conditional sentencing where the punishment was not at all certain. A certain survival of the theory of regularity is found in the modern view that certainty of discovery is more important than imposing a sanction. See STRAHL, DEN SVENSKA KRIMINALPOLITIKEN 93 (1961).

¹⁵ See authorities cited note 5 *supra*.

¹⁶ The classical school has also left its mark on the principles advanced to support common denominators of all punishments: equivalence (similar cases are handled alike), proportionality (between the type of crime and the sanction, and between the specific crime and the punishment imposed), and responsibility.

¹⁷ See 1 ACCE, *supra* note 4, at 45-80.

He recommended instead that the object of criminal law should be to neutralize the potential for crime commission by taking away the desire or by terminating the opportunity. The desire could be removed through fines and imprisonment, depending upon the intensity of the will to criminality. The opportunity could be removed through imposing the death penalty or life imprisonment.

Modern criminal law theory in Sweden, however, awaited the development of criminological research which attempted to give meaning to crime statistics and which prospered with the increase in crime rates that accompanied industrialization and urbanization. The product of this development was the modern sociological school of criminal law, the leader of which was Franz von Liszt (1851-1919).¹⁸ This school, concentrating on practical measures to protect society from crime, divided criminals according to their susceptibility to rehabilitation.¹⁹ An important methodological contribution of the sociological school was the introduction of the dualistic system of sanctions which *Brottsbalken* incorporates.²⁰ Under this system, penalties are tied both to specific crimes to serve the general preventive function and to the particular situation of the offender to serve the individual preventive function.

The last of the continental criminal law theories to make a significant impression upon Swedish criminal law was the "social defense" school of Professor Marc Ancel of France.²¹ Although *Brottsbalken* is, for the most part, the product of Swedish reform

¹⁸ See *id.*

¹⁹ See notes 70-89 *infra* and accompanying text.

²⁰ The sociological school divided criminals into three categories: (1) those with criminal tendencies requiring rehabilitation and reform; (2) opportunity criminals requiring no reformation; and (3) unalterable chronic offenders. See generally 1 AGGE, *supra* note 4, at 45-80. One can clearly see the effects of this type of thinking upon *Brottsbalken* and sentencing practices in Sweden over the past few years. A criminal whose successful rehabilitation appears likely usually receives a sanction directed toward the individual preventive goal. An otherwise law-abiding person who succumbs to an isolated opportunity to commit a crime will usually receive a sanction in the interest of general prevention. A hopeless recidivist may be interned for an indefinite term. See generally Fürst, *Högstra Domstolens Val av Brottsföljder*, 51 SvJT 81 (1966) (analyzing sentencing procedures in the first group of cases to come to the Supreme Court under *Brottsbalken*).

²¹ The social defense (*défense sociale*) school traces back to the theories of Enrico Ferri (1856-1929) and his Italian positivist school. The positivists saw the criminal simply as the product of his society and, therefore, rejected notions of individual responsibility in any absolute moralistic sense. Unfortunately, Ferri's ideas were adopted and misused by the Nazis. It was this misuse which triggered the social defense movement. See generally 1 AGGE, *supra* note 4, at 45-80.

movements, the social defense theory represents the clearest and most comprehensive statement of the theoretical basis of the new code.²² Social defense theorists emphasize the individual preventive function of the criminal law and endorse imprisonment or fines only where the science of criminology has not advanced far enough to provide other alternatives. The basic recommendations of this school include: (1) protect society rather than punish offenders; (2) neutralize offenders by non-punitive measures such as treatment; (3) effect individual prevention rather than general prevention; (4) humanize the law to maintain the dignity of the offender.²³

HISTORICAL DEVELOPMENT²⁴

The watershed in the development of Swedish criminal law was the code of 1734,²⁵ which by modern standards was quite harsh but which was considered very moderate for the times. Under the 1734 law, the judge enjoyed great discretion in meting out punishment. Prison was not central to the system of sanctions, but was used as a substitute for bodily punishments in certain cases. The code of 1779 represented a triumph for the theories of the Enlightenment and for King Gustav III. The death penalty was abolished for some crimes, and imprisonment frequently replaced the more afflictive measures. Reforms between 1841 and 1864 eliminated all forms of punishment except fines, prison, death, loss of civil rights, and prison at hard labor.

The criminal code of 1864,²⁶ "*Strafflagen*," was the first major and comprehensive reform to be enacted after the code of 1779. *Strafflagen* was to be the basic Swedish criminal law for a century upon which would be grafted substantial but piecemeal reforms. *Strafflagen's* most important contribution was to install imprisonment at the center of the system of sanctions, as opposed to the older emphasis on bodily punishments. The 1864 code also employed the principle of proportionality in punishment.

²² See T. SELLIN, *supra* note 2, at 8.

²³ See generally ANGEL, *LA NOUVELLE DÉFENSE SOCIALE* (1954). An English translation is available, ANGEL, *SOCIAL DEFENSE* (Routledge & Paul trans. 1965).

²⁴ For a more comprehensive presentation of the history of Swedish criminal law legislation up until the passage of *Brottsbalken* see I ACCE, *supra* note 4, at 80-152, and STRAHL, *supra* note 14, at 22-66.

²⁵ See Strahl, *Introduction* to T. SELLIN, *supra* note 2, at 5.

²⁶ 1864 SFS 11.

Between 1864 and 1910 the various minor reforms were aimed at perfecting *Strafflagen*,²⁷ but from 1910 to 1945 the amendments were directed at replacing the code with a more modern law. In 1921 the death penalty was abolished during peacetime.²⁸ Earlier, in 1916, significant advances were made in the administration of the prisons.²⁹ The use of the single cell, which itself was the product of a reform movement, was modified by the introduction of the colony system of farm and forest work which differentiated between prisoners on the basis of the probability of rehabilitation.³⁰ In 1923 a new criminal code³¹ based on the theories of Professor C. W. Thyren of Lund³² was prepared but was never enacted. This effort at wholesale reform, however, bore fruit in the inauguration of internment in the Act of 1927.³³ The culmination of this period of reform came in 1931 with the "dayfine" system which equalized the effects of fines on offenders from different socio-economic groups.³⁴ This equalization was accomplished by not only correlating the fine imposed to the gravity of the offense, but also to the ability of the offender to pay.

In 1937 the Swedish legislature set out to replace the basic 1864 criminal code with an entirely new one. To accomplish this objective, two legislative committees,³⁵ under the chairmanships of Court of Appeals President Birger Ekeberg³⁶ and former Minister of Justice Dr. Karl Schlyter,³⁷ were appointed. The immediate consequences

²⁷ In 1890 lighter punishments were incorporated into the code. See 1890 SFS 33. In 1902 reform schools were introduced for youthful offenders. See 1902 SFS 72. In 1906 parole and conditional sentencing were instituted, although a few harsher punishments were also introduced including the hard bed and dark room. 1906 SFS 13. The impetus for this slight retrogression appears to be the influence of the classical school. See Strahl, *supra* note 25, at 6.

²⁸ 1921 SFS 781; see Strahl, *supra* note 25, at 7. *Brottsbalken* ch. 22, § 19, still allows for the death penalty during time of war.

²⁹ See 1916 SFS 90.

³⁰ In 1918 further changes were made in the conditional sentencing and parole practices of 1906. See 1918 SFS 531, 538.

³¹ 1923 STATENS OFFENTLIGA UTREDNINGAR 9 [hereinafter cited SOU]. This annual publication presents all important legislative committee reports in Sweden.

³² Professor Thyren introduced the theories of both Franz von Liszt, see text accompanying notes 18-20 *supra*, and the Italian positivists, see note 21 *supra*.

³³ 1927 SFS 107-10; see Strahl, *supra* note 25, at 7.

³⁴ See Strahl, *supra* note 25, at 7, 11-12.

³⁵ *Id.* at 6-7.

³⁶ The first committee, *Straffrattskommitten*, under President Ekeberg's leadership was appointed in 1937 with responsibility over the section of the code dealing with the definitions and penalties for individual crimes. 1 AGGE, *supra* note 4, at 125.

³⁷ The second committee, *Strafflagberedningen*, appointed in 1938, was assigned to

of this project were periodic amendments to individual sections of *Strafflagen*.³⁸ These piecemeal reforms which were to be codified in *Brottsbalken* were thus in effect for some years prior to the passage of the new code.³⁹

President Ekeberg's committee presented its draft proposals in 1953 under the title "*Brottsbalken*" or "criminal section."⁴⁰ In 1956 Dr. Schlyter's committee presented its product under the title "*Skyddslag*" or "protective law."⁴¹ The proposals were then sub-

study and develop the system of sanctions. T. SELLIN, *THE PROTECTIVE CODE 7* (1957). Dr. Schlyter, Minister of Justice between 1932 and 1936 and the President Judge of the Court of Appeals for Southern Sweden until 1946, had a strong influence on the development of *Brottsbalken*. His preference was for rehabilitative detention as opposed to the conventional prison system. See generally SCHLYTER, *AVFOLKA FANGELSERNA* (1935).

³⁸ For example, probation in its modern form was introduced in 1939, 1939 SFS 314-18, obligatory parole was instituted in 1943, 1943 SFS 691-94, and emphasis on rehabilitation in prison administration was accomplished in 1945, 1945 SFS 872-80.

³⁹ See 1 AGGE, *supra* note 4, at 107-29.

⁴⁰ The 1953 draft can be found in 1953 SOU 14.

⁴¹ 1956 SOU 55. An English translation exists, T. SELLIN, *THE PROTECTIVE CODE* (1957). The title proposed for *Brottsbalken* by Dr. Schlyter's committee was "*Skydds-lag*" or "Protective Code," the title given to the draft of Part Three as presented in 1956 SOU 55. This title was generally in line with the reform movement's ultimate goal of eliminating all repressive elements from the criminal code, and turning it into a set of measures designed solely for the protection of society from crime through the use of the least coercive means possible. Swedish criminal law has moved closer each year to the principle of social care for reintegration. 1 AGGE, *supra* note 4, at 114. However, the term "*Skydds-lag*" and other terminological alterations produced by President Schlyter's committee were considered by many critics to go too far and to endanger the value of general prevention. See 1962 NJA II 371. Therefore, the title of the new code became that of the proposal presented in 1953 by President Ekeberg's committee—*Brottsbalken* or Criminal Section. 1953 SOU 14.

However, the greatest controversy occurred in regard to the term "*straff*" or "punishment." REGNEV, *BROTTSBALKEN 8* (1963). *Skydds-lag* had omitted the use of the word in order to avoid dividing consequences into those that were and were not punishment, since all consequences, from the standpoint of the reform school, should aim at resocializing and rehabilitating. STRAHL, *supra* note 14, at 107. The primary basis of the omission was the view that the term "punishment" is inconsistent with a modern protective code, because it contains a strong implication of retribution which has no place in a code dedicated to the values of general and individual prevention. However, conservative elements asserted that the term possesses a general preventive function in its tendency to frighten potential criminals. These critics also attacked *Skydds-lag* for failing to give enough attention to general prevention, putting too much weight on conditional sentence and probation, and overemphasizing treatment and care to the detriment of efficient use of prison as a deterrent.

In place of the word "punishment," *Skydds-lag* had used the term "*paföljder*" or "consequences" for the measures of prison, fines, conditional sentence, probation, and other sanctions. In the final form of *Brottsbalken*, the term "*paföljder*" was retained, but the consequences of prison and fines were labelled "*straffen*" or "punishments" in Chapter 1. This decision was made when a majority of the legislative committee, *Lagradet*, voted to use the term "punishment," and in 1960 it was placed in Chapter

mitted to and amended by a committee for the study of criminal and civil legislation (*Lagradet*) consisting of three Justices of the Supreme Court and one Justice of the Supreme Administrative Court. The drafts were also submitted to a number of interested organizations and authorities in accordance with the general Swedish practice. On August 26, 1960, *Lagradet* presented its report to the government, and on December 15, 1961, the final report was submitted to Parliament. Favorable legislative action occurred on December 21, 1962, and the new code became effective on January 1, 1965,⁴² precisely one century after *Strafflagen* had entered into force.⁴³

ANALYSIS OF THE CODE⁴⁴

A. Organization and Purposes

The primary purpose of the reform work that produced *Brottsbalken* was coordination and codification of the various legislative amendments to *Strafflagen* that had occurred throughout the years.⁴⁵ This organizational function cannot be considered insignificant, as *Strafflagen* had become quite fragmentary.⁴⁶ A second purpose was to bring about a compromise between diverse criminal law goals advanced by various scholars and interest groups.⁴⁷ Thus, some

I of *Brottsbalken*. I BECKMAN, HOLMBERG, HULT & STRAHL, BROTTSBALKEN JAMTE FORKLARINGAR 37 (1965). Thus, a terminologically unitary system was rejected at several points in favor of one containing the same terminological conflicts as *Strafflagen*. I AGGE, *supra* note 4, at 144-47.

⁴² For a more complete presentation of the process of study and enactment see 1962 NJA II 2-4. See also KUNGL. MAJ: TS. PROPOSITION 10 (1962); MED FORSLAG TILL BROTTSBALK, DEL. A-B (1962). For a short description of the process of Swedish legislation with special reference to criminal law legislation see R. GINSBURG & A. BRUZELIUS, *supra* note 1, at 18-20. Whenever a major reform is being considered, an expert committee is appointed, and the bill is submitted to relevant interest groups. In the case of civil and criminal law enactments, the permanent institution of the *Lagradet* studies the bill. Its unanimous views are theoretically advisory only, but in practice its drafts are usually accepted and the views expressed by *Lagradet* provide the basis for later interpretation of the statute. In the case of criminal law, the Minister of Justice prepares the final text of the bill.

⁴³ Kling, *Preface* to T. SELLIN, *supra* note 2, at 3.

⁴⁴ All English quotations from *Brottsbalken* in this article are taken from T. SELLIN, *supra* note 2. The selection of provisions of the code for analysis has been made on the basis of two criteria: (1) their usefulness in illuminating the values underlying *Brottsbalken*, and (2) their contribution to a basic understanding of the system of the code.

⁴⁵ Kling, *Brottsbalken*, 48 SvJT 1 (1963).

⁴⁶ I BECKMAN, HOLMBERG, HULT & STRAHL, *supra* note 4I, at 13.

⁴⁷ I AGGE, *supra* note 4, at 40.

of the measures found in *Brottsbalken* contrast sharply with the amended *Strafflagen* of 1864.⁴⁸

The purposes of the new code are clearly reflected in its overall organization.⁴⁹ *Brottsbalken* is divided into three main parts: Part One (General Provisions) describes the nature of and relationship between the measures used by the code and the applicability of the Swedish criminal law in certain difficult jurisdictional situations. Part Two (Of Crimes) sets forth and defines every crime and attaches to each a range of punishment to be used in those cases in

⁴⁸ See, e.g., notes 90-103 *infra* and accompanying text. Surprisingly, although the debate over certain sections of the originally proposed draft of *Brottsbalken* was intense, JURISTFÖRBUND, AKTUELL DEBATT OM BROTT OCH STRAFF (1957); Strahl & Olivecrona, *supra* note 5, at 561-83, 649, the bulk of the new code aroused little controversy during the process of formation and passage, see I ACCE, *supra* note 4, at 144.

⁴⁹ In order to gain a broader perspective of the organization and values of *Brottsbalken*, it is useful to contrast it with the French criminal code (CODE PÉNALE), the American Model Penal Code, and *Strafflagen*. The French code is divided into four books. Book One describes the various types of punishments and categories of crimes. Book Two treats problems of criminal responsibility, such as insanity and minority. Book Three defines each crime and specifies respective punishments. Book Four is a short treatment of several minor problems. Thus, it is apparent that the organization of the French code is preoccupied with criminal responsibility and the punishments for criminal acts. The organization of *Brottsbalken*, on the other hand, demonstrates a concern with penalties and alternative measures. The difference is between classical just retribution and the practical values of individual and general prevention.

The American Model Penal Code is also divided into four parts: Part I (General Provisions) deals with problems of criminal responsibility; Part II (Definition of Specific Crimes) is analogous to Part Two of *Brottsbalken*; Part III (Treatment and Correction) deals with probation and suspension of sentence to a limited degree, but is primarily concerned with the organization of penal institutions; Part IV (Organization and Correction) deals with the administrative organization of the departments of correction. While the Model Penal Code contains nearly as wide a range of alternatives to actual punishment as *Brottsbalken*, its organization and emphasis are such that these alternatives do not appear as parts of an overall system of flexible response and individual treatment, but as alternatives in a dual-track system—a system in which the judgment of the court is in terms of the traditional crime and its punishment, alternative consequences being imposed after the original determination of guilt as special exceptions to the common rule. Under *Brottsbalken*, the offender is confronted with a unitary system in which the best alternative method of treatment or punishment appropriate to his individual situation and crime is selected.

The contrast is perhaps even greater when *Brottsbalken's* organization is compared with that of *Strafflagen*. The latter is divided into twenty-seven chapters. The first six deal with jurisdiction, categories of punishment, complicity and attempt, concurrent sentences, mitigating factors, and damages to be rendered to the victim of a crime. Chapters seven through twenty-six treat individual crimes, while the last chapter concludes with special provisions for time of war and other like matters. Thus, the organization of *Strafflagen* was entirely different from that of the new code. *Strafflagen* was dominated to a great degree by the norms and programs of the classical school of criminal law. *Brottsbalken*, however, is in many respects consistent with the reform program of the sociological school.

which the general preventive function of the law is felt to be of predominant importance.⁵⁰ Part Three (Of Sanctions) provides six alternatives to actual punishment which can be utilized in those cases in which there appears a high probability of rehabilitation and in which general obedience to the laws is not threatened by the imposition of an alternative consequence.⁵¹ Thus, Part Two of the new code maintains the traditional values of equivalence, proportionality, and individual responsibility, while Part Three maximizes the possibilities for individualized treatment. By balancing the values of general and individual prevention, *Brottsbalken* satisfied both the advocates of the classical school of criminal law and the supporters of the sociological approach.

B. Part One. General Provisions

Chapter 1 (Of Crimes and Consequences). Chapter 1 of Part One of *Brottsbalken* contains general declarations concerning the nature of crime, the use of the various sanctions, and the goals of the code in general. Section 1 maintains the principle of "*nullum crimen sine lege*," in defining "crime" as an act for which a punishment is provided in *Brottsbalken* or another law.⁵² Under section 2, however, an act is not punishable unless it was committed intentionally. The nature of criminal intent has generally been left up to the courts to define.⁵³

Section 3 asserts that the term "*paföljd för brott*," used in *Brottsbalken*, refers to "the general punishments of fines and prison,"

⁵⁰ Two significant changes in this part are: (1) from the very specific definitions of *Strafflagen* to more generalized definitions leaving more room for interpretation and discretion on the part of the courts, see Kling, *Brottsbalken*, 48 SvJT, 1, 4 (1963); and (2) the abandonment of scales of punishment to guide the courts in their choice of sanctions and the substitution thereof of ranges of punishment within the discretion of the courts, see 1962 NJA II 79. Obviously both changes are in the direction of greater judicial discretion and more individualized treatment of offenders.

⁵¹ These six alternatives are: (1) conditional sentencing under Chapter 27, (2) probation under Chapter 28, (3) internment under Chapter 30, (4) surrender for special care under Chapter 31, (5) reduction of penalties under Chapter 33, and (6) complete freedom from any legal consequence in appropriate cases under Chapter 33.

⁵² The primary basis for the principle of "no crime without law" is provided by the supporting legislation to *Brottsbalken* of March 20, 1964. See 1964 SFS 163-218.

⁵³ The doctrine of intent developed by the courts does not differ strikingly from that generally prevailing in the United States. There are three categories of intent: (1) *direct*, where the effect produced was intended; (2) *indirect*, where the punishable effect was considered by the actor as certain to occur in the process of the crime, but was not considered necessary by him to accomplish his desired goal; and (3) *eventual*, which is essentially equivalent to the American category of "recklessness." See Strahl, *supra* note 25, at 11.

suspension or dismissal of a public official, disciplinary measures for members of the armed services, and conditional sentence, probation, youth imprisonment, internment, and surrender for special care.⁵⁴ The term "*påföljd för brott*," as literally translated, means "consequence for crime" or "effect of crime." Yet, Professor Sellin in his translation of the code renders the term as "sanction for crime."⁵⁵ The term "sanction" carries a connotation of punishment, or, at the least, a reference to time-honored responses to criminal activities, and, therefore, is not entirely faithful to the original, which intended the use of a neutral word without such connotations. Therefore, in this comment, the term will be translated as "consequence."

Brottsbalken divides "consequences" into two categories—punishments ("*straffen*") and other consequences.⁵⁶ Each definition of a crime in Part Two of *Brottsbalken* is accompanied by a specified range of punishment. These are to be used by the court where the general preventive function is predominant. Other consequences such as conditional sentence, probation, youth imprisonment, internment, and surrender for special care are to be utilized where the value of individual prevention is salient in the particular case.

Section 4 declares that the use of punishments is governed by the individual statutory definitions of the various crimes. It then provides that other consequences "may, according to what is provided for their use, nevertheless be applied albeit they are not mentioned in those provisions." This means that prison and fines are to be utilized according to the provisions for each crime, while the other consequences can be applied freely depending upon the characteristics defining the situation of the individual offender.⁵⁷

Section 7 specifies the purposes of *Brottsbalken*, which should be kept in mind by the court in choosing among the various consequences: "In the choice of consequences, the court, with an eye to

⁵⁴ KUNGL. MAJ: TS. PROPOSITION 10 (1962); MED FÖRSLAG TILL BROTTSBALK A9.

⁵⁵ T. SELLIN, THE PENAL CODE OF SWEDEN 25 (1965).

⁵⁶ An important accomplishment of *Brottsbalken* was to reduce the three categories of general punishment contained in *Strafflagen*, work (hard labor), prison, and fines to two—prison and fines. See STRAFFLAGEN, ch. 2, § 1 (1961); BRINCK, NYQUIST & OHLSON, STRAFFRATT GRUNDLAGGANDE LAROBOK I, ALLMAN STRAFFRATT ENLIGT BROTTSBALKEN 355 (1965). Compare these two categories of punishment with the eight of loss of civil rights, banishment, detention, confinement, forced labor, deportation, life at hard labor, and death referred to in § 56 of the French penal code. CODE PÉNALE § 56 (1959).

⁵⁷ See 1962 NJA II 28.

what is required to maintain general law obedience, shall keep particularly in mind that the sanction shall serve to foster the sentenced offender's adaptation to society." These are, of course, the values of general and individual prevention.⁵⁸ Thus, the basic intent of Chapter 1 is to establish *Brottsbalken* as a unitary system of rehabilitative consequences to be utilized in individualizing the treatment of offenders and punishments for the maintenance of general prevention. The Swedish Supreme Court in its first year of decision-making under the new code has demonstrated considerable concern over the proper application of *Brottsbalken's* flexible system of individualized response, while also taking into consideration the value of general prevention. Of the first forty-nine cases disposed of by the Court under the new code, thirty-two were treated predominantly as choice of sanction problems.⁵⁹

C. Part Two. Of Crimes

Chapter 6 (Of Crimes Against Morals). Chapter 6 of Part Two of *Brottsbalken*, dealing with moral offenses, is surprisingly progressive when viewed in the context of American legislation in this area.⁶⁰ The section proscribes only those activities that involve force

⁵⁸ The Model Penal Code § 6.02 (1962) provides no similar guides for the court in its choice of sanctions.

⁵⁹ Fürst, *supra* note 20, at 81. An example of the judicial concern over the choice of the appropriate sanction is the case referred to as B6 in the 1966 SVENSK JURISTTIDNING article concerning these forty-nine cases, written by Per-Erik Fürst of the Court of Appeals. *Id.* at 86. This case involved a twenty-five year old man who pleaded guilty to assisting two youths in thefts of military weapons. The court of first instance decided upon conditional sentence with supervision, but on review the Court of Appeals imposed a sentence of hard labor. The Supreme Court, by a vote of three to two, decided that probation was the appropriate consequence. 1964 SFS 163. The Court's dominant concern in this case was the choice of the proper consequence in terms of the individual offender. Conversely, in cases B27, B35, B36, and B45, the Court's primary concern was the value of general prevention. All four of these cases involved drunken driving, which in Sweden is considered a problem of general prevention rather than rehabilitation in the case of an average offender lacking problems of maladjustment. Prison was imposed in three of these cases, while probation was the consequence in the other. Fürst, *supra* note 20, at 92.

⁶⁰ In an interview with the author on July 9, 1966, Professor Knud Waaben of the Institute of Criminology in Copenhagen theorized that the absence in both Denmark and Sweden of criminal sanctions against consensual, private, adult sexual behavior is the result of two factors: (1) the high degree of respect in both countries for individual freedom of choice in matters of private activity and personal conscience; and (2) the lack of influence in either society of extremist religious elements that would make the criminal law an instrument of a particular set of values.

or violence, children, a public element, or the exploitation of a situation of dependency.⁶¹

Chapter 11 (Of Crimes in Connection with Debts). One somewhat harsh section of the new code is Chapter 11, which sets forth crimes concerning debts. Penalties ranging up to a maximum of six years can be incurred for various activities in connection with bankruptcies, such as concealing assets or giving away assets in contemplation of bankruptcy. For example, under section 4 of Chapter 11, favoritism to a creditor in contemplation of bankruptcy can result in a maximum sentence of two years in prison.

Chapter 16 (Of Crimes Against Public Order). This chapter handles a large variety of situations considered to be a threat to public order, such as riot, inciting rebellion, spreading a socially harmful rumor, obscenity, and agitation against an ethnic group. It also contains a provision which is somewhat inconsistent with the practical goals of *Brottsbalken*. Section 9 declares that a person who "publicly vilifies matters held sacred by the Church of Sweden" or other religious groups has committed a "breach of religious peace" punishable by imprisonment up to a maximum of six months. On the face of this provision many of Sweden's foremost writers and film directors would be subject to prosecution for insulting the Church. The provision, however, has usually been interpreted to cover only the most gross and irresponsible types of insults.⁶² Nevertheless, to single out the Church of Sweden and other religious bodies for special protection in regard to what is normally termed disorderly conduct is unnecessary, and presents a dangerous oppor-

⁶¹ A good example of the type of activity prohibited is provided by case B11 from the 1965 Supreme Court term. Fürst, *supra* note 20, at 92. The case involved sexual intercourse between a riding instructor and his fourteen year old pupil. This exploitation of dependency and youth was considered to be serious from the standpoint of general prevention, and the offender was sentenced to prison. *Id.*

Brottsbalken's treatment of morals offenses contrasts sharply with that of the French penal code, which prohibits various private, consensual acts, and even goes to the extent of providing a prison sentence of from three months to two years (to be remitted at the discretion of the injured spouse) for a woman who commits adultery, but no sanction for a man unless he brings his lover into the home as a concubine for which he can be fined. CODE PÉNALE §§ 336-39 (1959). Section 213 of the American Model Penal Code, on the other hand, is as progressive as *Brottsbalken*, but it is not representative of existing legislation in the United States in this field. *Brottsbalken's* morals provisions do not differ from those formerly in effect under chapter 18 of *Strafflagen*.

⁶² Conversation with Professor Hans Thornstedt, Faculty of Law, University of Stockholm.

tunity for the suppression of freedom of speech in regard to religious issues. Section 16 (disorderly conduct) would seem to accomplish the same purpose, with less danger of abuse. Surprisingly, neither this section, section 7 (insulting the Swedish flag), nor section 11 (obscenity)⁶³ produced any debate during the process of legislative study, perhaps because they merely continue earlier practices under *Strafflagen*.⁶⁴

Chapter 17 (Of Crimes Against Public Activity). Another provision of questionable value in a modern penal code is Chapter 17, section 6, which prohibits calumniating authority by spreading false rumors. In a parallel manner to the prohibition of insults against the state church of Chapter 16, section 9, this provision is subject to abuse through application to serious writings of a critical nature. Considerable protection is provided, however, by the rule that the prosecution must prove both that: (1) the rumor was false, and (2) the offender knew it to be false.⁶⁵

Chapter 19 (Of Crimes Against the Security of the Realm). Section 10 of Chapter 19 defines insulting a flag or other symbol of a foreign nation as a crime, punishable by a maximum of six months in prison. In addition, section 11 proscribes insulting, defaming, or affronting the chief of state or representative in Sweden of a foreign power, with a maximum punishment of two years imprisonment.⁶⁶ As in the case with Chapter 17, section 6, and Chapter 16, section 9, these broad and vague provisions could easily be utilized to throttle peaceful protests in the foreign policy realm.⁶⁷ The legislative com-

⁶³ Along with the usual obscenity rules, §11 contains a stipulation against public obscenity, which usually applies to public solicitation to prostitution or public sexual activities. BRINCK, NYQUIST & OHLSON, *supra* note 56, at 275.

The standards for the judgment of obscenity are left up to the courts, utilizing their interpretation of contemporary community standards. The language used in *Brottsbalken* to define obscenity ("offends morality and decency") is very similar to that employed in the French penal code ("contrary to good morals"). CODE PÉNALE art. 283 (1959). Section 251.4 of the American Model Penal Code follows the more specific and complicated requirements of United States Supreme Court decisions, such as "prurient interest," "predominant appeal," "customary limits of candor," "ordinary adults," and other like phrases.

⁶⁴ 1962 NJA II 250-51; see STRAFFLAGEN, ch. 11 (1864).

⁶⁵ See 1942 NJA II 691 for an example of the use of this section.

⁶⁶ *Strafflagen*, ch. 8, § 8 contained nearly identical provisions. See 1962 NJA II 285-86.

⁶⁷ A practical example of the type of problem created by these provisions occurred in the fall of 1965 when their use was considered with regard to a demonstrator who had carried a sign protesting the policies of the United States in Vietnam that rested rather neatly on the line between insult and criticism. The sign read: "John-

mittee (*Lagradet*) that studied *Brottsbalken* before its passage denied that these sections would interfere with freedom of speech, since they are limited to insulting declarations. However, the line between an insult and a serious criticism is admittedly subjectively determined.

Chapter 23 (Of Attempt, Preparation, Conspiracy and Complicity). Section 1 of Chapter 23 declares that an essential element of a conviction for attempt to commit a crime is "a danger that the act would lead to the completion of the crime or such danger had been precluded only because of accidental circumstances." This conception of an attempt is objective, and thereby much more limited than the subjective standard often utilized elsewhere.⁶⁸

Chapter 24 (Of Self-Defense and Other Acts of Necessity). Section 5 of Chapter 24 declares that using greater force in self-defense than was justifiable in light of the circumstances will, nevertheless, escape punishment if matters were such that the accused could "hardly have stopped to think." This provision is interpreted by the courts as involving a subjective standard—consideration of the special nervousness of the accused.⁶⁹ Thus, the self-defense rules are considerably more subjective than the rules of attempted crimes contained in Chapter 23. Moreover, section 2 declares that every person who comes to the assistance of another justifiably exercising the right of self-defense possesses the same right. Further, under section 6 an act that would normally be a crime is not punishable if it was committed due to an order from a person to whom the accused owes obedience.

D. Part Three. *Of Sanctions*⁷⁰

Chapter 25 (Of Fines, etc.). Since the Swedish system of dayfines, introduced in 1931, has been very successful in equalizing the effect

son, how many children are you killing today?" Dagens Nyheter, Nov. 2, 1965, p. 10.

⁶⁸ BRINCK, NYQUIST & OHLSON, *supra* note 56, at 76. Compare § 5.01 of the American Model Penal Code, which declares, among other things, that a person is guilty of an attempt if he "purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be . . ."

⁶⁹ BRINCK, NYQUIST & OHLSON, *supra* note 56, at 58.

⁷⁰ One must bear in mind that two different committees prepared *Brottsbalken*. Many of the more conservative provisions in Part Two can be attributed to President Birger Ekeberg's committee, while the progressive system of consequences in Part Three was the product of the committee headed by Dr. Karl Schlyter. This should not be stressed too heavily, however, as some experts (*e.g.*, Professor Strahl) sat on both committees.

of fines on members of various social classes,⁷¹ *Brottsbalken* has made no basic alterations in the fining system.⁷²

Chapter 26 (Of Imprisonment). One of the most important changes in the original proposed draft of Part Three of *Brottsbalken* occurred within Chapter 26. Chapter 2, section 6, of the proposal presented in 1956 ("*Skyddslag*")⁷³ declared that a person who is not yet eighteen years of age could not be sentenced to imprisonment. It also provided that those between eighteen and twenty-one could be sentenced to prison only if there were special reasons calling for a sentence of more than three years. However, section 4 of Chapter 26 of *Brottsbalken* now allows a person under eighteen to be sentenced to prison if very strong reasons for this measure exist. In addition, the new code provides for imprisonment of an offender between eighteen and twenty-one (with no three-year minimum) whenever it is necessary for general preventive reasons or when no other sanction is more appropriate. These changes appear to have been made for general preventive reasons.

Discretionary parole is provided under section 6 after two-thirds of a prison sentence, and section 7 provides for mandatory parole after five-sixths of a prison term.⁷⁴ Discretionary parole is a reward for good prison behavior, while mandatory parole is intended to provide a period of adjustment with supervision for every prisoner.

Chapter 27 (Of Conditional Sentence). The first measure that courts have available as an alternative to the punishments of prison and fines is conditional sentencing, a device used primarily as a warning where there is little likelihood that the offender will engage in further criminal behavior.⁷⁵ It is not combined with supervision,

⁷¹ 1931 SFS 327-31. See note 34 *supra* and accompanying text.

⁷² See STRAFFLAGEN, ch. 2, § 8 (1864).

⁷³ 1956 SOU 55.

⁷⁴ Another reform since *Brottsbalken* has eliminated mandatory parole and set up a maximum discretionary parole of one-half the prisoner's term. 1966 SFS 620-25.

⁷⁵ Conditional sentencing was first utilized by the Anglo-Saxon nations. They were followed by Belgium in 1886, France in 1891, and Sweden in 1906. STRAHL, *supra* note 14, at 46.

The consequence of conditional sentence has been used very frequently during the past twenty years. In the period 1948-49, eighty-five percent of all those sentenced for theft were given conditional sentences. Groth, 38 SvJT 509 (1953). In the 1950's approximately half of all sentences for theft were conditional. STRAHL, *supra* note 14, at 114. However, for general preventive reasons, conditional sentencing is seldom used in drunken driving cases. *Id.* at 118.

Brottsbalken clarifies former provisions on the use of conditional sentencing and probation, and differs somewhat from *Strafflagen* in this regard. See 1 BECKMAN,

but if the offender's activities during the period of conditional sentence are not satisfactory, another sanction can be imposed under section 6.

Section 3 provides a two-year probationary period in the case of conditional sentencing. In addition, section 6 declares that the offender can be directed to pay damages to the victim of his crime. However, it is quite clearly asserted in section 1 that a conditional sentence may not be imposed where the value of general prevention is predominant.

Chapter 28 (Of Probation). Probation differs from conditional sentencing primarily in the supervision given to the offender's activities during the three-year probationary period.⁷⁶ Section 1 declares that probation may be imposed only where a more far-reaching sanction is not needed—a serious limitation on the use of probation that was not contained in the originally proposed draft of Chapter 28.⁷⁷ Moreover, under section 3, the probation period may begin with from one to two months of treatment in an institution.

Chapter 29 (Of Youth Imprisonment). One of the most intensely debated proposals in the enactment of *Brottsbalken* was the attempt by Dr. Schlyter's committee to substitute the term "protective training" for the term "youth imprisonment" in Chapter 29.⁷⁸ This proposal was rejected primarily on the ground of general prevention.⁷⁹ Nevertheless, many of the specific provisions of the draft proposal were left unchanged.⁸⁰ Thus, for example, the term used in section 4 to describe the care or attention received by youths in the youth prisons is "*behandlingen*" or "treatment." This is in

HOLMBERG, HULT & STRAHL, *supra* note 41, at 14; 1 AGGE, STRAFFRÄTTENS ALLMÄNNAN DEL 146-47 (1959).

⁷⁶ The success of probation is heavily dependent upon the availability of private supervisors, who are paid a small sum by the state, but function mainly because of their interest in the problems of probationers. Although the number of probationers may reach 18,000 within the near future, supervisors are provided a mere six dollars per month in remuneration. SFS INFORMATION, no. 3 (1956).

⁷⁷ See 1956 SOU 55. However, under *Brottsbalken* probation quite frequently replaces prison. Conversation with Professor Hans Thornstedt, Faculty of Law, University of Stockholm, August 4, 1966.

⁷⁸ 1956 SOU 55.

⁷⁹ See 1962 NJA II 379; 1 AGGE, *supra* note 75, at 151. The term "*skyddsfostran*" or "protective training" has a strong connotation of parental action.

⁸⁰ One may question the significance of such terminological battles. For example, Professor Knud Waaben of the Institute of Criminology in Copenhagen has declared that Denmark changed the term for reform schools several times, but in each case the new term took on the meaning and characteristics of the old, including its stigma. Interview with author, July 9, 1966.

line with the original intention to make the experience one of institutional treatment and rehabilitation rather than punishment.

Under Chapter 29 sentence is served within and outside a youth institution for a maximum period of five years, no more than three years of which may be served inside the institution. The Chapter also retains most of the original proposal's grants of discretion in handling offenders sentenced to youth prison. An important change from *Strafflagen* is that youth prison may now be used in especially appropriate cases for those under eighteen or between twenty-one and twenty-three. However, it is still primarily intended for those between eighteen and twenty-one.

Chapter 30 (Of Internment). This provision is intended primarily for hopeless recidivists and others who are considered permanently dangerous to society. It permits the imposition of an indefinite sentence when necessary to protect society from further criminality.⁸¹ However, internment can only be used in those cases in which the offender has committed a crime carrying a prison sentence of two years or longer. Although section 3 provides that the courts in internment cases are to impose a minimum of from one to twelve years of custodial institutional care, in practice courts usually make the length of confinement equivalent to the standard prison sentence for the crime committed. Yet, unlike a prison sentence, the offender does not have the possibility of discretionary parole after two-thirds of his term nor mandatory parole after five-sixths of his sentence.⁸²

Section 5 provides that after the expiration of the minimum term, treatment shall continue outside the institution, if the internment board feels institutionalization is no longer necessary to prevent further criminality. Furthermore, under section 8 institutional care may not exceed the minimum term by more than five years without judicial consent. A court, however, can grant its consent to a three-year extension of internment every three years, so a

⁸¹ Internment was originally created in 1927 with two alternative types of sentence—one intended for dangerous recidivists with mental problems, and the other for dangerous recidivists without serious mental difficulties. See 1927 SFS 107-10. It was discovered, however, that the latter category did not in fact exist. Thus, *Brottsbalken* established one category of internment for all recidivists and dangerous and difficult criminals. Conversation with Professor Hans Thornstedt, Faculty of Law, University of Stockholm, May 13, 1966. See also 1 BECKMAN, HOLMBERG, HULT & STRAHL, *supra* note 41, at 14; BRINCK, NYQUIST & OHLSON, *supra* note 56, at 355; 1955 NORDISK KRIMINALISTISK ARSBOK 31.

⁸² Conversation with Professor Hans Thornstedt of the Faculty of Law, University of Stockholm, May 13, 1966; see BROTTSBALKEN, ch. 26, §§ 6-7 (1965).

prisoner can easily serve a life sentence of internment. If used too leniently, internment can undercut the principle of general prevention, but it is more dangerous in its tendency to obscure the maxim "no crime without law, and no punishment without a legal principle."⁸³ The internment provisions make possible indefinite terms of imprisonment ranging up to life with no definite criteria for their use other than the danger of further serious criminality.⁸⁴

Chapter 31 (Of Surrender for Special Care). This new Chapter of the code⁸⁵ permits the courts to surrender children, alcoholics, and persons subject to mental illness to other authorities in appropriate cases. In addition, section 4 provides for out-patient psychiatric treatment in special cases in which hospitalization is deemed unnecessary.⁸⁶

Through this Chapter *Brottsbalken* places surrender for special care, especially for mental care, on an equal footing with all other consequences. Thus, emphasis is placed on the judicial choice of an appropriate consequence, separated from the consideration of problems of criminal responsibility, which are irrelevant to the proper disposition of an individual case once guilt has been established.

Chapter 33 (Of Reduction and Exclusion of Consequences). Chapter 33 of *Brottsbalken* contains various special rules governing the use of consequences. Section 1 declares that no one under fifteen years of age at the time of his criminal act may be subjected to a criminal consequence, and section 4 provides for the imposition of milder punishments in cases involving those under eighteen. Moreover, section 4 also provides a basis for reducing the severity of punishment in any other case in which strong reasons dictate a

⁸³ Qwist, *Om Tidsobestamda Straff 17* (1966) (student paper).

⁸⁴ The problems that can arise from internment provisions are aptly illustrated by the classic case in the field, *In re Maddox*, 351 Mich. 358, 88 N.W.2d 470 (1958). This case involved a civil commitment under the Michigan sexual psychopath law. The offender was committed to the state penitentiary without a trial on the basis that his past behavior (several arrests and some minor convictions) indicated that he was a dangerous sexual psychopath. His commitment was for an indefinite term, and psychiatrists for the state declared that his mental problems required the "treatment" of being placed in a prison in precisely the same position as all other prisoners. The Michigan court ordered state officials to commit the offender to a genuine mental institution for treatment, or to release him within one month.

⁸⁵ See I BECKMAN, HOLMBERG, HULT & STRAHL, *supra* note 41, at 14.

⁸⁶ Out-patient care, however, will be used only rarely. 1962 NJA II 393.

lesser consequence.⁸⁷ A consequence may even be dispensed with entirely if it is obvious that no sanction for the crime is necessary. This provision, of course, is the final link in a complete chain of alternatives for individualization of treatment ranging from deprivation of liberty to complete freedom from all consequences.⁸⁸

Perhaps the most important single provision of the new code, however, is section 2 of this Chapter, which replaces the defense of insanity with a system of alternative consequences to be utilized in those cases where an offender has committed a crime under the influence of a mental defect.⁸⁹

A NEW APPROACH TO THE PROBLEM OF THE MENTALLY DISTURBED CRIMINAL

Under *Brottsbalken* legal insanity no longer absolves an individual of criminal responsibility. It is simply another factor to be considered by the court in choosing the appropriate consequence. However, only three consequences may be applied to an offender who is legally insane: (1) surrender for special care under Chapter 31, (2) probation under Chapter 28, or (3) fines under Chapter 25. Probation may be used as a consequence only in those cases in which it is felt to be more appropriate than surrender for special care in a mental institution. Fines are to be imposed only if they alone will be sufficient to deter the mentally disturbed offender from further criminality. For example, in the case of an individual who feels compelled to send insulting letters to another, fines might be utilized as a humane method of deterring him from further mentally abnormal behavior. Section 2 of Chapter 33 also provides that a defendant shall be "free of consequences," if under the circumstances no consequence should be imposed. This provision is intended to cover the situation in which an individual has committed a criminal act under the influence of insanity, but has recovered from his abnormal mental condition before trial. It can,

⁸⁷ See also BROTTSBALKEN, ch. 23, § 5, ch. 24, § 5, ch. 13, § 11, ch. 14, § 11, ch. 15, § 14, and ch. 3, § 4. All of these sections provide the possibility of reduction of penalties in specific cases.

⁸⁸ A Stockholm criminal lawyer, Bertil Malle, asserts that this provision is important, for it allows the defense lawyer a full range of commentary in the courtroom, since, even if the defendant is guilty of the crime, virtually anything might be relevant to a complete dismissal of all sanctions.

⁸⁹ Conversation with Professor Hans Thornstedt, Faculty of Law, University of Stockholm. See also I BECKMAN, HOLMBERG, HULT & STRAHL, *supra* note 41, at 15.

however, be used sparingly in other special circumstances.⁹⁰ Although theoretically under *Brottsbalken's* insanity provisions an offender could be surrendered for special care even though he became insane after committing the crime, such a result would be seldom possible in practice because of the great risk of simulation.⁹¹

Brottsbalken provides that an offender is deemed to be legally insane if he acted "under the influence of mental disease, feeble-mindedness or other mental abnormality of such profound nature that it must be considered equivalent to mental disease."⁹² It is interesting to compare the wording of this section with the "product" rule enunciated in *Durham v. United States*⁹³ that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."⁹⁴ Neither the *Durham* rule nor *Brottsbalken* require complete inability to distinguish right from wrong nor an "irresistible impulse." Indeed, both define legal insanity as either "insanity or mental defect." *Brottsbalken*, however, adds a third definition, "equivalence to mental disease"—a category intended primarily for psychopaths. Thus, the Swedish code extends the coverage of legal insanity even further than the *Durham* rule.⁹⁵

Surprisingly, *Brottsbalken's* criteria for insanity are no different from those under the old code.⁹⁶ Even under *Strafflagen*, Sweden had no rule like that of *Daniel M'Naghten's Case*⁹⁷ requiring either the inability to distinguish right from wrong or an incapacity to control conduct in order to conform with the law. This is particularly striking when one considers that the American Model Penal Code has retained the *M'Naghten* rule virtually intact although it has abandoned other archaic practices.⁹⁸ The advantage of the Swedish approach is that it, like the "product" rule in *Durham*, permits psychiatrists to testify within the language of their profession without being forced to indulge in an analysis of psychiatrically meaningless

⁹⁰ STRAHL, LES ANORMAUX MENTAUX SELON LE NOUVEAU CODE PÉNAL SUEDOIS 154 (1966).

⁹¹ *Id.* at 155.

⁹² BROTTSBALKEN, ch. 33, § 2 (1965).

⁹³ 214 F.2d 862 (D.C. Cir. 1954).

⁹⁴ *Id.* at 874-75.

⁹⁵ See STRAHL, *Introduction* to T. SELLIN, *supra* note 55, at 19.

⁹⁶ See STRAFFLAGEN, ch. 5, § 5 (1864).

⁹⁷ 8 Eng. Rep. 718 (1843).

⁹⁸ MODEL PENAL CODE § 4.01 (1962).

phrases, such as the inability of an individual to distinguish right from wrong.⁹⁹

In the vast majority of cases, the handling of the offender under *Brottsbalken* will proceed precisely the same as under *Strafflagen*. A mental investigation will be made and psychiatric testimony received where there is an indication that the offender may have serious mental difficulties. If the offender is found to have been under the influence of one of the three categories of mental disorder described in section 2 when he committed the crime, he will be surrendered for special care in most cases. On the surface, the only difference appears to be the purely formal one that under *Strafflagen* an offender was acquitted on the grounds of insanity and then committed for mental treatment, whereas under *Brottsbalken* he is convicted of the crime and then surrendered by the court for special care in a mental institution. However, the theoretical difference between the old and the new rules has important ramifications. First, there has been a tendency in the United States in recent years to consider the insanity defense as an easy way out of a difficult situation. Freeing an individual on the basis of criminal insanity and then committing him to an institution is in fact just as coercive and restrictive of an individual's liberty as sentencing him to prison.¹⁰⁰ By treating surrender for mental care as a consequence equivalent to all others, *Brottsbalken* emphasizes the essential equality of all restrictions on an individual's freedom of movement.¹⁰¹ Secondly, section 2 is an important step toward eliminating the view that there are two classes of people, the responsible and the irresponsible, from Swedish criminal law.¹⁰² Finally, the insanity provisions of the new

⁹⁹ However, it must be stressed that *Brottsbalken's* insanity provisions do not cover all mentally abnormal individuals—only those with serious mental illness, feeble-mindedness, or psychopathy. 1962 NJA II 395-96.

¹⁰⁰ T. SZASZ, LAW, LIBERTY AND PSYCHIATRY 144-45 (1963).

¹⁰¹ The only difficulty with *Brottsbalken's* insanity provisions is that a person who has serious mental problems, but is not found guilty, would have no special basis for admission to a hospital and would go on the regular waiting list. However, once a conviction has been obtained, many methods of handling can be used.

¹⁰² STRAHL, *supra* note 95, at 20. Under the more traditional view of legal insanity, the act of a person who is mentally ill or in some other way irresponsible (e.g., due to minority) does not come under the criminal law at all, since it is not even considered a crime. See STRAHL, LES ANORMAUX MENTAUX SELON LE NOUVEAU CODE PÉNAL SUEDOIS 149 (1966). This view of criminal responsibility can be seen in the definition of legal insanity in the French penal code which declares: "There is neither crime nor misdemeanor, when the accused was in a state of insanity at the time of the action . . ." CODE PÉNALE art. 64 (1959). On its surface the French rule is as

code signify the influence of the sociological school of criminal law which emphasizes individual treatment and practical measures rather than abstract concepts.¹⁰³

INDIVIDUALIZATION—THE SIGNIFICANCE OF THE SYSTEM
OF CONSEQUENCES

The importance of *Brottsbalken's* system of consequences lies in its comprehensive presentation of a unitary set of alternatives aimed at maximizing the possibility for individual treatment of offenders. When a court considers a case, it has available the tools of prison and fines, to be used according to the individual definitions of crimes in Part Two, as well as the instruments of conditional sentencing, probation, internment, surrender for special care, and youth imprisonment, provided in Part Three. Moreover, courts have the power either to reduce the severity of particular consequences or not to impose any sanction at all in appropriate cases.

Although *Brottsbalken* gives the judiciary wide discretion in the choice of consequences to be imposed, judges must, nevertheless, bear in mind the values of individual and general prevention and abide by various technical qualifications.¹⁰⁴ Prison and fines, for example, are to be used only in the interest of general prevention, while the other rehabilitative consequences are to be utilized when the value of individual prevention is predominant. Since it has been determined that measures that take away the freedom of movement of an individual have a detrimental effect upon rehabilitation and future adaptation to society,¹⁰⁵ prison is recommended only as a last resort when no other measure is appropriate.¹⁰⁶ The first

broad as *Brottsbalken's* provisions, but it is interpreted to require a mental state of delirium similar to that required by the *M'Naghten* case. FRÉJAVILLE & SOVER, *MANUEL DE DROIT CRIMINEL* 113 (1964). Thus, the emphasis of the French code is on criminal responsibility. On the other hand, under *Brottsbalken* insanity is a factor to be considered in choosing an appropriate practical form of treatment for the individual offender.

¹⁰³ Section 2 is a product of the reform movement led by President Schlyter, which aimed at eliminating all elements of the classical school from the penal code, including the concepts of responsibility, punishment, and retribution. This section rests somewhat uneasily in the code, since certain other reforms that should have accompanied it were eliminated in the legislative process. Nevertheless, it remains an important gain for the sociological school.

¹⁰⁴ See 1962 NJA II 369. An example of a technical qualification is the requirement of special circumstances for the use of probation where the minimum punishment for the crime is one year in prison or more. BROTTSBALKEN, ch. 28, § 1 (1965).

¹⁰⁵ See generally BÖRJESON, *OM PAFÖLJDERS VERRNINGAR* (1966).

¹⁰⁶ Strahl & Olivecrona, *Aktuella Spörsmål*, 42 SVENSK JURISTTIDNING 561-81 (1957).

year of judicial decisions under *Brottsbalken* reveals that the Swedish courts are taking the system of alternative consequences quite seriously and are attempting to utilize it in a manner that will individualize the treatment of offenders.¹⁰⁷

CRIMINOLOGY AND BROTTSBALKEN

Criminal law has long been a field of human endeavor in which opinions have prevailed over factual evidence, when the latter has been available at all. Debates over criminal law legislation typically involve claims and counter claims as to the effect of the proposed measures on reducing criminality in society. Unfortunately, few participants in these debates feel any need to support their claims with empirical evidence based on adequate research. Although Swedish legislators have been more concerned with the practical effects of criminal legislation than their counterparts in many other nations, *Brottsbalken* did not have an entirely satisfactory basis in factual research concerning the effects of the various alternative consequences.¹⁰⁸ This was excused on the ground that criminology

¹⁰⁷ Of the forty-nine cases handled by the Supreme Court under *Brottsbalken* in 1965, nine cases involved youths between eighteen and twenty-one years of age. Of the twenty-three adult cases, five received conditional sentences, nine were sentenced to probation, seven were sent to prison, and two received other measures. First, *Högsta Domstolens Val av Brottsföljder*, 51 SvJT 81, 84-86 (1966). On the basis of the first year of Supreme Court decisions under *Brottsbalken*, Per-Erik Fürst, Justice of the Court of Appeals, came to the following conclusions: (1) it is too early to draw firm conclusions about the operation of *Brottsbalken*; (2) the Supreme Court was often very careful to show precisely how it decided the choice of consequences; (3) when general prevention was in the foreground of the case, the Supreme Court rendered judgment without considering which sentence was best for the adaptation of the offender to society; (4) *Brottsbalken* clearly sees the offender as a subject for care and handling, and this method is utilized by the Supreme Court; (5) *Brottsbalken* presents more opportunities than *Strafflagen* for the use of sanctions that do not deprive the offender of his freedom; (6) the Supreme Court never explained its use of prison, but it always explained the use of other sanctions; (7) it is clear that the rule requiring strong reasons for use of probation in the case of a serious crime was established in the interest of general prevention; (8) in cases of drunken driving, the Supreme Court invariably gives a prison sentence if the offender is a well-adapted citizen, while it allows other sanctions for individuals whose adaptation to society might be injured by a prison term; (9) *Brottsbalken's* concentration on appropriate handling and care has caused the courts to concentrate more than before on the predicted effect of given sanctions on the accused; and (10) in the process of appeal the Court of Appeals often reversed the judgment of the court of first instance, and the Supreme Court frequently reversed the consequence chosen by the Court of Appeals. *Id.* at 84-96.

¹⁰⁸ See Strahl & Olivecrona, *supra* note 106, at 562, in which Professor Ivar Strahl, one of the members of the committee that prepared the system of sanctions contained in *Brottsbalken*, admitted that the committee did not perform enough research on the causes of crime during the eighteen years of its work. Nevertheless, it produced

had not yet been able to produce adequate evidence of the causes of criminal behavior.¹⁰⁹ Criminological statistics and research, however, have a much longer and more successful history than such statements would indicate.¹¹⁰

An example of the important criminological research that has been done in Sweden is the 1966 study of the effects of criminal consequences by Dr. Bengt Börjeson, demonstrating that those offenders sentenced to prison have a higher rate of recidivism than those who receive other rehabilitative consequences.¹¹¹ The ultimate conclusion to be drawn from such a study is that no offenders should be given prison as a consequence. However, because the political climate in Sweden is not yet ripe for such a radical development, the practical lesson to be learned from this study is that more offenders than before should be given rehabilitative consequences that do not deprive them of their freedom.¹¹²

Although not grounded on an entirely satisfactory criminological basis, *Brottsbalken* and the earlier amendments to *Strafflagen* have, nevertheless, provided Sweden with a system of alternative consequences that will permit the increased use of empirical findings such

several significant studies of sensitive problem areas, such as recidivism, youth imprisonment, and internment. See T. SELLIN, *THE PROTECTIVE CODE* 7 (1957).

¹⁰⁹ See 1962 NJA II 370. Minister of Justice Herman Kling even went so far as to declare that criminological research is so limited at present that no changes in the old criminal code were justified. He went on to declare that the new system of consequences was developed simply because one cannot stand still. Kling, *Brottsbalken*, 48 SvJT 1, 7 (1963).

¹¹⁰ A basis for criminological research was first provided when France began to keep statistics on crime in 1825, followed by Sweden in 1830. STRAHL, *DEN SVENSKA KRIMINALPOLITIKEN* 35 (1961). The year 1913, however, should be considered as the date of the first really effective Swedish criminal data system. *Id.* at 66.

¹¹¹ BÖRJESON, *supra* note 105, at 35. This study examined 421 persons between the ages of eighteen and twenty at the time they were sentenced for crimes before the criminal court of Göteborg, Sweden. The purpose of the research was to determine the relative effects of various consequences on resocialization, as judged by adjustment to work, abusive use of alcohol, and further criminality. The backgrounds of all individuals studied were examined on the basis of thirty-eight factors relevant to the probability of recidivism and the prognosis for resocialization. Offenders were placed in risk categories for recidivism based on their backgrounds and the seriousness of their crimes. Dr. Börjeson prepared graphs of the risk categories in relation to actual recidivism for two classes of offenders—those who received prison sentences and those who received other consequences. Thus, he eliminated the built-in bias that had plagued other such studies—that judges tend to be influenced in their choice of sanctions by their prognosis of successful rehabilitation of the offender. See generally STRAHL, *supra* note 110. For each category of risk, those who had been sentenced to prison had higher rates of recidivism than those who had received other consequences.

¹¹² Börjeson, *Utformas Kriminalpolitiken Rationellt?*, *Dagens Nyheter*, June 17, 1966.

as those revealed in Dr. Börjeson's study. *Brottsbalken* not only has increased the emphasis on consequences that do not deprive the offender of freedom of movement, such as probation and conditional sentencing,¹¹³ but has also contributed to the view that an offender should be treated essentially as a subject for individual rehabilitation.¹¹⁴ Thus, in its traditionally moderate, but steady manner, Sweden has developed a system of criminal consequences that is capable of satisfying the demands of the social defense school and other modern criminal law reformers for the maximum possible use of the sciences relevant to criminal law.

CONCLUSION

Since 1864, the primary purpose of criminal law reform in Sweden has been to attempt to satisfy society's demand for protection from criminal behavior at the smallest possible cost to individual freedom by extending the province of alternative consequences.¹¹⁵ Reform measures have slowly increased the number of exceptions to the rule that punishment always follows crime, and rehabilitation and humanitarian respect for the individual offender have come increasingly to dominate Swedish criminal law.¹¹⁶ *Brottsbalken* extends this development even further. Its major significance lies in four fundamental humanitarian solutions to basic criminal law problems: (1) the use of a "product" criterion of legal insanity, and the abandonment of the insanity defense in favor of the utilization

¹¹³ Fürst, *supra* note 107, at 96; Strahl & Olivecrona, *supra* note 106, at 565.

¹¹⁴ Fürst, *supra* note 107, at 93.

¹¹⁵ See 1962 NJA II 373. Although emphasis on the combination of punishment, guilt, and the moral ground of the law forms some part of the basis of the Swedish criminal law, see BRINCK, NYQUIST & OHLSON, *supra* note 56, at 65, these elements are much stronger in other nations, such as France and Germany. In response to the emphasis of the Nazi regime on general prevention without regard to the legality principle, post-war German scholarship has strongly emphasized the role that morality and guilt play in the criminal law. Thus, the 1962 proposal of a new criminal code in Germany was mainly based on Kantian proportionality and retribution. Morality and guilt are clearly set forth as the basis of German criminal law, and the modern trend toward more pragmatic measures is rejected. See Simson, *Strafrrätts Utveckling i Tyskland och Förslaget till Ny Strafflag*, 48 SvJT 583, 587 (1963). Similarly, the French penal code utilizes the term "*la peine*" (penalty or punishment) as the description of six different categories of punishment that range from fines to banishment and death. FRÉJAVILLE & SOVER, *supra* note 102, at 42-111. The difference between a penalty and other forms of sanctions under French law involves (1) the use of a criminal court, (2) the utilization of the criminal law, and (3) punishment through suffering or blame. *Id.* at 51-52.

¹¹⁶ See notes 7-43 *supra* and accompanying text.

of the mental state of the offender as a "factor" in the choice of an appropriate consequence; (2) the development of a system of alternative consequences that maximizes the possibility of individual treatment of offenders; (3) the specific limitation of the goals of the code to general and individual prevention, with an emphasis on minimizing the use of sanctions that interfere with individual liberty; and (4) the formulation of a set of provisions that is a direct response to twentieth century scholarship, and which can be readily adapted to the findings of future criminological research.