1973

Perennial Problems of Criminal Law

Jerome Hall

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlr>

Part of the [Law Commons](#)

Recommended Citation

Hall, Jerome (1973) "Perennial Problems of Criminal Law," *Hofstra Law Review*: Vol. 1: Iss. 1, Article 3.

Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol1/iss1/3>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

PERENNIAL PROBLEMS OF CRIMINAL LAW

*Jerome Hall**

THAT crime and punishment are perennial problems is plain; indeed, from ancient Greek drama to Shakespeare, Goethe, Dostoyevski and onwards into the present, they have raised the most subtle questions about "the human situation." The relevant legal problems have recently become so complicated that even scholars who have spent many years studying them are puzzled and discouraged. It is not so much the clash of competent opinions that is disturbing as it is the tide of history moved by global, uncontrollable forces, wide-spread tragedy, and the advance of psychiatry that engenders compassion for those who "fall by the wayside" and troubles our best efforts to cope with crime. If we are not to succumb to skepticism or futility regarding the volume of crime in this country, we must take careful stock of what we are doing and what should be done to improve our situation.

The commonly prescribed remedy is empirical research. If only we *knew* whether this or that penalty deterred potential offenders; if only we *knew* the effect of various types of peno-correctional treatment on rehabilitation, and so on.¹ Since we know so little, the need seems obvious—increase our knowledge by sociological, psychiatric and other empirical research. But the mills of intensive empirical research have been grinding out voluminous "findings" these many years, and still we lack the required answers; we remain very much in the dark. There must be something wrong with what we are doing, not least with the call for more empirical research.

Without disparaging sound social research, it is submitted that our principal problem is—what exactly is the problem? More fully, the most urgent need is to scrutinize the terms we employ and make them clear and precise, discover guiding lines and theories that make the study of criminal law and empirical research significant, and adopt a sound peno-correctional policy.

CONCEPTUAL ANALYSIS

Such basic terms as "crime," "criminal law," "punishment" and "retribution" are still very ambiguous. For early Italian positivists,

* Professor of Law at the University of California Hastings College of the Law; Distinguished Service Professor Emeritus, Indiana University.

1. See Logan, *Evaluation Research in Crime and Delinquency: A Reappraisal*, 63 J. CRIM. L.C. & P.S. 378 (1972).

crime was "natural," to be defined, in disregard of criminal law, as anti-social or harmful behavior; this continues to be defended in some sociological quarters. For others, crime is *any* behavior forbidden by criminal law, and criminal law is law that prescribes "punishment." But are rules imposing strict penal liability "really" criminal law and is a privation imposed on innocent persons "punishment" in the same sense as a privation imposed on a robber or a thief? Thus, for still others, crime and punishment have moral connotations. Inevitably, empirical research and discussions that proceed in innocent neglect of the conceptual ambiguities do not advance knowledge. Where one person speaks about crime as unrelated to law, while another speaks of crime as based on voluntary harm-doing forbidden by criminal law, while a third speaks of any behavior, including inadvertent negligence (which contradicts the criteria of volition which he also includes in "mens rea") the construction of a relevant body of knowledge is greatly handicapped.

"Retribution" is also a word with a long history in moral philosophy where its connotations are desert, proportionality, justice and rational inquiry. But in psychological discussions and in many judicial opinions, including very recent ones by justices of the United States Supreme Court, "retribution" is synonymous with "vengeance." Obviously, if one writer has the former meaning in mind, while another thinks of emotional retaliation, discussions are not profitable. In this instance, current usage has so emphasized the latter meaning that the only remedy may be to drop "retribution" entirely, and speak of justice or of just punishment.

There is also disagreement regarding inadvertent negligence; there are archaic laws and technicalities, *e.g.*, legal distinctions drawn between larceny by trick and criminal fraud, which may not be socially significant; and there is the difference between arbitrarily imposed commands and norms which have grown spontaneously from custom and a long series of judicial decisions. Plainly, the demarcation of a uniform field of data relevant to "criminal law" is not possible by sole reliance on formal prescriptions in terms of "punishment." The need for concomitant conceptual analysis is also unmistakable.

GUIDING LINES OF ORGANIZATION

The need to discover guiding lines is evident by mere reference to the amorphous literature on criminal procedure and administration. I am not referring to studies of particular problems or segments

of procedure or administration but to collections of data and discussions which are little more than reports of current events. Last year, a defendant was arrested two blocks from his house, and the house was searched. Last month, the defendant was arrested in front of his house; yesterday, the arrest was at his doorstep. Decisions a, b and c were rendered. A stomach pump used by a police officer to secure evidence is disapproved, but its use by a doctor is legal. And so on. The acquisition of knowledge of procedure requires much more than the compilation of an endless series of discrete decisions on different facts. What is needed is a rational organization of the data, and the only semblance of that in the current literature is a chronological arrangement of materials, *e.g.*, from police to preliminary examination to prosecution, trial and so on. Such an historical approach may have its uses, but if we are to understand criminal procedure we must organize the data along rational lines, as has been done to a significant degree with the substantive criminal law.

For example, to recall some relevant considerations: (1) Criminal procedure, no less than civil procedure, is pointed at issues raised in the *substantive* law. Unless the substantive questions are held in view, procedure becomes a sort of game, interesting in itself, no doubt, but leaving unexplored opinions concerning delay, the influence of voir dire examinations on jurors and the like. The scholar should advance beyond such commonplace observations; he should explore and explicate the relation of procedure to substance, and thereby add to our knowledge of both procedural and substantive criminal law.

(2) The relation of procedure to substantive law involves the logic of criminal procedure, including distinctions between proof and persuasion and the study of relevance with regard to each of them. More important still, this necessitates the articulation of the basic purpose of procedure—to discover the truth of the allegations set out in the indictment or information. (Of course, the drama of a criminal trial is a warranted collateral pursuit.)

(3) The logic of criminal procedure is tied to, and is often limited by, adherence to values other than truth, *e.g.*, the restrictions set by the Bill of Rights. Confession is very relevant to the *truth* of a substantive charge, but we do not tolerate the use of confessions compelled by the “third degree.” Evidence directly in point may not be gotten by invading the privacy of the defendant’s home. The truth of the State’s allegations must be established beyond a reasonable doubt despite the fact that in many cases reasonable jurors have

solid grounds for believing that the defendant is guilty. Thus, a variety of humane values limits the efficiency of purely logical adjudication.

(4) Finally, there is the historical institutional factor to be considered; it bears the marks of a distinctive culture and the operation of chance or accident. Among the nations there are different organizations of police, prosecutorial offices, judiciary, jury and correctional institutions. These agencies have acquired many practices, techniques and standards that were not legally prescribed, *e.g.*, waiver of the felony, "bargaining," in our system. We can set the officials and their practices in meaningful contexts in relation to the rules of criminal procedure logically related to the issues and purposes of the substantive law, limited by the Bill of Rights and other values. Other models and functions than that outlined above may be employed; what is certain is that some rational organization of the materials is an essential prerequisite to the acquisition of knowledge of the criminal law system.

ANALYSIS AND EMPIRICAL RESEARCH

I have been discussing the need for conceptual clarity and guidelines as conditions of advance of knowledge of criminal law. These matters also concern the common opinion that empirical research will solve our problems. For example, in studies of the effectiveness of law, *i.e.*, deterrence and rehabilitation, if one scholar studies deterrence on the supposition that any law sanctioned by "punishment" is a criminal law while another scholar limits criminal law to rules concerning voluntary harm-doing by persons whose *mens rea* is either an intention to commit that sort of harm or the reckless commission of it, the results are not comparable.

There are other uncertainties about "effectiveness." I am not concerned here with the difficulties involved in studies of deterrence due to a negative factor, the number of potential criminals who did *not* commit crimes, or with the difficulties of studying only those who are "known" to have committed crimes or with comparisons of crime rates in Sweden and the United States. My concern here is with the lack of elucidation of "effectiveness," "deterrence," "rehabilitation," and other concepts. A legislature passes a law to produce certain changes, but these results should be distinguished from immediate and remote consequences. Results are aimed at and are intrinsic to action; consequences are external to action. The purpose of a housing law, *e.g.*, is to provide better housing for poor people.

The result may be that some people are provided with better housing but a direct consequence may be that the new housing increases juvenile delinquency in those neighborhoods. Capital punishment may deter some potential killers, but the consequences may be so unfortunate as to outweigh the advantageous results. Remote consequences cannot be definitely known, and that alone limits the utility of social research. A small start has been made by distinguishing specific from general deterrence. The latter needs detailed explanation with reference to the complexities involved, *e.g.*, the "sense of justice," learning theories, efficiency of police, prosecution, trial and peno-correctional treatment. There are also quantitative uncertainties. Is a law effective if 80% or 70% or 50% of the population obey it? Suppose only 20% obey it, but no one would have acted in the desired way if there were no law on the subject?

Similar questions should be asked about "rehabilitation." A current hypothesis seems to be that imprisonment has utterly failed if, after serving several years, a convict who previously spent 25 years in the worst sort of ghetto is again convicted after his release and return to the same environment. The same sort of specious "finding" is based on the fact that a large proportion of prison populations has a criminal record, when what needs to be known is the proportion of all those released in a past given period of time who later commit serious crimes. Rehabilitation involves the restructuring of an entire personality; statistical studies on recidivism hardly touch that difficult problem.

The other principal barrier to the solution of our problems by large-scale research is the lack of confrontation of opposed viewpoints. This is characteristic of the current educational scene where each department isolates its students, especially graduate students, from other departments; thus, a department of philosophy or history may have perspectives diametrically opposed to those held in the departments of sociology or political science but "never the twain shall meet!" Similar ideologies dominate large-scale research on the problems of crime. The leader has deep convictions and since that is what motivates action, grants are made by foundations on the supposition that they are helping to solve major problems when, in fact, they are subsidizing one side of a debate. What should be insisted on is that adequate provision must be made for research based on contrary viewpoints. This need not mean that the funds must be equally divided; it does mean much more than the mere symbolic presence of a "devil's disciple" who can simply be ignored. Enough

should be allocated to support research by a substantial minority who oppose the prevailing opinions. The same deliberate opposition of contrary and contradictory perspectives should guide the planning of symposia, public discussions, and the operation of public offices. There would be numerous benefits: on the negative side, a limitation on the pouring out of biased findings. Positively, there would be clarification of issues, rationally guided research, and recognition that we deal with problems that science alone cannot solve.

It is not my purpose to depreciate the importance of sound empirical research or to ignore the fact that it contributes to conceptual analysis, the discovery of guiding lines of organization and theoretical inquiry. I have submitted: (1) that sound empirical research depends on the above types of analysis and synthesis; (2) that even the soundest empirical research cannot provide solutions of our problems; it can inform the practical judgment of those who seek solutions of these problems; and (3) that we should discover the extent of our present knowledge by the deliberate use of methods that assure the adequate presentation of opposed perspectives, data, and theories.

PENO-CORRECTIONAL POLICY

The most difficult requirement of progress towards solution of the crime problem is the determination of a sound peno-correctional policy. "Policy" is a very extensive term. There are short-range and long-range policies; particularistic and integrative policies; policies regarding scope, objectives and sentencing; policies that involve values that are relatively malleable, *e.g.*, regarding certain sexual relations, and policies involving absolute values, *e.g.*, that no person should be dehumanized and that pain should not be inflicted on anyone unless there are very good reasons to do that. Policies are, also, feasible, possible, or utopian.

A. *Objectives*

The determination of the sound objectives of the peno-correctional system touches every phase of both research and practical work in the field of criminal law. Since it is widely agreed that deterrence and rehabilitation are sound objectives (although in the present mood only rehabilitation is espoused by many advocates of reform) the principal current issues concern that of justice. The confusion regarding "retribution" has been noted, and it should only be added that this misconception has the unfortunate effect of allowing the

question of justice to be ignored. To be sure, the value of justice is so ingrained that it is often implicit in discussions that say nothing about it; but the problems of justice are difficult and they should be carefully articulated if a sound policy is sought.

No one would advocate or condone amputation of the hands of thieves even if that were the most effective deterrent. No one advocates punishment of psychotic offenders. No one condones punishing an innocent person even in a situation where that would prevent considerable harm, *e.g.*, by appeasing mob spirit. The prohibition against cruel punishment, all of the other guarantees of the Bill of Rights and the presumption of innocence make no sense unless justice is valued. But if retribution in its ethical sense is excluded, punishment can be defended only on grounds of deterrence or rehabilitation. Thus the *justice* of what is done to convicts is ignored—until tragedy strikes and we are brought up short by the realization that we have lost sight of what is most precious in criminal law.

Few, if any, would disagree with the above observations about what should *not* be done. But when justice calls for punishment of guilty persons, the difficulties start. Is it possible to have justice in the above negative directions and, also, to make no distinctions between *what is done* to the robber or arsonist and *what is done* to or for those who sacrifice their lives for others, for students who need financial help or for ordinary decent persons who harm no one? Is it possible to maintain the principle of legality as a limitation on official action and at the same time allow offenders to escape the plain orbit of relevant penal law? Is it possible to make sense of praise and reward if no one is blamed or punished? The greatest defect in much of the current approach to crime is the failure to appreciate that even as regards privations, criminals should be treated as moral beings, not as animals to be conditioned.² That, more than anything else, is what our common law of crime means; that is what the common man understands. It is also what public officials lose sight of and many philosophers and social scientists ignore.

A revived appreciation of the common law of crimes could do much to correct the current imbalance. It is a discipline that has its roots in ancient Greek philosophy and the religious tradition of the West. It starts, say, with Bracton and continues thence for more than 700 years in the most detailed, refined, and articulated record of moral experience and deliberation to be found anywhere. The prin-

2. See Morris, *Persons and Punishment*, 52 THE MONIST 475 (1968), reprinted in THEORIES OF PUNISHMENT 76 (S. Grupp, ed. 1971).

ciples of this law, stated in terms of legality, mens rea, voluntary conduct, harm, causation and punishment rest finally on the view that man is a responsible person. This has not been interpreted in a fixed or dogmatic way; it is a perspective that has grown and deepened through the ages. While we continue to improve it, we cannot abandon these ultimate principles unless we are prepared to accept a mechanistic or paternalistic view of man, *e.g.*, one that may be garbed in the well-motivated attire of "treatment." Punishment is the public, realistic condemnation of harmful, immoral, legally forbidden conduct; it is an implication of the basic principles of the moral life. Those principles could not survive the demise of just punishment.

Without discussion, which the limits of this paper exclude, it is submitted that a sound policy has three aspects—justice, deterrence and rehabilitation—and that the neglect of any one of them leads to fallacies in analysis and research.³ But although a sound policy, an integrative one, is essential not only for productive social research but also to the maintenance and improvement of the criminal law, it will not suffice simply to recognize that all three of the stated objectives must be considered. A policy cannot decide specific cases, as Holmes has taught us; there are many individual factors to be considered (some of which will be discussed later) and there is no easy solution of this phase of the problem.

There is also the difficult problem of economic cost. A recent newspaper report stated, in substance, that the annual cost of maintaining juvenile delinquents in reformatories ranges from almost \$11,000 to \$19,000 for each juvenile, and this was contrasted with the annual cost of \$5,700 of attending Harvard University. There are limits on what can be spent on peno-correctional institutions. An even more difficult question concerns the limits on the quality of life in penal institutions if imprisonment is not to stimulate violation of law instead of deterring it.⁴ There is, also, the question of possible conflict between the above objectives; *e.g.*, is it possible to be just and at the same time rehabilitate offenders?

I believe defensible solutions can be reached regarding all of these difficult problems and that they will be compatible with the integrative theory. But this calls for the use of sound practical judg-

3. J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 304-307 (2d ed. 1960); Hall, *Justice in the 20th Century*, 59 CALIF. L. REV. 752, 755-758 (1971).

4. Professor J. Andenaes, no hard "retributionist" by any standard, writes: "[T]he humanizing of penal practice must be kept within certain limits if it is not to lead to an undermining of respect for law and authority." 43 J. CRIM. L.C. & P.S. 195 (1952), reprinted in *THEORIES OF PUNISHMENT*, *supra* note 2, at 159.

ment aided by clear analysis of each problem in the light of presently available knowledge, not for postponement on the basis of optimistic hopes that future empirical research will supply the necessary answers.

B. *The Scope of Criminal Law*

A major perennial question of policy concerns the scope of criminal law. The history of criminal law shows spontaneous rather than carefully studied changes, often responsive to special interests or to passing public opinion. The premise of this discussion is that the morality of criminal law is improved when behavior that is not plainly immoral has been removed from its orbit and, perhaps, transferred to that of non-penal law. This purpose is served when strict penal liability is so treated; whether even that disposition is defensible may be doubted, but the consequent strengthening of the criminal law seems evident.

A second move in that direction, dating at least from the beginning of this century, concerns the so-called "victimless crimes." However, the current emphasis on "victimless" is misleading in its implications that all crimes must have specific individuals as victims and that the harms must be inflicted on unwilling persons. Traffic violations, tax offenses and political crimes need not have specific victims. Similarly, it is fallacious to assume that all crimes are *contra voluntas*; consent to mayhem or to fights that cause public disorder is not a defense, and consent is not even theoretically applicable to political crimes.

The focus should be on the harm, *i.e.*, whether it is the kind of harm that calls for use of the punitive sanction. Unfortunately, discussions of this problem have been carried on in terms of a sharp dichotomy—harm or no harm. In fact, it is always possible to find *some* harm, some undesirable result or consequence; since no man is an island, if he hurts himself the community is harmed. Quoting J. S. Mill, including passages where he advocates governmental intervention, does not help to elucidate this criminal law problem. Instead, what needs study is the relative crudeness of criminal law, the possibly preferable use of non-punitive law, the use of non-legal agencies, and the value of individual autonomy which, like the presumption of innocence, should place the burden of proof on those who advocate control by criminal law.

Emphasis on "victimless" has another unfortunate consequence: it lumps together gambling, prostitution, addiction, and homosexu-

ality. But each of these differs importantly from the others; the respective solutions may also be expected to differ. If we make necessary distinctions and recognize that very different social problems are involved, we will advance beyond the intuition that something is wrong with our present handling of these problems.

We can strengthen the criminal law and subject fewer persons to its onerous sanctions by improving its moral quality in still other directions. The felony-murder rule leading to convictions of murder in the first degree regardless of the lack of even recklessness is still in vogue in this country and it leads to sharp disagreements among able judges. The objective standard of liability, especially in criminal homicide, also subjects some convicted persons to a higher degree of criminal liability than they deserve. In both of the above respects we can profit from the recent advance of English criminal law.⁵ On the other hand we are making considerable progress, especially in California, by the use of "diminished capacity" to approach nearer to just treatment; but that vague concept is very much in need of the sort of analysis discussed above if it is to serve as a definite standard of adjudication. Finally, apart from various subsidiary problems in other parts of the criminal law, there is the problem of inadvertent negligence. Here, too, the submission has been that such conduct should be removed from the orbit of penal liability and treated civilly.⁶ Although opinion on this question remains divided, recent discussions by scholars not previously involved definitely support that thesis.⁷

With regard to all of the above possibilities of narrowing the scope of criminal law, it should be noted that we lack the justification for the present indiscriminate treatment of those problems that may be allowed past generations whose non-punitive legal institu-

5. The 1957 Homicide Act (5 & 6 Eliz. 2, c. 11) and the 1967 Criminal Justice Act, Sec. 8.

6. Hall, *Negligent Behavior Should be Excluded from Penal Liability*, 63 COLUM. L. REV. 632 (1963).

7. See, e.g., Fine and Cohen, *Is Criminal Negligence a Defensible Basis for Penal Liability?*, 16 BUFFALO L. REV. 749 (1967); Wasserstrom, *H.L.A. Hart and the Doctrines of Mens Rea and Criminal Responsibility*, 35 U. CHI. L. REV. 92, 102-104 (1967); and Note, *Negligence and the General Problem of Criminal Responsibility*, 81 YALE L.J. 949 (1972).

The only recent article I have seen that supports criminal liability for inadvertent negligence is Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401 (1971). Professor Fletcher accepts the prevailing German position on this subject. Reflecting this influence is his confusion of inadvertent negligence with what in common law analysis is recklessness. See, *id.*, first full paragraph on page 426.

tions and non-legal facilities were relatively crude or wholly inadequate. In this century our administrative agencies have been developed to a level undreamed of in past ages; our social services have likewise advanced to points where they can make substantial contributions. We are not, therefore, faced with the simple alternative that confronted lawyers in the 18th century—either to use the crude apparatus of the penal law or to do nothing at all. We are fortunately in a position where we can refer large areas of deviant behavior to other institutions while, at the same time, by circumspect narrowing of it, we can strengthen the criminal law.

C. *Indeterminate Sentences Versus Definite Penalties*

It has long seemed axiomatic that the individualization of treatment provided by wide indeterminate sentences marked a great advance over earlier insistence on specific penalties. The differences among offenders and the circumstances of their wrong-doing seemed and still seem obviously to call for very different degrees of punishment and types of treatment. The fact that judges are not often expert in non-legal disciplines and the assumed availability of competent specialists, augmented by confidence in the social disciplines, led to the transfer of decision-making regarding sentences from judges limited by specific rules of law to administrative boards largely unfettered by law, who, presumably, would make a careful study of each offender.

Recent events have taken a turn which calls for a reappraisal of this policy. They began with the abandonment of legality in European dictatorships and the dramatic reminder that the use of power unlimited by definite rules of law can lead not to wise, compassionate treatment but to gross injustice and the abuse of elementary human rights. More recently, the criticism of indeterminate sentences by inmates of penitentiaries and their representatives has become articulate, sometimes strident. Studies of judicial decisions have revealed great disparities which cannot be rationally explained on the basis of available data. Parole boards are charged with arbitrarily freeing some offenders while continuing for years the imprisonment of others who are not distinguished in terms of the crime or the circumstances or the offenders' characteristics. There are insinuations of political influence and of reliance on fortuitous characteristics, *e.g.*, whether an inmate is clever enough to make a favorable impression on the guards. There are questions about the competence

of the boards, about the time they actually spend in studying the individual inmate, and there are serious doubts about the availability of objective knowledge to guide these very important decisions.

Third, is the influence of recent Supreme Court decisions, especially *Gault* and *Furman*.⁸ *Gault* dealt with the juvenile court, where individualization has had its greatest appeal; that decision and succeeding ones legalized juvenile court procedure to the point of bringing it very close to the formality of the criminal trial. Despite the judicial avowal not to interfere with the benevolent treatment of juveniles, criticism was not restricted to the trial; juvenile correctional institutions were even more severely criticized and were assumed to be punitive in their actual operation. Whether this criticism of procedure and treatment in cases of juveniles was warranted or mistaken, its indubitable effect, when joined to return to the rule of law as regards the juvenile court, is to raise serious doubts about the individualization of "treatment" and its corollary—the extensive indeterminate sentence.

Furman has a more direct relation to the indeterminate sentence; for, if there is a single thesis running through the majority opinions, it is that subjection to the capital penalty as now managed, *i.e.*, within the discretion of judges and juries, is arbitrary, capricious and without any "meaningful basis for distinguishing" the cases where it is imposed from the others; it is a mere "lottery." Inevitably, the question arises—how or why is the case different as regards life imprisonment instead of a shorter maximum term, imprisonment to 20 years instead of to 5 years or, indeed, as regards innumerable other indeterminate sentences? The capital penalty is distinctive in some ways, but it is like long terms of imprisonment in that all are severe privations. If the execution of some criminals is arbitrary or fortuitous, on what ground or by reference to what available evidence can the disparities that run through the entire system of indeterminate sentencing be defended?

Finally, and perhaps most persuasive, is the experience of the small, homogeneous, literate Scandinavian countries which had embraced the indeterminate sentence as the plain road to progress and humane treatment. Professor Andenaes, the distinguished Norwegian scholar, reports:⁹

At least in the Scandinavian countries the trend in recent years has been away from the sanctions of indeterminate dura-

8. *In re Gault*, 387 U.S. 1 (1967); *Furman v. Georgia*, 408 U.S. 238 (1972).

9. J. Andenaes, *The Future of Criminal Law*, CRIM. L. REV. 621-622 (Nov. 1971).

tion back to the traditional system of fixed sentences meted out by the court. This change in the trend is not due to theoretical speculation, but to experience and research.

The above developments, arising from different sources, leave us no choice except to reopen and reexamine the question of the indeterminate sentence. A first step in that direction is to fix the limits of defensible disagreement. It will be agreed, I believe, that we cannot return to 18th century classicism—to impose a specific penalty for each crime regardless of the offender's characteristics and the circumstances of his crime.¹⁰ On the other hand, we cannot ignore the recent criticism of the indeterminate sentence, noted above. We are drawn therefore to explore intermediate positions, *e.g.*, to take certain criteria as the basis for definite limitation on official discretion, leaving it to operate within more restricted areas than the present very wide range allows. For example, only for illustration, not to suggest that it is a defensible solution, let us attend to a present indeterminate provision of, say, 1 to 10 years' imprisonment. Among criteria that are candidates for definite statutory provision or for the legal regulation of parole boards are the following: conviction of a previous felony, being armed with a lethal weapon, the use of such a weapon in the infliction of a physical injury on the victim, and confirmed addiction to a "hard" drug. (Other criteria, *e.g.*, dangerousness and evidence of mental disease, are relatively subjective.) Instead of 1 to 10, the sentence in a particular case would be 1-2.5, 2.5-5, 5-7.5 or 7.5-10. An offender who was found to have all four of the above characteristics would be sentenced to 7.5-10 years; *i.e.*, the parole board would have discretion to discharge him any time after he had served 7.5 years, but not before. And so on as regards the other criteria, depending on whether there were one, two or three of them.¹¹

There are obvious objections to such a proposal, *e.g.*, why give equal weight to each of the four criteria? How defend any combination of them against other combinations or why treat a combination of two of them as equivalent to combinations of two other criteria? That there are infinite differences among offenders and the circum-

10. The usual account of 18th century penal law is little more than a myth since even at the peak of classical penology there were many ways of avoiding or mitigating the rigor of the substantive law. See, *e.g.*, HALL, *THEFT, LAW AND SOCIETY*, ch. 4 (2d ed. 1952).

11. See Judge M. E. Frankel's discussion of "a scheme of quantification" in his lecture on *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 47-48 (1972). "If this sounds crass and mechanical, I press it nonetheless as a goal preferable to the void in which we now operate." *Id.* at 48.

stances in which they acted is so obvious and it has so impressed able judges, lawyers and scholars that all of the recent well-known reports (the Model Penal Code, the Model Sentencing Act, and the American Bar Association's project on Sentencing Alternatives and Procedures) recommend continued reliance on wide discretion. The A.B.A. project focused on a narrow difference between the two models: it supported the Model Sentencing Act and rejected the Model Penal Code's statutory provision of minimum sentences.

The fact that the New York Commission rejected some of the Model Penal Code's provisions and preferred to substitute legal controls did not alter the view that wide indeterminacy is desirable. Although the A.B.A. Committee was well-informed regarding great disparities in the judges' sentences, there is little, if any, evidence in its report that defects and injustices in the operation of parole were considered or, indeed, that any serious criticism of the policy of indeterminate sentences was discussed. This is not stated as criticism of that distinguished Committee; the A.B.A. report was published in 1967, *i.e.*, before the very recent widely publicized complaints of inmates of prisons and before *Furman* was decided and, apparently, without consideration of the Scandinavian experience.

In the light of these recent developments, it is possible to formulate the present problem in more realistic terms. The question is not whether the indeterminate sentence is better *in theory* than any system of fixed penalties. Plato's *Statesman* is abundant proof of the preferability of decision by philosopher-kings unfettered by law. But that dialogue terminated with the equally persuasive argument that, lacking philosopher-kings, the best solution available in any actual state is the rule of law. Why should not that apply to a significant degree to decisions regarding the years of imprisonment that must be served? It could be shown, I think, that our traditional preference in the resolution of doubts is to give priority to the rule of law as a necessary curb on administration. The relevant, specific question is, what legal limits should be placed on administration?

Of first importance in dealing with this problem is recognition of the fact that this is a problem for informed practical judgment, not one that can be solved by empirical research.

Second, if the decision is one to be made by informed practical judgment, who should make that decision and how should it be reached? In our system, that kind of judgment is made by the legislature, hopefully, after full and free discussion in which opposed points of view and conflicting sets of data were considered. There is

considerable evidence in the above reports that rehabilitation and deterrence were foremost in the minds of the committees; evidence of an equal concern for justice is scant. Able legislators and thoughtful laymen, had they been members of those committees, might have called attention to the importance of this essential component of a sound penal policy.

Third, account should be taken of the fact that there is wide recognition of the need for evidence of the grounds of decision by judges and parole boards and for the availability of these records to the public.¹² This much, at least, seems plain—the indeterminate sentence can no longer be accepted on faith; the rule of law can no longer be ignored on the ground that there are always differences among offenders and situations. We do not abolish the law on criminal homicide because each case is different or because an act of euthanasia stimulates compassion rather than prosecution. We should not allow the justice of the substantive law to disintegrate in the mere belief that individualization unchecked by law actually provides a higher degree of justice. Opinions will differ regarding this; perhaps a common ground can be reached if the enactment of statutes along the above indicated lines were postponed, say, for five years and, as a first measure, judges and parole boards were required to state the standards and types of fact which they employed in reaching their decisions and, also, to say in their reports why particular combinations of them led to the various decisions. The common run of person understands the potential advantages of individualization; what they need to know is whether important decisions regarding sentences, release and detention were made on rational grounds and in conformity with recognized standards of justice. If that evidence cannot be produced, we should turn to legislation for substantial restoration of the rule of law.

THEORIES OF CRIMINAL LAW AND THEORIES ABOUT CRIMINAL LAW

In a large sense "theory" connotes knowledge or understanding. In a narrower sense, *e.g.*, that of "molecular theory," a theory is a set of interrelated concepts which unifies and explains a large range of data. A theory of criminal law depends on the elucidation of relevant concepts, on guiding lines implied in the rational interrelation

12. See *The Challenge of Crime in a Free Society* 179 (Pres. Comm. Law Enf. Adm. Just. 1967). But the focus of study of the task force was on "rehabilitative treatment." Task Force Report: Corrections 16 (1967).

of those concepts, and on its expression of a sound penal policy. Just as any scientific theory is verified by reference to fact, so does the validity of a criminal law theory depend on its coherence with actual criminal law, not with anyone's idealization of that law. The ambiguity of "criminal law" raises problems regarding theories of that law; and the alleged neutrality of theory (or of relevant social science) is contradicted by any criminal law theory's inevitable connotations of value or policy.

It is possible here to give only the most summary statement of the principal theories of criminal law and salient differences among German, English and American theories. In broad terms it may be said that all of these criminal law theories distinguish: (1) an external element—facts and behavior, (2) the legality of the behavior and (3) the subjective element, the factor of personal guilt. The dominant type of German criminal theory (which, outside the common law world, is more influential than any other theory) deals with the above elements in chronological order. In England, again oversimplifying, the dominant view, probably influenced by parliamentary supremacy and Bentham, is based on a practical, formal definition of criminal law focused on "punishment."¹³ In the United States, an effort has been made to construct a detailed, systematic theory of criminal law which takes account of the above elements in a single level of analysis. Based on the ethical premise that only voluntary harm-doing should be subjected to penal liability, it distinguishes and inter-relates rules, doctrines and principles of criminal law.¹⁴ Criminal law and legal scholarship would be greatly advanced if the above theories were subjected to critical comparison.

Theories of criminal law should be distinguished from theories about criminal law. A theory of criminal law is a structure of immanent, interrelated ideas; *e.g.*, the principles referred to above are derived from the union of the rules and doctrines. Such a theory represents the discovery of unifying concepts inherent in the criminal law. A theory *about* criminal law may be a sociological, psychiatric or anthropological theory, *e.g.*, that criminal law evolves from certain conditions; that it represents the interests of a dominant class or competition among classes; that it reflects instincts and drives that are of psychiatric significance; that it is a rational dialectic of

13. There are, of course, many variations in English criminal theory. For example, the position of the later Professor Turner and of Professor G. Williams on inadvertent negligence challenges the dominant model.

14. Hall, *supra* note 3, ch. 1. This theory is summarized in 77 *ETHICS* 15-16 (No. 1 1966) and in 9 *ARIZ. L. REV.* 360 (1968).

the moral life, and so on. Research on "criminal law" is sometimes carried on by social scientists in complete disregard of the significance of the legal concepts that are expressed in that law. The result may be an interesting contribution to behavioralism; it does not advance knowledge of the criminal law.

There is an alternative to this sort of study, one, indeed, that has the highest credentials in social science. I refer to the fact that the founders of many social disciplines were legal scholars. Weber was a professor of law before he turned to economics and sociology; Durkheim was also trained in law. The contributions of Maine to anthropology, of the German Historical School to history and social science, and of many legal scholars to political science are well-known.¹⁵ These scholars not only kept in view the rational significance of the law, they also applied that knowledge in their development of the social sciences.¹⁶ In sum, theories about criminal law, including the sociology of criminal law, depend on theories of criminal law.

The paramount importance of theory has become more fully appreciated as a result of the closer cultural relations among scholars of many countries, especially in the past 25 years. I am not referring to the occasional meetings of international societies but to the much more frequent exchange of ideas among legal scholars that has recently become possible. This means that the criminal law scholar of the future will address his best efforts to an international audience of scholars. The ultimate challenge is to construct a universal body of knowledge of criminal law and its administration.

15. J. HALL, *COMPARATIVE LAW AND SOCIAL THEORY* 111-114 (1963).

16. *E.g.*, Weber's theory of "types" and of social action was influenced by his legal training.