CHAPTER III

Changing Theories of Proper Treatment

I. PHILOSOPHIC REPUDIATION OF PUNITIVE METHODS

Within comparatively recent years a vigorous insistence that punishment be discarded as a principal method of treatment for known criminals has become increasingly vocal. The punitive notion is still dominant, despite the shift in its justification from the purpose of retribution to the alleged purpose of prevention. But ideas of other, more effective, methods for preventing repeated crime are finding expression and advocacy. To some extent they may be motivated, as is occasionally charged, by a mere sentimentalist horror of the rigors of punishment. Far more often and more obviously they spring from realization of the practical futility of punishment as a preventive. But whatever the cause, an insistence on procedures more effective than mere punishment is strengthening in frequency and explicitness.

These newer proposals must not be confused with some of the older philosophy which, though it uses the terminology of “correction” instead of “punishment,” is not in reality advocacy of a substitute for punishment, but only of some unusual justification for its use. It is imperative to distinguish the two ideas, despite their use of words apparently similar but fundamentally different in significance. One idea conceives of reformation through suffering; the other of rehabilitation by many methods.

30 As late as April, 1940, Morris R. Cohen can devote 39 pages to discussion of “The Moral Aspects of Criminal Law,” 49 Yale L. J. 987, without considering anything but its punitive aspects.
a. *Defective Use of Verbiage of Reform*

An example of the verbiage of "reformation," though the idea is still punitive, is this:

"Krause, who in other respects was not an adherent of determinism, regarded punishment as a means of education (i.e., not in its nature and purpose as an evil). He who was undergoing punishment, was under guardianship like the immature. The State has the right to interest itself in the development of the immature, in the reformation of the morally depraved will. According to Krause, there can be no such thing as a legal authority to inflict evil, as such, and therefore cause suffering. . . .

"Ahrens gives to this theory a coloring which touches even its absolute foundation; for he regards the purpose of the punishment as the restoration of the violated legal order of things. But he found this restoration of the legal order only in the personality of the criminal and not in an effect upon others. Consequently, rejecting all absolute theories (which he regards as amounting more or less to retribution), he designates his theory as the theory of reformation, and effectively defends himself against numerous obvious objections.

"Röder sought to give greater definiteness to the theory of reformation by his statement that the purpose of punishment lies in the elimination of the actually proven immoral will; wherefore, everyone may be placed under supervision (i.e., criminal supervision) exactly to the extent that he has manifested a will inclined to wrongdoing. . . . A reformatory punishment, to be consistent, can and must be pursued only so far as an improvement (presumptive, at least) is obtained; . . ." \(^{31}\)

Verbally that sounds somewhat like segregation primarily as a means of prevention, like the utilization of rehabilitative treatments, like a re-formation of the character of the individual. But it is noteworthy that none of these writers really

suggests the actual use of treatments peculiarly calculated to strengthen the individual's ability to evade certain causes of crime, or designed to remove the particular causes inherent in himself. In a merely verbal sense, they are, it is true, talking "correction." But the fundamental assumption implicit in each case is the now anachronistic one that crime and law-abiding behavior are matters wholly of free choice, satisfactorily controllable by making one choice less attractive, because of threatened punishment, than the other. Of true correction—correction of the impulses or weaknesses, correction of the conditions which exercise so great an influence upon choice—there is no realization apparent in those discussions. What they propose is in truth little if anything more than rephrasing of the idea that punishment shall be used as a means for guiding choice, rather than as a process of retribution. Jeremy Bentham lets the cat out of the bag in his statement that "When the ultimately intentional result is amendment or reformation, it is by the impression made by the action of the evil on the will of the offender that, in so far as it is produced, the result is considered as being produced. In this case the act of punishment is also termed an act of correction." 

Still other writers who might seem from their terminology, when it is divorced from its context, to be advocating correction of the causes within an individual which drive him into crime, and in this sense seem to be proposing rehabilitation rather than punishment, are in truth only discussing those causes of crime which lie outside the individual and produce the necessity for punishment. Thus, for example, Enrico Ferri writes at considerable length of what he characterizes as "penal substitutes." He says:

"Since punishments, instead of being the simple panacea
of crime which popular opinion, encouraged by the opinions of classical writers on crime and of legislators, imagine them, are very limited in their deterrent influence, it is natural that the criminal sociologist should look for other means of social defense in the actual study of crimes and of their natural origin. . . . These methods of indirect defense I have called *penal substitutes.*"  

But by this phrase he does not, as one might suppose, mean anything at all in the way of rehabilitation in the broader sense of the word. He is not thinking of substituting something other than punishment in the treatment of the individual. On the contrary, he has in mind changes in law which would make the need for treatment of the individual less frequent. He sets out as illustrations of these substitutes such things as the amelioration of poverty by the establishment of free trade. He would prevent smuggling, also, by that means. So, too, he would prevent drunkenness by increasing the tax on alcoholic beverages and lowering it on coffee, tea, and beer. His suggestion of a "penal substitute" for the prevention of repeated forgery is not a new method of dealing with the forger, but the use of metal money, which he assumes to be difficult of counterfeiting, in place of paper money.

The last half of Ferri's book is devoted to what he calls "practical reforms." It is obvious again, however, that he does not have in mind prevention of repeated crime through reform of the individual, but is writing about reform in the content and enforcement procedures of penal law. He considers the wisdom of the extent to which the presumption of innocence has been carried; he discusses the proper structure of prison buildings; he questions the practice of dismissing prosecutions without trial; he writes of indemnification of persons wrongfully convicted through judicial error and the indemnification of victims of crime, and of the use of lie detec-

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33 Enrico Ferri, *Criminal Sociology* (1898) p. 110.
tors. But he does not advocate a treatment different from that of punishment for the person whose guilt has been determined by reformed methods.

The persistence of the earlier expiatory, retributively punitive notion, even in comparatively modern and so-called scientific writing, is illustrated by the thesis of *The Criminal, the Judge, and the Public* by Franz Alexander and Hugo Staub. The authors vigorously advocate psychoanalysis of known criminals. But oddly enough their proposition is not that through such psychoanalysis the specific cause of an individual's criminality may be discovered and eliminated, so that he will be less likely to offend again. On the contrary, their purpose in the psychoanalysis would be to discover why a criminal offended in order that the amount of punishment deserved by other offenders might be more fairly, more "justly" determined. "We want to understand the criminal," they say, "in order to be able to judge him correctly, so that our judgment may be just beyond question. Our assertion that our clear understanding of the criminal serves the interests of society is based on the fact that the sense of justice belongs to the most fundamental factors of human social organization; any disturbance of the common sense of justice has a destructive effect upon society."

One finds essentially the same notion in the numerous dissertations by medical writers upon what they denominate "partial responsibility" for criminal acts—obviously not a partial responsibility to crime-preventive correction, but a partial deserving of the quantum of punishment imposed on normal persons.

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34 Translated from the German by Gregory Zilboorg (1931).
34a Ibid, p. xvi.
35 Even the Italian Penal Code of 1930 which at the time of its appearance received such laudation, particularly from those persons connected with it, for its modern progressiveness, shows clearly the persistence of the retributive no-
All such narrowly limited “reform” of prisoners, such mere pretense of alteration in treatment of convicted persons, such advocacy of the correction of social conditions in the verbiage of correcting criminals, is essentially adherent to the old, the punitive, philosophy of treatment, not representative of a new idea.

b. True Notions of Reform

But the Declaration of Principles of the American Prison Congress in 1870 suggests a real transition period, where the notion of “reform through punishment” is in its turn giving way to notions of “rehabilitation by methods independent of punishment.” The concept of rehabilitation is beginning to appear, at least by implication, though the possible methods other than punishment are not indicated or, if indicated, are mere incidentals of the punitive process. Thus the Declaration says:

“I. The treatment of criminals by society is for the protection of society. But since such treatment is directed to the criminal, rather than to the crime, its great object should be his moral regeneration. Hence the supreme aim of prison discipline is the reformation of criminals, not the infliction of vindictive suffering.”

Thus far there is nothing new in the Declaration; it is preceded by volumes of utterance to the same purport. But it continues:

“III. The progressive classification of prisoners, based on character and worked on some well-adjusted mark system, in such provisions as articles 91 and 92, to the effect that an offender who was drunk “from an accidental event or from force majeure,” at the time of the offense shall have his punishment reduced if his drunkenness was “such as largely to diminish responsibility, but without excluding it;” while “if the drunkenness was pre-ordained for the purpose of committing an offense, or for providing an excuse, the punishment shall be increased.” Penal Code of the Kingdom of Italy, translated from the Italian, His Majesty’s Stationery Office, London (1931).
should be established in all prisons above the common jail.

“V. The prisoner’s destiny should be placed, measurably, in his own hands; he must be put into circumstances where he will be able, through his own exertions, to continually better his own condition. . . .”

This seems truly the “rehabilitative,” rather than the “punitive” notion. As to segregation so long as dangerousness continues, rather than for a merely punitive period, the Declaration asserts:

“VIII. Peremptory sentences ought to be replaced by those of indeterminate length. Sentences limited only by satisfactory proof of reformation should be substituted for those measured by mere lapse of time.”

Since the date of that Declaration of Principles, one finds additional and even more emphatic advocacy of change in the treatment of the known offender. This new philosophy amounts to a definite repudiation of the “penal” system as such, and urges the substitution of truly “corrective” methods suited to the necessities of the individual.

Some of this advocacy is implicit, rather than precisely expressed. But it is an absolutely ineluctable implication from the causes of crime which the particular writers assume to exist—causes which obviously could not be either eliminated or even counteracted by mere imposition of punishment.

One reads, for example, that “Criminal biology, as defined in the basic text (of Adolph Lenz) is ‘the systematic study of the personality of the offender and of his offense as an individual experience.’ For the study of personality from the point of view of criminal biology, the hereditary background of the offender is of primary importance. Accordingly, the objective of research in criminal biology has been to demonstrate the significance of the hereditary factor in the formation of criminal personality. . . . The psychiatrist, Friedrich
Stumpff, after study of a number of repeaters, arrived at the conclusion that crime is the product of certain character traits which are inherited. The validity of his conclusion is greatly impaired by the unscientific manner in which the data have been gathered, which is quite typical for the investigations of family histories taken by criminal biologists."

Regardless of whether or not this biological theory is sound, it has indeed been advocated by many criminologists from Lombroso through Kretschmer, with his physiologic criminal types of asthenic, athletic, and pyknic, and Hooton with his notions of height and weight as related to criminal tendencies. If there be even a modicum of truth in these assumptions of the basis of criminality, it must follow that the product of hereditary or of physical characteristics cannot be treated by punishment alone with satisfactory results in the protection of public safety and security. The mere assertion of the biological basis of crime amounts, therefore, to a commensurate assertion that treatment other than mere punishment is an essential to public protection.

The same thing may be said, of course, concerning many other theories of the cause of criminality. Morris Ploscowe, although he does not specifically express his own ideas of what should be the proper treatment of known criminals, points out numerous causal factors which obviously cannot be eliminated by punishment alone, but must necessarily be dealt with by other methods suitable to the individual. He says, for example:

"Nevertheless tuberculosis, heart disease, hernia, defects of vision, etc., may be found in individual cases to be causes of delinquency in so far as they prevent or tend to prevent the sufferer from earning a living, just as Goring suggested that

36 Ernst Kretschmer, Physique and Character, translated from the German by W. J. H. Sprott, London (1936).
inferior physique may be at the bottom of man’s criminal behavior by handicapping him in legitimate occupations.”

And again, “The endocrinologists claim that the functioning of the glandular system profoundly affects physical development. As Berman states, ‘More and more we are forced to realize that the general form and external appearance of the human body depends to a large extent upon the functioning, during the early developmental period, of the endocrine glands. Our structure, the kinds of face we have, the length of our arms and legs, the shape of the pelvis, the color and consistency of the integument, the quantity and regional location of our subcutaneous fat, the amount and distribution of the hair on our bodies, the tonicity of our muscles, the sound of the voice and the size of the larynx, the emotions to which our exterior gives expression, all are to a certain extent conditioned by the productivity of our glands of internal secretion.’

“But not only is the claim made that the glands of internal secretion determine the physical features of the individual. It is also asserted that they are the real governors and arbiters of instincts and dispositions, emotions and reactions, character and temperament. Just as certain patterns are formed in the body by a particular arrangement of the ductless glands, so the mind also receives its pattern from the same source. A man’s nature is then chemically his endocrine nature.”

Ploscowe discusses at considerable length and with several references, these theories of the endocrinologists. “The science of endocrinology is still too young, and there is still too much disagreement about its data to allow definite conclusions. But this type of research contains interesting possibilities. If it establishes fundamental biochemical mechanisms at the basis of human conduct, the finding cannot fail to be of importance in an understanding of criminal behavior, which is but one form of human behavior.”

He might have added—what is a logically inescapable conclusion—that if the biochemical mechanism is established as

the basis of human conduct, the most effective form of crime preventive treatment should be one directed toward alteration of that mechanism.

These clear implications that treatments more specific, more varied, and more individualized than is possible under any penal procedure are necessary for the safety of society, find explicit assertion by Healy and Bronner:

"Only through picturing individuals as they are, made what they are by a combination of external causes and their own natures, and partly by the treatment that has been given them, can adequate impetus be given to a demand for the application of scientific method in this field.

"Without scientific practice the situation that embraces the needs of the individual and the needs of society is not met when he is handled as an offender, and very often indeed he turns and rends society. This result as reaction can be read between the lines of many a criminal's life history. Again, the first requirement of self-protection is that society make every attempt to understand the offender, to deal with him in ways that do not deteriorate him, but rather that build up in him a better mental attitude, by methods that make for him a fair opportunity after release from institutional life. . . .

"Nor can a plan be safely founded except upon recognition of the large variety and complexity of causes that any careful student of cases of delinquency and criminality can demonstrate. The theories earlier set forth voluminously by continental writers and the narrow, one-piece explanations of some American and English theorists must all be discarded for a larger vision. We must perceive the individual and his environment reacting back and forth on each other, each being changed as each is reacted on.

"We can easily enumerate a grist of criminological theories: possession by the devil; economic and sociological theories of causation; theories accounting for crime by imitation, degeneracy, heredity; crime as a disease; the somewhat later absurd attempts to account for a very large share of misconduct as manifestations essentially of epilepsy, feeblemindedness, injury of a hypothetical 'moral brain center,' immigration,
physical inferiorities and irritative conditions, such as imperfect vision or focal infections from abscessed teeth, psychopathic inferiority, innately defective emotional make-up, midbrain lesions, poverty, the unclear conception of dementia precox, inadequate personality, neurotic compensations for inferiority. These are enumerated to show, not that there is no truth at all in them, but rather that the very multiplicity of theories proves the danger of setting about any program that is based upon the idea that all or a large share of delinquency and crime is attributable to any one cause.

"The same warning may be given against following any such simply founded theory of treatment. Any expectation of accomplishing all or nearly all in the way of effective treatment by some particular plan of using force, punishment, kindness, religious appeal, medical care, or by any set form of reformation, is doomed to disappointment. The varieties of human beings and the varieties of causes of delinquency are too many to be met by a unitary conception of what it is possible to do in the therapy of delinquency and crime.

"In general terms it may be insisted that a hard-headed, entirely practicable, but scientific, social and legal plan, far-seeing and far-reaching, is the great primary necessity." 39

This express recognition of the need for treatment of known criminals by methods other than merely punitive is not confined to the philosophic cloisters.

"Keenly alive to the fact that 97 per cent of those who go to prison return to society, modern prison officials see the necessity of making the period of incarceration an opportunity to prepare each prisoner for the day when his confinement is over. This new point of view endows the prison with the function of carrying out careful, individualized study, treatment, and training of offenders, using the knowledge and techniques of medicine, psychiatry, psychology, education, vocational guidance and training, religious instruction, recreation, and every other discipline which contributes to the understanding and management of people. . . . Your committee finds

little dissent from this point of view among the students and practitioners of penal administration, but it does find widespread departures in practice." 40

A practical assertion of this more modern notion of crime prevention appears in the report of the Director of the Federal Bureau of Prisons for 1939 in which he says, "All of the new institutions are, we believe, planned in accordance with the modern concept of the penal institution as an instrumentality for rehabilitating and reforming the prisoner. Rather than expending our appropriation on expensive tool-proof steel, high walls, and elaborate locking devices, we have sought to provide the maximum number of housing units supplemented by adequate school, shop and training facilities." 41

Thus we find, as a relatively recent development, both from the ivory tower and from the fields of practice, a vigorous advocacy that instead of mere punishment as a preventive of crime there be substituted a variety of treatments calculated to eliminate those conditions within the individual which caused him to offend and may cause him to offend again.

c. Theories of Continued Segregation

That other ideal, the proposition that when a known offender cannot be fitted for safe return to freedom in society he should be segregated, not merely for a maximum period, but really indefinitely—for life if necessary—has found far less clear advocacy, though, as will be seen, it has found some actual adoption. The recognition of its necessity, however, is

41 An unusual judicial recognition of what ought to be the purpose of treatment of convicted criminals is expressed by Justice Hammer of the New York supreme court, in People ex rel. Montana v. McGee, 16 N. Y. S. (2d) 162 (1939). "It is the object of the Parole Law to afford every convicted person subjected thereto the privilege and opportunity to benefit by the disciplinary, correctional and reformatory purposes of the institution of incarceration. . . . The object is moral reformation of the prisoner, rather than punishment."
cogently exemplified, even if oddly so, in the action of a sentencing judge who put an eighteen-year-old boy, charged with eleven robberies in two years, on probation for fifty-five years—five years for each offense—on the theory that he needed "probation for life, and society needs protection from you." 42

2. PRESERVATION OF PUNITIVE VALUES

This growing awareness that other treatment of convicted criminals may protect society against repeated offense more effectively than mere punishment protects it does not preclude recognition that whatever is done to the criminal himself may have an effect on the conduct of others. To what extent the punishment of one restrains another’s tendencies toward crime we do not know. That it does have some effect and is thereby a protection of the social safety we assume. Hesitancy in yielding whatever of such good there may be in the punitive system quite understandably begets a hesitancy in discarding the punishment of convicted criminals and substituting other methods of treatment. There is fear lest in grasping at the shadow of a hoped-for diminution of repeated criminality we may lose the reality of an assumed restraint upon original crime.

Whether or not the failure of punishment to prevent repetition of crime is so complete, and its restraint of original crime so slight, that the latter might well be foregone in hope of improving the former, is perhaps open to argument. And this discussion aims at exposition rather than argument. The present writer perforce concedes, therefore, the validity of an assumption that punitive treatment of convicted criminals does restrain criminality by others who witness that punishment, and that this restraint should not be sacrificed to the desire

42 18 Probation 138 (June, 1940) published by the National Probation Association.
for greater effect upon the persons so treated. But it does not follow that the adoption of segregative and rehabilitative treatment of convicted persons, instead of punishment, would in fact lessen the desirable effect upon others.

To the extent that fear of punitive imprisonment is a factor in law-abiding conduct, the fear of segregative imprisonment will be equally potent, so those who advocate segregation during the whole period of dangerousness assume. The confinement will be as undesirable, as sedulously avoided, regardless of why it is enforced; its very indefiniteness of duration should make it more potent a threat than the prospect of a known duration. If, on the other hand, one adopts the theory that the effect of punishment lies less in the physical fear created than in unwillingness to incur the public reprobation evinced by punishment, then the stigmatization of a wrong-doer as unfit to associate with his fellows until he has been reformed in character is presumed to be quite as appalling as the condemnation by punishment. So, too, that crystallization of popular conceptions of right and wrong, that inducement of subconscious abhorrence of evil conduct and choice of good which Stephen and Aschaffenburg postulate as the proper objective of punishment will result in equal force from the conviction of an offender, regardless of whether his treatment thereafter be punishment or enforced rehabilitation for social existence.

The once conventional idea of preventing crime by threat of the most appallingly horrendous consequences long ago fell into obsolescence. Mutilation, deportation, flogging, the horrors of Botany Bay and Devil's Island, proved their own futility. One after the other they passed into disuse, and hope for the effectiveness of punitive treatment came to rest upon confinement and amercement. Now, say advocates of a different treatment, all the possible expectancies of fine and im-

prisonment as influences upon the conduct of others than the victims will spring in even greater measure from a judgment of unfitness for social freedom, with its consequent possibilities of confinement and enforced rehabilitation.

In this way, then, the newer philosophy, though it repudiates the effectiveness of mere punishment as a preventive of repeated crime and advocates other means to that end, maintains also that none of the assumed effectiveness of punishment as a socially desirable influence upon the conduct of others would be lost by the change.