CHAPTER VI
Conclusions

FROM all this welter of conflicting philosophies, from the available data of crime and criminals, from judicial opinions and from the content of legislative enactments, certain conclusions are inescapable.

In the first place the conventional, accepted idea of proper treatment of convicted criminals is still the traditional one of punishment. Theories upon which the use of punishment is justified have shifted in popularity. The form of the treatment has altered materially. Life imprisonment has largely been substituted for hanging; mutilation gave place to flogging and flogging in its turn to solitary confinement, or bread and water. The brutalities once part and parcel of punishment have been eradicated or ameliorated. Nevertheless, the essential character of the treatment imposed has not been changed; its form is different, but its nature still is punitive. That idea pervades judicial utterance and legislative enactment. The punitive purpose dominates both the content of the criminal law and its application. It is in fact the essential sum and substance of the law today.

But though punishment is still clearly the purpose of the law, the purpose of the punishment is not so clear. The once academically popular notion that punishment should be imposed only for the purpose of retribution, to the end of exacting an owed expiation, has passed into obsolescence. In the main it has yielded place to concepts of punishment as a preventive of new wrongdoing. But it is by no means obsolete. It still affects both the content of the law and its administration. Today's newer legislation can be accounted for in part only by recognition of the extent to which the motiva-
tion of revenge for injury accomplished has colored it. The
instinctive desire for revenge, for the compelled repayment by
an offender of a *quid pro quo* in suffering, is a social force
which has never been wholly argued down, which has defi-
nitely influenced the whole process of dealing with convicted
criminals and which must necessarily be taken cognizance of
in any proposal of legislation to be enacted. It seems safe to
say, therefore, that the purpose of treatment of discovered
criminals is a composite, in fluctuating proportions, of retro-
spective, retributive satisfaction and of prospective hope. But
no matter how strong the latter element of purpose, regardless
of how emphatically the preventive purpose is stressed, the
commonly accepted method of treatment, almost wholly re-
lied upon, is still the infliction of unpleasant consequences for
the sake of their effect upon the will of the sufferer—it is pun-
ishment, in the usual connotation of that term.

A second unavoidable conclusion is the relative ineffectiv-
eness of this punitive process, particularly as a preventive of
*repeated* crime by wrongdoers who have been subjected to it.
The light of history precludes an assumption that its failure
lies in the mildness of its punishments; the most drastic of
penalties have proved equally inefficient. Nor is there sub-
stantial evidence that its failures are caused by the infrequen-
cies of its application. On the contrary its most obvious fail-
ures and its most notable ones are precisely with the very in-
dividuals to whom it has in fact been applied once, twice, or
repeatedly. Whether or not a greater assurance of punish-
ment, a greater modicum of inevitability, would more effec-
tively decrease the amount of first criminality one cannot say.
Nor need one speculate—the problem of creating that
greater assurance has already been struggled with too long to
raise a probability of its attainment. The effective possibilities
of punishment, as a preventive method must be measured by
the actualities of the past and of the present. And by that meas-
urement the punitive method, particularly in its operation upon those to whom it has in fact been applied, has demonstrated its unsatisfactoriness beyond dispute.

The reasons for this failure constitute a fairly obvious further deduction. In the main the method fails because, though it may return its victims to social freedom with a strengthened desire to refrain from crime, it returns them also without the slightest increase in ability to do so. Too often it returns them to freedom with only a wish to evade renewed punishment, no desire at all to abstain from crime. But whether it succeeds in creating a will to abstain, or merely a will to sin more safely, it operates only upon the will, not upon the capacity to abstain. Only when the treatment applied ceases, in part at least, to be a punitive method can it actively seek to better its subjects' ability in self-support. The present system also fails as a preventive because, being punitive, it must release a subject at the end of his specified penal term, without regard to either his will or his capacity to refrain from further crime. It fails also because as a matter of fact it has been and still is a mass procedure which is not designed to protect its less vicious subjects from the character destructive contagion of other criminal mentalities. To these three basic causes of the failure of punishment to prevent repetition of crime must be added a fourth reason; it leaves its victims, after punishment, to their own resources, without state assistance in the avoidance of further criminality.

Though the process of punishment might conceivably be individualized and the character-destructive effect of mass treatments might thus conceivably be remedied, the other causes of its failure are inherent; they are elements in the very definition of punishment; they cannot, so long as the treatment of convicted criminals remains primarily punitive, be corrected. The failure of punishment cannot be prevented while the process of punishment is retained as the primary method
of treatment. Yet that the faults, and therefore the method, must be eliminated if society is to be successfully protected against repeated crime is an inescapable conclusion. Some fundamentally different method of treatment must be substituted. The only question is as to the essentials of that substitution.

Presumably the substitute could not wisely, even were attainment practicable, depart entirely from the notion of unpleasant consequences as a result of conviction of wrongdoing. Prevention of repeated crime is but one objective, though the main one, of criminal law enforcement. The prevention of first crime cannot be ignored. Nor might it be altogether safe to disregard that vigorous insistence of the man on the street that wrongdoers be punished because they deserve to be punished. It may well be doubted that disorder would increase and private persons might take into their own hands the exacting of retribution if instincts of revenge were left unsatisfied by official action. More likely, a public which believes that its freedom from crime is being adequately protected will acquiesce peaceably in whatever reasonable means are adopted for that end. Still, satisfaction of that undeniably prevalent wish for retributory suffering as a consequence of injury done must be given some heed in consideration of any substitute for the common, punitive method of dealing with convicted criminals.

In so far as the prevention of crime by others than the person dealt with is concerned, psychologists agree and history demonstrates that neither fear of monetary amercement nor the physical distress of imprisonment are of material effect. What deterrence there may be springs from more subtle influences; from the fear of public condemnation demonstrated through punishment, from the conduct habits and inhibitions created by open and notorious application in specific cases of what might otherwise be mere abstract formulations of
right and wrong, from the instinct of individuals to conform with the expressed beliefs and demanded conduct of the herd. If this be so, punishment, in the sense of treatment administered for the primary purpose of causing suffering, is not necessary to attainment of the end sought. All the deterrent effect, the explicit expression of group reprobation, the demonstration of its standards of right and wrong, its insistence upon conformity with its group ideas, can be expressed by conviction and individualized corrective treatment as effectively as by conviction and stereotyped punishment. Whether the revenge instincts would be as well satisfied by the former as by the latter may be questioned. But what dissatisfaction might result, it seems safe to say, would operate only as an obstacle to adoption of the substitute treatment, not as a source of evil resulting from its adoption.

Let us say, then, that the treatment of convicted criminals need not be punitive, even for the accomplishment of those ends of the criminal law which are collateral to the effect of the treatment upon the individual himself. So long as the process of treatment emphatically demonstrates a reprobation of specific conduct and a condemnation of persons guilty of such conduct, it need not be designed primarily to cause pain or suffering. With that premise accepted, it is possible to postulate affirmatively what the essence of the treatment should be. The extent to which desirable changes in the method of treatment could possibly be instituted under existing legislation has already been considered. The forced conclusion is that change which is real and fundamental enough to accomplish the purpose can be brought about only through new legislation. Many of the necessary rehabilitative procedures, it is true, are in a sense authorized by existing statutes; others could be established without actual conflict with existing law. But some of the necessary preventives of repetition are not now permissible even by implication. Moreover, the whole
statutory structure is built upon the notion of "deterrence" through "punishment." The ideas of "rehabilitation" and of active assistance in abstention from crime are not explicit enough to give character to administrative action. New laws are needed as a clear expression that newer procedures are desired.

The new legislation must be such as to eliminate the faults which cause the failure of the punitive system. Hence:

It must limit the possibility of character degradation.

It must keep dangerous persons under supervision, or even in segregation from society, for so long as their freedom is manifestly a danger.

Above all it must set up every reasonable facility and procedure for correcting the conditions which make an individual prone to crime and for increasing his capacity as well as his will to abstain therefrom.

And when it has done all that, and returns him to social freedom, it must continue its protection and must actively assist him in law-abiding conduct.

The details of operation of these four procedures may vary widely; the essential matter is that they, regardless of their details, rather than mere punishment, shall characterize the treatment of convicted criminals. When that is brought to pass, the present intolerable burden of crime and punishment and unceasingly repeated crime despite the punishment cannot but be materially decreased.