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Francis A. Allen

University of Michigan Law School

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THE LAW AS A PATH TO THE WORLD

Francis A. Allen*†

Many years ago the late Mr. Justice Oliver Wendell Holmes observed: "The law is a small subject (though . . . it leads to all things)"† The comments that follow are an elaboration of Justice Holmes's theme. It will be asserted that one characteristic of legal studies, properly pursued, is that they lead to a fuller understanding of the larger world of which the law and its institutions are a part. Because the law leads to a larger world of persons, events, and ideas, it claims the attention even of those possessing no interest in acquiring professional legal skills. This characteristic of legal studies, it will be argued, provides one (but by no means the only) important justification for the humanistic pursuit of the law.

Clearly, the assertion that the law may be seen as an avenue to deeper cultural understanding requires demonstration; and one might assume that such a demonstration, if it is possible at all, will perhaps be made most readily in the field of criminal law. This assumption is based on the facts that the criminal law responds to the most basic requirements for social living—reasonable security of life, limb, and possessions from unwarranted aggressions; that the criminal law possesses the most drastic sanctions at the disposal of government—the deprivation of the convicted offender's property, his liberty, and, on occasion, his very life; and that the criminal law must inevitably express views about the nature of human beings and their behavior.

The relevance of the criminal law to the purposes at hand is corroborated by a glance at recent history. To a remarkable degree our basic societal concerns and the issues that divide us have appeared in sharpest focus in the criminal law and its applications. In 1932 the Supreme Court of the United States almost for

* Edson R. Sunderland Professor of Law, University of Michigan. A.B. 1941, Cornell College; LL.B. 1946, Northwestern University.—Ed.

† This article was presented as the Henry Russel Lecture at the University of Michigan on March 20, 1979. In part, it revisits some of the questions addressed in the author's Alumni Lecture in Jurisprudence at the University of Tennessee, *Criminal Law and the Modern Consciousness: Some Observations on Blameworthiness*, 44 TENN. L. REV. 753 (1977). The writer expresses his appreciation to Dean Kenneth L. Penegar and the University of Tennessee College of Law for providing an occasion and inducement to discuss these issues.

1. Letter from Oliver Wendell Holmes to Lewis Einstein (March 22, 1908), reprinted in *THE HOLMES-EINSTEIN LETTERS* 37 (J. Peabody ed. 1964).

the first time tested the adequacy of state criminal procedures against the great moral imperatives of the fourteenth amendment, and in doing so began a new chapter in our constitutional history. It is, of course, a coincidence that the decision of *Powell v. Alabama* was made within only a few months of the rise of Hitler in Germany.² Yet both occurrences may be located in the same current of events. A crisis in freedom has afflicted western societies since the First World War; and the conclusion has grown that the proper regulation of governmental authority within the system of criminal justice is an indispensable part of the strategy of freedom. Since the Second World War, basic issues have assumed even more concrete forms in the criminal law. Fundamental questions about the nature of political obligation and the emancipation of conscience from legal restraints emerged in the 1960s. These questions were made inescapable by the criminal prosecutions of some who opposed the Vietnam War or who advanced the cause of racial militancy. Closely related were the allegations of inequality and inequity in American society. These charges, of course, were not confined to the system of criminal justice. But assertions of inequality possess a sharper bite when levelled against a system concerned, as is criminal justice, with issues of freedom and restraint, of life and death. Finally, the administration of criminal justice has held a central position in our political dialogue because of a widespread conviction of increasing crime in this country. Fears of a collapse of public order are, and have long been, a powerful dynamic in American politics. They profoundly affected, perhaps determined, the outcome of at least one recent presidential election.

The involvements of the criminal law with the culture of which it is a part, however, are not limited to the great political struggles of the times. Perhaps more interesting and significant is the illumination it sheds on certain underlying intellectual issues, issues that pervade our literature, art, and politics—issues, it may be added, that define the limits, color, and feel of the modern world.

Some months ago I received a letter from a behavioral scientist at another university who, in effect, said: "No one who knows anything can possibly take seriously what the criminal law assumes about human behavior." A student who has spent any considerable time with the substantive criminal law—that body

2. 287 U.S. 45 (1932).

of law which seeks to elucidate the bases of criminal liability and punishment—will have no difficulty in grasping my correspondent's meaning. The very vocabulary of the criminal law is an affront to many modern men and women. The law speaks of human purpose and responsibility, of guilty minds and guilty acts, justification and excuse. Surely such language asserts, or appears to assert, views about the nature of human beings and the bases of human behavior. Clearly, too, the views apparently asserted conflict with the postulates underlying much modern thought, including much that is cultivated in the university.

My correspondent thus identified a crucial issue: Who are the blameworthy and the praiseworthy in modern society? or, stated perhaps more accurately, Do the concepts of praiseworthiness and blameworthiness possess meaning and utility in the modern era? Although correct in perceiving the significance of the issue, my correspondent failed to make two further observations. The first is that despite its vocabulary, criminal justice, when viewed in its entirety, neglects to take a clear and unambiguous stance toward these issues. It hedges its bets. It speaks, now of moral autonomy, now from deterministic assumptions. It assumes the mantle of the moral philosopher and, a moment later, the posture of the behaviorist. It reveals ambivalence and self-contradiction. The second observation is that in so conducting itself the criminal law proceeds in a fashion wholly typical of the wider society. The same revulsions and ambivalences characterize our literature and politics. At least since Ivan Karamazov uttered his impassioned protests against the modern age, a legion of humanists has set itself against an emerging scientific view of human nature. Yet the lines are not firm. In the 1970s Doris Lessing identified "a confusion of standards and . . . uncertainty of values" as the distinguishing characteristic of our literature. "It is hard to make moral judgements [*sic*]," she wrote, "to use words like good or bad."³ Confusion about the bases of human action pervade our educational practice and social behavior. Perhaps as good a definition of modern man as any other is that he is one divided within himself about his own nature.

These observations lead to the principle of blameworthiness in the criminal law and to the suspicion that its career possesses a significance radiating beyond the law. Those espousing the principle of blameworthiness assert that the definition of criminal

3. D. LESSING, *A SMALL PERSONAL VOICE* 5 (1974).

behavior must contain the element of moral default on the part of offenders. This principle is susceptible of widely varying meanings. The extreme retributivist position, sometimes associated with the name of Immanuel Kant, holds that the purpose of criminal punishment is to vindicate the moral law, a purpose in which considerations of immediate social utility and advantage play no determining role. Whatever the intellectual interest in this assertion, it has offered small attractions to law-givers. No western society—neither sixteenth-century Geneva nor seventeenth-century New England—has attempted to give it consistent practical application.

There are more modest versions of the blameworthiness principle, however. Thus, it may be said that persons must not be criminally punished *unless* they are morally culpable. This view of the matter does not deny utilitarian ends for criminal punishment. One holding it may even concede that although proof of moral default is relevant to the justice of punishment, it does not explain why there should be criminal punishment. Justification of resort to punishment can be said to rest on utilitarian calculation—the deterrence or incapacitation of offenders, their rehabilitation, the security and survival of the state. What is insisted on is that whenever social goals are pursued by the state, it may properly employ criminal penalties only when the accused reveals moral culpability. There thus emerges from the blameworthiness principle the proposition that criminal behavior cannot be defined simply as that which is dangerous to social interests. Dangerous behavior may be unintended or nonnegligent. Criminality properly defined must also encompass behavior that can fairly be seen as a product of moral default, a conscious flouting of moral norms.

As might be expected, this and related conceptions of criminal behavior have been under heavy attack in the modern world. Yet there has probably never been a time when the moral blameworthiness of offenders was wholly excluded from serious thought about the penal law. Moreover, we are now living through a period in which the principle of blameworthiness is being strongly reasserted, a support expressed by individuals and groups representing widely divergent personal and social philosophies. What, then, are the sources of this historical support for the blameworthiness principle and, especially, what are the sources of its modern advocacy? Full and satisfactory answers to these complex questions can hardly be undertaken here, but a few observations will be offered.

Perhaps the most basic reason for the persistence and survival of the blameworthiness principle is that in many instances it expresses what might be called the popular understanding of criminality. In widely differing societies rulers have encountered stubborn communal insistence that only those persons who *deserve* such treatment should be subjected to the severe and stigmatic penalties of the criminal law. Deserved punishment, in turn, appears to imply an offender possessed of meaningful powers to choose his own acts and one who has used those powers to pursue a course offensive to decency and propriety. That moral conviction and outrage fuel the system of criminal justice requires little demonstration. Patently such motivations significantly influence what kinds of behavior will be defined as criminal; what acts will be selected for criminal prosecution; and what penalties will be imposed once offenders are convicted. A law-giver who has misjudged the community's sense of propriety and proportion by condemning acts that are widely approved or authorizing penalties too extreme, may encounter the phenomenon of nullification: Prosecutors may refuse to prosecute; juries may disregard the evidence and acquit, and judges may in myriad ways frustrate the enforcement of the law. The Prohibition Experiment provided many instances of such responses, but examples may be drawn from other historical periods, including the present.

The community's sense of propriety and proportion, which often gives support to the blameworthiness principle in criminal justice, performs broader functions within the legal system. The point may be located by asking, Why do political regimes capable of exercising naked power consent to be bound by bodies of legal principle? One answer, of course, is that such regimes sometimes do not consent, and that history is replete with instances of "direct action" by tyrannical governments in disregard of law. Yet the reality of law in many aspects of life in totalitarian societies is evident and requires explanation. Part of the answer must lie in the fact that, although the law limits the volition of such regimes, it offers advantages to the rulers as well as the ruled. The exercise of naked power may often impose unacceptable costs on the regime. Even Hitler on occasion found this to be true. More importantly, however, governmental power is simply incapable of dealing with the multitude of issues emerging from a complex society without some kind of standardization of response. Just as theologians in the eighteenth century found more comprehensible a God who rules through natural law than one who exercises an infinity of discrete volitional acts, so also political regimes, even

those apparently possessed of unlimited powers, have found the law to be indispensable; for it affords essential economies of effort and resources. To achieve these economies, however, the law must consistently inspire high levels of voluntary compliance on the part of those subject to its authority. This, in turn, presupposes a body of legal principle that can be readily understood and acted on. Perhaps especially in the areas of penal law, an effective body of legal principle is one that is generally comprehensible to the affected citizens, not only in the sense of being capable of rational application by them, but which also appeals to almost instinctual feelings of fitness and propriety. It may go beyond demonstration to assert that no system of penal law that totally excludes the concept of blameworthiness can satisfy these conditions in our culture. But the strong propensities to associate criminality with moral default suggest, if they do not actually prove, that attempts to eliminate the factor of blameworthiness from the criminal law threaten its coherence and effectiveness.

Other and quite different defenses of the blameworthiness principle, however, are being advanced today. Many of these reflect the sensitivity widely felt in the modern world for political issues involving the relations of the individual to the state. Although lately we have been invited by Professor B.F. Skinner to proceed beyond human freedom and dignity, those values still retain a certain following in the late twentieth century. Some proponents of freedom and dignity believe the penal law's conception of human nature to be of critical importance, for it is seen as influencing the placement of the line separating the realm of the individual from that of the state. Thus, it is argued, no theoretical limits on state intervention into the lives and psyches of individuals emerge—except those resulting from technical incapacity—when the human animal is viewed simply as a product derived from the vectoring of his genetic endowments and his life experiences. In support of this proposition attention is called to the perhaps curious fact that a penal system strongly dedicated to the rehabilitation and character-changing of offenders often produces measures more stringent than those predicated on the notion of deserved punishment. Thus, a conception of the human being as an entity possessing moral autonomy, as one eligible for praise or blame, is seen as important not only to ethical but also to basic political concerns.

Much more might be said, of course, about the modern defenses of the blameworthiness principle in the criminal law. Yet an impatient reaction may be anticipated. If so much can be said

for the principle of blameworthiness, even when delineated in the broad strokes employed here, is it not clear what course the law should take? Why (it may be asked) do not lawyers, judges, legislators, and others concerned with such things, proceed to the formulation of a penal code that gives clear and consistent expression to the blameworthiness principle? Why not a morally based criminal law? It is in attempting to respond to these and similar questions that one uncovers the clearest evidences of the kinship of the criminal law with the times in which it functions. For in the effort to predicate criminal liability on moral culpability and to proportion penalties to moral default one instantly becomes enmeshed in a gamut of characteristic modern issues. Here one tastes the flavor of the twentieth century and learns of ambiguity, contradiction, conflict of social purpose, compromise, and incoherence. When he was a candidate for the presidency, Mr. Carter called for a morally based politics and a morally based foreign policy. One suspects that the success of efforts to achieve a morally based criminal law will prove as tentative and incomplete as that in other areas, and for many of the same reasons.

The first of the obstacles to the implementation of the blameworthiness principle has already been adverted to: the modern doubts about the reality and extent of moral freedom. Wherever one may ultimately strike the balance between fate and freedom when considering human behavior, no one who has been exposed to modern currents of thought is likely thereafter to feel entirely at ease with the concepts of responsibility and culpability as those ideas are employed in the criminal law. This unease may be enhanced by the suspicion that on occasion the concept of responsibility has been utilized for repressive social purposes. These doubts have affected the nature of criminal law scholarship in this country. Some serious students have found themselves in positions like those of liberal clergymen whose faith in the assumptions of the traditional theology are shaken but who are unwilling to separate themselves completely from the tradition they have come to doubt. This may provide the most fundamental explanation for the fact that, at least until recently, American criminal law scholarship has often ignored questions of principle and definition and has, instead, focussed on problems of process and procedure and on the techniques of penological treatment.

Yet these doubts, important as they are, are not the origin of all limitations on the expression of the blameworthiness principle in the criminal law. Obstacles to its full realization spring from a wide variety of other sources. Some of these inhere in the

structure of criminal justice itself. Moral evaluation requires that attention be focussed on the internal mental states of accused persons, and places heavy burdens on the processes of proof. As a common-law judge remarked five centuries ago: "[T]he Devil [himself] knoweth not the thoughts of man."⁴ One may anticipate only rough-and-ready, relatively unsophisticated, moral evaluations from an operating system of criminal justice. There are other technical obstacles. If the definition of murder, for example, includes the element of "killing another human being," it is clear that *A* who, intending to kill *B*, shoots and misses, is not guilty of murder and not eligible for its attendant penalties. This is true even though *A* possesses the moral culpability of a murderer and may pose as serious a threat of future danger as one who has killed. Some such moral anomalies can be eliminated or minimized, but it is doubtful that all can be removed.

Another cluster of restraints results from the facts that the law is multi-valued and multi-purposed and that these various purposes compete for realization. In the criminal law the insistent nature of its regulatory purposes may often induce many to reject concern for the fine shadings of moral culpability, as a luxury too expensive to indulge. In the areas of economic crime the impulse to achieve regulatory objectives has resulted in a body of law that renders issues of moral culpability largely irrelevant and strips from the system those principles relied on elsewhere to contain the powers of government exerted in the criminal process. The most dramatic manifestation of this tendency is the doctrine of strict liability. Literally thousands of statutes have been enacted imposing often substantial criminal penalties on persons who fortuitously produce a forbidden result, persons who did not intend the result and who may have exerted every reasonable means to avoid it. Nor is this tendency confined to cases of economic crime; it is often manifest in areas of violent behavior. Thus, frequently, persons who have committed acts of violence but in circumstances of great pressure are denied the mitigation that an analysis of their culpability might require. When this occurs, it ordinarily reflects deterrent concerns—the belief that concessions to the prisoner at the bar will (to use the language of the behaviorist) "reinforce" tendencies to violence in other persons.

I shall refer to only one more of the many other factors conditioning the contributions of the blameworthiness principle to the

4. Y. B. Pasch. 17 Edw. 4, f. 2a, pl. 2 (1477) (Brian, C.J.).

criminal law. If one asserts that crime, properly defined, must include elements of behavior fairly characterized as the products of moral default, he must expect in this pluralistic age to encounter the questions, "What morality?" and "Whose morality?" Nor can these challenges always be set to rest through the processes of democratic lawmaking—by judicial edict or legislative enactment—as the continuing abortion controversy abundantly illustrates. The law relating to justification of the use of deadly force provides other instances of the conflict of moralities. Here one encounters a confrontation between the written law's effort to restrict the uses of deadly force to narrow limits, on the one hand, and, on the other, what might be called a popular ethic of private violence. The prototypical case is one in which a householder has killed a burglar or a chicken thief, but under circumstances in which the crime-preventive purpose might reasonably have been achieved without taking life. Although it is relatively clear in such cases that the householder has himself committed a serious offense, the processes of nullification often defeat the criminal prosecution of such defendants. The ethic of private violence manifests itself in other contexts—in the arguments and tactics of gun-control opponents and in the defenses sometimes offered for political violence and terrorism. Perhaps fortunately, this society provides no philosopher-kings to resolve such value conflicts; but the persistence of these issues constricts the possibilities of a morally based criminal law.

Enough has now been said to demonstrate the tenuous nature of the hold maintained by the blameworthiness principle on the criminal law. Perhaps these comments also reveal some important characteristics of the intellectual problems encountered in the penal law. It would surely be erroneous to conclude that all is waste and confusion in these legal areas. Yet it is difficult to deny that the impression gained from their scrutiny is more likely to be that of dissonance and cacophony than of Mozartean structure.

Although the hold of the blameworthiness principle on criminal justice is tenuous, it has been maintained. Indeed, in recent years its grip has been strengthened. Talk about deserved punishment and criminal responsibility seems more confident and less qualified today than a decade, certainly two decades, ago. This phenomenon gives rise to a new range of problems involving the relations of the substantive law, that body of doctrine concerned with defining the elements of criminal liability, and the theories of penal treatment. A tension has existed between the legal theo-

ries of liability and those of penological treatment throughout most of the twentieth century, but the tension was muted or disguised for much of this period because of the ascendancy of what I have called the rehabilitative ideal. In the 1970s the tension became obvious and inescapable. The same public that is asked to support the criminal law and to condemn the criminal offense is also asked to embrace and provide financial resources for programs of correctional treatment that view offenders as the products of conditions over which they had little or no control. Indeed, the rehabilitative program may insistently eschew the labelling of the subject with moral guilt on the assumption that such labelling produces insuperable obstacles to rehabilitation and may itself become the source of new crimes and delinquencies on the part of criminal offenders. The question arises whether the community can simultaneously entertain two views apparently based on such sharply divergent postulates or whether they can be accommodated with the degree of conviction necessary both to vitalize the criminal law as an effective body of regulative norms and also to advance programs of treatment realistically calculated to render its subjects less likely to offend the legal norms. Are we doomed to a condition in which the community is perpetually divided between the punitive and the compassionate, to a policy reflecting an uneasy compromise of incompatible views which succeeds chiefly in cancelling out the effectiveness of both tendencies?

In the 1970s the dominant currents of opinion seek to minimize the tension between the theories of criminal liability and penological treatment by largely forsaking the objective of rehabilitation in correctional practice. This is a remarkable phenomenon and one which has much to say about the society in which the system of criminal justice functions.

The rehabilitative ideal encompasses a complex of ideas. For present purposes it can be described as the notion that the primary, perhaps exclusive, objective of penal treatment is to effect changes in the characters, attitudes, and behavior of convicted offenders, so as to advance the social defense but also to contribute to the welfare and satisfactions of offenders. The rehabilitative ideal has deep roots in western society. Clearly articulated versions of it may be found in the Old Testament and in the Greek plays and, again, in the writings of medieval churchmen and in the eighteenth-century Enlightenment.

To appreciate the modern decline of the rehabilitative ideal one must understand its dominance for the larger part of the

twentieth century. However frequently it failed in practical application, it nevertheless pervaded theoretical thought, and even in the wider community established the aspirations and goals for penal treatment. Most of the characteristic innovations in criminal justice were products of the rehabilitative ideal: the juvenile court, systems of parole and probation, therapeutic efforts (however limited) in the prisons. In the course of a decade, perhaps less, the situation has profoundly altered. A spate of legislation has been enacted attacking parole and the indeterminate sentence, imposing the assumptions of adult criminality on the juvenile court, and explicitly withdrawing rehabilitative objectives from sentencing guidelines. Even more remarkable has been the disaffection suffered by the rehabilitative ideal in the universities where, in the past, it had gained its chief intellectual and emotional support. The rehabilitative ideal, of course, is not dead; but, surely, it no longer flourishes.

The reasons for this precipitous decline may have significance beyond the administration of criminal justice. It may be assumed that a flourishing rehabilitative ideal presupposes a society in which there is vigorous and widespread confidence in the malleability of human nature and in the capacity of social institutions to bring about desirable changes in human attitudes and aspirations. It must also be a society with a sufficient consensus of values to make possible a workable agreement on what it means to be rehabilitated, on the distinction between the malady and the cure. Such conditions, at any rate, were satisfied in nineteenth-century antebellum America when the rehabilitative ideal achieved its first modern flowering. They are not satisfied in the America of the 1970s. We are undergoing what Daniel Bell has called a crisis of belief, and this crisis provides unfertile ground for the rehabilitative ideal.

It is not only criminal justice that has suffered loss of confidence in American society. All of the institutions traditionally relied on to develop character and social capacities have similarly lost support. This seems clearly true of the family, the schools, and religion. If the modern literature on the subject is correct or even substantially accurate, the family has sustained serious losses of authority in its child-rearing functions to the state, the schools, peer groups, experts, and to the market. The modern conception of the family, we are told, is changing (or has changed) from a hierarchical structure characterized by a system of mandated mutual obligations to an association of convenience designed to advance the satisfactions and sense of self-fulfillment

of its individual members. Such changes must surely attenuate the effectiveness of the family as a socializing agency, as one centrally concerned with character and attitudes. The point need not be labored. Similar appraisals of the schools and organized religion are likely to reveal substantial diminishments of confidence, not so much in the malleability of human nature, but in the capacity of those institutions to produce desirable and effective guidance to the behavior of persons they serve.

This is not to say, of course, that the decline of the rehabilitative ideal is wholly the product of a general social *malaise*. A rational and powerful critique of modern manifestations of rehabilitationism has been building for over a generation. Perhaps the most important focus of this attack is on the political implications of the rehabilitative ideal. Therapists have been slow to recognize that a regime of rehabilitation is, in fact, a system of governance over persons in positions of dependency, and as such raises basic questions of individual immunities and political values. The same point may be made, of course, about any penological program, whether or not motivated by rehabilitative aspirations. Nevertheless, the political problem is immeasurably intensified by the rehabilitative ideal, for it contemplates a regime necessarily involving large exercises of official discretion and official concerns extending well beyond the external compliance of inmates with institutional regulations, into the thoughts and motivations of the subject population.

It may be doubted, however, that the disaffection into which the rehabilitative ideal fell in the 1970s is primarily the result of the rational case arrayed against it. Part of that case is that rehabilitative techniques employed in American penology simply do not work, that there is no evidence that we possess the knowledge and techniques to prevent criminal recidivism. Whether or not the proposition in this stark form is valid, one thing is clear: it is not new. Highly skeptical and sometimes carefully considered appraisals of rehabilitative capacity extend far back to the period before World War II. Arguments asserting the ineffectiveness of rehabilitative efforts were brushed aside for a generation. In the 1970s they became persuasive.

We have, accordingly, entered into an era in which concern is being expressed most strongly for the value of just punishment and for deterrence achieved by punishment, as contrasted with rehabilitative treatment. Modern attention to the justice of punishment is surely appropriate and, no doubt, overdue. Yet in the law, as in other kinds of social action, any posture taken toward

complex issues is attended by its own distinctive pathologies and its own set of unexpected consequences. There is truth in Eric Sevareid's observation that a "chief cause of problems is solutions."⁵ One of the objectives of modern reform, reflecting its strong egalitarian tendency, is the reduction of sentencing disparities—disparities resulting from the awarding of widely different penalties to persons who have committed substantially identical criminal acts. This, certainly, is an important and proper objective. Yet as Aristotle perceived, injustice may arise not only when persons who have committed the same crime are treated differently, but also when persons who have committed different crimes are treated the same. It is this second kind of injustice to which contemporary attitudes tend. No criminal code, however skillfully constructed, can encompass all the myriad differences of circumstance that are relevant to the justice of penalties. These can only be taken into account, and then imperfectly, through the exercise of wise sentencing discretion. Yet intolerance of such discretion is one of the leading characteristics of modern reform. This intolerance produces a further irony. The stripping of discretion from judges and correctional officials does not eliminate it from the system. Rather, it relocates discretion in other parts of the criminal process. Denying discretion to judges enhances discretion in prosecutors and the police.

There are other sources of disquiet. Criminal justice tends to harshness and excess. Constant effort is demanded to prevent the process from falling below minimal standards of decency and humanity; and even constant effort often proves inadequate for the task. Despite the failings of the rehabilitative ideal (and in many respects they have been monumental) one clear contribution may be listed to its credit. Persons with strong rehabilitative motives have been the chief source of pressure for amelioration of the physical and moral environments of penal institutions. One may well inquire where the impetus for decency and humanity will come from in an era marked by the eclipse of the rehabilitative ideal. This observation suggests broader concerns. We have traditionally viewed mercy and justice as contrasting values. Perhaps we have erred in this. The history of prisons indicates that elementary decency fails when compassion is lost. Perhaps we may be led to the conclusion, both in the criminal law and in wider areas of social concern, that justice in our times cannot be

5. Quoted in C. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 169 (1978).

approached without compassion.

It has been suggested in these comments that the law provides an interesting and useful vantage point from which to view the late twentieth-century world. Professionals are not prone to underrate the importance of their disciplines, and appropriate modesty requires an exertion of will. To note the kinship of legal issues with those of the larger society is not to assert their identity. Context is important. What is most characteristic of modern society is not its organic unity but its fragmentation. Different values and assumptions dominate in the economic, the social, and the esthetic arenas; and these diversities and contradictions go far to define the modern condition. One of the strengths of the law as a source of general understanding is that in considerable degree it is involved in all these areas. Yet, as Justice Holmes suggested, the law is a small subject; and its contributions to understanding are limited. The law is not a mirror of society. Certainly it provides no compass to direct the course or establish the destination. The modest assertion is this: The law may contribute to a feel for the climate of our times, for the lay of the land.