

DISMANTLING THE CRIMINAL LAW SYSTEM

The criminal law systems in the United States as well as those of most Western countries have been subject to much recent criticism. Crime rates have been increasing much faster than population size in almost every Western country. In the United States one group of critics has blamed the courts, especially the Supreme Court, for the rise in crime, claiming they have “handcuffed the police” by restrictions on police procedure. Another group of critics blames the prison system and society at large, contending prisons encourage rather than discourage criminal conduct. Further, they say, people trapped by racism and poverty have few alternatives to crime. But all the critics agree that the criminal law system is not working as intended.

The term “dismantle” originally meant to uncloak, to take off a mantel or cloak. It has also come to mean to strip of apparatus, take apart, or pull down. The Articles in this special issue are concerned with dismantling the criminal law system in both of these senses. First, they are concerned with uncovering the underlying principles and assumptions of the criminal law system. Second, many of them also suggest ways to strip the criminal law system of some of its elements or modify it in significant ways.

The purpose of this introduction is to provide an overall framework for considering the more detailed Articles which follow. Thus, it first distinguishes models of various types of systems for controlling undesirable behavior. The models are ideal types to which actual systems conform in varying degrees. Emphasis is placed upon the underlying philosophical principles and conceptions which distinguish the traditional criminal law system from those stressing treatment and preventive social reform. Second, it shows how various attacks on the criminal law system pertain to different elements of it. Finally, it indicates how the conceptions of criminal, treatment, and preventive social reform systems are involved in the specific problems of insanity, drug addition, and preventive detention.

I. THE CRIMINAL LAW SYSTEM

The criminal law system consists of all the various elements involved in the process which results in punishment of some persons. So conceived, the criminal law system includes at least the following elements: substantive and procedural rules, principles, policies, decisions, judges,

lawyers, courtrooms, police, penitentiaries, and probation agencies. But if one thus defines the criminal law system by its result--punishment for some people--one must be able to distinguish punishment from similar results of other systems. The process-product distinction is somewhat artificial as applied to a criminal law system, but it is a useful pedagogic device for clarifying the conceptual differences between criminal, treatment, and preventive social reform systems.

There are five basic elements in a widely accepted philosophical definition of punishment.¹ First, it involves an evil or deprivation; second, it is for an offense against the rules; third, it is (or is supposed to be) of an offender for his offense; fourth, it is imposed by human beings; and fifth, those persons administering it have authority to do so by the system of rules against which the offense was committed. However, this definition of punishment does not immediately distinguish it from compulsory treatment. Both involve an evil, deprivation of liberty, and both are imposed by human beings granted authority to do so by the system of rules. To distinguish punishment and treatment requires an elucidation of the first three elements in the definition.

The first difference concerns the nature of the offense in the second element. Punishment is for, and most criminal offenses require, a discrete item of behavior (an act); however, not all of them do, *e.g.*, vagrancy. Treatment, on the other hand, is not for a discrete item of behavior but a condition or status,² *e.g.*, being mentally ill. Frequently, of course, behavior is used as evidence of a status, but the behavior is merely a symptom of the underlying status to be treated. Thus, discrete items of behavior are not logically or conceptually required for treatment. Indeed, it is quite compatible with the concept of treatment to seek to change a status before it results in undesirable behavior.

The difference between punishment for a discrete item of behavior and treatment for a status leads to a second difference between them. The immediate aim of punishment is to prevent the occurrence of specified sorts of behavior, while the immediate aim of treatment is to alter or change a status.³ This difference in aim is very important to the first

¹See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4-6 (1968); Flew, *The Justification of Punishment*, in THE PHILOSOPHY OF PUNISHMENT 85-87 (H. Acton ed. 1969).

²"Status" is used throughout to mean being in a certain state or condition.

³This discussion of the distinction between punishment and treatment generally follows H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 17-34 (1968). However, where Packer speaks of the "justifying aims" of punishment and treatment, I follow Hart and

element in the definition, namely, punishment involves an evil. In punishment, the intention is to inflict an evil upon an offender. One may attempt to avoid certain types of evil, *e.g.*, physical pain; still some evil is imposed. If one's intention were to provide an overall benefit, then it would not be punishment but reward. In treatment, while evil may be inflicted, it is not part of the intention or purpose, since the overall purpose is to benefit the person treated. It is perfectly possible to seek to remove all evil; whatever evil is involved is considered unavoidable. The deprivation of liberty involved in compulsory commitment is viewed as analogous to the unavoidable pain in having a decayed tooth filled.

The third element of the definition of punishment, that it be of an offender for his offense, is also important in distinguishing it from treatment. For a person to be an offender, this element requires he must be somehow responsible for his offense. In treatment, it is irrelevant whether or not a person is responsible for his status. People are treated for illness, and usually they are not responsible for being ill. Of course, a person may be responsible for his illness by having neglected to take proper care of himself, but it is in any event irrelevant since the immediate aim is simply to change his status.

The requirement of criminal responsibility is central to the traditional criminal law system. There are three basic conditions for criminal responsibility. First, a person must engage in voluntary behavior (perform an act). A person is not responsible for involuntary, *e.g.*, purely reflexive, behavior.⁴ Second, the act must cause or pose a risk of causing a result (harm, *actus reus*) which the law seeks to prevent. This causal condition for responsibility serves to eliminate vicarious and collective responsibility from the model of the criminal law system. Third, the person must have the appropriate mental conditions or *mens rea*.

The doctrine of *mens rea* has been at the center of many attacks upon the criminal law. Indeed; one proposal for dismantling the criminal law system is simply to abolish the requirement of *mens rea*.⁵ There has also been much philosophical controversy concerning what the *mens rea* requirement involves.⁶ A traditional view considers it to require some positive mental state of the actor which is usually evidenced by acting

speaking of their "immediate aims." This leaves open the question of what reasons, if any, justify them. See HART, *supra* note 1, at 6-8.

⁴For a discussion of the importance of the behavior being voluntary, see HART, *supra* note 1, at 90-112; Thalberg, *Hart on Strict Liability and Excusing Conditions*, 81 ETHICS 150 (1971).

⁵See K. MENNINGER, *THE CRIME OF PUNISHMENT* (1968); B. WOOTTON, *CRIME AND THE CRIMINAL LAW* (1963).

⁶See, *e.g.*, PACKER, *supra* note 3, at 103-8.

purposely, knowingly, recklessly, or negligently. On a view of this sort, excuses such as accident, mistake, and duress indicate the absence of required mental state. On the other hand, some recent writers have defined men *rea* simply in terms of the absence of a valid excuse.⁷ On this view, mens rea simply operates to exclude responsibility for some actions.

Legal excuses indicate that a person was not responsible, while justifications indicate that the person did not perform a prohibited act. Thus, justifications do not involve a denial of responsibility. The underlying philosophical principle of excuses is that a person is not responsible for an action if he could not have avoided it, could not have done otherwise. Two types of excuses have traditionally been recognized. One type rests upon ignorance, *i.e.*, a person can not reasonably be expected to avoid performing an action if he cannot foresee that harm might result from it. Mistake and accident are the main excuses of this sort. The other type of excuses rests upon an actor's lack of control of his behavior. Duress is a legal excuse of this type.

Thus, the criminal law system is a complex process resulting in punishment of some people. It defines prohibited acts and determines who has and has not performed them. Of those who have, it attempts to distinguish between those who were responsible and those who were not. Finally, punishment is imposed on those who were responsible for performing prohibited actions. A treatment system, on the other hand, logically need not require the performance of discrete behavior or that a person be responsible. Nor does it purposely impose an evil; any evil involved is incidental to changing a person's status.

II. ATTACKS ON THE CRIMINAL LAW SYSTEM

There are three main ways of dismantling, in the sense of tearing down, the criminal law system. First, offenses can be eliminated by repealing substantive laws, *i.e.*, by *decriminalization of conduct*. Second, the responsibility requirement may be attacked in either of two ways. The criminal law may be declared inapplicable to groups of people (juveniles, for example) on the ground that they cannot be responsible, *i.e.*, *divestment of people*,⁸ or the responsibility condition may be eliminated as a requirement of conviction. The latter approach may involve eliminating

⁷See, *e.g.*, HART, *The Ascription of Responsibility and Rights*, in *ESSAYS ON LOGIC AND LANGUAGE* 145 (A. Flew ed. 1951).

⁸Kittrie includes both decriminalization and divestment under the latter term. But these are distinct methods of dismantling the criminal law system and should have separate names. See N. KITTRIE, *THE RIGHT TO BE DIFFERENT* 4 (1971).

any of the three elements required for responsibility, but most attention has focused on the act and mens rea requirements. Third, one can seek to eliminate punishment. More specifically, most attacks of this type have been aimed at eliminating the prison system at least as it has traditionally operated.

These three methods of dismantling the criminal law system roughly correspond to different stages of the criminal law process. The first method eliminates grounds for arrest or detainment. The second method affects the conviction process. People are either removed from the process or the requirements for conviction are modified by eliminating one or more of the conditions for responsibility. The latter makes conviction easier, but the criminal law system is being changed toward another type of system. The third method is concerned with sentencing. A general outline of the attempts and success to date of each of these lines of attack may be useful.

Many theoretical arguments have been advanced in recent years for decriminalization of much conduct. Perhaps the best known discussion of decriminalization is the so-called Hart-Devlin debate.⁹ The arguments concern what types of conduct should be criminal. Essentially four types of reasons for making conduct criminal have been discussed: to prevent harm to others, to prevent people from harming themselves, to prevent offense to others, and to enforce the popular morality. Hart has criticized the last reason. Elimination of laws to enforce popular morality would decriminalize fornications, homosexual conduct between consenting adults, etc. But laws based upon the second and third reasons have also come under attack.¹⁰

Many of the arguments for decriminalization are moralistic ones, that is, they argue there is no justifiable reason for making some conduct criminal. Practical lines of reasoning may be more effective in producing change. One argument simply declares it is not possible to effectively enforce all the laws now on the books.¹¹ Since they cannot all be

⁹See P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963). See also B. MITCHELL, *LAW, MORALITY, AND RELIGION IN A SECULAR SOCIETY* (1967).

¹⁰For discussions of the third reason, see Feinberg, "*Harmless Immoralities*" and *Offensive Nuisances*, in *ISSUES IN LAW AND MORALITY* (N. Care & T. Trelogan eds.) (forthcoming); Bayles, *Offensive Conduct and the Law*, in *id.*; Feinberg, *Rejoinder*, in *id.* For discussions of laws to prevent people from harming themselves, see Bayles, *Criminal Paternalism*, in *LIMITS OF LAW: NOMOS XV* (J. Pennock & J. Chapman eds.) (Forthcoming); Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107 (R. Wasserstrom ed. 1971); Feinberg, *Legal Paternalism*, 1 *CAN J. OF PHIL.* 105 (1971).

¹¹See PACKER, *supra* note 3, at 270-95.



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