Volume 2
Number 1 *Fall 1967*

*pp.*84-93

Fall 1967

The Need for Education in the Law of Criminal Corrections

J. Skelly Wright

COMMENTS

THE NEED FOR EDUCATION IN THE LAW OF CRIMINAL CORRECTION

J. SKELLY WRIGHT*

> "The best law enforcement has little value if prison sentences are only temporary and embittering way stations for men whose release means a return to crime."[1]

I

Criminal law, long the stepchild of the law school and the lawyer, is showing signs of a return to acceptability. Once law school freshmen dozed through this required course while freshmen law teachers, compelled by their lack of seniority to teach it, droned through their notes. Now bright-eyed young men and women, stimulated and directed by creative and provocative lecturers, debate the concepts of culpability, capacity, competence, equal justice, right to counsel, and the defendant's right to a fair trial in relation to the rights of television and the press fully to cover, not only the trial itself, but also the investigation which led to the trial.

This resurgence of interest in the criminal law is also reflected in the flood of law review articles discreetly telling the bench and bar alike to wake up to new approaches to criminal justice.[2] The annual applications for judicial clerkships confirm that criminal law is on the way back. The superior students, the only ones who make applications to be law clerks, seem to be deeply committed to the importance of criminal law. The law schools are reaching out for these committed young men with attractive teaching offers. Many of these men do go on to teach criminal law. Thus this renewed interest in the criminal law is transmitted from school to school.

One wonders what caused the change, what created all the interest. I like to think that the idealism in these young people has been sparked by the recent decisions of the Supreme Court in the area of the criminal

---

* Judge, United States Court of Appeals for the District of Columbia Circuit.

1. President Johnson's Crime Message to Congress, 112 CONG. REC. 5147 (1967).

2. *See, e.g.,* Hudon, *Freedom of Press versus Fair Trials: The Remedy Lies with the Courts,* 1 Val. U.L. REV. 8 (1966); Kalven, *American Jury and the Death Penalty,* 33 U. OF CHI. L. REV. 769 (1966); O'Brien, *Implementing Justice: The National Defender Project,* 1 VAL. U.L. REV. 320 (1967); Tauro, *Challenge to American Criminal Jurisprudence,* 50 JUDICATURE 188 (1967).

law. For years we have professed equality before the law, proclaiming that our Bill of Rights was equally applicable to all our citizens. But those of us who are older in the law know full well that to the great majority of defendants in criminal cases, the ones too poor to hire competent counsel, these professions of equality were a cruel hoax.[3] The kind of trial a defendant received did depend on the condition of his pocketbook and the equality of our justice did depend, to some degree at least, on who was receiving it.

The Supreme Court has sought to make good the constitutional promise of equality to rich and poor alike by interpreting the Bill of Rights as a code of law rather than as material for Fourth of July speeches.[4] This effort on the part of the Court has indeed stirred the law schools to action. But we are only at the beginning of this revolution in the criminal law. This revolution cannot succeed if the law acts in isolation. As the great Roscoe Pound has said: Law is social engineering —a means by which society attains its goals. Until society acts effectively toward eliminating the causes of crimes—the discrimination in housing, in schools, in jobs, a discrimination which creates the ghettos which disgrace our urban centers—the law is merely spinning its wheels.[5]

II

As social engineers, lawyers and judges must learn and understand, in addition to the causes of crime, the means by which the antisocial person may be restored to useful citizenship. Again the law cannot act in isolation. The rehabilitation of the criminal offender falls primarily in the field of the behavioral scientist—the sociologist, the anthropologist, the psychologist, the psychiatrist and the social worker.

Society, however, has chosen the law as its instrument to determine not only the criminal responsibility—the guilt or innocence—of its citizens, but the disposition of the guilty as well. The discipline of the law, therefore, plays a crucial role in criminal correction. It is in the field of criminal correction that the law schools in particular, and

3. For an American Bar Foundation survey of the national scope of the problem of defending the poor, *see* L. SILVERSTEIN, DEFENSE OF THE POOR—THE NATIONAL REPORT (1965).

> The most dramatic fact to emerge from this review of the past decade (1950-60) is that there are now, at the end of it, nearly three times as many Legal Aid and Defender offices in the United States as there were at the beginning. As of June 1, 1960, there were 305 such offices in operation—a growth in ten years from 92 to 209 Legal Aid offices and from 29 to 96 Defender offices.

E. BROWNELL, LEGAL AID IN THE UNITED STATES—SUPPLEMENT (1961).

4. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963); Lane v. Brown, 372 U.S. 477 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. Illinois, 352 U.S. 12 (1956).

5. R. POUND, PHILOSOPHY OF THE LAW (1922).

judges in general, have left something to be desired.[6]

No one today seriously denies that rehabilitation is the primary goal of the correctional process. Yet all of us know that we have failed to achieve that goal. Over half of the offenders entering federal and state prisons today have been there before. Recidivism is the rule rather than the exception. As long as this rule continues, the administration of criminal justice shall have failed in its goals.[7]

I am not suggesting, of course, that the law alone is responsible for recidivism. The fault for the bankruptcy of our correctional system must be laid at the door of society itself. It is society which provides correctional institutions which often are nothing more than training schools for criminals, where first offenders are converted into hardened practitioners. Until society is educated to the need for rehabilitation and provides for the implementation of that goal, not only as a moral necessity but in its own self-interest, recidivism will continue to be the rule rather than the exception.[8]

The education of society in this regard is, to some extent at least, the responsibility of the law. To this end the law must look to the law schools as the incubators of new ideas and approaches to social engineering in the field of rehabilitation. Courts, acting through sentencing judges and using traditional criminal law concepts, have failed. Until sentencing judges understand and apply social principles in the correction process, recidivism will remain rampant.

III

The administration of criminal justice is directly responsible for stigmatizing particular human beings as criminals. This stigma is one of the primary causes of recidivism. Since this criminal stigma in effect imprisons its wearer for the balance of his life, barring him from participation in society as a truly free man, the law, in the light of current social advance, should determine whether it is painting too broadly with its criminal brush.

I am encouraged that, while our goal of human restoration is

---

6. *See* Rubin, *Developments in Correctional Law*, 12 CRIME AND DELINQ. 179 (1966); Saurez, *Psychiatry and Criminal Law Education*, in CRIME, LAW AND CORRECTIONS (R. Slovenko ed. 1966) (wherein the role of psychiatry in the law is analzyed and a suggestion made to the effect that the two fields be taught in the undergraduate study of law.)

7. It has been estimated that over fifty percent of the felons that are discharged from prison have further trouble with the law. It has further been suggested that thirty-five percent of them are back in prison within three years of discharge. *See* D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964); THE CHALLENGE OF CRIME IN A FREE SOCIETY—REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT 46 (1967).

8. *See generally* CRIME, LAW AND CORRECTIONS (R. Slovenko ed. 1966).

still over the horizon, we in the law are taking some halting steps toward its realization. The law is at least beginning to distinguish between crime and disease. The criminal law from its historical beginning has always treated alcoholism as a crime. We have known for years that chronic alcoholism is a disease; yet we have continued to run the sufferers from this unfortunate disease through the treadmill of the criminal process—through the drunk tanks and the night courts—time and again until in some cases the arrests for drunkenness run in the hundreds. Imagine if you can what a drain on society's resources simply arresting drunks is. Hundreds of thousands of drunk arrests are made in this country each year.[9] Police officers' time, better used on the streets in preventing crime, is wasted in following the course of a drunk arrest through the courts. Our magistrates courts have become objects of ridicule partly, at least, because they are required time and again to deal with alcoholics on a criminal basis.

As a result of two recent cases there is hope that the criminal law can wash its hands of the dirty business of treating sick people as criminals. In a Fourth Circuit case the appellant, Driver, had been arrested more than 200 times for public drunkenness.[10] Holding that chronic alcoholism is an illness, not a crime, the court stated:

> The upshot of our decision is that the State (North Carolina) cannot stamp an unpretending chronic alcoholic as a criminal if his drunken public display is involuntary as the result of his disease. . . .[11]

In *Easter v. District of Columbia*,[12] we followed the lead of the Fourth Circuit, reversing a conviction of public drunkenness on the ground that the chronic alcoholic is a sick man, not a criminal. I predict that it is only a question of time before all of the courts in this country, state and federal, will recognize chronic alcoholism as a disease and proscribe it as a basis for a criminal charge.

IV

Our court dockets are also crowded with prosecutions against drug addicts. (The charge, however, is usually in terms of possessing, buying or selling narcotics.) Unlike the chronic alcoholic, whose sentence is usually stated in terms of days, the drug addict is subjected to savage

9. According to statistics cited in the comments to the Model Penal Code, of 2,612,704 arrests reported, 1,001,427 were for drunkenness. AMERICAN LAW INSTITUTE MODEL PENAL CODE § 250, Comment 1 (tent. draft no. 13).

10. Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966).

11. *Id.* at 764.

12. Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966).

mandatory minimum sentences running from five to ten years, without benefit of probation or parole.[13] The criminal law is the instrument used by society to impose these sentences. Until now the courts, with their hands tied by the mandatory minimum requirement of the sentencing laws, have dutifully performed their function.

In this area too there is a glimmer of hope. The Supreme Court, in *Robinson v. California,*[14] has held that drug addiction is an illness and that a drug addict cannot be branded as a criminal and punished because he is ill. In *Robinson* the Supreme Court compared drug addiction with any other disease and stated:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. . . . in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[15]

Following *Robinson,* President Kennedy appointed an Advisory Commission on Narcotic and Drug Abuse, which reported what every informed person already knew—that drug addiction was indeed an illness, and that it was a prostitution of the criminal process to use it against sick people because of their sickness. But the public, long suffering from an hysterical fear of "dope fiends,"[16] had to be educated so that Congress might act. The Commission made various recommendations to the President, which President Johnson put in the form of proposed legislation. After being watered down, these recommendations became the Narcotic Addict Rehabilitation Act of 1966.[17] Under this Act, a person arrested for possession of narcotics need not be prosecuted under the federal narcotics laws, provided he agrees to civil commitment to a hospital which would treat his addiction. Even where

---

13. For a compilation of the various statutory penalties *see* W. ELDRIDGE, NARCOTICS AND THE LAW 149-93 (1961).

14. 370 U.S. 660 (1962).

15. *Id.* at 666.

16. For an examination of the basis of the fear of the "dope fiend," *see* Eldridge *supra* note 13, at 12:

> The critical view of addicts and addiction grew out of a great many misconceptions. These misconceptions have been kept viable by a succession of inaccurate information, sometimes innocent and sometimes artful, which has in time created a whole body of dope mythology effectively blocking public support for a dispassionate inquiry. The social questions are not so clearly defined as many would have us believe.

17. Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. §§ 4251-55 (1966).

the arrest is for selling narcotics, if it appears that the sale was primarily for the purpose of supporting his addiction, the defendant can be given the alternative of civil commitment rather than sentence under the federal narcotics laws.[18] Thus, under the Act, drug addiction, even though it manifests itself in the sale of drugs, may be treated for what it is—an illness, not a crime.

V

Society, educated and led by the law and related disciplines, should also strive to avoid stigmatizing its citizens as criminals even where their antisocial acts are not the result of disease. Correction, which really is the return to useful citizenship, is often thwarted rather than aided by formal prosecution. This is true even where the prosecution ends in probation. The criminal record, without more, causes the rejection and the ostracism which denies employment and social acceptability. The recidivism in many probation cases is directly attributable to the effect of the criminal stigma.

We should go to great lengths, therefore, to avoid this stigma in cases where there is a possibility of rehabilitation without it. One obvious, though largely unused, method of avoiding the criminal stigma and accomplishing rehabilitation is the deferment of prosecution contingent on voluntary submission to correction authorities for such supervision, psychiatric support and employment aid as may be available.

The correction agencies of the state and federal governments, unfortunately, are presently not equipped to provide their services during such a period of deferred prosecution. Without this kind of service the danger of recidivism is increased, even with the best prospects for rehabilitation.

Of course, many police and prosecuting authorities throughout the country already exercise a kind of dispensing power. Where, in their judgment, an individual who has committed an offense need not be punished for it because the possibility of repetition is remote, or for other reasons, no prosecution is instituted. Inherent in the exercise of this informal dispensing power, however, is the danger of unequal justice resulting from improper pressure on the dispensing authorities, or genuine mistake in failing to recognize the need for rehabilitative help. I suggest that in some cases there should indeed be a dispensing authority. That authority should be the judge aided by the recommendations of the prosecutor, the representations of defense counsel and an in-depth

18. The Act allows commitment for treatment only if the person engaged in the sale did so for the "primary purpose of obtaining a drug which he requires for his personal use because of his addiction to such drug." 18 U.S.C. § 4251(f)(2) (1966).

report from the probation authorities. So informed, a judge may decide with some assurance that formal prosecution is unnecessary, provided there is voluntary acceptance of aid in rehabilitation.

Our present penal institutions are geared primarily to custodial care. The Federal Rehabilitation Act of 1965[19] does provide, however, for the establishment of residential community treatment centers, popularly known as "half-way houses." These community treatment centers are staffed with psychologists, psychiatrists, social workers, employment personnel, and representatives of other disciplines concerned with rehabilitation. The centers are small and community-oriented, primarily serving as a bridge back to life in the community for those offenders terminating their sentences.

The community treatment centers could be used as well for the in-patient or out-patient care of persons whose prosecution has been informally deferred. With the help of personnel from these centers, such persons can be physically, educationally and psychiatrically prepared to accept employment in the community where they live. Further, their development can be followed in that employment and in their day-to-day lives until rehabilitation is effected. In this way employment and social acceptability can more easily be found for such offenders not stigmatized as criminals.

The deferment of prosecution, of course, does not preclude prosecution if the informal attempt at rehabilitation fails. But unless a real effort is made to rehabilitate the offender without prosecution, the possibility of recidivism in every case is apparent.

The New York Times[20] recently carried a story, the first line of which read: "A program to get jobs or job training for selected defendants in criminal cases instead of prosecuting them was announced jointly yesterday by Mayor Lindsay and Senator Robert F. Kennedy." The announcement of these political leaders, sensitive to the problem of the urban slum and the crime which the hopelessness and rejection of the slum creates, stated that the program was to be used "to bring stability to the lives of many who may have turned to crime because of inadequate education and job opportunities." A three-year test of the plan is to be carried out with federal funds in Manhattan Criminal Court. The famed Vera Institute of Justice will screen the offenders for

19. Prisoner Rehabilitation Act of 1965, 18 U.S.C. § 4082 (1966). This Act gives the Attorney General three important powers. He may commit or transfer prisoners to the community treatment center. Also, the Attorney General may allow a prisoner to work in private employment while he remains an inmate. Finally, in emergency situations or as part of the preparation for release, the Attorney General may grant brief periods of leave.

20. N.Y. Times, May 14, 1967, p. 19, col. 1.

whom the program will be made available. The plan provides for release without bail accompanied by job training and employment. A report on the offender's possibilities would be made available to the judge, and the judge would decide whether prosecution should be deferred pending the informal rehabilitative attempt.

VI

Where deferment of prosecution is not possible, or where an attempt at deferment fails, and the offender eventually pleads guilty or is convicted, the judge will be called upon to pronounce sentence. On another occasion I have suggested, and I suggest again, that judges are not qualified by training to impose sentence. Expert consideration of what length of time is required to rehabilitate a particular defendant falls in the ken of disciplines other than the law; moreover, that consideration should be a continuing one related to the progress of the subject. Thus, in addition to lacking the necessary sociological training, the judge is called upon to impose a sentence before the subject's initial response to rehabilitative attempts is available. It is for this reason that I have long felt that something akin to the California system[21] is much preferable to the sentencing procedures now generally in use in state and federal courts. In sentencing, a judge should merely determine whether or not the subject is to be placed on probation. If that determination goes against the subject, then the subject should be committed to the correctional authorities, to be released at any time within the maximum period provided by law. While it is true that deterrence is still a factor to be considered in sentencing, particularly in some kinds of offenses, the fact of commitment itself, possibly for the maximum period permitted by law, should be deterrent enough.

VII

In addition to suggesting that the judge be shorn of much of the responsibility of sentencing, I have a suggestion relating to the responsibility for ending the sentence. This suggestion concerns the parole boards. I think that the state and federal governments should give consideration to abolishing parole boards. Parole boards are usually politically appointed and the members thereof are often long on political influence and short on education in the behavioral sciences. The result has been a series of scandals in relation to the obtaining of paroles for clients of lawyers presumably favored by parole boards. A professional

21. For a description of the California system *see* Fenton, *Group Counseling: A Method for the Treatment of Prisoners*, in CRIME, LAW AND CORRECTIONS 606 (R. Slovenko ed. 1967).

correction agency which has followed the subject through service of his sentence is in a much better position fairly to determine the time of his parole. The correction agency would transfer selected subjects, when deemed ready, to residential community treatment centers and obtain jobs for them in the community while they live at the community center. The information obtained through these functions would enable the agency to know when the next stop in phasing out the subject's obligation under his sentence can be taken.

VIII

I have one further thought in connection with correctional procedure. It is with reference to the efficacy of the adversary system itself in the field of criminal justice. I have come to believe that with respect to many offenders, particularly those from our urban slums, the adversary system has not worked well. We all know and accept society's responsibility for slum-produced crime. We know, too, that the deprivation and discrimination of the slums is not the choice of the slum dweller. But their effect on him as a potentially antisocial person, often without fault of his own, is unmistakable. Thus, in my judgment, society has a great responsibility to the slum dweller who finds himself enmeshed in the toils of the law.

It is true that we are now providing counsel for the indigent in most cases.[22] It is true also that, largely because of the work of the Vera Foundation, our approach toward bail has become more realistic and humane.[23] These two advances have intensified the adversary character of the criminal law as it relates to the poor. Instead of pleading guilty in 80, sometimes even 90, percent of the cases, the rate of guilty pleas in the District of Columbia, for example, has declined to 40 percent in the last two years. In spite of this decline the rate of convictions has remained more or less constant.

In many cases, taking the indigent defendant to trial has encouraged false hopes, led to a rationalization of innocence, and has frequently produced perjured defenses. Thus, when sentencing time eventually comes, the sentence is often not only longer but is imposed on a defendant who often feels he has been done a great injustice. The defendant's dissatisfaction with the treatment he received in court and his dissatisfaction with society in general is reflected in his reaction to rehabilitative at-

22. For a discussion of the systems that presently provide this representation *see* O'Brien, *Implementing Justice: The National Defender Project*, 1 VAL. U.L. REV. 320 (1967).

23. For a discussion of the effects of the Vera project on the bail system *see* Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1498 (1966).

tempts on the part of correction authorities. Ultimately this dissatisfaction may contribute to his recidivism.

It seems to me that our criminal law, particularly with reference to the poor offender, ought to be oriented toward treatment of that offender at the earliest possible moment. This treatment should take place before his suspicion and rejection of society is confirmed by the criminal process itself. Early treatment can be facilitated by proper use of the public defenders. If we are going to have public defenders for the poor, these public defenders, who hopefully will be brought in to assist the accused immediately on his arrest, should assert every legal defense available to the defendant. But after it becomes clear that it would be futile to take the case to trial, the public defender will best serve the defendant and society by attempting to have the prosecution deferred for an informal rehabilitative attempt, or otherwise terminated without delay and further frustration. If the public defender is able to convince his client that the client's interests can best be served by early disposition, the chance for rehabilitation is improved immeasurably. It is my judgment that in many cases involving the poor, particularly those from our urban slums, our much heralded fair trial often results only in even greater rejection of society by the offender.

In this I am reminded of an observation of the noted British author, G. K. Chesterton, in commenting on the impersonal routine to which an offender is subjected in the criminal courts:

> And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (some of them are quite intelligent); it is simply that they have gotten used to it. They simply do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they see only their own workshop.