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Charles W. Dean

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## TREATMENT CONCEPTS AND PENOLOGY A SOCIOLOGIST'S VIEW

CHARLES W. DEAN

### I. INTRODUCTION

Social institutions are constantly changing according to the requirements of the social system of which they are a part. They are also interrelated so that a change in one affects all other institutions. Change is very gradual, usually consisting of slight revisions or of new elements being added to the old. The tendency is for the new elements to adapt to the old rather than the old to the new so that the overall functioning of the institution continues uninterrupted and relatively unchanged. Understanding the inconsistent and slow progress of the prison reform movement is not quite so difficult when prisons are viewed as social institutions, inextricably intertwined with all other institutions in the society.

Perhaps criminal law is more closely related to penology than to other social institutions. Historically, the relationship between these two institutions has been so close that significant periods in the historical evolution of the modern correctional movement correspond with significant shifts in the criminal law. Both the *M'Naghten* and *Durham* rules serve as landmarks in shifting public attitudes toward criminals and penology. First, consider the two centuries before *M'Naghten*.

### II. PRE-M'NAGHTEN PENOLOGY

Two centuries preceding the M'Naghten rule, social reaction to the offender was exclusively in terms of the welfare of the victim and of the community. The offender by his act of offending was considered to have forfeited his claim to social concern. This absence of social and legal concern for the offender went unchallenged and was clearly expressed in the penal practices up until around 1800. Corporal and capital punishment were the most common forms of punishment for crimes. In England the death penalty was *the* penalty for over two hundred crimes, many of which are now considered minor. To illustrate this, between 1749 and 1771, 86 percent of the 678 executions in London were for relatively minor crimes such as burglary, house-

breaking, forgery, larceny and horse stealing.<sup>1</sup> As use of the death penalty became routine, great ingenuity was practiced in order to add variety to administering this form of punishment. Executioners sometimes became famous for their particular specialty and ranked among the top entertainers of their day. Dismemberment, castration, blinding and cutting out of the tongue were popular forms of mutilation which were used for lesser offenses. In most cases this was the equivalent of the death penalty since those who received these types of punishment received little medical care.

The English colonialization process, particularly the exploitation of the New World, created a severe labor shortage and many other criminals who would have been executed prior to this time were transported to America instead. The underlying reasons for this change were not humanitarian but economic. Transportation was an acceptable substitute for corporal and capital punishment since offenders were completely removed from society, were placed in a situation that was often the equivalent of the death penalty, and their labor helped solve some of the manpower problems in the new territories.

The increased use of slave labor and the American Revolution temporarily ended the heavy labor demands created by the settling of the New World, but judges continued to impose this kind of sentence. The convicted offenders were "temporarily" housed in old jails and in the hulls of non-serviceable ships.<sup>2</sup> Later, when England began to settle Australia, the use of transportation was resumed. There the criminals were assigned to road, forestry and quarry work and worked in chains ten hours a day. At night they were chained in shanties often too small to permit all of them to sit down at one time.<sup>3</sup> When the rapid expansion of the British Empire ceased, this method of dealing with criminals was no longer acceptable.

With the rise of the middle classes during the Industrial Revolution there developed a general increase in public abhorrence of brutality which prevented a return to the use of capital punishment. Thus, imprisonment became an increasingly common means of dealing with convicted criminals. Initially, the inmates were not treated humanely, but at least the cruelty was

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1. L. RADZINOWICZ, *1 HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750* 148 (1948).

2. W. JOHNSON, *THE ENGLISH PRISON HULLS* 3 (1957).

3. G. INES, *A HISTORY OF PENAL METHODS* 278 (1914).

hidden from the public eye and therefore was the object of little public concern. The inmates of early prisons were kept in irons since this was cheaper than to guarantee their safety by sufficient walls and proper locks. These early prisons were so unpleasant that there was some question as to whether they were more humane than the death penalty. Both transportation and early prisons were functional equivalents of capital punishment since in both cases there was extreme suffering on the part of the convicted criminal, and the offender was completely and often permanently removed from the society.

It is generally agreed that the eighteenth century was remarkable for its emphasis on the concept of the rights of man. Becarria and Voltaire and later Bentham and Romilly all contributed greatly to extensive practical reforms of criminal jurisprudence. The English criminal code was completely transformed between 1820 and 1861. In 1822 the death penalty was removed for some one hundred petty offenses and by 1861 that penalty remained solely for murder, treason and piracy. It was a period during which the rights of workers, women and children received increased recognition.<sup>4</sup> Thus, while the *M'Naghten* rule of 1843 stands as a landmark in the history of law, it was but one of many measures precipitated by changes in cultural values during that period.

Since the criminal law reforms practically abolished mutilation, reduced the number of capital crimes and restricted corporal punishment, and since transportation was no longer feasible, a substitute means of dealing with the offender was necessary. At first the jails and hulls of ships, which previously had been used to keep prisoners until other forms of punishment could be administered, fulfilled this objective. Widespread use of long-term imprisonment as punishment in itself began in 1787, the year the first American penitentiary was opened. The efforts of Sir Samuel Romilly led to the erection in 1816 of the first modern English prison. The idea spread rapidly, and by 1835 Americans had established the first genuine penal system in the world.

Early penology was not complex. A punitive ideology dominated the system, and there was little concern for inmate welfare since generally it was still believed that prisoners had forfeited their right to social concern. Cruelty appeared to breed

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4. H. BARNES & N. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 322-25, (4th ed. 1963).

cruelty. In the case of capital punishment, when one form did not deter others from criminality, more sadistic forms were introduced. In these early prisons, when one form of punishment did not produce conformity, harsher forms of treatment were used. Conditions became progressively worse.

In addition to providing a substitute for corporal and capital punishment, prisons were designed to get away from the evil conditions existing in the jails. Congregate confinement with men, women and children sleeping indiscriminately on the floors of filthy compartments, liquor sold at the jail bar, neglect and brutality were accepted as standard practice. Idleness compounded the bad effects of these conditions. The early part of the nineteenth century had witnessed an attack on antiquated criminal law. Later the same century also witnessed a successful attack on a derivative evil, antiquated methods of punishment for prisoners. Early prison reforms were concerned mainly with the twin evils of congregate confinement and idleness.<sup>5</sup> Although earlier there had been a general reduction in the use of punishment and much talk of rehabilitation, there was little in the way of penal progress until the 1870's. While some of the above conditions were corrected, a punitive philosophy still predominated and found expression in mass treatment, rigid repression and regimentation, silence rules, severe punishment, poor and insufficient food, confinement in small, unsanitary, poorly lighted cells and lack of anything but the most rudimentary efforts of rehabilitation. Prisoners were exploited to the limit in chain gangs, contract shops and lease systems.

The 1870's appeared to mark the beginning of a "golden age" in penology. In this decade the Elmira, New York, reformatory for men, was opened with a program which had rehabilitation or reformation as its aim and which made the first systematic use of parole in this country. The first separate institutions for women were opened in Indiana and Massachusetts. The American Prison Association was organized and at its first Congress in 1870 adopted a declaration of principles so advanced in thought that it was reaffirmed in 1930 with few changes. The first International Prison Congress, held in London in 1872, was attended by the leading American advocates of prison reform, and the atmosphere of the Congress was also one of progress.<sup>6</sup>

5. R. KORN & L. MCKORKLE, *CRIMINOLOGY AND PENOLOGY* 410-11 (1965).

6. THE AMERICAN CORRECTIONAL ASS'N, *MANUAL OF CORRECTIONAL STANDARDS* 10 (1964).

Advances in theoretical penology were not matched by advances in practical application. The Elmira Reformatory, as well as other institutions patterned after it, failed to realize the high hopes of the founders. This was largely due to their unrealistic faith in the effectiveness of unselective education for all and other mass treatment programs which eventually made the education treadmills which prisons had become. By 1910 it was generally admitted that the adult reformatory idea, as put into practice, was almost a complete failure.<sup>7</sup>

In spite of the ferment of reform in the 1870's, there was little significant progress until well into the twentieth century. The conditions and practices existing prior to 1870 went on for another half century and, in fact, some have existed until the present. The last state operating the lease system, under which prisoners were virtually sold into servitude, did not abolish it until 1928, and then only after public opinion was aroused by successive scandals. At about the same time, disclosures of brutality in chain gangs gradually resulted in almost complete abolition of the use of chains in state road camps and other outdoor work projects. The number of states using flogging as prison punishment steadily decreased during the last half century, but it is still practiced in a few states, both officially and surreptitiously. In short, the punitive philosophy was predominant in policy and practice in American prisons, not merely in the nineteenth century but well in to the twentieth century and has by no means lost its power now.<sup>8</sup>

In the period just before World War II, the attacks on prison conditions which had been made intermittently since the early 1800's were given due impetus by the reports of state commissions set up by New York and New Jersey to investigate their prison systems. Generally, it was agreed that corrective efforts up to that time had been dismal failures.<sup>9</sup> As rehabilitative devices, punishment, religious services, industrial activity and mass education had been weighed in the balance and found wanting. Penology needed new explanations and techniques.

### III. CORRECTIONS IN THE ERA OF THE DURHAM RULE

Parallel with the recognition of the apparent failure of penal efforts up to that time, there developed a conflict in cultural

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7. *Id.* at 11.

8. *Id.* at 11-12.

9. *Id.* at 12.

values concerning criminal liability. By the end of a century that had seen a virtually world-wide abolition of slavery, the only two classes of people completely under the domination of the state were the hospitalized insane and the incarcerated criminal. For societies increasingly aware of problems and responsibilities of social welfare, this became an increasingly acute moral problem. In the case of mental patients the problem was ameliorated by the increased professionalization of treatment and liberalization of laws. No similar solution was available for prisoners, and the persistence of punitive attitudes toward criminals only intensified the moral dilemma.<sup>10</sup> As essential part of this view was belief that the criminal, of his own volition, chose to do wrong. In an intellectual atmosphere which was increasingly skeptical of all simple philosophies and ethics, the doctrine of moral culpability began to weaken. Denied this prop, what George Bernard Shaw called the "ruthlessness of the pure heart" began to appear even more ruthless.<sup>11</sup> At this point, the issue was complicated by the new doctrine of psychiatry: the idea that criminality could result from disease as well as immorality. Once the traditional doctrine of moral responsibility was undermined, the possibility arose that those who inflicted pain rather than those who endured it were morally culpable. These convictions were consistent with the *Durham* ruling. This ruling stated that not only those who did not know that they were doing wrong, but those who knew but could not keep from doing what they knew to be wrong were not criminally liable. Thus, the social-psychiatric form of justice which had been developing since *M'Naghten* was accepted by a court. Since in effect society became to some extent the co-defendant of the accused, moral indignation against the offender as an enemy of society now became itself an immoral attitude. The prisoner became the victim of a questionable ideology, and those who punished him at least shared in his guilt. In a book written by a prisoner in 1914, the manifesto of the new convict reads:

My business in this book was to show that penal imprisonment is an evil, and its perpetuation a crime . . . and to show that it does not protect the community but exposes it to incalculable perils. Men enfeebled by crime are not cured by punishment, or by homilies and precepts, but by taking off our coats and showing them

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10. *Id.* at 12-13.

11. G. SHAW, *THE CRIME OF IMPRISONMENT* 63 (1946).

personally how honest and useful things are done. And let every lapse and failure on their part to follow the example, be counted not against them, but against ourselves who failed to convince them of the truth, and hold them up to the doing of good.<sup>12</sup>

From this time on penology was no longer singleminded. Psychiatry and related disciplines were considered to be a necessary part of any prison treatment program. It has been fairly well accepted that incarceration alone constitutes adequate punishment. This has resulted in steadily increasing emphasis on treatment and a steadily decreasing emphasis on punishment in correctional institutions. This has solved the problem. Those who think criminals should be punished accept imprisonment as punishment enough, and those who think criminals should be treated are told that treatment facilities will be provided. The moral dilemma is no longer disturbing. An ambivalent and capricious public assumes punishment *and* treatment, all hidden in the confines of the correctional institution. Prisons are now referred to as "correctional institutions", and guards are called "correctional officers".

While there has been much discussion of the *Durham* rule and the implications that derive from this position for the law, there has been little said about the consequences of the "criminal as diseased victim" concept on corrections. This new conception of the offender has had profound significance for the correctional institution. Having so many people constantly in close quarters for such extended periods of time produces a potentially explosive situation. Experienced correctional administrators are fully cognizant of the potential dangers accompanying the introduction of changes and for that reason penal institutions usually are quite conservative. When treatment staff was added to prisons, it was a matter of policy that little else was changed. The functions of these new staff members were added to existing programs with little concern for the limitations that were imposed by the prison setting. It was generally recognized that the treatment staff should be more concerned with individual inmates, a concern not paramount in the value system of the custody officer. The new staff was labeled "treatment" and the old staff "custody." Members of the treatment staff, generally referred to as "professionals", were better educated and better

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12. J. HAWTHORNE, *THE SUBTERRANEAN BROTHERHOOD* xvii-xviii (1914), quoting from R. KORN, *supra* note 5, at 585.



paid. While outnumbered in the overall prison personnel, the treatment staff usually outnumbered custody staff on classification committees and other decision making bodies. However, the custody members' votes often carried the weight of a veto since they were more concerned with security, the primary goal of the institution, which was requisite to maintaining the institution. There was little communication between treatment and custody staffs. Each represented different social classes both inside and outside the institution, with the higher class being the newcomer in the institution and contributing less to organizational maintenance.

Basically, the prison had not changed but a few new staff members had been placed in the institution. These usually were regarded as appendages which had little to do with the real business of the institution. The treatment staff was expected to perform their rituals without interrupting the custody oriented procedures of the institution. At this time rehabilitation was the task of a few people whose duties were not highly regarded by a majority of institution personnel, nor were these duties considered essential to the functioning of the institution. These conditions existed until the 1950's when it was gradually recognized that rehabilitation of the offender was far too difficult a task to be accomplished within an organization that was characterized by such half-hearted and divided efforts.

Paralleling the development of rehabilitative programs was the development of greater concern for more humane treatment of prisoners. The same cultural conditions seemed to precipitate both movements simultaneously. While related, these two are not the same. Their parallel development has resulted in rehabilitative programs being perceived as humanitarian services for inmates. This is encouraged by the failure of treatment staffs and correctional administrators to distinguish clearly between treatment and humaneness. This is forced on them in many instances since it appears that in many places in order to procure funds adequate to provide special diets for diabetics, for dental and medical services, a prison administrator has to present these as essential to rehabilitation. While such facilities and services would be assumed to be an integral part of any well developed rehabilitative program, there is no reason to believe that they have anything to do with altering post-release behavior.

Related to the changes in the correctional institution, inmates also were affected. First, the social definitions of the inmate were altered. This was roughly equivalent to defining an alcoholic as a sick person instead of a weak or evil person. A sick person placed in a correctional institution for treatment is not as emphatically and officially declared to be unfit for normal social intercourse as is the person who is sent to a prison as punishment for antisocial behavior. Thus, at release the inmate is supposed to be a treated person who is expected to act as a well person and therefore not commit any more crimes. This could have the effect of a self-fulfilling prophesy regarding post-release behavior.

As indicated above, the correctional institution has no single-minded intent regarding its correctional function. While the social definition of the convicted felon may be somewhat softened by a philosophy which maintains that this responsibility was limited, within the institution itself there are practices which support the idea that the prisoner was fully responsible for his crime. Prison treatment and custody workers alike stress that admitting one's past mistake is requisite to rehabilitation. The inmate who insists on his own innocence is usually considered to be one who has not learned to face reality. If the social summary on an inmate says, "this individual does not learn from past mistakes", this individual is considered to be a poor risk. The paradox of this is that the person who is actually sick and who does not realize that he was doing wrong is likely to be considered the most "evil", for he will be the one who is least likely to admit that he was wrong. Thus, the least responsible individual is considered most evil since he will not admit his guilt. The one that admits his guilt freely is considered a better prospect for rehabilitation. Little concern is directed toward the possibility that readily admitting guilt may be an attempt to manipulate. If a parole board judged an inmate on the basis of the amount of remorse he evidences for his crime, an admission of crime certainly would be the first step that inmate would take in exhibiting deep remorse. Thus, from the above it is apparent that the cultural ambivalence toward responsibility is reflected in the correctional institution. On one hand the inmate is led to believe that he is sick and in need of treatment. This approach is evident in the administration of psychological tests, the presence of social workers and psychologists, group therapy and other "rehabilitative" or "treatment" pro-

grams of the correctional institution. Yet, on the other hand the first step in the rehabilitative process is a sense of remorse which directly contradicts the "criminal as diseased victim" concept.

Although the above contradictions exist, defining prisoners as diseased persons who need treatment instead of evil people who deserve punishment may reduce some of the negative consequences of society's definition of the criminal so that at release the offender might re-enter society with less stigma. This conception of the offender may benefit him in three ways. First, it may facilitate acceptance by non-criminal associates, a condition generally considered to be important to successful adjustment in the outside world. Second, it may reduce the possibility that the person leaving prison will think of himself as a criminal. There are data indicating that a criminal self-concept is significantly related to post-release criminal behavior. Third, this perspective may minimize the possibility of the inmate identifying with other criminals after release. There are rather widely accepted theories supported by considerable data which maintain that non-criminal associates, non-criminal self-concepts and identification with non-criminal significant others are significantly related to staying out of further legal difficulties after release.<sup>13</sup>

#### IV. PROGRESS TO DATE

While there seems to be an increasing acceptance of the treatment concept for inmates in many segments of society, there are other significant and large segments where hostility toward the treatment approach seems to be very great. For example, in November, 1967, the following editorial appeared in one of the leading capital city newspapers in a state where there is a very progressive correctional program.

#### WORDS OF WARNING

WHILE Washington is caught up in a fervor of proper labeling and fair packaging, we might as well toss an idea of our own into the naming game.

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We offer yet another recommendation for those who hope to influence personal reactions by plastering notices hither and yon:

13. For a recent discussion of these theories and their relationship with post release behavior, see Dean, *New Directions for Parole Prediction Research*, 59 J. CRIM. L.C. & P.S. 214 (1968).

We suggest that the United States Supreme Court, along with the other criminal-coddling courts of the land, give thought to labeling the *convicted* crooks, hoodlums, rapists and murderers they keep turning loose upon the public.

Something along this line might be helpful to law-abiding citizens who otherwise might not appreciate what they are facing:

*"Warning! Exposure to this individual has been proved to be dangerous to health and could be fatal."*<sup>14</sup>

This suggests that some significant portions of the public may not be very accepting of the treatment concept after all. When such statements are added to the rather consistent practice of providing very meager governmental support for correctional programs there seems little reason to argue that there is widespread confidence and support of correctional programs for convicted felons. Mental health, welfare, juvenile facilities, education and aid for the elderly seem to receive considerably more attention than the inmates of correctional institutions. Prison inmates are not in a position to vote, there is no organization to present their case to legislatures, they have no alumni association which supports their activities, and legislators are sensitive to the ambivalent attitude toward these people on the part of the voting public. As was the case in other periods of prison reforms, many of the changes have been more verbalizations than alterations of actual practices.

While the public appears to have reservations about the priority of the treatment concept for corrections, at the same time there is a general demand that something be done to reduce recidivism in crime. Since treatment programs are expensive and money is scarce, there is a tremendous temptation for prison administrators to accentuate the positive by describing existing treatment programs in glowing terms, however inadequate they may be. Correctional people in general refer to such practices as "paper programs" or programs that are talked about but do not actually exist. One system which claimed to have a progressive program had a school with one teacher for two thousand inmates, a hospital without a physician, psychological and IQ

14. The State, (Columbia, S. C.), October 9, 1967, at 12-A, col. 1-2 (emphasis added in last sentence).

tests given, interpreted and recorded by untrained inmates including the ritualistic administration of the Minnesota Multiphasic Personality Inventory to all inmates, group counseling with untrained leadership and vocational training on century old plumbing and electrical systems.

The prevalence of "paper programs" cannot be explained by the types of people who are attracted to or who are selected for correctional work. The most plausible explanation seems to be that these people do what is required of them. The American public demands some assurance that every possible effort is being made to change these "dangerous" criminals before they are turned loose. The same public which makes these demands also insists that someone be fired if there is a riot. Furthermore, the same public is not very willing to bear the expense of the rehabilitative programs they demand. What is a prison administrator to do? The Correctional Administrator is in a double bind and has to perform two difficult and at times contradictory roles with very little support either in finances or in public opinion. If he believes in what he is trying to do, he must placate a public that wants to brand inmates as dangerous one day and to rehabilitate them the next.

#### V. HOW MUCH SUCCESS HAS BEEN REALIZED

There are no data indicating the amount of success of correctional efforts to date. There is a large body of literature reporting numerous research findings and suggesting a large number of plausible theories concerning treatment of the offender. However, the knowledge that is available has not been translated into feasible action programs or the programs have not been successfully implemented or if they have been implemented they have lacked evaluation. If they have been evaluated, the results usually have been negative, and in the few cases where there were positive results reported there have been no replications to support these findings. Much of the research that has been done has been based on information collected from prison files which were compiled for administrative purposes and do not meet the basic requirements of data to be utilized in scientific investigation. Prison records are full of references to unhappiness of childhood, sibling rivalry, broken homes, early sex experience, etc. However, in the numerous studies of parole violation and recidivism which have used all the information that

is available in prison files, none of the above items mentioned or others related to these have been shown to be significantly related to post-release behavior. It seems that relative to post-release performance, there is little in the prison files other than prior criminal record which is predictive. If the content of these files reflect the orientation and focus of those responsible for the treatment program, then limited success can be expected until new orientations are adopted. Rather than conducting a positive search for some new strategy for corrections, the historical development has been a matter of attempting one method, and after learning that this did not work, choosing the next easiest alternative, regardless of its actual promise. There seems to be general agreement that the prison setting is not one that is conducive to treatment. Prisons are generally overcrowded, which in turn creates both budget and security problems. Thus, probation, parole and other community based programs have been considered the most advantageous treatment methods available at this time. There has been a general shift toward treatment outside the institution walls, and there is general agreement that such efforts will have optimum effectiveness if situated in the community. While this seems plausible, the effectiveness of such programs has not been demonstrated. In the instances when variations in recidivism rates have been demonstrated due to the use of such facilities, the research reports usually fail to present a very thorough account of how the participants were selected so that when differences are reported they could result from the selection process. At the present time it can be said that prisons have done an effective job of isolating the offender from the public community.

Prisons continue to change by the same slow evolutionary process, new changes being integrated into old structures with a definite strain toward continuity of past traditions and attitudes and practices. Even in the most progressive systems the attitudes of custodial officials and the support received by the public has not changed drastically. Perhaps it is inevitable that the concept of rehabilitation must be sold to the public before adequate support will be received, but at this point in time there is a definite lag between the demands of the public, the verbalizations of correctional officials and the practices that are generally observed in correctional institutions.