Summer 1936

Criminology and a Modern Penal Code

Jerome Hall

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Jerome Hall, Criminology and a Modern Penal Code, 27 Am. Inst. Crim. L. & Criminology 1 (1936-1937)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

CRIMINOLOGY AND A MODERN PENAL CODE*

JEROME HALL†

Of all types of group behavior, law-making is one of the most deliberate. In law, therefore, the application of knowledge to human affairs should find an especially apt field of inquiry. As in many discussions of relationships between knowledge and group conduct, certain ideas and assumptions are implicit in the following namely: that there are "social problems"; that their solution is desired; and that in worth-while measure they can be solved by action based upon knowledge.

Especially since the English Utilitarians, laws have been sharply differentiated from objectives fixed non-legally—by political, ethical and social considerations. Jhering's contribution to this ideology emphasized social ends and social utility, and may be said to have introduced a series of premises into legislation and adjudication that led to results not attainable, at least so perceptibly, by the earlier Utilitarian formulas, couched, for the most part, in individualistic terms. But Jhering's writing is largely vitiated by his pervasive analogizing of an evolutionary, transcendental, "universal purpose" which determined human motivation as inexorably as physical "causation" was then conceived to operate. Individualistic Utilitarianism and socio-teleological determinism have given way to an instrumentalism that builds upon both, but rejects those positions that are inconsistent with the basic assumptions of social problem-solving stated above. Instrumentalism, alone, does not provide an adequate perspective from which to view the problems to be dealt with.¹ But to some extent it does facilitate analysis of the relationships between law and social problems.

Bentham first applied Utilitarianism to the criminal law—its precise penalties nursing the post-Newtonian hope (Hutcheson, Hume, Helvetius, Beccaria, *et al.*) of constructing an exact "moral science." Thoughtful persons have largely rejected 18th century

* This paper was presented on December 27, 1935, at the annual meeting of the American Sociological Society, Section on Criminology.

† Professor of Criminal Law and Criminology, Louisiana State University Law School.

¹ Instrumentalism has aptly been called a "governmental view of truth" (B. Russell). In the solution of practical political problems, the conception is helpful. But we need to reject the inhuman and perverse implications of instrumentalism applied directly to human beings.

penology. But the problems that challenge knowledge of human affairs can again find no more fruitful field of inquiry than in the criminal law.

The focus of our problem is a penal code. Such a code consists chiefly of propositions (rules) of distinctive character.² Recent analytical jurists, qualifying the Austinian conception of legal rules as "commands," insist that such rules are "norms." They state that rules of law are prescriptions, not descriptions; that they do not, like empirical generalizations, describe what *Is*, but that they prescribe what *Ought* to be; that they do not deal with fact or nature or existence of any sort, but that, on the contrary, they are ideals deriving validity only from their formal inter-relationship; and that, accordingly, in law, *Ought* has no ethical connotation, but is, instead, a characteristic of certain propositions constructed within an independent epistemological category.

From the legislator's (any "manipulator's") point of view, however, characterization of rules of law either as "commands" or as "norms" is indiscriminate. From this viewpoint, at least, it is necessary to distinguish two divisions of each rule. With reference to criminal law, we may (building upon Kelsen) term these divisions, respectively, the behavior-circumstance element and the treatment-consequence element. The treatment-consequence element *prescribes* the penalty. It is the familiar sanction. It supplies the normative character of legal rules. But the behavior-circumstance element, whatever the form in which it may be cast, is a general description of recurring fact.³

Now it is this latter element of the rules that is referred to when it is stated that one important function of criminologists in their collaboration on a modern penal code, will be to help "define" crimes. It may be readily seen, however, that "definition" is an inapt term. In a narrow sense, definition means a set of symbols stated as premises, which need to be applied consistently in a discussion. Ordinarily definition presupposes existing and adequate knowledge, *i. e.*, it consists of brief exposition of the unknown

² There are also definitions of terms, propositions that are purely descriptive and impose no duty on any person, etc. With these we are not here concerned.

³ It is possible to view the treatment-consequence element similarly upon the hypothesis that officials act in certain typical ways. This is not attempted here partly because of the particular question under discussion, *i. e.*, anti-social behavior; partly because we approach the problem from the viewpoint of the legislator, administrator and judge; quite naturally, deterministic hypotheses recede, and treatment is viewed as deliberate, and largely unconditioned conduct. From this point of view, the conduct of officials is purposive rather than merely existential. This is discussed further in the text.

in terms of the known. But the very opposite must be presupposed in the search for correct answers to social problems. "Definition" here develops progressively in the course of painstaking research. Such definition is constructed upon discoveries regarding anti-social conduct which, finally, permit the filling in of the behavior-circumstance element of legal rules with content that is "correct" (defensible) in light of present knowledge and present problems.

Criminology includes existing knowledge of crimes defined in terms that denote certain social phenomena; and it includes various methods and techniques of research available for further acquisition of such knowledge.

But something other than criminology, thus defined, is needed for the construction of a modern penal code. For we are here concerned with the *relationships* of criminology to *law*. We seek knowledge regarding the correct content of *legal rules*, and regarding correct administration of such rules. In the case of major offenses, to be sure, criminologists study phenomena described or indicated by the behavior-circumstance element of legal rules. But the coincidence has not been shown to be a necessary one. And, as regards a vast number of minor offenses, it is clear that there is no necessary relationship between legal and social criminality. Hence it is preferable to reserve the term "criminology" for knowledge and study of certain social phenomena without regard to penal laws. Accordingly, the term "sociology of criminal law" will be used to refer to the specific relationships that here concern us.

The sociology of criminal law is by no means mere juxtaposition of criminology and criminal law—although it presupposes knowledge of both disciplines. We are familiar with discussions of pressure groups, of social and economic forces that influence legislation, of psychologic drives that affect judicial decision, and so on. But most of these essays, whatever else they may be, cannot constitute the distinctive field of sociology of law since they completely ignore legal rules.⁴

The basic hypothesis upon which a sociology of law rests is that rules are potent, conditioning factors as regards the conduct both of lay population and officials—that rules make a difference that is "sufficient" in degree and importance to engage serious intellectual interest.⁵ A further necessary hypothesis is that the con-

⁴ And no description of official or other conduct has been presented which permits study of "law" as distinctive behavior.

⁵ Obviously this does not mean that the rules are administered exactly as written. Nor does it mean that the rules are not radically modified, sometimes

tents of rules are more or less correct or incorrect—depending, in part, upon criteria of correctness established in certain fields of empirical knowledge. So, too, as regards administration of the rules whether by police or judges or peno-correctional officials. A third fundamental hypothesis is that the purpose of rules is the influencing of human conduct towards socially desirable ends. A sociology of law, when constructed, will be a theoretical social science consisting of generalizations regarding social phenomena insofar as they refer to the contents, purposes, applications, and effects of legal rules.⁶

How shall we set about to construct such a discipline, or, more specifically and narrowly, to make the discoveries regarding anti-social behavior that are needed for sound definition of crimes (behavior-circumstance elements of penal rules)? Theoretically there are two approaches to the problem—stated as extremes: to study anti-social behavior in complete disregard of penal law; or, to study the behavior described or indicated by existing rules of law. Persistent application of purely non-legal criteria of criminality would be tremendously valuable for criminology. But the other approach would seem generally to offer the greater, and certainly the more direct, advantage for present purposes. Besides, many acts made criminal by law are of very ancient vintage. They occur as behavior-circumstances in numerous codes.⁷ If, in such cases, we may to some extent be unavoidably influenced by existing legal conceptions, then it is necessary to be thoroughly conscious of that influence. We must know as fully and as precisely as possible what the present rules are. Hence, though for different reasons, analysis of the rules is important in either approach.

even ignored, where they lag far behind the needs arising from present social problems. It does not mean that there are not other conditioning factors. A persistent need is for differentiation of litigated from non-litigated situations, for differentiation of rules and situations that can be specifically objectified, from necessarily amorphous rules and situations, etc. Current psychological literature on concept formation and concept adherence and departure is relevant.

⁶ Hence while continued research in criminal law (rules) and in criminology, carried on in separate compartments, may help, it does not directly add to the kind of knowledge that is needed. Even though the drafting of a modern penal code may need to be long deferred, none the less, if the analysis above presented is sound, every contribution to a sociology of criminal law, whether by independent scholars or by groups of collaborating scholars, will mark an advance in the necessary direction.

⁷ As to limitations upon social research resulting from acceptance of the legal definition of crime, see *Some Basic Problems in Criminology* (1933) 167 *Annals of Am. Acad. of Pol. & Soc. Sci.* 131-2.

And cf. footnote 6 *supra*. Hence, in any event, it would at some point, be essential to focus research and discovery upon rules of law.

But the existing rules should provide no more than starting-points to assist projection of the lines of empirical research. To begin with phenomena described in existing rules does not in the least mean that research is to be confined within these limits. It does not mean that there will be the slightest limitation upon the study of offenders, or of recurrent patterns of their behavior (professionalism). Nor does it mean that we shall not emerge with a new and distinctive penal code. Moreover, this method will avoid dogmatism. It will be possible to trace the process step by step which led from the existing rules to the ones discovered. Projection of research from existing behavior-circumstances will encourage narrow formulation of problems. Accumulation of the knowledge thus acquired can lead to broader generalizations whose validity will rest upon a carefully wrought foundation. Hence the tremendous importance of specific discoveries resulting from painstaking research should be apparent.

There is another aspect of the definition problem which is of the utmost importance. A penal code consists of words, phrases, and propositions—all concepts of various degrees of generality. Accordingly, we have to deal, also, with concept-formulation as a linguistic problem. Its solution requires an understanding of the “referents” (Ogden and Richards) discovered by criminologic research, as well as an understanding of the linguistic requirements of the criminal law—to invent adequate symbols. These latter requirements are technical ones. They involve phenomena that can be studied independently as self-sustaining and self-perpetuating.

The language of our law was not always technical. Pick up any of the early mediaeval codes and you read words of common usage throughout. Note, for example, the following dooms of the Anglo-Saxon king, Aethelberht: “If one man slays another on the king’s premises, he shall pay fifty shillings compensation; for seizing a man by the hair fifty sceattas shall be paid as compensation; if the hearing of either ear is destroyed, twenty-five shillings shall be paid as compensation; if an ear is struck off, twelve shillings shall be paid as compensation; if an ear is pierced, three shillings shall be paid as compensation; if an ear is lacerated, six shillings shall be paid as compensation.”⁸ The specificity of these provisions, both as to behavior-circumstances and treatment-consequences—the latter frequently stated in exact quantitative terms—is one striking characteristic of early law.

⁸ F. L. Attenborough, *The Laws of the Earliest English Kings*, (1922).

More noteworthy for present purpose, is the total lack of definition of any of the terms used. It is assumed that the meanings of "steal," "slay," "property," and so on, are known. For the most part we find much simpler concepts that are barely more than descriptions of specific situations (images); e. g., "lacerate nose," "pierce cheek," "knock eye out," "seize hair," "break skull," "strike off thumb," etc. The referents were simple and well known; the symbols were words of common usage, commonly interpreted.

Conspicuous in modern penal statutes is the profusion of tautology, obscurity, and inconsistency; also, of technicality—e. g., felony, misdemeanor, *mens rea*, trespass, and so on. Thirdly, there are numerous, apparently popular words which have been given technical meanings. Thus in legal definitions of murder, we note such terms as "malice" and "premeditate." But we discover very soon that "malice" does not necessarily mean spite or wickedness in any degree; and that "premeditate" may mean much less than "meditate." Explanations of these various linguistic phenomena, non-technical and technical, may include such diverse ones as that in terms of growth of language viewed as an autonomous institution; of the eccentricity, perverseness, even chicanery, of professionals; and, not least, of motivation towards socially desirable ends, unsupported by research or analysis of proposed laws in relation to existing ones.

Elsewhere I have discussed the use of fiction and the deliberate invention of technicality to diminish the lag between rules and social problems.⁹ Here it needs to be emphasized that the result of such manipulation is new content poured into old receptacles. The function of fiction is to change the real referents of rules while preserving their conceptual forms.

It would be leaving a mistaken impression, however, if it were concluded from the above that all technicalities must be eliminated. Legal science, like any other, depends considerably upon a technical vocabulary—in its best sense. Technical terms are frequently tools of analysis essential to the understanding and manipulation of a complex legal structure. Again, they result unavoidably, to some extent, from complexity of culture. And, as has been suggested, they frequently function as administrative devices, created out of social need, in modern legal systems that operate by use of official discretion to discharge rigidly prescribed duties.

Differentiation of useful technicalities from mere vestiges and

⁹ *Theft, Law and Society* (1935) Chapter three; also pp. 254-268.

from terms that carry ambiguous or artificial connotations must, in part, be determined by intensive research into the social problems that arise in modern conditions. Discovery of typical behavior configurations, selection of the important referents, consideration of the problems of proof and of the technical requirements of our legal structure—all of these factors must engage intensive study at the hands of groups of specialists. Their efforts should be co-ordinated in terms of knowledge of the problems-to-be-solved as social problems—with legal concepts constructed always with a view to their important, auxiliary functions.

It will be seen that perhaps the most important contribution which the criminologist can make is discovery of recurrent, anti-social behavior. The creative synthesis and generalizing required are common to all scientific discovery. But because reduction of descriptions of social phenomena to common or quantitative terms is usually at the cost of adequate representation of significant empirical differences, we may not discover laws that lend themselves helpfully to logical or mathematical manipulation.¹⁰ Hence we may be unable, permanently perhaps, to systematize the generalizations discovered. But that uniformities in criminal behavior and in the relationships of such behavior to environment have been and can be discovered is clear. These discoveries by criminologists will, as indicated, be translated into terms that are in conformity with legal, linguistic requirements.

As noted, sound definition of the behavior-circumstances of legal rules depends largely upon research into all the parallel social processes.¹¹ What, now, of Administration? Whereas the rules contain abstractions of significant features of recurrent behavior, each case presents a specific situation. Hence Administration is the process of applying generalizations to concrete situations. Individualization of punishment means, in these terms, the discovery

¹⁰ Cf. "In regard to his subject matter, on the other hand, the physicist has to limit himself very severely: He must content himself with describing the most simple events which can be brought within the domain of our experience; all events of a more complex order are beyond the power of the human intellect to reconstruct with the subtle accuracy and logical perfection which the theoretical physicist demands. Supreme purity, clarity and certainty at the cost of completeness." Albert Einstein, *The World as I See It* (1934) 21.

¹¹ Mr. Justice Cardozo, in his paper, *What Medicine Can Do for Law*, points to legislation limiting the hours of labor, of night work for women, to compulsory vaccination, and the tuberculin test for cattle, as examples of the effect upon law of "fuller knowledge of the investigations of scientists and social workers." *Law and Literature*, pp. 75, 77.

For a remarkably suggestive article, see Yandell Henderson, *Science, Law and Alcohol*, Harper's, June, 1933.

within the abstract, treatment consequence prescription, of the correct concrete sanction to be applied to a specific individual.¹²

The assumption throughout is that the present concrete situation falls within the prescribed generalization. But that hypothesis has for some years proved inadequate either to explain judicial decision, viewed from without, or to guide the judges themselves. Acceleration of social change has been so rapid, at least since the Industrial Revolution, that by hardly any stretch of imagination can many concrete situations or present knowledge regarding them be subsumed under rules formulated for a culture distinctly different from our present one. Hence it has long been recognized that the courts constantly legislate; and it seems a clear understatement to assert that such legislation is enacted only "interstitially," at least so far as the criminal law is concerned.

As legislator, the judge's task is, in part, that of the criminologist. He needs to understand many social problems in all their ramifications. He needs a degree of sophistication regarding the social sciences generally, to enable him, not to dispense with expert knowledge, but to evaluate such knowledge critically. Passing over the problem of personnel—the needs of which, as regards criminal law administration, are rather obvious—we must note that even the ablest scholar on the bench is, under our system, enormously handicapped through lack of information and analyses of the factual problems which confront him. Accordingly one of the greatest needs of our times is provision for permanent research institutes as recognized adjuncts to courts and legislatures.¹³ As regards both divisions of legal rules, one persistent quest of draftsmen who wished to build upon the work of such an institute would be—what formulation of them will permit the fullest utilization of knowledge?

But there is another, equally persistent, equally important problem. Consideration of the treatment-consequence element from the law-making point of view, discloses the purposive, normative aspect of law. Hence the problem of the legislator includes not

¹² Obviously the practice would change radically if an administrative board took over the entire functions of sentencing and treatment. The legal theory would remain essentially the same; it would include application of a long series of "sanctions"—which, if legal, would be administered under a law more general than the totality of actual treatments ("sanctions").

¹³ Cf. Sheldon Glueck, *The Social Sciences and Scientific Method in the Administration of Justice* (1933) 167 *Annals Amer. Acad. Pol. & Soc. Sci.* at 116. The term "Ministry of Justice" does not seem apt since it suggests the continental control of judiciary.

only scientific generalization regarding existing social facts; it includes also thinking in terms of the accomplishment of certain ends by appropriate means. Such purposive functioning is directed towards the *discovery* of solutions to social problems. In this aspect the distinctions that have frequently been drawn between law that Is and law that Ought to be are purely formal ones. But the Ought that is relevant to solution of social problems is not a purely ethical Ought, nor, indeed, is it any logical Ought. It is, instead, the correct solution of existing social problems. Now it is the distinctive character of such problems (viewed not historically, *i. e.*, after the outcomes ("solutions") are known, but viewed as *existing* problems), that the answers ("Oughts") are unknown. The agent has some knowledge, but not enough. He has some sense of what the desirable end or ends should be, but his understanding in that regard is vague and uncertain. So too, as regards effective means. Social problem-solving is a process that consists of increasing his knowledge, and, at the same time, of discovering *particular* objectives and the *particular* means to their attainment.

In this connection it needs to be pointed out that the formulation of broad generalizations as ends, though acquiesced in by most persons, provides not the slightest aid in solution of social problems. Such notions as "welfare," "the public good," "the protection of society," and so forth, may be set down on paper; and it is rather simple to subsume a large number of propositions that are formally consistent with the initial generalization. But since such generalities can include almost any actual content imaginable, they include nothing of value in social problem-solving. (Where such slogans are adequate, does any social problem exist?) The discovery of specific ends and means is, indeed, inconsistent with acceptance of broad generalizations as already representing desirable ends and means. Realization of the nature of legal rules and their administration, and of present, social problem-solving, as dependent upon discovery of specific ends and means, places the emphasis where it needs to be placed, namely, upon the most detailed empirical research possible by the most creative minds that can be enlisted.¹⁴

¹⁴ "No amount of mere fact-finding develops science nor the scientific attitude in either physics or social affairs. Facts merely amassed and piled up are dead; a burden which only adds to confusion. When ideas, hypotheses, begin to play upon facts, when they are methods for experimental use in action, then light dawns; then it becomes possible to discriminate significant from trivial facts, and relations take the place of isolated scraps." John Dewey, *Science and Society* in *Philosophy and Civilization* (1931) at 329.

And for an indefinite future, as regards increase of social science here and

The nature of legislation and adjudication and of legal rules viewed as implements to such functioning, makes it necessary to consider, also, the meaning of social values as they affect a sociology of criminal law. The distinction to be stressed here is that between ethics, and the study of moral ideas or attitudes. There is, no doubt, a defensible empirical explanation for the origin of both. But ethics, as here limited, is concerned with the validity of moral judgments, the assumptions underlying them, and their relationship to certain standards or premises. On the other hand, moral ideas can be studied empirically, *i. e.*, as to their actual content, the psychological forces underlying them, their differences in various cultures, their social functions, and so on.

The criminologist should be concerned primarily with the empirical study of moral ideas. (Indeed, crimes as social phenomena, in part, *mean* attitudes and expressions of disapproval.) If moral ideas are viewed as facts which operate in reactions against persons and conduct deemed anti-social, then the ethical validity of such ideas is of no consequence so far as criminologic research is concerned. They must be accepted without bias as elements in the factual set-up with which the scientist must deal, however superficial or distasteful they may be.

One of the most striking defects of contemporary criminology results from neglect of study of the mores in their special relationships to socially criminal behavior. This results from at least partial acceptance of the legal conception of crimes as violations of penal law. Consequently the criminologist focuses upon the offense and upon the offender in such isolation from group reactions as to preclude the possibility of discovering the nature of socially criminal behavior. This lack of knowledge imposes serious limitations upon present construction of a sociology of criminal law.

Two further observations must be made to avoid erroneous impressions from the above. First, moral ideas change; they even improve. And it is possible to discover points of leverage accessible to reform. Next, it must be noted that the infiltration of moral attitudes as an element in the factual set-up does not make research impossible. Social attitudes have persistent aspects. Not

now, reliance must be placed upon common sense science. For a discussion that common sense is not nearly so different from exact science as is sometimes imagined, see Emile Myerson, *Identity and Reality* (1930) Chap XI; and cf. C. I. Lewis, *Mind and the World Order* at 397.

And the methods and results of our best research indicate that we must persistently cultivate thinking in terms of multiple causation and multiple effect, and work out the statistical correlations, so far as possible and meaningful.

only can they be studied in their overt manifestations like other recurrent behavior, but they can, also, once known, be fixed as relatively constant factors in the set-up. The other factors may then be studied as relevant variables. As a matter of fact, the problems that press for solution are mostly of this latter sort. Thus, disapproval of receiving stolen property can be studied as a social attitude, and it may be discovered in a particular locality, that there is a certain range of intensity—say from that towards professionals to that towards consumers.¹⁵ The inquiries that require by far the most study center upon the discovery of typical behavior configurations, the effects of particular laws as regards the crime rates, convictions, recidivism, and so on—all of which can be brought into significant relationships with the given social attitudes.

Prevalent moral attitudes largely determine not only what behavior is socially criminal; they determine, also, to a considerable degree, the treatment that can be accorded offenders.¹⁶ History, anthropological literature, and observation of contemporary phenomena all support the thesis that socially dangerous behavior sets off deeply-rooted emotional responses that tend towards overt action against the offenders.¹⁷ (The situations can be described in terms of typical stimulus—response patterns.) Psychiatry and bio-chemistry reenforce the above assertion—the one by analyses of the affective nature of man, the other by analyses of bio-chemical changes set off by emotional states.¹⁸ And elaborate essays on the fallacies of the retributive “theory” of punishment are beside the point.

Strong social disapproval of dangerous persons and of very injurious behavior is so obvious that to merely state the facts is to labor the issue. Yet who can read the declamations of many writers on penology and fail to note their utter disregard of prevailing mores and their persistence? They write as though we can completely ignore the moral attitudes of the general population and turn loose persons regarded as murderers, rapists, or racketeers.

¹⁵ Study of attitudes will be modified as significant behavior differences are discovered; also, before and after legal enactments. The immediate pressing needs are not at the extremities, but with reference to the middle area of lesser felonies and major misdemeanors.

¹⁶ Cf. Cardozo, *What Medicine Can Do for Law* in *Law and Literature*, 87-88; and Ulman, *The Trial Judge's Dilemma—A Judge's View*, in *Probation and Criminal Justice* (Ed. S. Glueck) 114, 116.

¹⁷ It is sufficient for present purposes to confine the thesis to serious attacks upon the person. I am indulging in some simplification here as to “prevailing mores”; obviously the problem is complex.

¹⁸ Cf. Cannon, *Bodily Changes in Pain, Hunger, Fear and Rage* (1929).

(The very terms are emotive.) Another fact that cannot be ignored by social scientists is that there are many thousands of maladjusted, calloused, dangerous persons in our population who, so far as is known, cannot be rehabilitated. To term any treatment of such persons that provides adequate protection, solely "measures of defense" is sheer euphemism. It is certainly punishment to the offender. It is apt to be regarded as punishment—though perhaps, as being too mild—by large sections of the public.

We must not be content to map out a paper-program, though it be a logical structure whose harmony delights the aesthetic sense, or a utopia whose contemplation quells the unrest of reality. It may be conceded that such programs ultimately have even practical utility by providing ideals that stimulate endeavor. But for the purpose of drafting a criminal code here and now, such efforts are largely irrelevant. The briefest study of history—certainly that of law—shows an amazing inertia, an astounding persistence of patterns of thought that cannot be ignored by scientists. To say that a proposed code must be practicable, that its chances for adoption must be good, is to put the matter superficially. It is the business of the social scientist to ground his discovery in fact. Correct norms cannot be spun from thin air. Norms that are discovered and formulated after intensive research will much more probably bear such a relationship to facts, conditions, knowledge, and problems that there is some likelihood of their successful manipulation.

When we contemplate the problem in such general terms, it is impossible to include the qualifications that need to be made. But we must never forget that penology has progressed; for example, to cite an extreme illustration, that indiscriminate executions have given way—under the humanitarian influence of the Classical School¹⁹—to finer instrumentalities, to sounder treatment, and, so far as one can judge, to better results generally.

¹⁹ Bias and lack of understanding are exhibited in much of the current condemnation of the Classical School, and by whole-hog acceptance of the Positivists. We need revision of such criticism to avoid the very evils that the Positivists sought to overcome, i. e., uncritical acceptance of existing theories. The Classical School, to be understood, must be viewed partly in light of its attack upon the inhumanity of the then-existing law. Cf. the writer's paper, *Edward Livingston and His Louisiana Penal Code*, *Am. Bar Assn. Jour.*, Mar., 1936.

Much of Ferri's criticism is sheer oratory—anything but scientific analysis. On the other hand, Ferri, himself, has been misinterpreted by alleged positivists, as opposed to study of the "offense." The contrary is true. What he objected to was subservience to existing concepts, to existing definitions of offenses; and he quite properly insisted upon empirical research.

All of this points to the need for much more narrow formulation of research and of programs for reform than is customary. The ultimate results will be none the less far-reaching. The need is to combine the most careful historical explorations²⁰ with the most critical detailed investigations of present situations—studied at every step in close relationship to narrowly formulated, tentative hypotheses; to locate areas of flexibility in the existing institutions that such study—not our hopes—reveals; to insert finer programs of reform at those points where the state of the mores lend probability to successful manipulation, and to guide them thence in accordance with knowledge, not fancy. We need to persevere through permanent scientific organization that will envisage the problems in terms of years, perhaps even, centuries.

The social attitudes that now call insistently for punishment of serious offenders (and suggest the possibility of their manipulation in further prevention of criminality) present only one aspect of the limitations imposed upon construction and administration of a penal code. There are other values which rigorously restrict the application of science and scientific methods in penology, and indeed, in human affairs generally. These limitations have been aggravated by the necessity to execute the verdicts of ill-equipped judges and juries who have, on the basis of inadequate facts (e. g., exclusion of motive), determined once for all, what treatment shall be applied.

The result is that we know very little about the rehabilitation of offenders—except that we have learned that, even in the case of juveniles, years of maladjustment cannot be obliterated by a few weeks of treatment; and that catapulting an offender back to his former environment renders all therapy futile.²¹ Beneficent results have been achieved by exceptional penologists. But their knowledge has not been expressed and organized so as to be generally available. Penology is totally unscientific in the sense that it is generally impossible to predict the results of treatment (which is not—violation of parole prediction).

Is it far-fetched to suggest that we should encourage develop-

²⁰ Social science frequently gains in soundness when it is reenforced by an historical base. We have a laboratory in history far more extensive than any now available in the contemporary scene. Consider, for example, the transportation of convicts to Australia and their normal adjustment to the new environment, as this stretch of experience affects the hypothesis of economic conditions as a factor in criminality.

²¹ See Sheldon and Eleanor Glueck, 1000 *Juvenile Delinquents*.

ment of a pure science of penology? A science of penology might call into use every conceivable method of treatment short of annihilation of the "guinea pig." It might apply the most rigorous treatment to the least offender and the very mildest to the most hardened. Whatever it did, it would proceed in utter disregard of any objective other than the discovery of the effects of given treatment upon given types of offenders with reference to their behavior following their release—and that would mean much more than reference to technical recidivism. A purely scientific penologist would be no more concerned for the welfare of his "materials" than the chemist is for that of the contents of his test tube. A scientific penology would proceed statistically. It might seek the destruction of whole neighborhoods and populations root and branch (on the basis of ecological studies) in utter disregard of such scientific negligibles as individual or social values.

If we choose humanitarianism rather than science, do we not concede serious limitations upon discovery, upon techniques of research, and, in its finality, the irrelevance of hypotheses taken bodily from the sciences of inert phenomena? But the alternative is not to dismiss entirely the development of a much sounder penology than now exists. Here, as throughout, it is necessary to push scientific treatment to the utmost limits possible without impairment of sound social values. In the light of such knowledge as is available, we can, for example, conduct researches similar to those performed by educators in schools (classification of types, "experiment" and "control" groups, varied programs, testing, etc.). It would be necessary to record the results with the greatest possible detail, and to preserve such records indefinitely.²²

It remains to consider a fundamental problem that extends beyond the scope of traditional penal law. Criminal law (as shown by the fact that the behavior-circumstance elements of the rules consist of general descriptions of socially *undesirable* behavior), seeks to attain socially desirable conduct by penalizing the contrary of such conduct. Traditionally and today the legal apparatus functions in the direction of "wrong" behavior. It is a machine of coercion applied to anti-social conduct. Its product, if any, results entirely by indirection.

At almost every step there arise limitations on the effectiveness

²² Experimentation upon offenders in institutions would also tend to satisfy the public demand for (other) punishment, and thus facilitate the creation and operation of a sentencing board (in lieu of judge and jury) as well as individualized and modified, instead of general and prescribed, treatment.

of such coercion. The behavior prescribed must take complete form before officials are permitted to notice what is happening. It is assumed that the persons enjoined can obey injunctions. The legal apparatus does not know "conditions." It is not concerned with behavior as "determined" in any degree. Hence it is not concerned in any degree with prevention of conditions that are potent factors in the production of criminality that recurs year by year despite the application of sanctions. Again, the apparatus operates only upon the individual who does the wrongful act. It ignores persistent, habitual patterns of behavior that distinguish professional from sporadic criminality. And, of course, it cannot exert compulsion upon the thousands who may not be brought within the net.

Is it possible and desirable to direct the machinery of compulsion into broader channels? Of inclusion of types of offenders and/or patterns of behavior? Of provision for guidance and training of the mal-adjusted and the ill-equipped who are brought into court? Of prevention or modification of conditions? Of dealing with groups of persons inhabiting delinquency areas? Can the gaps between courts and legislatures be bridged to the end that positive and farther-reaching results are achieved by a reconstructed legal apparatus? These problems will need the finest legal acumen and craftsmanship. What the criminologist can do is to lay bare the total social problem and all methods of prevention as well as of treatment—including those for which, so far as we know at present, legal instrumentalities cannot be applied. Thus a by-product will be an inclusive program for full and co-ordinated utilization of all social agencies—legal and non-legal.

I have attempted to construct a broad frame of reference within which specific problems can be placed. The classification of offenses on interrelated bases of typical social injuries and typical offenders (as substitutes for the meaningless, unjust and costly felony and misdemeanor), the treatment of the mentally diseased,²³

²³ Since *McNaughton's Case* (1843) the adequacy of the law on insanity has been much debated. Mr. Justice Cardozo (*What Medicine Can Do For Law*) and other lawyers with wide experience in the operation of the rules, have asserted their dissatisfaction with the present legal tests. Dr. Maudsley's "RESPONSIBILITY IN MENTAL DISEASE" (1874) set the main outlines of the criticism: (1) The legal tests of responsibility had their origin in the purpose to free from criminal liability all persons who lacked normal capacity. (2) "Capacity" referred to certain facts and to medical and psychological knowledge regarding them. (3) The legal tests no longer provide adequate reference to existing knowledge of mental capacity. The criticism of numerous experts indicates that they cannot fully present existing medical and psychiatric knowledge under present rules. But the difficulties of adherents of particular schools of psychology should not encourage uncritical acceptance of their views. Mental disease cannot, like smallpox, be

of petty offenders against property rights,²⁴ of maladjusted persons who do not inflict serious social injury (drunkards, prostitutes, drug addicts, vagrants, etc.), of professional criminality, the provision of adequate administrative machinery, improved personnel, simplified procedure, and reform of criminal evidence in light of scientific discoveries—these indicate some of the problems.

A sociology of criminal law will extend beyond the problems of an American Code. The field of comparative criminal law, viewed not as technical case and statute similarities and differences, but as phenomena that represent social forces and attempts to solve social problems in various cultures, awaits sociological research and analysis. Not the least result of such study, and of the construction of a modern penal code, and of observation of its operation by a permanent research organization,²⁵ should be definite and abundant increase in social science.

identified by pathognomonic symptoms. How to secure the fullest use of the soundest medical and psychiatric knowledge, is the problem.

²⁴ Cf. the writer's *Theft, Law and Society* (1935) as illustration, also, of the general problem of constructing a sociology of criminal law.

²⁵ We have been so accustomed to relying upon courts to make laws work that we have neglected creating and utilizing flexible legislation. Our codes and statutes, once enacted, are permitted to stand unchanged for generations, until even the most skilful maneuvers of courts can no longer persuade the population that dead laws live. The Swedish system of legislation for short periods of time and improvements resulting from constant observation and study by experts, may well engage serious attention. This attitude towards legislation supplemented by permanent research organizations, offers much to all fields of law and to a sociology of law.