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Karl Menninger M.D.
The Menninger Foundation

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THE CRIMINAL LAW SYSTEM

Karl Menninger, M.D.*†

Our highly civilized nation has the most crime of any country in the world. Our beloved President was only recently assassinated by a nonentity who was himself assassinated before a trial could be held. Our jails are full, our court dockets are jammed. Every state is enlarging its prison "facilities" at the very moment that all progressive states are reducing the capacities and populations of their state hospitals. While four-fifths of the patients in our state hospitals are now discharged within a few months of their admission, seventy per cent of the people in jail receiving the standard *penological* "treatment" have been there longer, and have been there before. They have already *had* our idea of treatment once or twice or thrice. And over and beyond all the felons who are locked up and re-locked up, released and rearrested, retried and re-sentenced (at great and wasteful expense to the body politic) there is the much larger number who are never detected, never convicted, never serve a sentence. Crime is costing us twenty-eight billion dollars per year in this country, and a pall of darkness extends over the entire administration of criminal justice.

Many people are distressed about this situation. Many are alarmed and say so publicly. And, let it be said in fairness, many are trying to remedy it—either by piecemeal changes in the process here and there—improved police science, for example—or by more radical proposals.

I. THE ROLE OF THE PSYCHIATRIST

What can the field of psychiatry, a branch of medical science, contribute to the improvement of the situation? What can the psychiatrist do—or refrain from doing—that would help? Often the psychiatrist seems to merely add confusion and subterfuge rather than clarification.

* A.B. 1914, M.S. 1915, University of Wisconsin; M.D. *cum laude* 1917, Harvard University; D.Sc. 1949, Washburn University; L.H.D. 1955, Park College; LL.D. 1956, Jefferson Medical School; LL.D. 1960, Parsons College; LL.D. 1962, Kansas State College; L.H.D. 1963, Saint Benedict's College; D.Sc. 1965, University of Wisconsin; LL.D. 1965, Baker University. Chairman of the Board of Trustees, The Menninger Foundation.

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I submit that our negative help, made with the best of intentions, stems from our being in the wrong place, offering our help at the wrong time. A psychiatrist is out of place in the courtroom, because he does not speak the language used there or understand the principles in operation in the courtroom nor concur with the method of finding truth to which the law is committed. The psychiatrist enters the courtroom—by invitation, remember—to be exploited by someone, either by the prosecution or by the defense, usually the latter. He is introduced to utter a few magic words, to say that the individual who has been accused is or was bewitched. If he is bewitched then of course he is not responsible for the crime he committed; the witch is responsible. In the older days the prisoner could be executed for that—or someone else could be—but we have grown more humane. Since we cannot execute the witch we do not execute anyone.

Modern psychiatrists do not use the term "bewitched". They use an equally fantastic, meaningless term, "responsible". This is not their word; it is a legal word. They really do not know what it means. Nevertheless, the court asks them if the prisoner has it. If the prisoner is behaving in a way which psychiatrists regard as ill, they assume this to be what the lawyers call "irresponsibility". And so, the psychiatrists answer "yes" or "no".

Psychiatrists are inclined to doubt that *anyone* is completely irresponsible for anything about his life except his own birth. In everything in which he participates a human being has a share of responsibility, as we interpret the word. Do not talk about what fate has done to you, said Freud in essence; look rather at what you have done with your fate. Someone asked Freud if people were responsible even for their dreams, and he replied dryly, that if the dreamer were not responsible, who indeed is?

Whatever the quality of legal responsibility, it is nothing which psychiatrists have been trained to identify. On the other hand, since it is a human opinion about a course of treatment which psychiatrists do not use, namely, punishment, it is up to the judge or the jury, certainly not the psychiatrist, to say whether or not the man should receive this treatment. If the psychiatrist must testify in the courtroom he can say whether or not a man is deluded or hallucinated or how he is in contact with reality; these are behavior patterns which he has learned to detect. The judge can then decide from this information whether it fits his notion of punishability, which is to say responsibility.

It is a real blessing that in the majority of cases psychiatrists are not called to testify in court. But it is a great tragedy that in

all cases psychiatrists are not available to judges *after* the guilt has been established to advise them regarding disposition, as was recommended by the Wickersham report in 1927, by the section on criminal law of the American Bar Association the same year, by the National Crime Commission the following year, and by the American Medical Association and the American Psychiatric Association in succeeding years. It would be a great step forward if the judge could obtain psychiatric, social and educational evaluation of the offender by a board of experts. We shall discuss this further, shortly.

II. THE ROLE OF THE JUDGE

As it is, in most instances, a man convicted of having broken the law is for the time being at the mercy of the judge, who must decide without any information where the convicted man goes next, what he does next, what roundabout route he follows in his temporary removal and slow return to society.

Does the judge order the offender to make restitution in kind to the person injured? No. Does he draw any conclusions about the unhealthy neighborhood or precinct in which the crime committed by this man seems to be endemic? No.

Will the judge investigate the personality, the character, the strengths and weaknesses of the offender? Will he be guided in making his decision (the offender's social treatment) by any hint that the criminal needs counsel or crutches or a confessor? Most probably not. The judge is not a doctor; he is not a sociologist; he is not a policeman; he is not a welfare man; he is a judge. He must act for the state in balancing the offense committed with the corresponding offensiveness on the part of the state. The offender may have been ruthless; he may have committed his crime without finesse, but he will receive his repayment with formality and dignity. The judge will consult the statute books and read the prescription.

Let us not be too hard on the judge. Most of the improvements that have been brought about in recent times have come because some judge could not take it any more. He is really in a dreadful position because he is expected to do the impossible. He is expected to know in advance just how much frustration and humiliation it is going to require to change the convicted offender into something better—or something worse. There is usually nobody to help him, and in many instances he has only a few minutes to decide each case. And he has very few alternatives; things are pretty well specified in the books.

If he is a very enlightened judge operating in a very enlightened state where something like the enlightened Model Penal Code is in effect, he may venture to suggest that the case be studied impartially by scientific experts and the recommendation made to him as to where the man might be sent for some kind of social handling which would effect a change in his behavior patterns. At least it could be determined whether he was sick or senile, feeble minded or frantic, meretricious or merely fatuous. Such a judge might allow himself to assume that if a man has done something wrong, there may be something wrong with that man or with the situation in which that man operates. He might assume a capacity for receiving help which could at least be explored.

But in a vast majority of instances the judge may not assume that and does not proceed accordingly. He assumes that the man who has been convicted of crime is mentally and physically healthy, and is moreover willful and perverse, such that he did defiantly, aggressively, knowingly and impudently violate the laws of our state. By due process of law, this individual is convicted.

For such persons there is a stipulated remedy. It has been established by law. Regardless of other factors relevant to the single act which has been pronounced criminal, there must now be an official ordering of punishment and subsequent infliction of this punishment. The punishment must fit the crime, not the criminal, and the legislature long ago decided how that fit was to be measured.

This is one place where the psychiatrist could and should come in. The facts have been decided. The guilt has been established. Now the question is, what can be done with this man? What is wrong with him? What is wrong with the environment in which he lives? What is it that is overtaxing him? Why can not he behave like the rest of us? Why does he want to make everyone mad, at such great expense to himself as well as to us? Is he feeble minded? Is he moronic? Is he blind with rage, and if so what about? Is there a nail in his shoe or a tumor in his brain?

It is often easy to dismiss such cases by saying, "Oh, he is just a greedy fellow who wanted to make money," or "a vicious fellow who wanted to see blood." But these are not scientific judgments. These are primitive judgments. These are the kinds of judgments about human behavior which gave rise to our now archaic system.

Following the trial the psychiatrist could be very useful. He could be part of a team which might have sixty days, for example,

in which to study the offender and offense or offenses which he has committed. They could evaluate his educational level, his peculiar emotional constitution, his physical status, his talents if any, his proficiencies and also his deficiencies.

As a result of such a diagnostic study the psychiatrist and his associates could say to the judge, "This man, who does such bad things, is driven in this direction by forces that unaided he cannot control. He was beaten daily by his father for the first ten years of his life. And in his blind rage he keeps wanting to beat back. It will take him a long time to learn that there is a different kind of human relationship, and he is not likely to learn it unless he can be in a place for awhile in which he can re-learn his living habits and the ways of relating himself to other human beings."

Or the clinic may say to the judge, "This man does bad things because he has a very bad head. The poor fellow has the intelligence level of a nine-year-old child and yet he is expected to live and cooperate with people as if he were at least half his real age, which is thirty. He can't do it. Society must temper the winds to the shorn lamb, or they will have a continuously erring or straying member."

Or the clinic might say to the judge, "This man did commit a criminal act and under circumstances which made it the only possible thing he could do. It was the lesser of two evils and in a certain sense he did wisely. The chances are a hundred to one that he will not do anything like this again and he should return immediately to his work and report to the judge periodically."

Or the clinic might say, "This man is possessed of delusions and hallucinations to the extent that he has no idea of the real nature of what he does or what the court intends to do to him. We should recommend his immediate treatment in a hospital."

Just such recommendations as these are made daily by such diagnostic centers as are provided by the laws of the State of Kansas and the State of California. Theoretically all offenders are supposed to have such examinations and their judges given such reports before a sentence goes into effect. Practically, the demand for such services has been so great that in Kansas at least all the psychiatrists we can muster cannot keep up with the job.

III. THE ROLE OF THE PRISON

The recommendations of any scientific clinic are going to disregard the assumption that the prisoner has to be punished. Just being mean to a person because he has been mean to society

does no good. But treatment people must take for any condition is going to have its unpleasant aspects and perhaps seem to them to be punishment. If you doubt this, make an appointment with the dentist to have your tooth pulled. Treatment is never a pleasure.

The whole idea of punishment is so inextricably wrapped up with law, tradition, morality of various versions, childhood recollections, sentimental identifications, fear, resentment and other emotions that it is extremely difficult to speak about it or write about it objectively. Our statutes themselves contain prohibitions against cruel and unusual punishments, indicating that in some way or other the hurting done by the state must be a familiar and garden variety of hurting and not something unexpected. To deprive a man of decent social relationships, palatable food, normal sexual relations, friendships and constructive communication does not strike the law or the lawyers or even the public conscience as being cruel or unusual.

It is really hard for a scientist to find any justification for punishment as the law interprets it. The general idea seems to be that since the man has offended society, society must now officially offend him. It must deliver him a "tit" for the "tat" that he delivered. So this must not be impulsive retaliation; it must not be mob action. It must be done by agency, by stipulation and by statute. It must be something that will make him sorry for what he did; if he is already sorry, then it must be something that makes him sorrier. The fact that he is more apt to be sorry that he let himself be caught does not enter into the formula.

Furthermore, the "tit" that we inflict upon him, must be different from the "tat" that he inflicted upon us. He may have murdered or robbed or cheated or seduced; we—society, the law, the prison—do not do any of those terrible things. But we will take him out of his ordinary walks of life, out of his vocation, if any, out of his family, out of his community, out of the world of free human beings. He will be transferred to a housed colony of strangers with whom he has nothing in common for the most part except that like himself they have been caught at something illegal, could not escape from the "system" and hence are now being given the treatment. These others have also been sentenced to undergo this public, official revenge for their offenses, including this reduction to a state of humiliation, anonymity, idleness and futility.

In this state of quarantine and degradation, the offender will meditate upon his evil deeds, his stupidity in having permitted

himself to get caught in what "everybody was doing", and upon the generosity of the state and of society in providing him with a living free of charge.¹

He will be assigned a number and a uniform, and he will be maintained at public expense in the most drab and dreary environment conceivable, for a period of time which becomes the subject of complicated methodological recalculation based on the number of years defined as minimum, the number of times the prisoner is caught whispering or smuggling "contraband" into his cell, the number of auto tags manufactured, and other criteria of good and bad behavior.

IV. THE ROLE OF THE PAROLE BOARD

When the minimum prescribed "time" has been served, the prisoner may go before the parole board. He lives the last months of the period in an agony of mixed fear, uncertainty and anticipation. On the day appointed he dresses in his best overalls. He may be allowed to have his shabby old out-of-style coat brought from the locker room and draped over his shoulders. Wistful, frightened, suspicious—sometimes sullen, but always apprehensive—he sits at the long table before the warden and the chief guard and the solemn members of the parole board. His record is read; abstracts of his "case" lie before each member of the board. This includes his prison record, which usually tells how many times he has been punished for talking in ranks, for buying smuggled tobacco, for replying to an officer, or for quarreling with another prisoner. If his record is not too bad, if the deputy

¹ Hospital care of the mentally ill has forced upon the attention of jurists as well as physicians the fact that there has never been any realistic consideration given to the legal problem of whether or not an institutionalized person receives the medical treatment most likely to restore his health and therefore his liberty as soon as possible. Incarceration by the state in a mental hospital without proper treatment has been declared by Dr. Morton Birnbaum of the New York City Bar to represent a deprivation of liberty without due process of law. This is a problem for psychiatrists and lawyers, but there is an implication here that ought to be followed up with the prisoner. For while due process has certainly been provided for, adequate treatment in case any need for such exists, has not been provided for. If a prisoner is suffering from pneumonia or cancer which could be cured by adequate treatment he would surely be entitled to treatment; if a prisoner is suffering from psychiatric conditions which could be treated and presumably cured is he not similarly entitled to treatment; and in either case is the denial of treatment other than cruel and unusual punishment which we have long since eschewed? See Birnbaum, *The Right To Treatment*, 46 A.B.A.J. 499 (1960).

warden can say a few good words for him, if his legal time minus his gained time fits the formula decided by the judge long, long ago, he is "eligible". He is then asked a few questions.

I have heard some of these questions: "Do you think you have learned your lesson?" "Do you intend to go straight now?" "Will you behave yourself?" "Can you keep out of trouble?" "Are you sorry for what you did?" "Have you been treated fairly here?" "Do you have a job?" "Will you join the church?"

Questions even sillier than these are fired at a fellow who would answer affirmatively any question in the world if he thought it would get him out of the torture of his imprisonment. Sometimes, of course, members of parole boards ask very intelligent questions, but most of them realize that the answers given under such circumstances are not very credible. The great deformity of this man's personality (if there is one) is never examined, and of course could not be under these circumstances. For all its strength and growth, psychiatry has not yet been able to convince the parole boards, the lawyers, judges, or even the general public that there can be a useful, systematic, scientific investigation of the motives, feelings, fears, sorrows, hates and loves, delusions, and phobias of individuals who will cooperate. But these private inner secrets cannot be elicited in a public situation.

I do not criticize the board members for the questions they ask. I criticize them for asking any questions at all, under the circumstances. The best interviewer in the world would probably fail to elicit any useful information out of an examination like this made under these conditions in front of these jurymen. But the right kind of an examination *could* be made and reported.

But the tragedy of it is that as a rule there is not much scientific data to go by. There has been no psychiatric examination. There has been no case study. There has been no objective personality inventory. Frequently, if not usually, there has been no social worker investigation of the family, the neighborhood, the sociological surroundings of the crime. Furthermore, most parole boards have under their jurisdiction too small a number of parole officers, often extremely conscientious and capable individuals but often insufficiently trained and inadequately supervised, and usually underpaid.

Thus whether the parole board is perspicacious and conscientious as I know some to be, or stupid and unscrupulous as I have known others to be, the fate of the prisoner is a toss-up. He may be remanded back to prison for a little more penitence

and reflection—at state expense, of course. Or he may be dumped back upon society to sink or swim, blessed only with the expensive education he has had in concealing bitterness and fury. In some states, such as my own, he will not be released, no matter how good his record or how long his service, until he or someone else has obtained for him some sort of employment prospect. Many are kept waiting to serve a post graduate term in prison while presumably more meritorious and virtuous (at least more fortunate) people on the outside take the available jobs. But if there are any jobs that no one wants, prisoners, *i.e.* ex-prisoners, may have a chance at them.

V. THE ROLE OF THE PUBLIC

The ex-prisoner thus re-enters a world no longer like the one he left some years before, and certainly nothing like the one he has been living in. In the new world, aside from a few uneasy relatives and uncertain friends, the prisoner is surrounded by hostility, suspicion, distrust and dislike. Complex social and economic situations which were already too much for him have grown no simpler. The unequal tussle with a smarter, "nicer" and more successful people begins again. The ex-prisoner is thus proscribed from employment by most concerns, and usually unable to find new friends and ways of living, and above all is forced to survive, without any further help except an occasional warning from a watchful parole officer.

His chief occupation for awhile will be the search for an occupation, accompanied by innumerable rebuffs, suspicious glances, discouragements and hostile encounters and of course inevitably, temptations. Aside from that of his parole officer, toward whom he may not always feel kindly, the first friendly face that such an individual is likely to see is that of some crony of the old days who has been waiting for a little help to do a little job.

Remember, we are talking about a human being, a handicapped one at that, one who needs all the things the rest of us do—something to do, something to eat, someone to talk to, and a little bit more! You and I can get along without committing crimes (most of the time). But obviously the criminal cannot, or at least does not. The fellow who has been in jail not only has what made him commit the crime, but he has what the jail did to him. Like the rest of us he is inevitably attracted to other people, but it is a lot harder for him after discharge to get to those other people, and the people he is finally able to get to are often poorly equipped to help him, to love him, or even to like him.

Do the churches reach out to take him in? Do business firms recruit him? Do the unions quickly take him in and find him a job? Does the country club give him a locker? Does any but the lowest class restaurant or rooming house welcome so unprepossessing, shabbily dressed and often ill favored individual?

Does anyone know or care if he is depressed, desperate, deluded, hallucinated, delirious, suffused with ideas that he is being persecuted or convinced that he is an avenging angel who must slay the enemies of white supremacy? Does anyone ask whether he might still be dangerous? Does anyone ask what useful things this man might do, what values he might render to society in exchange for the offenses he perpetrated upon it? Does anyone ask what might have been done to deter him from continuing as he was obviously going? Does anyone ask what might be done to redirect him?

No, certainly not. That is not in the book. Criminals are not to be "helped." Criminals are to be *held*, and hurt, threatened and warned, pushed and punished, released and paroled. But "helped"—for heaven's sake! Soft-headed sentimentalism, liberalism, egg-head stuff, practically communistic. These men are toughs; they are dangerous; they are vicious; they are enemies of society. Do not pity them; pity their poor victims. They owe a debt to society. They should pay for their crimes. And keep paying.

If there were ten times as many parole officers as there are, and if they were all as good as a few of our parole officers are, and if they could carry ten times the load these men and women are now carrying—which is already too great—and if these parole officers could have just a little more training and occasionally a little encouragement from the judges, a little assistance from psychiatric clinics or other behavioral scientists, above all if they could have a little more appreciation from the public for what they do—well, this is one of the biggest combinations of "ifs" imaginable. But if all these "ifs" could be, these indefatigable but inconspicuous friends and guides of former prisoners might turn the tide. But at the present time they are swamped.

VI. CONCLUSIONS

The Seven Steps-Freedom House plan tries to enlist former prisoners to help one another and also to win the support and sponsorship of Big Brother friends in the outside world. The idea of helping one another is based on the similar principle in Alcoholics Anonymous, which has been so successful. I think it will be successful here too.

The rapid growth of the Freedom House idea and the Seven Steps Program—which is only one of several projects having a similar aim—is an indication of the great need for proper post-prison support of these men whom we have ruined—perhaps not quite ruined, but severely damaged. For the prison is not merely inefficient and vastly expensive, not merely a source of a false sense of reassurance to the public—it is a vicious, degrading, destroying, expensive juggernaut which society keeps in its backyard like some extravagant Roman nobleman keeping pet lions to harass his “lazy” slaves.

The architects of the prevailing system knew nothing about modern science; their notion of controlling human behavior was based entirely on various forms and degrees of force. They did not think in terms of changing the individual but only in terms of intimidating him and—if necessary—making good the official threats of retaliating harm. But science has uncovered facts not known to our ancestors—the authors of this system. We know better. And so, again, why do we continue this obsolete system? Does not the public care—even the intelligent public?

Time and time and time again somebody shouts about our present sorry system and its failures, just as I am shouting now. The President shouts. J. Edgar Hoover shouts. The magazines shout. The newspapers shout. They shout that the situation is bad, bad, bad and getting worse, that we should replace obsolete procedures with scientific methods. But do we?

It is not just psychiatrists who have thus cried in the wilderness, unheeded. The voices of progressive penologists have been loud and clear. Leading jurists, wardens, psychologists, sociologists, intelligent police chiefs are speaking out, and begging for better tools and methods. Even occasional governors and mayors and congressmen are to be heard. And recently the President of the United States, in his message to Congress on March 8, 1965, suggested four measures which might help to curb the increasing incidence of crime.

Associate Justice Brennan of the United States Supreme Court does not shout. He is encouraged by something he sees. Recently he said quietly, “we may be at the threshold of a major re-examination of the premises which underlie our system for the administration of criminal justice.”²

Let us hope he is right.

² Brennan, *Law and Psychiatry Must Join in Defending Mentally Ill Criminals*, 49 A.B.A.J. 239, 243 (1963).