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ADDRESS

THE DECLINE OF THE REHABILITATIVE IDEAL IN AMERICAN CRIMINAL JUSTICE*

FRANCIS A. ALLEN**

THese comments do not constitute a set of perfected conclusions; rather, what is being presented is in the nature of an interim report. Because this is true, I do not have a printed text. I shall be speaking very informally, and on the basis of notes.

If there is any one characteristic of modern legal thought more important than any other it is the modern concern with issues of public policy. This has not always been true; at other times other interests appeared to dominate, such as the construction of elegant structures of precedents or questions of the historical validity of legal doctrine. Yet the modern fixation on public policy has not resulted, by and large, in highly sophisticated techniques of policy analysis. There has been much talk about policy science. We have borrowed from other disciplines, such as economics, and have enriched our vocabularies with talk about "cost-benefit ratios." I have no doubt that these accretions to our language have at times added significantly to our thought; although there are times when one almost concludes that the new phrases are chiefly useful to young faculty members demonstrating their command of fashionable language in their tenure articles. We do not do very much by way of auditing the performance of regulatory schemes initiated by the law, with the result that often we literally do not know what we are doing. Nor are we doing much to find out.

One of the areas of policy analysis insufficiently explored involves the impact of new knowledge on the law. The questions have not been ignored, as is demonstrated by the interests of a group of American legal historians in the impact of new technology on the law in nineteenth-century America. Yet I think most would agree that we are far from being able to state useful generalizations about the distribution of knowledge in this society, and about the tortuous course taken by knowledge as it moves out of the laboratory and the library and eventually to the court house or legislative hall.

What may be even more surprising is that in a democratic society we have not really been much concerned about the impact of changes in public attitudes and opinion on the law. One of the most forthright discussions of these matters is still DICEY'S *LAW AND PUBLIC OPINION IN ENGLAND*,¹ but that book was originally published in 1905. Among other things, Dicey argues that in many areas the law tends to lead a life of its own, that new law is to some

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¹ A. DICEY, *LAW AND PUBLIC OPINION IN ENGLAND* (1905).

extent generated by old law, and that in many instances there is no such thing as a public opinion, but rather many public opinions involving different segments of the community, only some of which are influential on legal development.

The decline of what I have called the rehabilitative ideal seems to me to offer a prime opportunity to consider the effect of changes in public attitudes on the policy of the law. I say a prime opportunity because we are talking about a series of ideas that has dominated thought about criminal justice in this country throughout most of the 20th century. Indeed, the origins of these ideas lie in the previous century and in even earlier history. Within the space of a single decade, perhaps less, there has been a precipitous falling off of support for the rehabilitative ideal in almost all segments of public opinion. This, of course, raises the question of why this has occurred and what its significance may be.

Consideration of these events may contribute to modern thought about public policy in the criminal law. If one, for example, is interested in maintaining or expanding a rehabilitative approach to penal treatment, it may be important to understand what limitations on such efforts are imposed by the present temper of public opinion. But there is another justification, and I confess that this has become increasingly interesting to me. The decline of the rehabilitative ideal may be of importance not only to those professionally interested in problems of crime and punishment, but also to those who may find in it insights about the society of which the criminal law is a part. More and more scholars in the universities are discovering that a useful approach to the understanding of contemporary society is to see it through the eyes of the legal system. Holmes, as usual, has the exact phrase. "The law is a small subject," he wrote, "though . . . it leads to all things. . . ."²

I now come to the unhappy point in the lecture in which it is necessary to define terms. Nothing is better calculated to produce glazed looks on the face of an audience. It reminds me of an incident when I was a young, and, of course, a brash, law teacher. I was sitting at lunch at the Northwestern University Law School with some of my elderly colleagues, that is to say, persons in their late thirties and forties. The conversation was going full tilt when, very rudely, I interrupted one of my venerable colleagues to say: "But you certainly can't talk about that without defining your terms." My wonderful friend, Professor Nat Nathanson, whom I had confronted, smiled his lovely smile and said: "Define the terms and kill the conversation." He then proceeded without taking further notice of my presence. I hope that the modest effort I shall make in defining my terms will not kill the communication between us; for I believe that a word needs to be said about the meaning of the phrase "the rehabilitative ideal." My efforts at definition will be brief and not very elaborate.

When I speak of the rehabilitative ideal I refer to the notion that the sanctions of the criminal law should or must be employed to achieve fundamental changes in the characters, personalities, and attitudes of convicted offenders, not only in the interest of the social defense, but also in the interests of the well-being of the offender himself. This appears to be a

² THE HOLMES-EINSTEIN LETTERS 37 (J. Bishop ed. 1964).

simple idea, and it may be difficult to understand how it has come to be the source of such vigorous public controversies.

Actually the formula, as stated, doesn't tell one much. Obviously, it makes a great deal of difference how important one regards the rehabilitative object in comparison to other purposes of criminal punishment. Is rehabilitation to be regarded as the predominant purpose of criminal treatment or even the exclusive justification for criminal sanctions, as has, in fact, been asserted by some enthusiasts during the twentieth century; or is rehabilitation to be taken as only one of the goals of criminal punishment, other goals including things like the deterrence of crime, incapacitation of dangerous people, or even the expression of our feelings of moral indignation produced by the crime that was committed? The difference is great, for the latter view may result in our giving up rehabilitative aspirations in cases in which other objectives are thought to be of vital importance.

It also makes a great deal of difference about how one views the techniques of rehabilitation. Those techniques have in the past included the use of the whip and the club. On the other hand, the techniques espoused have included depth psychology, or drastic therapies like psycho-surgery, behavior modification, and the like. On still other occasions the rehabilitative techniques have included efforts to overcome illiteracy and training in job skills. It follows that although the general formula may be stated with some ease, there are many varieties of the rehabilitative ideal.

As was said earlier, there have been major defections from the rehabilitative ideal in very recent years. Until the mid-sixties or even the early seventies, the rehabilitative ideal was, by all odds, the dominant American theory of penal treatment. The support in the public and on the bench was perhaps not as enthusiastic as in the academic halls, but there was a wide consensus that the objective of criminal justice, however infrequently attained, ought to be rehabilitation. There are various ways the dominance of the idea can be illustrated. Almost all of the characteristic innovations in criminal justice in the 20th century are related to the rehabilitative ideal: the juvenile court, systems of probation and parole, the indeterminate sentence, the promise (if not the reality) of therapeutic programs in the prisons. Moreover, the rehabilitative ideal dominated the research interests of scientific criminology in this country. Typically, criminology was not much interested in such issues as the definition of criminal behavior, or the procedures by which criminality is determined. The criminologist took the convicted offender as a given, and proceeded to think about how a different and better person could be made out of him. This is one of the interesting instances of how an over-arching ideology determines what kinds of questions will be researched. One of the consequences of this was that until the last decade there has been no comprehensive effort to research the question of the deterrent efficacy of legal sanctions. A good deal of work in this area is now being done, but most of it has its origins in the last decade.

We, today, suddenly find ourselves in a situation in which there has been a massive desertion from the rehabilitative ideal and its assumptions. The significant thing is not so much that the general public has abandoned the rehabilitative ideal, or that the media have, or that the politicians have. In this country about once every seven years, since the American Revolution, we

suddenly discover that we have a crime problem. And each time we discover it we forget that it ever happened before. But the significance of this occasion is not simply that we are agitated about high crime rates, but that there has been a desertion of the rehabilitative ideal by the academic community; and that has not happened before.

This certainly is not to say that the rehabilitative ideal is dead. Some years ago it was fashionable to say that God is dead — a casualty of the modern world. The Association of the Bar of the City of New York published a book in the early 1970s with a question for its title, *IS LAW DEAD?*³ I do not assert that the rehabilitative ideal is dead; but I do assert that it is languishing. There are many groups in the community that support it with about the same undiluted enthusiasm as in the past; the Quakers, for example, have long identified with the rehabilitative ideal and with reservations continue to do so. There is substantial support for the continuation of the old ideology from the “helping professions,” many members of which may be said to have a kind of vested interest in its maintenance. The fact is that hundreds of millions of dollars are being appropriated by Congress for rehabilitative objectives. It may be that there is something fundamental in American character that embraces the notion of rehabilitation.

Yet however casual one's interest in the system of criminal justice may be, I think that one can hardly miss the massive desertions from the standard of the rehabilitative ideal. It shows up in all sorts of ways. There are sentencing statutes now being passed expressly stating that rehabilitative considerations shall not be taken into account with reference to certain kinds of sentencing. It is really inconceivable that such provisions could have been enacted as recently as ten years ago. There is a great impatience with discretion in sentencing; a great desire for something called certainty in sentencing; a great impatience with high levels of criminality; strong support for vigorous measures of law enforcement; strong support for the notion of mandatory minimum sentences; and strong support for the elimination of the parole function altogether. All these things are grist for the mill in the new age that has followed the dominance of the rehabilitative ideal.

So there has been a precipitous and remarkable shift of opinion, more thorough-going than anything I can recall over a comparable period involving significant issues of legal policy. It will be useful if we can gain some notions about the “why” of these occurrences.

There is a book written by a lawyer-sociologist, Anthony Platt and entitled *THE CHILD SAVERS*⁴ that may be helpful in getting into the question. Some of you may know the book. The title is sardonic. The book consists of Professor Platt's version of the history of the juvenile court movement; it is angry and tendentious and fun because it is so angry. Platt's theory is that, in its origins, the juvenile court is a product of the milk-and-water values of the wives of the prosperous Chicago bourgeoisie in the last quarter of the 19th century, which women insisted on imposing those values on the children of the immigrant population. What was true of the origins is true of the subsequent history of

³ *IS LAW DEAD?* (E. Rostow ed. 1971).

⁴ A. PLATT, *THE CHILD SAVERS* (1977).

the juvenile court: a continuing effort to impose middle-class standards on the poor and oppressed groups within society.

It is no part of my purpose to analyze or quarrel with this thesis. But in thinking about the Platt book this interesting question arises: Can you ever have a viable, flourishing rehabilitative ideal in a society unless the dominant segments of the society are confident of their values, so confident that they are willing to use the public force to impose them on society as a whole? And I wonder if that is not likely to be true also, of any society that would satisfy the requirements of Professor Platt.

At this point I am going to advance a proposition. It is an analytic proposition, not an empirical statement, and relates to what characteristics a society must possess in order to maintain a flourishing rehabilitative ideal. Then I shall try to test that proposition by looking at two very different societies in which the rehabilitative ideal flourished. Finally, I shall ask whether those conditions are satisfied in modern America. My proposition is in two parts. First, you cannot have a flourishing rehabilitative ideal unless the society as a whole has a strong faith in the malleability of human behavior and human character. It ought not to be supposed that no society could exist without that faith. The Calvinist society of Geneva with beliefs in predestination and the fixity of behavior types might constitute one example. A society founded on the assumptions of the Italian School of criminology may provide a more modern possibility. Lombroso, the leader of that School, talked about "born criminals" and viewed crime as the product of basic biological constitutional factors. If one accepts those assumptions, then penal policy is likely to be largely incapacitative, not rehabilitative in character; and in fact members of the Italian School espoused extensive use of capital punishment. There is something inherently anti-rehabilitationist about capital punishment. It is more likely, however, that this lack of faith will be expressed in somewhat different ways in the present age: that is, a society which at least in theory retains its belief that people can be made better, but which also reveals a fundamental skepticism about the capacity of its institutions to produce desirable changes in human character and behavior. This is more likely the realistic situation we shall have to survey.

Thus, one of the analytic conditions for the rehabilitative ideal is a faith in the malleability of human beings. The second proposition is that there must be a sufficient consensus of values to permit practical agreement on what it means to be rehabilitated. An example is in order. The well-known psychiatrist, Eric Fromm puts this case in one of his books. A patient comes to a psychiatrist complaining of neurotic symptoms, and the therapist discovers a deep conflict in him. The patient has been educated as an architect and his dearest wish is to practice that profession. His father, however, insists that the young man enter the family business which is facing economic difficulties. And the son sacrifices his own inclinations and aspirations and gives up his profession. The question is, of what does the cure consist in this case? What does it mean to be rehabilitated? How do you distinguish the cure from the disease? Should the objective of therapy be to cause the young man to adapt to the decision he has made in order that he can function effectively in the family business; or should the objective be to strengthen the resolve of the

young man to break away from his family ties and proceed with the realization of his own ambitions?

There is a value choice to be made. Determining the ends of rehabilitation is surrounded by value choices. And the second condition for a flourishing rehabilitative ideal is, not unanimity of values in society, but a workable consensus on what it means to be rehabilitated.

As I indicated, I shall look at two societies in which the rehabilitative ideal strongly established itself. The first is 19th century America, particularly pre-Civil War America. This was the great age of reform in America, reform associated not only with penal matters but with almost all aspects of life. This is not to say that the rehabilitative ideal was invented in the United States, it most clearly was not. One finds expressions of the rehabilitative ideal in the Old Testament, particularly the assertion that the purpose of chastisement is to make the victim a better person. The idea is repeated in the Greek plays, in Plato, and in the writings of medieval churchmen. Versions of the idea are repeated again and again in the reformist writings in the 18th century both in France and England.

Nevertheless, there is real basis for saying that the first practical institutional expressions occurred in the United States. The notion of the malleability of institutions was widely discussed in the Jacksonian period. Illustrative is a famous lecture by Ralph Waldo Emerson, entitled, interestingly enough, "Man the Reformer".⁵ Emerson says that "[i]n the history of the world the doctrine of Reform had never such scope as at the present hour [present being 1841]. . . . [There is] not a kingdom, town, statute, rite, calling, man, or woman, but is threatened by the new spirit."⁶ The spirit he refers to is, of course, the spirit of reform.

Looking specifically at the area of the criminal law, one will discover that the modern penitentiary system was founded in the states of Pennsylvania and New York. The central concept of the penitentiary system was, however bizarre the methods employed to achieve it, that criminal penalties should be imposed for the purposes of improving the character, the attitudes, the behavior of persons subjected to penal treatment. Of course, the closer you get to a society the more complicated it appears. This applies to generalizations about the reformist character of ante-bellum America. The fact is, for example, that a good many people associated with the penitentiary movement, and particularly those who really knew something about it, were skeptical about the reform capacities of the penitentiary system. And if one looks at the works of novelists like Hawthorne and Melville, he finds a spirit being expressed quite different from a vibrant enthusiasm about the possibilities of malleability of human beings, for changes for the better. This is true, and yet it seems quite accurate to say that one of the dominant strands of the 19th century America was faith in the malleability of human beings for the better, not only in the criminal law, but generally.

Did early 19th century America have a consensus of values that made rehabilitation feasible? It was a pluralistic society; there were conflicts in values then as now, and in some areas the conflicts were as intense as those

⁵ R. EMERSON, NATURE ADDRESSES AND LECTURES (1886).

⁶ *Id.* at 228.

today. But there were certain kinds of accord that can be safely identified; and one of the most interesting of these is the high regard expressed for the family. The 19th century, some historians have said, was a period in which there was a great surge of domesticity; that is, a rising evaluation of the importance of the nuclear family. The family remained largely immune from the attacks of the times on almost all other institutions. Some attacks on the family came from the extreme fringes of the feminist movement, but even that movement was, by and large, predicated on the assumption of the essential importance of the family and its sanctity. This is important, for if you look at the juvenile court statute in your state today, very likely you will find that the sanctions imposed by the court are directed to be as near as may be to those imposed by wise parents in a family setting. The notion of the family as a model of rehabilitation has been very important. So in summary it can be said that early 19th century America was a society in which the rehabilitative ideal found strong expression. It was a society that revealed faith in the malleability of human nature, and one in which there was a workable consensus about what rehabilitation means.

The second example of a society in which the rehabilitative ideal has flourished is one of a very different kind. I refer to modern China. That country may be said to be the clearest and most enthusiastic adherent to its own version of the rehabilitative ideal in the world today. Modern China is a society that probably believes more strongly in the malleability of human nature than any other. The official line is "Every peasant a sage." One of the manifestations of this is the remarkable faith that that society has in education — the belief that the way to solve social problems is through the devices of education. I shall not pause because of passing time to go into the details, but my assertion is that modern China, like early 19th century America, is a society that reveals those characteristics specified for a thriving rehabilitative ideal: faith in malleability of human nature and accord on the values relating to what it means to be rehabilitated.

The interesting question, of course, is whether those conditions are now satisfied in this society. If they are missing, this may give some clues about why the rehabilitative ideal has declined in these times. What are the institutions that we have traditionally relied on to change human nature for the better? The answer would certainly include the family, the schools, religion, and what might broadly be called therapy. This is not meant to be an exhaustive list. My gloomy conclusion is that in each of these areas there has been a precipitous loss of confidence in the capacity of the institution to make desirable changes in human character.

First, the family. We talk about family dissolution, violence within the family, child abuse, spousal violence. We note the fact, for it is a fact, that the family has suffered in importance because many of its functions have been taken over by other agencies, and quite deliberately so. The family has lost significance as an economic unit. There are not very many of us engaged in family farming these days, in an undertaking in which every member of the family has an economic role to play. We have delegated to public schools, to government, important aspects of the family — to adolescent peer groups, to self-styled experts on child-rearing and marital counseling. The paternalism of government is so pervasive that we almost forget that it occurs. One of the

best illustrations of this can be found in the current discussions of the proposal of the Federal Trade Commission to regulate advertising directed to children. I certainly do not want to devalue the merits of that proposal, for there may be a very good case to be made for it. I am inclined to think that there is. But in the Task Force Report of the Commission, there is a passage which, when thought about, boggles the mind. The statement is by a psychiatrist. The reason for government regulation, he says, is that if the parent tries to control what his children see on television, there will be an unhappy confrontation between parent and child. The notion that it is the function of government, and the federal government at that, to introduce itself between parent and child in the interests of family harmony, is a concept a little hard to accommodate.

One can also say that there has been a very significant change in the definition of what the family is. It makes a great deal of difference whether you regard the family as a kind of hierarchy in which there are mandated mutual obligations or whether you look on the family as a kind of arrangement of convenience to advance the personal self-satisfactions of each member of the family group. The modern literature on the family indicates that the second definition is becoming the dominant mode. With that being the dominant mode, one is not likely to put many chips on the family as a dynamic force for creating desirable traits of character and attitudes. The family is a tough institution, and it is not ready to be buried; but if we compare the role of the family as an instrumentality for producing desirable character today with that in earlier periods, we shall certainly find significant changes since the high point in domesticity reached in the 19th century.

What about the public school? It is the American tradition that public schools are a marvelous instrumentality for producing the kind of character that makes a democratic society possible. That faith begins at least with Thomas Jefferson and includes many 19th century reformers like Horace Mann. Is that the aspiration we hold for the public school today? One of the things most distressing today is not so much that citizens will not vote for schools levies, but the decline in our aspirations for the schools, the decline in our confidence in what the schools can accomplish. Instead of looking at the public schools as that great instrumentality for making the democratic way possible, the most we now demand, and that very tentatively, is that high school students shall have acquired basic literacy before graduating. And there are a great many public school people who say that that demand is too severe, and that all kinds of evil things can occur if you try to enforce it. This is in sharp contrast to the Chinese view of education as a solution to all problems. Time does not permit me to discuss religion. I am interested in the implications of the "born again" movement, but I shall not pause to talk about them.

What about therapy? This is a hard and complicated issue. It is certainly true that the kinds of therapy directed to making people adjust to their circumstances is not in great repute among young people in these times. On the other hand, we are afflicted by a kind of pervasive psychologism in this country which oozes out of television talk shows and situation comedies and in a whole literature of self-improvement, written, however, by persons other than the self to be improved. This psychologism performs the alchemy of

transforming what are basically fundamental moral and ethical issues or basic issues of public policy into occasions for therapeutic manipulation. Despite the decline in the rehabilitative ideal, I see no corresponding decline in this pervasive psychologism. On the other hand, this kind of psychologism is directed to providing ease, comfort and excuse. It is not directed to bringing people together for the purpose of achieving major social objectives.

This does not present an inspiring view of the modern world. I am saying that there has, in fact, developed in this country a serious loss in the vibrancy of expectations about the capacity of our institutions to affect human character and behavior for the better. I also conclude that there has been a decline in the consensus of values relevant to the ends of rehabilitation, even though I shall not be able to develop that point in detail. Whatever the intellectual case against the rehabilitative ideal may be (and there is a case to be made) the decline in the rehabilitative ideal is not primarily the product of the case made. The decline is much more closely related to various cultural phenomena, most of which are not directly associated with criminal justice at all.

And so we enter a new era. It is an era in which we are very much concerned about granting discretion to public officials. This is one of the legacies of Viet Nam and Watergate. It is an era in which we are very much concerned in seeing that criminal sentences are certain, that criminal penalties are vigorously imposed. No doubt many of these tendencies are well justified by the circumstances of the times. But we need to understand that every stance that one takes toward a complex social issue has its own distinctive and peculiar pathologies. We ought not to think that in choosing a stance one can avoid fundamental difficulties. And the new stance in criminal justice today produces such difficulties. For example, if you say that it is a bad thing (and it is) to impose widely different penalties on two people who have done the same thing, one is recognizing a genuine problem of injustice that has caused deep concern, and properly so. But the other side of the coin is that there is another kind of injustice that results from providing the same penalty to persons who have done different things. It brings to mind the statement of Justice Frankfurter in a different context: "[T]here is no greater inequality than the enforced equality of unequals."⁷ And one of the problems of present sentencing schemes is that in the effort to avoid disparities resulting from punishing people differently who have done the same thing, we may now tend to punish people the same way who have committed crimes in very different circumstances. The possibilities of legal definitions being made sufficiently precise to avoid that problem are very remote.

Maybe we don't know very much about how to make prisoners better — I think we don't. But the whole history of the prison indicates that we know a great deal about how to make them worse; so that even if the rehabilitative ideal is rejected, no sane society can avoid the problem of how to mitigate the harms created by its own penal efforts. We are going to have to worry about this unless we are simply blind. That means that some of the same concerns

⁷ FRANKFURTER, *The Zeitgeist and the Judiciary*, in *LAW AND POLITICS* 6 (A. MacLeish & E. Prichard, Jr. eds. 1971).

that were rampant during the dominance of the rehabilitative ideal will have to be considered again.

There is another thing, and with this I shall conclude. I was one of those who vigorously criticized the rehabilitative ideal, and I remain a critic of many of its modern manifestations. But one of the things the rehabilitative ideal did was to focus attention on the individual human being caught up in the system of criminal justice. The question is, if you forswear the rehabilitative ideal, where will the impetus come from to advance the essential decency of the system? Many of the present tendencies tend toward a kind of war theory of criminal justice. We are really not dealing with individuals, according to this view, but with the "criminal classes". Mr. Nixon talked about a war between the "peace forces" and the "criminal forces" — there is a great deal of this ideology at work in the modern period. One of the consequences of the rehabilitative ideal was that there were compassionate people in institutions concerned about individual people. And even if they didn't succeed in affecting the recidivism rate, every so often they did useful things for individuals. Where is this impulse to come from in the future? I believe no matter how heinous the crime committed by the offender, we as a society cannot afford to deny him opportunities for self-improvement. I say those opportunities must be provided, that compassion and decency require that we do, and that this is true whether we embrace the rehabilitative ideal or not. I have a feeling too, that it would probably be a good thing if, now that we have become inoculated against the extravagant claims made on behalf of rehabilitation, we went back to the drawing board again and looked at some sorts of peripheral things like employment training to see if, just possibly, we might be able to accomplish something a little like rehabilitation in some cases. It may be possible in this way to succeed very modestly in rehabilitating the rehabilitative ideal.