MORALITY AND THE COERCIVE PROCESS *

JOHN V. BARRY†

The disinclination of legal scholars to concern themselves with the philosophy and theory of the criminal law has often evoked comment. Lord Devlin (as he has since become) supplied an instance when, addressing the Society of Public Teachers of Law in 1958, he remarked, "You cannot leave it to the judges — certainly not to the judges of first instance — to build up unaided a coherent system of law: they are far too much concerned with the facts and needs of the cases they are dealing with. The practice and tradition of *ex tempore* judgments means that they throw off things that are better left unsaid".[1] His Lordship continued, "it has always struck me as odd that students of law and academic lawyers tend to avoid the criminal law, comparatively speaking, and interest themselves so much in the civil law", and he stressed that "there is a great field in the criminal law for more constructive work, since for historic reasons appeals have never been allowed in criminal law to the extent which they are in civil law". It may be only wishful thinking, but there seems to be developing a greater readiness on the part of academic lawyers to grapple with the complex and elusive problems of the criminal law. To do so in a worthwhile fashion requires a good deal more than a dutiful approach and a familiarity with judicial decisions and criminal statutes. The subject is fascinating, for it concerns man in the display of his worst and his best qualities. The study of it is part of the eternal quest for justice. Justice, as Madison reminds us *(Federalist No. 51)*, "is the end of government. It is the end of civil society". The quest began when mankind first assembled in societies, and it will cease only when the human comedy is ended. But it will not be advanced merely by taking our stand upon ancient ways and hoary assumptions, nor by disregarding the validated knowledge and sensible hypotheses which the behavioural sciences have to offer to lawyers concerning the most baffling of all problems, the enigma of man and his nature.

Each of these texts is the contribution of a scholar of eminence to the quest for justice. Professor Hall's *General Principles of the Criminal Law* and Professor Tappan's *Crime, Justice and Correction* are invaluable studies of the criminal process in theory and in action, from interrogation to the infliction of punishment. Professor Gellhorn's *American Rights* is a refreshingly lucid examination of the significance of basic civil liberties and the constitutional and legal devices designed to ensure they shall have genuine meaning.

---

* This is a review article which discusses (1) *General Principles of Criminal Law* by Jerome Hall. 2nd edition. New York, Bobbs-Merrill Company, 1960. xii, 642 pp.; (2) *Crime Justice and Correction* by Paul W. Tappan. New York, McGraw-Hill Book Company, 1960. xiii, 781 pp.; (3) *American Rights, The Constitution in Action* by Walter Gellhorn. New York, The Macmillan Company, 1960. vi, 232 pp.

† The Honourable Sir John V. Barry, a Justice of the Supreme Court of Victoria.

[1] "Statutory Offences" (1958) 4 *Jo. Soc. Pub. T.L.* (N.S.) 206.

All three authors are in no doubt about the supreme importance of the criminal law as a field to be investigated and elucidated, and to be made rationally acceptable as a body of organized knowledge. Each author recognises that there is an intimate relationship between law and morality that must be maintained and fostered. While it is true, as Lord Atkin said in *Proprietary Articles Association* v. *A.-G. for Canada*,[2] that morality and criminality are far from co-extensive, Lord Coleridge's proposition is also true, that "the absolute divorce of law from morality would be of fatal consequence".[3] The primary purpose of a legal system is to ensure order and stability, so that in a given situation a member of society will be able to predict how another member is likely to behave. Individual security resides in a citizen's confident expectation that other human beings will conform to certain minimal standards of behaviour, and, as Viscount Simonds recognised in *Shaw* v. *D.P.P.*,[4] the prohibitions of the law are one among the many devices that society employs to influence and control human beings to ensure they will conform to those standards. But man is an ethical animal, and to satisfy the rational and social components of his nature order and stability must be achieved by just means. The essential characteristic of the criminal law is punishment, ranging from the disgrace and social condemnation involved in conviction, to the deprivation, temporary or permanent, of liberty, or even of life itself. But it is a fundamental ethical principle that we may not inflict pain or disgrace upon another without adequate justification. The question whether a penalty is just is thus a problem in morality, and justice in the law is a quality that cannot be made intelligible except by reference to ethical standards. Society can be made good only by making men better, and the progress of the social organization can be achieved only by the development of the social impulses of its members.

> If I love my neighbour I shall not wish to cut his throat; and in order that I may love him, I must be pretty sure that he does not mean to cut mine. . . . The moral requirement of the criminal law, is, therefore, essentially, that it should be such a law as is favourable, when considered in connection with the whole order, to the strength and development of the existing morality. If the criminal asks, How do you justify yourself for punishing me? the reply must be, Because the inflexible administration of the law is an essential pre-condition of the whole system, under which alone progress is possible. A society in which peace and order are preserved is superior, in morals as in other respects, to a society in which peace and order are made impossible by violence; and the suppression by punishment of offenders is involved in the system.[5]

In the opening sentence of the first edition (1947) of his *General Principles of the Criminal Law*, Professor Jerome Hall regarded the criminal law as "a sustained effort to preserve important social values from serious harm and to do so not arbitrarily, but in accordance with rational methods directed towards the discovery of just ends". In the 1960 edition (an extensive revision and re-organization of its predecessor) the same outlook is dominant. The author undertakes the task of formulating a comprehensive scientific theory of the criminal law, consisting of a body of general principles by reference to which

---

[2] (1931) A.C. at 324.
[3] *R.* v. *Dudley and Stephens* (1884) 14 Q.B.D. at 287.
[4] (1961) 3 W.L.R. 897 at 917.
[5] Leslie Stephen, 2 *Social Rights and Duties* (1896) 79.

every penal law may be explained, and he succeeds exceedingly well. He assigns the propositions of the criminal law to three categories. The first, consisting of the specific prohibitions of the penal law, he calls "rules". The next embraces "doctrines", which are rational propositions qualifying and controlling the rules, and are thus essential to the complete definition of a crime. To give an illustration, the different components of the crime of burglary and of the crime of arson are to be ascertained by reference to the specific definitions found in the "rules". For the purpose of determining guilt in a given case, however, reference may have to be made to the "doctrines" embodying the controlling concepts of the exculpatory effect of insanity, immaturity, intoxication, mistake, coercion and necessity. But the doctrines are not exculpatory only; in them are to be found, too, the propositions expressing the legal meaning and criminal consequences of attempts, conspiracies and solicitations to the commission of crimes, and of complicity in their commission. The third category is of a more general nature; it consists of the "principles" infusing the criminal law, which Professor Hall considers are derived from the total body of propositions that comprise the "rules" and the "doctrines". The "principles" consist of seven ultimate notions which Professor Hall formulates (p.18) in a positive generalization; *the harm forbidden in a penal law must be imputed to any normal adult who voluntarily commits it with criminal intent, and such a person must be subjected to the legally prescribed punishment.* The other fifteen chapters of the work are devoted to the elucidation of this generalization, and to an examination that is both robust and subtle of the concepts it embraces. Fundamental in Professor Hall's philosophy is the principle of legality, and Chapter 2, *Legality — Nulla Poena Sine Lege*, is a remarkably acute examination of this concept. To him, the principle draws its vitality from its historic meaning. Absolute power, perhaps because it corrupts absolutely, is invariably used absolutely. To devise and advocate concepts designed to restrain arbitrariness on the part of those controlling the coercive machinery of the State has ever required ingenuity and courage, and to preserve them from the constant attempts, open and concealed, to subvert or erode them calls always for vigilance and tenacity. Professor Hall rightly regards the principle of legality as a positive limitation on the power of the State to impose a penalty upon a citizen. Its effectiveness is achieved by an insistence upon the idea, dynamically pervading Western civilisation, that guilt can legally exist, and punishment be lawfully inflicted, only in conformity with specific provisions established and known at the time when the act alleged as a crime was done. His discussion of the misuse of the process of "analogy" by authoritarian regimes in Russia and Germany by which the courts widened the net of punishability to catch persons whose conduct was not within the strict terms of the law, but was made so by the use of "legal analogy" and an appeal to the "sound feelings of the people", is a useful corrective of loose thinking. Resort to analogy, of course, is usually the first step towards the misuse of the criminal process as a means of oppression. The author observes, with truth, that "substantial justice rarely suffers from lack of laws. By comparison with lack of discovery of criminal conduct, lack of detection, lack of complaint, and inefficiency in administration, the failure to punish the guilty resulting from gaps in the penal law is an almost trivial defect" (p.50). But oppression may result from schemes altruistically conceived as well as from the despotic use of the coercive powers of the State. His warning is timely when he points out the dangers inherent in the proposals of the criminologists of the Positivist School and their successors,

that "anti-social" persons should be detained indefinitely until some "expert" body considers them fit for release. No one aware of the history and value of the salutary protections of the criminal law can view this notion and its implications without grave misgiving.

Professor Hall's discussion of *mens rea* covers four chapters, and is surely the most acute and valuable examination that has been made. He rejects the objective test of liability (which has been given new vitality by the House of Lords in *D.P.P.* v. *Smith*)[6] whereby liability to punishment depends not on the actual state of the defendant's mind, but on an intention imputed to him because, wise after the event, a tribunal considers the ordinary reasonable man would have foreseen the criminal harm as the natural and probable consequence of his acts. Viscount Kilmuir's speech in *Smith's Case* provokes a number of regrets, and one among them is that Professor Hall's brilliant exposition of the weaknesses of Mr. Justice Holmes' doctrine of "objective liability", on which the Lord Chancellor relied so heavily, was, apparently, not considered by the House. The author's position is surely sound. To him the principle of *mens rea* is the ultimate summation of the moral judgments that forbid the intentional or reckless commission of certain social harms, and it requires that personal as distinct from imputed guilt should be established before there may be a conviction exposing to punishment. "What penal law now does to a large extent (and what it should do throughout its total range) is to make liability depend upon the actual state of the defendant's mind regarding the relevant facts" (p.165). But "objective liability is not to be confused with the appraisal of the external evidence ('reasonable man' method) that must be relied upon to discover other persons' mental states". The discussion of the distinction between intention and motive is of great utility. Motive is no part of *mens rea;* it is excluded because "*mens rea,* a fusion of cognition and volition, is the mental state expressed in the voluntary commission of a proscribed harm". Hence motive, however excellent, inducing an accused person to disregard a criminal prohibition is pertinent only to the course to be taken, either by the authorities which determine whether there should be a prosecution, or by the tribunal which determines what should be done to the defendant after conviction. The ethics of penal law are in this sense objective, and "the insistence that guilt should be personal must be interpreted to accord with the paramount value of the objectivity of the principle of *mens rea*".

The range and subtlety of Professor Hall's discussion of other obscure areas of the criminal law, including harm (he has a well-founded distaste of the ambiguity in current uses of the expression *actus reus*), causation, punishment, strict liability, ignorance and mistake, necessity and coercion, mental disease, intoxication, and criminal attempt, make it tempting to give further illustrations of the author's approach. The temptation must be resisted, however, leaving the reader to examine for himself what is the most valuable synthesis, and (though the author's literary style is not remarkable for elegance and lucidity) the most consistently erudite, constructive, and civilized dissertation upon the philosophy and theory of the criminal law it has been this reviewer's good fortune to read. The present text is the impressive product of extensive research and wise cogitation over the dozen years since the publication of the first edition. Professor Hall's fructifying influence upon the development of the criminal law, manifested since the appearance of his *Theft Law & Society* in

[6] (1961) A.C. 290.

1935, will certainly be strengthened by the second edition of *General Principles.*

One of Professor Hall's great assets is his exceptional familiarity with the aims and methodology of psychiatry and criminology, and the literature describing them. In his final chapter, *Criminology and Penal Theory,* he insists that "notwithstanding the current specialization, . . . criminology and penal theory are actually inter-dependent phases of a single body of knowledge" (p.601); "penal theory and criminology therefore share a common interest in principles, doctrines and rules of penal law as well as in the concomitant criminal conduct" (p.621). A lawyer as well as a sociologist, Professor Tappan shares this view, and because of this, his *Crime, Justice & Correction* may safely be commended to lawyers sceptical of the claims and uses of criminology. His monumental treatise is presented in three parts: Part I, *Crime and Causation;* Part II, *The Administration of Justice,* and Part III, *Correction.* He bases himself on the sensible proposition that crime is whatever conduct the law prohibits, and punishes as criminal by means of the judicial process. He has no liking for the vagueness of the term "white-collar crime", used by some criminologists in U.S.A. In the writings of its proponents, the meaning of this concept is hard to pin down, but, broadly, it covers business practices and activities prompted by greed rather than need, which, though not necessarily forbidden by the existing criminal law, are nevertheless socially injurious. However analogically attractive, it is opposed to the principle of legality, and while it is permissible for sociologists to contrast what is with what should be criminal, it is needlessly confusing to introduce the word "crime" to describe behaviour that is not contrary to law. A valuable feature of Professor Tappan's book is that it combines a comprehensive exposition of legal and criminological theories with an account of the factual situations to which they relate. His survey of the prevalence and distribution of crime in U.S.A. discloses a perturbing increase in major crimes over recent years. It is estimated that in 1957 there were over 1,400,000 crimes, consisting of murder, forcible rape (as distinct from statutory rape, which is equivalent to what we know as carnal knowledge of a female under a certain age), robbery, aggravated assault, burglary, larceny over 50 dollars, and automobile theft, and the number rose by 9.3 per cent to 1,500,000 in 1958. Murders rose from 8,027 to 8,182, providing the smallest percentage increase, 1.9, while rape supplied the greatest increase, 13.0 per centum. From the statistics (which, however, he rightly regards as unsatisfactory) Professor Tappan infers that criminality matures and declines at an earlier age than was true a generation ago, and there is less cause for alarm about the crime rates of the youthful offenders aged 18 and over than was once thought. But such comfort as there is in that conclusion vanishes when he points out (p.56) that the 18 to 21 class has highest arrest figures of all age groups for robbery and rape, 18 being the most significant age, and the 21 to 25 class the highest rates for homicides and assaults, the most significant age being 24. The author is sensibly guarded and conservative in his excellent discussion of causation factors in crime. To him cause "means simply a more or less direct and meaningful relationship in which one factor or event tends sensibly to produce another" (p.71). The chapters on physical, constitutional and hereditary factors, on psychopathology and crimes against the person and on personality deviations and crime, are admirable. The sections on psychoses and crime and on mental deficiency (pp.119-144), and on psychological instability, alcoholism and drug addiction (pp.145-168), provide, compactly and lucidly, the information (and the terminology) which judges and counsel need to deal adequately with cases in which insanity or mental defect

or drunkenness is pleaded as a ground of exculpation. The influence of social factors, such as slums and vice areas, is discussed dispassionately. Poverty does not necessarily lead to crime, but the very high proportion of convicted persons come from the lower economic levels. "The significant point," he comments (p.213), "is that some individuals cannot readily achieve their wants legitimately . . . , and these individuals may seize what they cannot or will not earn. Few get into trouble for taking crusts of bread or for finding shelter from the elements". The least competent in natural ability or in training, who often display character defects stemming from their depressed economic circumstances, provide a constantly replenished reservoir from which offenders are drawn. The outlook of persons living in sub-standard conditions all too often matches their circumstances. They lack foresight, and thus the prospect of punishment does not occur to them, or if they do think of being caught, fear of consequences deters them less than it does the more fortunately placed, because they have less to lose.

The problem of alcoholism as an element in criminal behaviour is sensibly examined. It is estimated that in U.S.A. there are four million heavy drinkers and one million chronic alcoholics. It is only a guess, for we lack adequate national statistics of what Lady Barbara Wootton calls "social pathology", but it is probable that the proportions in Australia are not dissimilar. The economic cost directly attributable to alcoholism in U.S.A. is said to be a thousand million dollars a year. Experience in the divorce and criminal jurisdictions, and as chairman of a Parole Board, has satisfied this reviewer that intemperate use of alcohol is a direct and precipitating factor in at least 30 per centum of broken marriages and of criminal offences, and a proper investigation would probably show the percentage to be much higher. Professor Tappan notes that the prevailing view among authorities on alcoholism is that it "constitutes a psychiatric abnormality symptomatic of underlying personality illness or disorder that requires psychotherapy". It is, however, not the chronic alcoholic who is the grave problem in the commission of criminal offences. The problem is rather that of offenders whose self-control is diminished by liquor, and whose capacity to restrain their aggressive or acquisitive impulses is reduced to vanishing point.

The examination of the administration of justice in U.S.A. is thorough and informed. Recognising that the traditional notion of the efficacy of punishment as a deterrent is "crudely oversimple" (p.246), he insists nevertheless that the penal law and its inflexible application do in fact deter, and that with the declining efficacy of other forms of social control, they must be relied on increasingly to maintain standards of behaviour essential to the security and survival of the community. But he is concerned that the punitive mechanisms of society should be used constructively and not vindictively and destructively, and he is fully aware that this aim is a long way from being accomplished. The imperfections of the police, the judiciary, and the legal profession in U.S.A. are frankly discussed. We in British communities need to beware of the perils of complacency, but we can justly claim superiority over U.S.A., where the simplicity, efficiency and fairness that (relatively speaking) characterise our criminal procedures are absent. We tend to take as obviously necessary our method of the hearing preliminary to trial, where depositions are taken and the prisoner has the right to a copy of them, and it is startling that there is no such general practice in U.S.A. Professor Tappan is keenly aware of the factors and the practices that impair the efficient administration of justice in U.S.A.,

and he subjects the whole criminal process, from arrest to the suffering of the penalty, to a critical but balanced and informed examination. T.V. addicts mystified by crime dramas produced in U.S.A. will find enlightenment in Professor Tappan's pages upon numerous aspects of that country's criminal procedures. Those concerned professionally with the administration of criminal justice — police, lawyers and judges — will take from them much food for reflection from his sober account of the deficiencies that imperil the security of the community the criminal law is designed to serve, and as well, often expose to the risk of injustice persons who may be unreasonably subjected to its bewildering technicalities and intricacies. This account of crime, justice, punishment and correction in U.S.A. is encyclopaedic and comprehensive; it is buttressed, not only by the author's sound scholarship and his experience as a member of the Federal Parole Board and as consultant to the American Law Institute, but also by his personal knowledge of what goes on in other countries, including Australia.

It is a central fact of American political life, as Professor Walter Gellhorn observes, that everybody likes the Constitution. It is the subject of mystic (and, one suspects, sometimes mystified) veneration. Professor Gellhorn performs successfully his undertaking to tell the intelligent layman what, in the actual social process, is the significance of the 166 words of the Constitution of the United States of America on which are based the right of the American citizen, white or coloured, to habeas corpus and to fair trial, his right to be free from official intrusion by way of search and seizure, his right to speak or to be silent, his right to freedom of movement, his right to be regarded as equal to other citizens before the law, and his right to be protected from oppression by private "power-aggregates" resorting to practices that deprive constitutional freedoms of genuine meaning. The nine chapters comprise a series of graceful essays on various aspects of what are regarded in Western civilization as fundamental civil liberties. In the U.S.A., the struggle to prevent the invasion or abridgement of fundamental human rights is more in the open, and the context in which it is waged more dramatic, than it is in British communities. It is possible here to speculate only cursorily on the reasons for this state of affairs. It may be that it is connected with the American *ethos,* in which a veneration of the law marches strangely with an impatience of legal restraints. The unwritten conventions that control British communities, particularly in respect of public office and employment, seem there to be less generally acknowledged and accepted. The dominance and irresponsibility of the media of mass communication, and the absence of common standards of good taste and (in Sir Harold Nicholson's meaning of the phrase) of good behaviour, make the task of creating the good society one of great and constant difficulty, particularly as (according to national tradition) the acquisition of great wealth and material comforts are the glittering prizes that spur to individual effort. But these socially corrosive factors are not confined to U.S.A.; they display themselves in more or less degree in every "affluent" society, and the sociological equivalent of *Gresham's Law,* that bad practices drive out the good, operates ineluctably in all societies. This book has all the equipment of legal scholarship, and lawyers should not pass it by because it is professedly written for the layman. They will gain from it a fresh understanding of vital principles that are important to them professionally as the pronouncements of courts of authority in leading cases, and, in addition, it will recall to them how essential these principles are to the survival of the civilized

ideals that have been painfully forged upon the anvil of human suffering. Official oppression takes various guises, and it is never so dangerous as when it appears to be undertaken for the general protection, or against an individual who is the object of popular execration. We may yet learn to our cost that the United States Supreme Court, in its fairly consistent recognition that the most effective way to guard against the misuse of official power, when it is employed to obtain evidence of guilt, is to forbid the use of its fruits,[7] has been wiser than was the Judicial Committee of the Privy Council when it decided that evidence illegally obtained was nonetheless admissible and that (involuntary confessions apart) relevancy alone is the test of admissibility.[8]

These books are of excellent quality. Despite the constitutional and procedural differences, they are the more valuable for Australian lawyers because they are influenced by American problems and experience. The tensions of American society heighten and dramatise the conflicts of the values that are fundamental, too, in our society. To read these three works is to perceive the validity of Sir James Fitzjames Stephen's assertion:[9]

> No department of law can claim greater moral importance than that which, with the detail and precision necessary for legal purposes, stigmatises certain kinds of conduct as crimes, the commission of which involves, if detected, indelible infamy and the loss, as the case may be, of life, property, or personal liberty. . . . The political and constitutional interest of the subject is not inferior to its moral interest.

---

[7] *Cf. Rochin* v. *California* (1951-52) 342 U.S. 165; *Mapp* v. *Ohio* (1961) 81 S. Ct. 1684; (1961) 52 *American Jo. Crim. Law and Criminology* 245. *Cf.* (1962) 53 *id.* 85.

[8] *Kurama* v. *The Queen* (1955) A.C. 197.

[9] Stephen, 1 *History of the Criminal Law of England* ix.