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E. H. Sutherland

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### Recommended Citation

E. H. Sutherland, *Person Versus the Act in Criminology*, 14 Cornell L. Rev. 159 (1929)  
Available at: <http://scholarship.law.cornell.edu/clr/vol14/iss2/3>

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## THE PERSON VERSUS THE ACT IN CRIMINOLOGY

E. H. SUTHERLAND\*

A century ago a crime, in the eyes of the law, was a disembodied act. The object of attention was not the person but the specific act abstracted from all other circumstances or traits of the person. This conception was manifest both in the methods of determining guilt and in the methods of determining penalties. In the trial the court could consider as pertinent evidence only that which assisted in determining whether a specific act had been performed and whether that act was in contravention of the legal rule. Intent, to be sure, was taken into consideration but this was done because intent was deemed to be an essential part of the act, for a crime was not merely an overt act but included an intent to violate the law. Also, the penalty, though inflicted upon the person, was not determined by consideration of the person but of the public. Definite penalties were fixed in advance by legislative assemblies and were uniform for all persons convicted of violating a particular law. This uniformity was justified on the ground that it was necessary to have a definitely predetermined penalty in order that prospective offenders might take it into their calculations of pleasures and pains which would result from the act. The pride of the system was its impersonality. Theoretically it gave no consideration to social status, wealth, religion, previous behavior, or any other element or circumstance of the person. This conventional system was not so consistent as described; it varied from place to place; exceptions were made for children and "lunatics"; and practice often violated the theory.

This conventional system of thought and practice is still the backbone of the body of the law. But the institutions which make and enforce the law have manifested a distinct trend away from exclusive interest in abstract acts toward an inclusion of the whole person. The modifications were not introduced by a definite statement of the new principle of personality but were defined or justified in terms of the old principle of abstract acts. Some of the modifications have been made by expansion of the concept of "intent." Many of them have been merely the legalization of methods that had been used previously without authorization.

Some of these modifications, classified logically rather than chronologically, are as follows: (1) The habitual offenders act, (2) grant of greater discretion to the court to determine penalties, (3) grant of

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\*Professor of Sociology, University of Minnesota.

greater discretion to administrative boards to determine penalties, (4) grant of discretion to the court to use non-punitive methods of treatment of offenders, (5) legislative provisions for acquiring or requiring more knowledge of personality of offenders, (6) official methods of correcting or segregating prospective offenders prior to the commission of offenses.

One of these modifications was the habitual offenders act. England passed an act of this kind in 1869 and several states in America borrowed this policy about 1890. These acts provided that a person who had been convicted of felonies a specified number of times might or must be imprisoned for a longer period of time, up to life. The early laws did not work satisfactorily and were soon repealed or fell into comparative disuse. The principle was revived recently in New York State by a measure popularly known as the Baumes' law and has been extended to several other states. These habitual offenders acts take into consideration so much of the person as may be revealed by the number of prior convictions of felonies. When the acts are mandatory they definitely exclude consideration of any other aspect of personality. These acts, therefore, use a mechanical criterion of personality, but are a step in the direction of the consideration of the person since the penalty is determined not by one specific act but by three or four specific acts.

A second modification consisted in conferring upon the court greater discretion in regard to the amount of punishment to be inflicted for the violation of a particular law. In the conventional system the penalty had been definitely fixed by the legislature, and the court had little or no discretion in adjusting the penalty to the person. The modification consisted in authorizing the court to take the whole person into account and to fix the penalty between maximum and minimum limits set by the legislature. The court, to be sure, had little information regarding the personality and decisions, so far as adjusted to personality, were likely to be based on the appearance of the offender or upon unverified evidence which came out in the trial.

A third modification was the grant of greater discretion to administrative boards. The legislature empowered parole boards or other administrative boards to determine within limits set by the laws or by the courts the exact amount of punishment in a particular case. In Minnesota and some other states the parole board really became the sentencing board, having complete authority within limits set by the legislature. In general this power which is given to the administrative board is taken either entirely or partly from the court

which previously had it. The court, in fixing a penalty, is compelled to base a decision on scanty evidence and to base predictions entirely on the behavior prior to or very soon after the trial. The administrative board has more time to secure knowledge regarding the behavior of the offender prior to the trial and can keep him under close supervision for a considerable time in prison. This means that the administrative board has a better opportunity to adjust the treatment to the particular offender.

A fourth modification was the grant of discretion to the court to use non-punitive methods of treatment. In the conventional system punishment was the only legal method of treatment. By probation laws the court was authorized to use non-punitive methods of treatment. Sometimes probation is regarded by offenders as less desirable than a penalty; a Minneapolis bootlegger recently, when placed on probation, requested that he be permitted to pay a fine instead. From the point of view of constitutional law, probation was justified as a suspension of penalty but actually it meant that the laws authorized the use of either punitive or non-punitive methods in dealing with those who violated the law. Thus the court was given authority not only to vary the punishment but to eliminate punishment entirely if it seemed to be desirable in a particular case to do so. The extent to which this method is used is illustrated in Massachusetts where during several years the number of persons on probation has been about five times as large as the number serving sentences in penal and reformatory institutions.

A fifth modification was to provide by legislative enactment for more adequate means of determining the nature of the person involved in the criminal case. Finger print bureaus were developed to assist the police, the courts, and the prisons in securing a record of the earlier career of the offender. A more complete record than found elsewhere is the one compiled by the State Commission of Probation of Massachusetts. This file in 1926 contained the names and social histories of over 750,000 persons. By a law enacted in that year the use of this central bureau was made compulsory upon courts in all cases in which persons were charged with offenses punishable by more than one year's imprisonment. In the courts of a century ago this information would not only have been useless but its use would have been illegal. Many states have provided, also, for psychiatrists, psychologists, and social workers to assist in diagnosing the offender and recommending treatment. In a recent survey of these facilities in courts and penal institutions Dr. Overholser reported that about 10 per cent of the courts and 36 per cent of the penal institutions

from which he secured replies had the services of psychiatrists and that about 20 per cent of the courts had trained social workers other than probation officers.<sup>1</sup> In penal and reformatory institutions such sources of information regarding personality as were available a generation ago were called upon for assistance in determining whether an offender should be released on parole. Consequently the examination was made shortly before his release in most cases. These examinations are now made early in his period of imprisonment so that the information may be utilized to direct his labor, education, recreation, and other activities while the person is in prison as well as while he is on parole.

A sixth modification was to extend the policy of dealing through the court or other agencies with persons who showed a disposition to lawlessness even though they had not committed crimes. Feeble-minded and insane were segregated or placed under guardians by court order for the purpose, among others, of preventing them from committing crimes. The juvenile court dealt under one jurisdiction with delinquent, dependent, and neglected children, and the three classes were handled thus on the theory that they equally needed the guardianship of the State in order, among other things, to prevent them from becoming criminals in adult life. The State has provided, also, child guidance clinics, psychopathic clinics, visiting teachers, and twenty-four hour schools for the same purpose. It is not impossible that the knowledge of personality may become sufficiently precise to justify the segregation by court order of persons who are not feeble-minded or insane but who are for other reasons so likely to become criminals that they constitute a distinct menace to society. Such persons would then be confined not because of something they had done but, as the insane are, because of something they would be likely to do in the future.

These modifications that have been described are developed most consistently in the juvenile court and the institutions through which it works. Great discretion is given to this court; juvenile court laws are generally blanket laws; the juvenile court has the greatest equipment of social workers, psychiatrists, and other special assistants. It is necessary, to be sure, to prove specific violation of a legal regulation in order to secure a legal basis for treating a delinquent child. But if that evidence cannot be secured it is generally possible to adjudge the child dependent or neglected and deal with him in the

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<sup>1</sup>Overholser, *Use of Psychiatric Facilities in Courts and Penal Institutions Throughout the United States (1928)* PROCEEDINGS OF THE NATIONAL CONFERENCE OF SOCIAL WORK.

same way. At any rate, once a violation has been proved the court is free to consider everything in the person or his social situation that may appear to be significant, taking into account sex, age, health, mentality, emotional control, school record, recreational interests, previous behavior, character of home, character of neighborhood, character of playmates, and a variety of other things. The best juvenile courts do not feel competent to deal with complicated cases without complete pictures of the personality and the circumstances of the delinquent. Developments somewhat similar in nature but less extensive are found in other specialized courts, such as domestic relations courts or morals courts.

Thus a distinct tendency to consider the whole person is evident. Guilt is still determined on the basis of specific acts but there has been a tendency to deal officially, in advance of specific crimes, with persons who are presumed to be most likely to commit crimes. The principal modifications have been made in the methods of determining penalties, and there the tendency to base policies on a knowledge of the entire person rather than of abstract acts is most evident.

Few persons question the fact of this trend; many question its desirability. Some of those who doubt its desirability insist that crimes have increased enormously during the recent generations in which it has been most apparent, and assert that this chronological association is proof of a causal relation between the two variables. This is essentially a speculative problem, for the effects of policies cannot be measured accurately in the present state of development of statistics of crime and of techniques of investigation. An analysis must be made, therefore, in terms of general knowledge and probabilities.

In the first place it is evident that a chronological association between two variables does not prove a causal relation between them. The importation of bananas into the United States has increased during the period of increase in crime rates, but evidently the increase in the importation of bananas is not the cause of the increase in crimes. It is more probable that both the increase in importation of bananas and the increase in crime rates are the result of some underlying change. Similarly it is probable that the increased interest in the personality of offenders and the increased number of crimes are both the result of some change in general social organization and social relations. The most fundamental change in social relations is the increased mobility of people. This mobility appears to be the basic cause of the increase in crime and the increase in the

consideration of personality of offenders. Mobility produced crime by introducing greater variety in the patterns of behavior, by bringing into contact persons who were unknown to each other and thus making social life more anonymous, by causing congestion of population so that groups which were in contact in certain ways still remained isolated from each other. Variations from established codes were facilitated by these changes. Crime was one of these variations, science was another. Science led to the consideration of the entire personality of the offender. The conventional system was a dogmatic closed system; it had a final explanation of crime and a policy in regard to it; no place was left for research or discovery. Such systems of thought are inconsistent with science. Interest in personality of the offender is the result of the extension of science in the field of criminology. Thus, though it cannot be definitely proved that there is no causal relation between increase in consideration of personality and increase in crime rates, both of these seem to be the result of other changes and especially of a change in mobility.

In the second place, the policy of deterrence seems to be necessarily decreasing in effectiveness in modern society. If every crime were automatically, by a law of Nature, followed immediately by extreme suffering crime would almost entirely disappear. Persons who oppose the modifications which have been described above do so on the ground that the most effective method of combating crime is by approaching as closely as possible to the results of this assumed law of Nature by making punishments as uniform, certain, and severe as possible. It is necessary, however, to analyze these concepts of uniformity, certainty, and severity and consider them in relation to modern social life.

Uniformity in the conventional system referred to the similarity of punishment of all persons who violated a particular law. That was a mechanical type of uniformity, which, as has been shown, left no place for increased knowledge and which was inconsistent with the developing science of modern life. A new uniformity is being developed which consists in similarity of treatment of all offenders with a particular type of personality, regardless of the offense of which they have been convicted. Study of personality and testing of results of methods tend to produce techniques that are effective in producing desired results, and thus the techniques may become standardized. This uniformity is something like that in medicine. One type of uniformity is decreasing, and the other is increasing. But uniformity, as such, has no significance as a deterrent regardless of whether the person or the abstract act is considered as the basis. Absolute uniformity in

treatment might exist without the least deterrent influence. Equal rewards might be given to all persons who violate a law or who have a particular personality trait, but the uniformity would not have deterrent value. The content of the treatment rather than its uniformity must be considered in attempting to determine the deterrent value of the conventional system in comparison with the modified system.

Uniformity, therefore, needs to be differentiated from certainty and severity of treatment.<sup>2</sup> Certainty of treatment refers to the frequency with which violations of law are followed by detection, identification, conviction, and some official treatment. Severity of treatment refers to the average amount of suffering produced in those convicted by the method of treatment which is used. Uniformity, certainty, and severity are independently variable; any one of them might change in one direction while the others change in the opposite direction.

Certainty of treatment cannot be attained in modern society, especially for robbery and burglary. Estimates have been made that not more than three per cent of the violations of law are followed by conviction and some formal treatment. This estimate is probably too high. The certainty of treatment is probably less in the United States than in the less mobile and more homogeneous countries of western Europe, but a high degree of certainty is impossible in any complex society. In spite of great uncertainty of treatment a very small proportion of the population commit serious crimes. A large proportion of the serious crimes are committed by a few people who violate the same laws persistently. A man who was convicted recently of burglary confessed that he had committed 174 burglaries in Minneapolis and St. Paul in one year. Two young men were caught in a robbery in Minneapolis late one night and confessed that they had committed ten robberies earlier that same night. Thus it is not possible to depend very largely on certainty of treatment as a deterrent; certainty must decrease as society becomes more complex unless phenomenal developments occur in the detection of criminals.

Severity of treatment is also increasingly ineffective as a deterrent. If all offenders were punished severely the severity might be effective. But when one offender is punished severely and ninety-nine are not detected in their crimes, the punishment is of little value either in re-

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<sup>2</sup>This problem is stated in terms of treatment rather than of punishment because punishment is no longer the only method authorized by the State in dealing with those who are convicted of crime.

forming the one who is caught or in deterring others. Moreover social life is changing so that the offender gets more support and the State less support in its policy of punishment. The one who is caught and punished severely gets moral support and other support from the offenders who are not caught. He gets this support even if he is not punished,—witness the oil scandals. The State has a constantly decreasing support in a policy of punishment. A century ago punishment was used as a method of control in the home, the school, and the church. Now it has disappeared almost completely from the school and church and is fast decreasing in the home. Consequently when the State uses punishment it does not get the support from the surrounding culture that it secured previously and the punishment is decreasingly effective either in reforming or deterring. The offender therefore feels less completely isolated when he is punished and the punishment is not so clearly a symbol of social disapprobation.

Therefore dependence upon certainty and severity of treatment seems to be increasingly unwarranted. In addition, that policy is unable to encourage or utilize the increasing knowledge regarding offenders. The possibilities of the opposite policy are illustrated by the recent report of the committee on parole in Illinois. Professor Burgess and others classified the persons placed on parole from the state institutions of Illinois into nine groups; the rate of violation of parole in the group at one extreme was 1.5 per cent, while at the other extreme it was 76 per cent. Consequently these policies which are based on a consideration of personality, if carried out consistently, may be expected to protect society from crime in three ways: First, they would secure a relatively permanent segregation of persons who because of mental abnormality, anti-authority complexes, or lack of appreciation of conventional values or social situations constitute the greatest menace to the group. Segregation will probably not reform these offenders but it will protect the group by incapacitating them and to a slight extent by deterring others. Apparently no other policy can be used in the present state of techniques of control for a large proportion of chronic and professional offenders and a considerable number of first offenders. Second, this policy would restore to society without alienating them a large proportion of those who have not definitely broken away from the general culture of organized society. Third, this policy would isolate the type of personality and the social situations from which crimes are most likely to issue, and would make it possible to deal with such persons in advance of crime and to attack and eliminate those social situations. Thus protection against crime would be secured by

modifying those who could be modified by available techniques, segregating those who could not be so modified, and correcting or segregating in advance of crime those who were proved to be most likely to commit crime, and attacking and eliminating the social situations which were most conducive to crime. Such policies would be as much evidence that the organized society disapproved of crime and it is this disapprobation rather than the punishment which tends to deter the large majority of the population from crime.