REVIEW ESSAY

Criminal Punishment and Psychiatric Fallacies

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The Crime of Punishment. Karl Menninger. New York: Viking Press. 1968. $8.95.

> *Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasions of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.*
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> –LOUIS D. BRANDEIS

Nowhere is this general tendency expressed by Brandeis more prominent than in the area of criminal law. In spite of the reasoned warnings of some writers, we are greeted by a continuous stream of books and articles from psychiatrists and psychoanalysts (and their judicial followers) with one common theme: Criminal punishment is an unscientific survival of barbarism and must be replaced by a system of individual and social therapy.[1] To believe otherwise is to be unscientific and (if the distinction is recognized) immoral.

The most recent attempt to argue this position comes from the pen of Dr. Karl Menninger. In his Isaac Ray Award book, *The Crime of Punishment,* Dr. Menninger launches (in the name of scientific psychiatry) a radical attack on the institution of criminal punishment as it operates in the context of the Anglo-American legal system. He does not wish merely

to change parts of the existing system (e.g., the insanity defense) but wants, as an ideal, the elimination of that system entirely. The idea is then to replace this system with a more "scientific" system of social control. With sentencing largely in the control of psychiatrists and other health workers, and increased use of preventive detention, the new system would not be subject to the inefficiencies in controlling crime that characterize our present judicial adversary system.

> The juridical system seems to the doctor to be an unscientific jumble based on clumsy and often self-defeating precedents. Psychiatrists cannot understand why the legal profession continues to lend its support to such a system after the scientific discoveries of the past century have become common knowledge. That this knowledge is coolly ignored and flouted by the system is not so much an affront to the scientists as it is a denial of what was once mystery and is now common sense. . . .
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> Being against punishment is not a sentimental conviction. It is a logical conclusion drawn from scientific experience.
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> The criminal court should cease with the findings of guilt and innocence, and the "procedure thereafter should be guided by a professional treatment tribunal composed, say, of a psychiatrist, a psychologist, a sociologist or cultural anthropologist, an educator, and a judge with long experience in criminal trials and with special interest in the protection of the rights of those charged with crime."[2]
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> Why not a large number of *community safety centers* or crime prevention centers? Such a center would be concerned far more with the prevention of crime than with the arrest and mop-up. Offenders or supposed offenders upon capture would be conveyed immediately to the proper center for identification and examination, and then, if indicated, transferred to a central court and/or diagnostic center. Later–if the judge so desires–a program for continuing correction and/or parole could be assigned, again to the officers of the local center. [pp. 91-92; 204; 139; 268][3]

It is my view that Menninger's position is totally and systematically wrong–that its defense is fabricated solely upon confusions and fallacies (e.g., that moral conclusions can be drawn from scientific premises). And thus, in this brief essay, I should like to expose these confusions and fallacies. This task is important for three main reasons. First, though his book is in many ways erroneous, Dr. Menninger is a popular and widely influential practitioner in his field; and thus it is important to show that he is wrong and to point out the implications of his positions.[4] Second, if my reading constitutes a fair sample, his views are representative of what is a common position among psychiatrists, psychoanalysts, and social scientists in general. Third, and perhaps most important, his views are not merely incorrect, but are of a kind that is socially and politically dangerous.

Enough by way of introduction. I should now like to pass to a consideration of the argument itself and the character of the confusions and fallacies it exhibits. These are of three main kinds: moral, legal, and (ironically) scientific.

VALUES, COMPETING VALUES, AND JUSTICE

When we speak of moral values we can mean either of two very different things. First, we can mean those moral beliefs which, as a matter of fact, people or groups of people have. The term "mores" is sometimes used for values in this sense. Second, we can mean those values which ought to be promoted—regardless of whether or not they are in fact promoted or believed valuable. This is the sphere, not of mores, but of ethics or morality proper. And quite clearly the two spheres are different. No one, for example, really believes that it was morally right for the Nazis to persecute the Jews (or that they ought to have done it) just because they believed it was right. One holding such a view would be committed to the proposition that the Nazis were subject to no moral criticism for what they did, and this is absurd. Being wrong about morality may, under some circumstances, excuse; but it can never justify. For example, we may absolve from moral blame the Jehovah's Witness who lets her child die for lack of a transfusion without thereby agreeing that the action performed was really right and ought to be recommended to others.

Now it should be fairly clear that it is only values in the first sense (mores) which can be regarded as discoverable by empirical science. Beliefs about values are not themselves values; they are facts. And thus, like all facts, they are open to the expert analysis of the behavioral scientists. But we must not be deceived into thinking that this expert authority about beliefs or mores extends to pronouncements about what really ought to be done. The scientist, like any other rational and informed man, may certainly be competent in moral discussion; but (and this is crucial) he is not *professionally* competent. Though his studies may give him access to facts relevant in moral argument, they do not give him special insight into moral conclusions. To put the point in another and perhaps even more obvious way: Scientists are professionally competent to tell us the most efficient means for the technical attainment of our goals; but they are not competent *qua* scientists to set those goals or to morally assess the means. Efficiency is not to be identified with morality.

These points are often forgotten when important decisions of social policy are being made. Menninger ignores them entirely:

> The very word *justice* irritates scientists. No surgeon expects to be asked if an operation for cancer is just or not. No doctor will be reproached on the grounds that the dose of penicillin he has prescribed is less or more than *justice* would stipulate. Behavioral scientists regard it as equally absurd to invoke the question of justice in deciding what to do with a woman who cannot resist her propensity to shoplift, or with a man who cannot repress an impulse to assault somebody. This sort of behavior has to be controlled; it has to be discouraged; it has to be *stopped.* This (to the scientist) is a matter of public safety and amicable coexistence, not of justice....
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> Being against punishment is not a sentimental conviction. It is a logical conclusion drawn from scientific experience. [pp. 17; 204]

It is almost impossible to believe that Menninger intends that we take these remarks seriously. How in the world is "being against" anything logically derivable from scientific premises? (I would love to see such an argument formalized.) And what moral are we supposed to draw from the remarks about the surgeon? It is, of course, true that no surgeon expects to be asked if an operation is just. But neither does he expect to be asked if an operation is hexagonal, approaches middle C, or tastes good. Are we thus to conclude that hexagonality, middle C, and good taste are meaningless concepts?

Of course, Menninger's thesis may be restricted solely to moral values, and the argument may be that their inaccessibility to scientific procedures renders them meaningless. But there is not a single reason to hold such a view (to hold that "meaningful" means "scientifically useful"); and, in fact, I do not think that Menninger himself really holds such a view—even if he does espouse it in theory. To say that a concept is meaningless and to really believe this are two different things. For example: Does Menninger really believe that, if police broke into his home and detained him for months without trial because some psychiatrist thought he was dangerous, he would be talking nonsense if he described his treatment as unjust? I seriously doubt it.

What is really going on in the quoted passage is, I think, the following: Menninger has noted that science, as a social institution,[5] has incarnate in it certain mores. And it is Menninger's view that these mores ought to be elevated to a more influential place in our moral decisions than they now occupy. But this is itself a piece of moral advice—a judgment of value priority and not of fact—and so it is open to the same kinds of standards we use in evaluating any moral recommendation. No matter how much Menninger propagandizes for the scientific status of his recommendations, the fact remains that they are recommendations and not findings. Thus with respect to them he has no professional competence. We must, therefore, evaluate his proposals in the light of all those considerations which are relevant from the moral point of view.

What are these considerations? To avoid starting a treatise in moral philosophy, I shall state rather dogmatically that there are two main kinds of considerations relevant to moral evaluation: considerations of utility; and considerations of justice. Utilitarian considerations are concerned with promoting the greatest amount of happiness and well-being in the world as possible. Considerations of justice function as checks on social utility, weighing against promoting happiness if in so doing some people must be treated unfairly in the process. These considerations compete and often have to be weighed against each other. But it is just this competitive nature of basic moral values that Menninger fails to appreciate. In effect, he opts for considerations of utility (e.g., health and public safety) to the exclusion of considerations of justice. And he does this with a vengeance:

> Eliminating one offender who happens to get caught *weakens* public security by creating a false sense of diminished danger through a definite remedial measure. Actually, it does not remedy anything, and it bypasses completely the real and unsolved problem of how to *identify, detect, and detain potentially dangerous citizens.* [p. 108]

The argument here seems to be that since health is the predominant value in psychiatry, its social analogue (public safety) ought to be the predominant political value. What is being suggested is that we deprive people of their liberty as a kind of preventive medicine, and this is clearly to choose social utility over one of the mainstays of criminal justice: procedural due process.

Our system of criminal due process involves such guarantees as the following: (1) No man is to be deprived of his liberty for what he is or what he might do, but only because he has in fact violated some legal prohibition. This is the traditional requirement for an overt act. (2) A man is to be presumed innocent. This means that the state must prove its case beyond a reasonable doubt to a jury of the defendant's peers and that the defendant may exploit the adversary system to its full to make such proof impossible. (3) A man is to be responsible only for what he has done as an individual. He is not to be held guilty because others like him often commit crimes.[6] (4) a man is not to be forced to testify against himself, to help the state in its attempt to deprive him of his liberty.

Such guarantees would have no place in a purely therapeutic or preventive context, and Menninger quite correctly argues that the procedures they involve are not the best way to arrive at truth and thus that they interfere with the efficiency of securing public safety (pp. 53 ff.). But of course they do; *that is their very function*! They aim, not at the discovery of truth, but at the protection of the defendant in his otherwise unequal battle with the state. And our employment of these procedures tests the

sincerity of our commitment to what is often claimed as the basic moral value in our system of criminal justice—namely, the belief that it is better to free some guilty persons than to convict some innocent ones.

We can begin to understand the tensions inherent in the criminal process only if we realize how the values of justice and due process compete with the utilitarian value of public safety.[7] If we were only interested in public safety, we would let the police coerce confessions, deny any excuses for wrongdoing, and even punish some innocent people to keep everyone else careful. One only has to call to mind Nazi Germany, Soviet Russia, and present-day South Africa and Greece for a picture of the logical outcome of a society which places order and public safety over all values of justice. (Almost unbelievably, from a man famous for his liberal and benevolent humanism, Menninger looks with wistful longing at the security provided by the legal systems of Greece and China!) [p. 277]

Being involuntarily deprived of our liberty (even by a benevolent Dr. Menninger who calls it therapy rather than punishment) is an evil most of us would like to avoid—particularly if we have done nothing wrong, but only appear to have "dangerous tendencies." Thus we should be quite stupid to take steps that would involve giving up the guarantees which help us avoid this evil. Menninger, of course, does not explicitly say that he is against due process (who would?); but if he is not against it, then his set of proposals involves a fundamental paradox. For if his proposed system is to retain all present guarantees to preserve fairly the freedom of each individual, why suppose that it will be any more efficient than present practices? To make it more efficient, some due process will necessarily have to be sacrificed.

THE SCIENTIFIC EXAMINATION OF DETERRENCE THEORY

It is absurd to characterize public safety as the *real* problem of criminal law (as though other issues, like due process, are illusions), but surely such safety is admittedly one of the important values that any system of criminal law must seek to promote. And so it is worth inquiring if it is even true that, as a matter of fact, our present system of criminal punishment fails to work in providing for our security. Here we are dealing with an empirical scientific issue, and one would think that Menninger would be on safe ground. But he is not. He tells us that we must replace punishment with therapy because the only possible defense for punishment is deterrence theory; and this theory is known to be false.[8] But he is quite wrong here. Deterrence theory is not known to be false, and Menninger fails to show that it is false. His whole case is one of ridicule supported by no evidence whatsoever. Here is all that he says to support his attack on deterrence theory:

> ["Brushes" with the law] are dreary, repetitous crises in the dismal, dreary life of one of the miserable ones. They are signals of distress, signals of failure, signals of crises which society sees primarily in terms of *its* annoyance, *its* irritation, *its* injury. They are the spasms and struggles and convulsions of a submarginal human being trying to make it in our complex society with inadequate equipment and inadequate preparations.
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> [We have described] a man who seemed to have spent his life going from one difficulty into another, into the jail and out of it, only to get back in again, like one caught in a revolving door. It ended in death. The grinding mills of the law did nothing for Crow; they cost Kansas City a lot of money, mostly wasted. It gave a score of people something to do, mostly useless. One might wonder what could have been done early in this chap's life to have protected his victims better. [pp. 19; 21-22]

It is almost impossible to know what Menninger expects us to conclude from these passages, for they appear to involve at least two gross confusions. First, as a psychiatrist, Menninger has perhaps seen a limited number of criminals who really are compulsive and thus are nondeterrable. And the existence of such people certainly points up a distinct failure within our system of criminal punishment. But they will indict the system *as a whole* only if they can be regarded as representative of criminality in general. But this is just the conclusion we may not draw on the basis of so limited a sample. What about the college student who smokes marijuana, or the Martin Luther King who engages in civil disobedience, or the university professor who omits some lecture fees on his tax return? These are all legally criminals, but are their actions "the spasms and struggles and convulsions of a submarginal human being"? Note what Menninger says:

> "Ah," the reader will say, "perhaps what you say is true in those violent rape and murder cases, but take everyday bank robbing and check forging and stealing—you cannot tell me that these people are not out for the money!"
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> I would not deny that money is desired and obtained, but I would also say that the *taking* of money from the victim by these devices means something special, and something quite different from what you think it does. [p. 183]

Here we enter the world of apparent fantasy. The actions of our pot smoker, our civil disobedient, and our tax evader are all symbolic of something unconscious. But, even if this is true, just how is it relevant? It will presumably be relevant only if it is the case that these unconscious motives can be said to compel the agent in such a way that he is not responsible and thus not a proper object for punishment. But, having ridiculed the notions of fault and responsibility, and having modestly declared the inability of the psychiatrist in a courtroom ever to say with any certainty that an action of a particular man was compulsive (and thus

nonresponsible) because of mental disorder (pp. 132 ff.), Menninger can hardly go forth and present a perfectly general theory of determinism for all human action. A general theory of determinism, if it rests on no inductive basis of established particular cases, is a metaphysical theory and not a scientific conclusion. And if, as a metaphysical theory, it requires that we stop distinguishing the actions of a Martin Luther King from those of a Daniel M'Naghten, then it is a useless bit of stipulation.

The second confusion in Menninger's rejection of deterrence theory is related to the first. It is the failure to distinguish special from general deterrence.[9] He thus makes a quite misleading use of the facts of recidivism. Recidivism surely shows that criminal punishment does not deter many of the particular people who are caught up in the criminal process. But this fact is quite irrelevant to the claim that having a deterrence system has the general effect of keeping many members of society from ever engaging in criminal conduct and thus making themselves eligible for the process. It is not difficult to believe, for example, that one major reason why more of us do not smoke marijuana or submit fraudulent tax returns is that we are deterred by the criminal penalties. To scientifically refute deterrence theory, and thus provide a basis for replacing our entire system of punishment with something else, it would have to be shown that substantial numbers of those who do not now commit crimes would continue to be law-abiding if all criminal sanctions were abolished. But we have no evidence at all on this complex counterfactual. And, in the absence of any such evidence, it is irresponsible to ridicule and reject deterrence theory in the name of science.

LAW AND PSYCHIATRY

The psychiatrist, Menninger argues, should be removed from the courtroom entirely (p. 138). I have some sympathy with these sentiments, but not for the reasons Menninger offers. His suggestion (a not unfamiliar one) is that at most psychiatric testimony is relevant to establishing the *mens rea* of the offense—that is, the mental element which establishes the degree of personal responsibility or blameworthiness for what was done. But, with such invective and ridicule, Menninger says that we should drop inquiries into mens rea entirely. We should simply inquire if the offense was committed, regardless of the mental state with which it was committed. If we determine that the prisoner (patient?) did commit the offense, he should be turned over to a team of psychiatrists and other experts. They would then inquire into his mental state in order to determine how long to detain him for society's protection and his own rehabilitation (pp. 113 ff., 139).

Though this proposal has a plausible ring to it, it is in fact almost impossible to give it a coherent interpretation. How, for example, can one convict for the offense alone when a mens rea is typically a material (i.e., defining) element of the offense itself? Was the offense murder or manslaughter? The question cannot be answered without an inquiry into mens rea—i.e., did the actor have malice aforethought? The revisions and complexities that elimination of mens rea would introduce into our legal system are vast. If he is aware of such problems, Menninger totally ignores them.[10]

Suppose, however, we did eliminate mens rea at the trial and then had our fellow convicted for the offense of (say) "causally bringing about the death of another human being." And now he is turned over to psychiatrists. The kinds of problems that might arise become obvious. Suppose he caused the death by nonculpable accident (that is, he did not even have what we would now call the mens rea of negligence). Further suppose that, upon examination, he was found to be "potentially dangerous." Should he be locked up for a period of enforced therapy (perhaps for life) even though he had committed no wrong at all? Or consider trivial offenders. Should a man who compulsively cashes bad checks be sent to a mental institution for an indeterminate period because he is hopeless? The questions are not medical or scientific. They are questions of *moral* and *political decision,* and we should be foolish to entrust our responsibility for them to a team of "experts." Criminal judges, whatever their weaknesses, are at least bound by the rules of our community. They may not, as may psychiatrists, act on their own personal conceptions of what is good for or dangerous to the community.

An actual example is illustrative here: The closest existing analogue to what Menninger advocates is to be found in the American juvenile courts. Here it has been traditional to suspend guarantees of due process because the state was presumably acting in the benevolent interest of the juvenile rather than as a punishing agent. (It is really astounding how we can deceive ourselves merely by changing the name of what we do.) A reading of the opinion of Justice Fortas in the 1967 Gault case (where some due process is finally guaranteed to juveniles) should give us pause before we hand over any other area of human liberty to benevolent experts.[11] Menninger is right in his premise that science and due process do not mix well. The moral to be drawn, however, is the following: Beware of psychiatrists bearing gifts.

Near the end of his argument, after dismissing the notions of blameworthiness and responsibility, Menninger suggests that instead of punishing people we might impose *penalties* on them:

> If a burglar takes my property, I would like to have it returned or paid for by him if possible, and the state ought to be reimbursed for its costs, too. This could be forcibly required to come from the burglar. This would be equitable; it would be just, and it would not be "punitive." [p. 203]

Just how "punitive" this would be depends, I suppose, on just how rich the burglar is and on just what happens to him for nonpayment. But this is not the objection I want to pursue. What interests me is the suggestion that criminal law ought to move toward becoming a part of tort law—the law of damages for harms done not involving breach of contract. Does Menninger find damages attractive for any other reason than that they are not *called* "punishment"? After all, in tort law conditions of blameworthiness and responsibility are relevant. We do not normally make a man pay damages in the absence of any fault on his part. We rather, as the phrase goes, let the loss lie where it falls. If I am not negligent, then normally (though not always) I am not liable for damages. What if Menninger's burglar was a man who believed the property was his own, or who was sleepwalking, or caused damage in an epileptic seizure, or took it to use for his self-defense? Judgments of liability for damages might well differ in all these cases. And so even this move toward tort will not allow us to avoid something like the criminal law's mens rea.

CONCLUSION

Dr. Menninger is a decent and generous man, and I do not mean to charge that he intentionally advocates injustice. He has simply fallen victim to the trap which often leads benevolent men to pursue an unjust course: the singleminded pursuit of one social goal to the exclusion of all others. In addressing himself to the limited goals of public safety and rehabilitation, he does highlight some terrible abuses and inadequacies that exist within our present system of criminal punishment. What we do not get from him, however, is a persuasive case against that system itself.

I would not pose as a man devoted to our system of criminal punishment. It contains much hypocrisy and moral pretension and is, at best, a necessary evil. However, in spite of its admitted shortcomings, it does appear to do at least a tolerable job of balancing public safety against the often competing values of liberty and due process. And thus there is a presumption in its favor. By this I mean nothing more than that the burden of proof lies on the man who would replace it to provide careful arguments which are conceptually clear, empirically well-founded, and morally cogent. It is just this burden which Dr. Menninger has failed totally to bear.

NOTES

1. Standard sources for such a view are Alexander and Staub (1956), and Abrahamsen (1960). This theme is also to be found throughout most of the books produced by winners of the Isaac Ray Award. The most detailed and persuasive case against this position has been made by Szasz (1963). See also Wertham (1955).

2. It is significant that the judge is listed last, and that it is not specified whether or not he is to have a decisive veto power with respect to a violation of the prisoner's rights. The judge must simply be "interested" in these rights. The quoted portion of the extract is from Glueck (1936).

3. It is important to note that Menninger's recommendations range over supposed offenders. Nowhere does he suggest that the operations of these centers (including their detention powers) are to be restricted to those who have been convicted of some legal wrong.

4. Menninger is often called in for expert testimony at legislative hearings on criminal law reform, for he is taken to be a chief spokesman for a liberal and humane jurisprudence. Such a reputation accounts, I gather, for his selection for a feature interview in the issue of "Psychology Today" devoted to law and psychology (February 1969). Views like Menninger's are surely in part behind the pressure for sexual psychopath laws and other laws for the preventive detention of those (e.g., drug addicts, homosexuals, and drunks) who are judged to present a "potential danger" to the community.

5. For an elaboration of the institutional character of science, and of psychiatry in particular, see the material by Szasz in Schoeck and Wiggins (1962).

6. It is often not noticed that provisions for preventive detention (especially if they rest on statistical evidence) tend to involve *collective* rather than individual criteria for guilt. It is judged that Jones is to be detained because he is a member of some class (e.g., vagrants) which manifests a high crime rate. This point is totally missed in the otherwise excellent article on preventive detection by Dershowitz in the "New York Review" (13 March 1969).

7. An important recent book, Packer (1968), illuminates the tension inherent in our system of criminal punishment by contrasting the "crime control model" with the "due process model."

8. Menninger dismisses entirely the arguments of those who have advocated a retributive theory of punishment. For example, he fails to consider the possible alteration in our concept of a human being (and how we *treat* human beings) if we cease to regard people as agents of dignity and responsibility who are capable of being blameworthy for what they do. To see that one can offer a retributive theory which is something more than disguised vengeance, consult Morris (1968).

9. For more on this distinction, see Packer (1968).

10. Some psychiatrists try to meet this worry by advocating a *bifurcated trial* (something along the lines of the California practice). There is to be a guilt trial and a sanity trial. At the former, considerations of mens rea will be relevant and allowed. All questions of sanity, however, will be reserved for the second trial; and thus it is only at this second trial that psychiatric testimony will be allowed. This system, however, will fail for the following reason: If a man is insane, he might be incapable of having the mens rea required for the commission of the offense. It would thus

deny him due process to exclude psychiatric testimony from the first trial. See People v. Wells.

11. See also the horror stories of arbitary mental commitment cited by Szasz (1963). Szasz has raised profound questions and deserves a serious answer. Menninger simply proposes to eliminate such abuses by training police and mental health workers with the proper *therapeutic attitudes* (pp. 260; 271). But this misses the point entirely; benevolence is not justice, and therapeutic attitudes are not necessarily due process attitudes. Menninger might also recall Lord Acton's reminder about the corruptive nature of power. Or does he perhaps think that psychiatrists are immune from such corruption? Nice, benevolent people are perhaps preferable to mean, stubborn ones, but it does not follow from this that the former should be allowed to coerce and confine the latter.

CASES

PEOPLE v. WELLS (1949) Cal.2d. 33: 330; P.2d. 202: 53.
In re GAULT (1967) U.S. 387: 1.

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