

Menninger: The Crime of Punishment

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The Crime of Punishment. By KARL MENNINGER, M.D. New York: The Viking Press, 1968. Pp. 305. \$8.95.

Though by announced title, Dr. Karl Menninger's main attack is directed to the vengeance or punishment seeking principles underlying prevailing penal systems of the United States, a very primary value of the book lies in the depth and explicit candor with which the author analyzes the adversary systems of criminal justice from arrest through trial and the aftermaths.

Menninger is quite aware of lawyers' little secrets. Self-deception is not one of his arts. He writes with anger and indignation at our dual system of criminal justice: promised playacting for the rich, notorious, or persistent; second-hand adjustment plea for the poor, ignorant populace.

Menninger knows of "el Dissapero" or the suspect's "rights," staunchly defended because ninety-plus percent of these poor beggars will waive "rights" and "voluntarily" plead guilty to a negotiated King's Calendar sentence. Menninger knows criminal justice as it is. His analysis is quite bereft of desperate accolades in prose. Menninger deplores the de facto revolving door system of criminal jurisprudence and writes with no sympathy for the de jure system either.

He attacks with vigor the infrequent jury trial ("an age old *mise en fene* and the stylized symbol of the whole process of the legal justice"); the appeal game ("laissez faire"); the elected judges work product; the sentences ("absurd"); post appeal and prearraignment reception ("calf branding"); prison therapy milieu (idleness co-existing with a silent, sullen massive threat of instant violence); and the offender's tomorrow (the eighty plus recidivist or repeater rate).

Menninger puts a hammerlock to the phrase "justice." He asks why did Bentham, Hobbs, Spinoza, Holmes, Judge Frank and Edmund Cahn despair of "justice." He answers that they found *law sanctioned injustice* everywhere. Law as justice is not often that *active process* of preventing or repairing wrong. Law begins with an answer not a problem; a universal premise is not, mind you, a "hypothesis." Too often, as Professor Fred Rodell of Yale Law School put it, "The Law not only stands still but is proud and determined to stand still."¹ Menninger writes, "there is no 'justice' in chemical reactions, illness, or in behavior disorder!"² Menninger lacks lawyers' reverence for abstract justice, stare decisis or precedent in a dynamic and changing world:

All of us in approaching problems in daily living, problems in our families or occupations, try to find the most expedient, the most effective, the most sensible thing to do about these problems. We sit and ponder them, we confer, we consult. We put our heads together in little quarterback huddles—or big ones—a dozen times a day. We try to decide what can be done and how best to do it. Families do it, engineers, doctors, hospital staffs, plumbers, businessmen, salesmen do it. So do school teachers, bankers, merchants, railroad officials, and government officials. Everybody does it. Everybody, that is, except our representatives in the judicial system. . . . In juridical thinking one does not ask what will work, or what will be useful, or what will be the most economical, or the most effective. All "principles" but one are disregarded; one asks only "what is legal."³

Menninger's surgeon's scalpel cuts with ease through hallowed totems, comfort-

¹ MENNINGER, *THE CRIME OF PUNISHMENT* 95 (1968).

² *Id.* at 96.

³ *Supra* note 1, at 16-17.

able platitudes and "caboose talk" that many law schools are so busy assiduously proclaiming to the "moon generation."

Examples:

The "fair trial":

Nothing could be more unfair than a fair trial operating on the assumption that in respect to behavior control all men are created equal.⁴

What all defendants are faced with:

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. . . . The discoveries of Sigmund Freud and other scientists near the turn of the century, led to new understandings of human behavior that made a tremendous impact on almost all aspects of human life—all except law.⁵

The psychiatrist as "expert" witness at the insanity plea:

Why us? Why not a clergyman, mayor, or editor of a local newspaper. We neither invented the phrase nor defend it.⁶

On police (And maybe, had he thought about it, their critics):

They are caught in an obsolete, ineffective crime breeding—rather than crime preventing system, which we have inherited. My charges are against the system, not the people in it. The system is ours as much as theirs.⁷

On the causes of crime, Menninger avoids the more diffuse analysis of society's role in the origins of hard core behavior, stressing instead the role of individual ego, id and super ego. Relief from a profound sense of helplessness, and the inability to conform to rules or accept mental illness are conscious causes of crime, but Menninger discusses unconscious determinants of overt crime such as self-denial, projection, flight to custody (pre and post *Miranda* warnings no doubt) or over-rigid, unconscious taboos.

In the treatment, reformation and prevention of crime, Menninger writes of segregation, confinement or imprisonment as "Punishment," "Penalty" or "Price."

Menninger is opposed to the vengeance seeking "good guy-bad guy" concept of punishment.

All legal sanctions involve penalties for infractions. But the element of punishment is an adventitious and indefensible additional penalty; it corrupts the legal principle of quid pro quo with a moral surcharge. Punishment is in part an attitude, a philosophy. It is a deliberate infliction of pain in addition to or in lieu of penalty.⁸

Confinement or imprisonment might, however, be a "Penalty" for crime or law infraction.

⁴ *Supra* note 1, at 92.

⁵ *Supra* note 1, at 91-92.

⁶ *Supra* note 1, at 139.

⁷ *Supra* note 1, at 34.

⁸ *Supra* note 1, at 203.

If a man strikes a rock in anger, his suffering from a bleeding hand is a penalty not a punishment. If another man over-smokes and develops lung cancer, the infliction is a penalty not a punishment.⁹

Though Menninger is opposed to punishment defined as pain for the sake of inflicting pain, he strongly supports the concept "Penalty."

Certainly the abolition of punishment does not mean the omission or curtailment of penalties; quite the contrary. Penalties should be greater and surer and quicker in coming. I favor stricter penalties for many offenses, and more swift and certain assessment of them.¹⁰

Thus, Menninger would preserve in criminal law processes a role for "Penalty" where swift, certain and *useful*.

The distinction between "Penalty" and "Punishment" is not, as Frankfurter would have it, "A horse easily curried." Defining punishment as "bad" but penalty as "appropriate" may satisfy a psychiatrist's longing for neutral principles, but a patient who acts not "bad," but "inappropriately," may *expect or receive* (note the difference) the appropriate penalty (not punishment) of confinement to the quiet room. A rose is a rose is a rose.

And on the concession that there but for the grace of . . . go us, how are the "marginal we" to be deterred or discouraged from pursuit of the life of crime? Menninger avoids a skirmish, hence, I guess the battle. He sees imprisonment or segregation of a convicted offender as a minor and occasionally useful aspect of therapy, but denies the usefulness of imprisonment to deter the free. Is he sure? Menninger, without reference to free will, responsibility, consciousness of right or other assumptions and premises of Russian jurisprudence (which of course psychiatrists find so unreal), concedes much to tradition by the concept of imprisonment as a "price" for crime.

If we disregard traffic signals we are penalized, not punished. If our offense was a calculated "necessity" in an emergency, then the fine is the "price" of the exception. Price is an agreed-upon predetermined value, voluntarily tendered in exchange for a desired goal or gain. Penalty is a predetermined price levied automatically, invariably, and categorically in direct relation to a violation or infraction of a pre-set rule of "law." In a sense it, too, is voluntary: the payer of the penalty knew from the outset what it would be if he incurred it.¹¹

Price of course speaks to market options or that odious free will idea. Penalty as the do good *or else* speaks to an announcement promulgated in the hope that, out of fear or reason, the citizen will not encounter the promised legal consequences for antisocial acts. These consequences can be labeled prices, liquidated damages or just possibly community vengeance.

Perhaps then the price for crime might be a penalty in sheep's clothing, and penalty as the price of crime might, at least in some measure, represent punishment, the fear of which *just might* deter the marginal "we" from socially destructive or inappropriate behavior.

I intend not to demean Dr. Menninger's distinctions, but if the deterrable are

⁹ *Supra* note 1, at 202.

¹⁰ *Supra* note 1, at 202.

¹¹ *Supra* note 1, at 202.

to be deterred from casual violence, acting out of socially destructive behavior, then fear of punishment, vengeance, penalty, price or call it what you may, has a place. In the late hours of Watts the sign read "Turn right or die." There is more to the intelligent ordering of human behavior than rehabilitation of an offender.

The transcendental significance to Dr. Menninger's work and plea is the reasoned hope that pain for pain's sake, or punishment unrelated to *attainable societal goals becomes anathema*.

We should favor, as he does, any aspect of community therapy when and if it *can clearly* rehabilitate him, or in proper perspective, deter them. Maybe the anti-trust violator should go to prison and the armed robber to the health resort. As it is now, the violent crime offender gets penal servitude (which one or both of his parents had no doubt accustomed him to), and the white-collar criminal gets the fine. (Price!)

Let's be honest with ourselves. We don't know why we suspend sentences, fine, place individuals on probation or send people to jail. Menninger writes of his one day at a hasty and disorganized conference with the commissioners, lawyers, and staff of the President's Commission on Law Enforcement, which, in 1967, issued its two year study—"The Challenge of Crime in a Free Society."

Whatever conclusions the clerical staff was able to draw from the scattered comments, were never submitted in writing to the participants; indeed, I never heard from the Commission again after this one hectic session. . . . Certainly someone kept at it assiduously, but within two years an elaborate report appeared making 200 specific recommendations; this, after an initial acknowledgment that things "could hardly be worse," and that no one knew exactly how bad they were. "Its [the report's] major intellectual contribution," commented a British writer, "seems to be an admission of almost total ignorance—about the extent of the crime problem in the United States, (perhaps only a tenth of all crimes are reported), or the correction, or even the definition of crime."¹²

Dr. Karl Menninger and others in medicine, criminology, psychology, and prison administration are doing something to recommend programs which would have meaning and impact on the very visible eighty percent plus recidivist rate for those unfortunates who *after* legal process and imprisonment repeat the same or worse offenses. Though many projects in this direction have been more storefront in quantity, *only money* and legislative inaction stand between the present and the kind of breakthrough effected in the last twenty years with the non-criminally ill. Space age treatment of behavioral problems of those already imprisoned by the adversary process is possible if the public will spend more money for savings later. Yet, though, is not prison reform the *cart* of law reform and not the horse? Menninger does not discuss substantive criminal law. I suppose he would agree that infamous crimes such as murder, rape or robbery will always present custodial problems in any society. He does not allude to the more controversial crimes of drugs, gambling or consensual sex offenses. He need not. The horse of criminal law is that neglected subject "procedure." The horse, in whose stirrups we students, judges, legislators, educators and the tribal public, ride so uneasily, is the adversary system of criminal justice. Long and utopian on rights and promise, and so pitifully short on delivery.

To some of us anyway, suspect rights or the "thou shalt nots" cannot reform the delinquencies of court and police when rights are engrafted to that "enshrined process," the failure of which very largely spawned the very abuses "rights" promise to cure. Succinctly put, the adversary system of criminal justice can not afford penal

¹² *Supra* note 1, at 247.

reform. Money does not purchase an affair of the spirit. How much can money, or lots of it, do for arrest, indictment, "voluntary" plea, an ambitious prosecutor, a loyal defendant advocate, enough amounts of the "right kind" of evidence, a public and private "trial," or six successive appeal options for the smart people!

It is ironic that over one-half the pages of *The Crime of Punishment* (the first half) are directed at the peculiarly legal processes and procedures prior to "guilt," punishment or imprisonment. Maybe we lawyers contribute to the crime of punishment! Does the adversary truth process, fully developed 250 years ago, co-existing with supposed great protections and encumbered by ambitious crusades, work? Do the ninety percent guilty plea ratios, made credible by an exquisite variety of offenses, counts, sanctions and penalties, serve either reformation, vengeance, deterrence, honesty, science, health or social control?

Why must there be *the trial* that we knew in the unscientific and suspicious rural eighteenth century England? Why must our evidence rules remain antiquated, hopelessly unconversant with hardware, software or modern science; dishonored by both sides in the trial by "ordeal." Why should lawyers in 1969 "represent" "guilty" clients? And why should clients be "guilty," or ten of them "released" to save one "innocent?" And while on the subject, why should an ill-informed public (the toys of "competent" counsel) be the "finders" of the "fact," or ill-trained elected judges be the arbiters of remedy? There may be more of us guilty of the crime of punishment than the prisons. A non-lawyer, Karl Menninger, pleads for *legal* reform. What are we lawyers going to do?

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