

BOOK REVIEWS

TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY. By G. Edward White.¹ New York: Oxford University Press. 1980. Pp. xvi, 283. \$19.95.

Reviewed by Robert W. Gordon²

Professor White tells the story of the development of tort law — or rather, theorizing about tort law — through four successive stages of thought he calls (1) Legal Science (or Conceptualism), (2) Realism, (3) Consensus Thought, and (4) Neo-conceptualism. His story begins around 1870, when legal academics, inspired by a generally prevailing ideal of scientific endeavor, tried to sort private law into systems of general classification. What emerged from this process was the doctrinal field of torts, until then a heterogeneous jumble of miscellaneous rights of action. In their passion for generalization, legal scientists sought to reclassify as many of these actions as possible under a single theory of liability, whose organizing principle was fault. By the early years of the new century the scientists had popularized among the bar the now familiar organization of the field, into intentional torts, negligence, and strict liability — though they thought the last anomalous and kept trying to expel it. Soon, however, there arose a generation of Realists (preceded by the transitional figure of Francis Bohlen and typified by his opponent Leon Green), who, influenced by the antiformalist and empiricist views of the philosophy and social science of their age, sharply criticized the “principles” developed by legal science as excessively abstract: “negligence,” for example, could only be given meaning by examining particular types of risk created by particular categories of plaintiffs; “legal” or “proximate” cause was shown to require the same kind of inquiry into the relation of the parties, and the resolution of questions of negligence or causation came to be seen as calling for judgments of policy, ascertaining the “interests” of all the relevant parties and arriving at some balance of them. After some skirmishes, the Realist view generally triumphed by the 1930’s, though the doctrinal categories of Science were retained as ways of organizing the field. But the atomizing tendencies of Realism, its drive to reduce

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² Professor of Law, University of Wisconsin. I would like to thank Henry Steiner for his helpful comments on an earlier draft of this Review. A conversation with Professor White improved the manuscript at several points, though of course he is not to be taken as having approved its final form.

legal rules to a rubble of disconnected particulars, set in motion a yearning for intellectual equilibrium and repose. This mood persisted through the 1940's and 1950's and was very creative in a practical way, producing out of its confidence in "objectivity and rationality" (p. 189) *Prosser on Torts*,³ Judge Traynor's opinions on strict products liability,⁴ and the second *Restatement*.⁵ This "Consensus Thought," however, had never really responded to the threat of Realism by formulating a new structure for tort law; it had only stopped talking about Realism. Consequently, that threat persisted into the late 1960's and 1970's, when a diverse band of tort theorists (Posner, Epstein, Fletcher, Calabresi) responded by setting out to restore to the field some general unifying conceptions. Now, the rival theories of these Neoconceptualists struggle to dominate the analysis of tort liability.

I.

If the story thus outlined sounds rather familiar, it's because it is: for law teachers at least, the experience of reading this book will be like taking a bus tour through the city in which they have lived their adult lives: "Now on your right is the *Palsgraf* case,⁶ a case you would hardly believe really happened. . . . And if you look closely, you can see where products liability began to emerge in *Escola*."⁷ The tourist may wonder why the bus (the trip is billed as a tour of intellectual landmarks) skips some of the most famous attractions, since it stops at length by Holmes, Bohlen, Leon Green, Cardozo, Prosser, and Traynor but misses or slights Jeremiah Smith, Pound, Wigmore, Seavey, Harper and James, Hart, and Honoré, and even (most surprisingly) Learned Hand, whose negligence "formula"⁸ is indispensable to every torts student. Where he does stop, White as tour guide provides concise and useful accounts of the major changes in thought summarized above; these are sometimes pedestrian but some-

³ W. PROSSER, HANDBOOK OF THE LAW OF TORTS (1st ed. 1941).

⁴ See, e.g., *Greenman v. Yuba Power Prods.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (en banc); *Trust v. Arden Farms Co.*, 50 Cal. 2d 217, 235, 324 P.2d 583, 594 (1958) (en banc) (Traynor, J., concurring and dissenting); *Gordon v. Aztec Brewing Co.*, 33 Cal. 2d 514, 523, 203 P.2d 522, 528 (1949) (en banc) (Traynor, J., concurring in the judgment).

⁵ RESTATEMENT (SECOND) OF TORTS (1965).

⁶ *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

⁷ *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944).

⁸ "[I]f the probability be called P; the injury, L; and the burden B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B < PL$." *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

times insightful. Of particular interest is White's perceptive discussion of the battle between Leon Green and Francis Bohlen in the 1920's and 1930's (pp. 75-83), the confrontation of mature Realism with an earlier form, modified Conceptualism. Green and the true Realists, on one hand, and Bohlen and the modified Conceptualists, on the other, shared a basic assumption: policy is critical to the resolution of any legal question. But, as White explains, they derived irreconcilable conclusions that characterize the two strands of scholarship within the Realist movement — Bohlen thought doctrinal rules could be adapted to social change, but Green came to believe all rules were myths.

II.

But White aspires to something more than a survey of theories about tort law. The book's real claim to novelty is in the way it explains why tort doctrine has taken the forms it has; and it is that apparatus of explanation that I want to discuss.

To begin with, White's version involves some important deviations and omissions from the usual telling of the story. Normally "social forces," vaguely conceived of as "industrialization" or more concretely as "the railroads" or "the factory system," play an important causal role.⁹ In the benign version, the spirit of the common law deploys the negligence principle to protect infant American industry against costs that would hamper its takeoff, but it repudiates negligence and turns to promoting social welfare through strict liability when such protection is no longer necessary for economic growth. In the harsher, Populist version, railroads and industry capture the legal system in the nineteenth century and twist it to their design to force farmers, workers, passengers, and shippers to subsidize their accident costs; but these groups organize in their turn to qualify or repudiate the negligence principle through employers' liability, railroad safety, and workmen's compensation statutes; and gradually over this century the courts come to recognize their interests in spreading the risks of accidents by shifting them back to the enterprises that "cause" them. Often the two versions are combined, presenting the law as having been perverted to private ends in the nineteenth century but restored to the true norm of the public interest in our own.

⁹ See, e.g., Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

White deliberately turns his back on all such interpretations — less, apparently, because he rejects them than because he thinks them incomplete. An approach from the perspective of intellectual history, he says, explains as much or more about “the emergence of Torts as a distinct branch of law” (p. 3). At first the choice of emphasis seems eccentric. Here is a history of tort law that omits — with rare, fleeting exceptions — any mention of railroad or industrial accidents, medical malpractice, the personal injury bar, the contingent fee, accident and liability insurance, and the entire regime of relevant public law — from workmen’s compensation, the Federal Employers’ Liability¹⁰ and Safety Appliance Acts¹¹ and statutory limitations on defenses, to the modern Occupational Safety and Health¹² and Consumer Product Safety Acts¹³ and no-fault automobile insurance plans.¹⁴ In a way, White’s selection of his topic is unfortunate, as it would be fascinating to learn, for example, who the lawyers were who took accident cases in the nineteenth century and how they worked out the ground rules of the negligence system with their opponents in the legal departments of railroads, what was thought of as a strong case and a weak one, what role the juries played, how damages were categorized and measured, whether (as seems unlikely, from what we now know¹⁵) appellate doctrine was strictly followed by trial courts or (as seems more likely) relaxed to favor plaintiffs, and so forth. White is just not interested in this level: his subject is juristic writing, and indeed such writing at its highest pitch of refinement. He rarely tells what happens to tort doctrine in the opinions of ordinary state and federal judges but concentrates instead on the law of the jurisconsults, the systematic efforts of academic writers and academically minded judges.

Disappointing though it may be to those who keep hoping for something completely different in the legal history line, White’s choice of emphasis is defensible. Surely the history of legal ideas is an important branch of the history of political and economic thought, of the way in which people try to explain, justify, and rationalize the social arrangements under which they live. And White’s thesis that formal systems of legal thought significantly influence the subject matter of tort law is intriguing. The ideas of the mandarin often deviate

¹⁰ 45 U.S.C. §§ 51-60 (1976).

¹¹ *Id.* §§ 1-16.

¹² 29 *id.* §§ 651-678.

¹³ 15 *id.* §§ 2051-2081.

¹⁴ *E.g.*, CONN. GEN. STAT. ANN. §§ 38-319 to -351 (West Supp. 1980); MASS. GEN. LAWS ANN. ch. 90, §§ 34A-34J (West 1969).

¹⁵ See L. FRIEDMAN, A HISTORY OF AMERICAN LAW 423 (1973).

from those of the bar generally, because of the academics' professional predilection for theory and "reform." But it is exactly for that reason that academic legal writers make such good sources for the intellectual historian: they have already done the spadework of trying to abstract a clear and concise version of the common sense of their time, so as to bring current practice into line with what they regard as its underlying core of principle. Even when they are least representative, because most critical of the contemporary common sense, they are often most influential. Torts, as White often points out, has notoriously been a field in which the wild academic theories of one generation have become the practitioners' clichés of the next. Furthermore, if one is trying, as White is, to explain how formal systems of doctrine are made and unmade, it is not a bad strategy to stick fairly closely to the doctrinal writers themselves, rather than hunting far afield for explanations from social context. For it is actually very difficult to account for the emergence of negligence as a general organizing principle of tort liability as if it were a technological response of the law to the "social needs of industrialization," for one would then have to explain, for instance, why England and the United States seem to have undertaken the systematic generalization of the fault principle to include all tort liability at the same time (1870's and 1880's) despite England's much earlier industrialization as well as why Germany responded to industrialization by *imposing* strict liability on railroads and industrial concerns for accidents by way of exception to a preexisting fault standard!¹⁶ There are simply too many variables in economic growth to support a hypothesis that any of them is socially "necessary."

It is likewise difficult to account for the negligence principle simply as having been created by interest groups such as railroads and factory owners, though undoubtedly lawyers for these enterprises played a part in shaping the case law from which the principle was synthesized and later in ensuring its general diffusion through the profession. Lawyers commonly believed that entrepreneurs had a stake in systematic legal science because of its supposed benefits of certainty and predictability.¹⁷ But that belief is only legal-intellectual ideology

¹⁶ See F. LAWSON, *NEGLIGENCE IN THE CIVIL LAW* 45-46 (1950).

¹⁷ Morton Horwitz' much-criticized thesis that 19th century judges fiddled the liability rules in part to help transportation and industrial enterprises externalize their costs, M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, ch. 3 (1977), seems to me perfectly correct if taken as a proposition about judicial ideology: it's what the judges repeatedly said they wanted to do. Whether the rules had any such effect is a totally different question, not resolvable by doctrinal history and possibly not resolvable at all.

and often not justified — as for example when entrepreneurs want to change the rules, when they are indifferent to them altogether, or when they prefer them in as tangled and confusing a mess as possible.¹⁸ Employers who want to reduce the cost of accidents can invest in favorable doctrine such as the fellow servant rule; they can also invest in accident prevention, overkill deterrent litigation, firing workmen who bring tort claims, agitating against the contingent fee as a means of financing claims, lobbying for state-funded insurance, etc. Employers were quick enough to abandon the old war cry of “no liability without fault” when compromise on workmen’s compensation offered the prospect of quieting labor trouble over safety at an acceptable cost.¹⁹

White does not suggest, nor should this critique of the attribution of legal developments to sociological factors be taken as, a plea for a return to the old idealistic view that legal doctrine “evolved” solely through its own internal logic in ways that had nothing to do with factories or railroads. The point is just that the usual social theories connecting doctrines to factories and railroads — that the doctrine “serves social functions” or is the “product of interest-group pressures” — are so unpersuasive in their current form that one cannot blame a legal historian for taking up the much less problematic task of trying to get straight at least what the doctrine was all about.²⁰

III.

For this purpose, however, White’s book is not as informative as it might be. One hopes that an intellectual history of a body of law will try to reconstruct the conceptual world

¹⁸ In the late 19th century, for example, one of the great projects of reform-minded judges and legal academics was promoting “uniformity” by means of uniform state laws, the application of “federal general common law” in diversity jurisdiction, and the standardization of doctrine through authoritative treatises and casebooks, “national” law curricula like Harvard’s, and heavy reliance on England as the mother jurisdiction. Entrepreneurs took very little interest in any of this, preferring to exploit the advantages of the hodgepodge muddle of law in a diverse federal system. See Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 L. & SOC. REV. 57, 117-18 (1975).

¹⁹ Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

²⁰ The closest thing we have to a historical account attempting to vindicate an instrumental theory of the relation of doctrine to economic behavior is a pathbreaking study by a nonhistorian: Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). I remain skeptical about whether, given the number and complexity of the variables intervening between the statement of the rule and its application (see pp. 907-08 *supra*), any such theory is tenable.

of its creators, to describe their system of thought and the sources they assembled to construct it, and perhaps also to reveal its intellectual context, its relation to other contemporary systems of thought. White's descriptive accounts of Science, Realism, and Consensus are frustratingly vague; he rarely tries except in the most general way to outline their substantive content. His references to context tend to be to shadowy names of intellectual movements; and he seems almost completely indifferent to exploring sources.

The advent of the idea of Legal Science is his master key to understanding tort law of the late nineteenth century. Yet we never learn much about where it came from or even what it was, and what we do learn is muddled. Although it was not until 1870 that the legal elite found a solid institutional home for their ideal at Harvard, they had aspired throughout the nineteenth century, as White says (p. 252 n.22), to an ideal of law based on a scientific scheme of principled classification. Of course, that late nineteenth century jurists *talked* about science in more or less the same way as the previous two generations does not mean there was nothing different in how they actually went about *doing* it.²¹ White, though, offers little assistance in defining the late nineteenth century version.

²¹ In ante bellum American legal texts the meanings of "legal science" were as diffuse as references to the idea were frequent. It sometimes meant the empirical-rational method of inducing "principles" from cases, sometimes also the grouping of principles in some scheme of classification, and sometimes just the imposing mass of liberal-classical background erudition that the educated practitioner was expected to possess. By White's period these earlier meanings had mingled with more specific ones: the systems of analytic classification suggested by John Austin's *LECTURES ON JURISPRUDENCE* (S. Austin ed. 1861-1863) and the methods of German legal-historical scholarship. See, e.g., S. AMOS, *THE SCIENCE OF LAW I-12* (1877). Scholars such as Ames, Langdell, and Holmes mostly thought of Science in terms of these more specific meanings, though Langdell's famous remarks —

Law, considered as a science, consists of certain principles. . . . Each of these doctrines has arrived at its present state by slow degrees. . . . This growth is to be traced in the main through a series of cases, and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied.

C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* vi (1871) — could have been made by any ante bellum lawyer. On the other hand, although direct comparisons of legal to natural science were very common in the ante bellum period, my sense is that after 1870 *serious and detailed* lawyers' use of natural science analogies in Anglo-American scholarship is very rare. An important exception perhaps is Pollock's notion that law may be seen as probabilistic prediction of future decisions from regularities in past ones. F. POLLOCK, *The Science of Case-Law*, in *ESSAYS IN JURISPRUDENCE AND ETHICS* 237, 247-53 (1882). This is not at all to challenge White's basic point that positive natural science was taken by most Americans to be the model for learning in the late 19th century, but only to say that this very general aspiration, shared by learned persons in all fields, is not very helpful in pinning down the specific aims and methods of legal science.

Initially, it seems to be "conceptualization" — the ordering of knowledge into broad categories (p. 6).²² Later, Science is described as the method of extracting general hypotheses by induction from factual data and verifying them by application to more facts: this "revolutionary" method is neatly exemplified by Langdell's view of cases as the specimens that the common lawyer sorts into classes according to principles (p. 26). So it is, but the method is old-hat Baconianism! Perhaps White has been misled by the nineteenth century legal elite's incessant speechmaking about the need to make law scientific into supposing that they adopted the methods of modern natural science; actually, it would be awfully hard to show that most of them even knew anything about it.²³

One way to figure out what legal and other sciences specifically owed each other in this period would be to explore parallels among fields. One might usefully start with scholars whose tasks were similar to those of the legal writers, such as historians of political institutions and ideas, philosophers concerned with causation, or economists and social theorists, and perhaps at some point go on to explore the striking resemblances between late nineteenth century legal thought and classical political economy, and finally consider the uses that legal thought made of social evolutionism and of the "comparative method" of philology and anthropology.²⁴

If that enterprise seemed too wildly ambitious, as naturally it might, one could pull back to the conventional technique of examining the sources that were cited by the legal writers themselves, which Mark DeWolfe Howe used beautifully in his intellectual biography of Holmes.²⁵ Astonishingly, White does not do *any* of this sourcework; he gets through two chapters

²² Unhappily, this view is first illustrated by the work of Nicholas St. John Green, a brilliant forerunner of legal and philosophical pragmatism, whose actual ideas follow more closely White's formula for Realism (p. 65) — "presentism, objectivism, empiricism, and anti-universalism" — than that for Science.

²³ President Eliot of Harvard, a *real* scientist, probably had no notion that his law school dean was talking about a classical Roman idea when he said that law was a science. Eliot thought the "scientific" thing at the Law School was its fancy new "clinical" method of teaching: giving students first-hand exposure to the specimens, actual cases, instead of filtering the cases through didactic treatises and lectures. See Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329, 334-36 (1979), for comparisons of the "clinical" methods introduced at the Law School with those promoted by Eliot at the Lawrence Scientific School, M.I.T., and the Harvard Medical School.

²⁴ See, e.g., P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979); J. BURROW, *EVOLUTION AND SOCIETY* (1966); P. STEIN, *LEGAL EVOLUTION* (1980).

²⁵ M. HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882* (1963). See also the provocative sketch of C. FIFOOT, *JUDGE AND JURIST IN THE REIGN OF VICTORIA* (1959).

on legal science without any reference to its three founding fathers, Austin, Bentham, and Maine; to Savigny, Jhering, and the Pandectists, who strongly influenced English and American academic lawyers through their study of Roman legal classifications;²⁶ to the law faculty of Oxford, who developed Anglo-American Legal Science in partnership with their American counterparts; or finally, to the many judges — except Shaw and Doe, whom he mentions — who paved the way for the scholars' generalizations. The effect is to blot out almost the whole intellectual context of tort law in such a way as to make it seem to spring, fully dressed in Victorian frock coat, from the head of Holmes.

Matters improve when White reaches the more familiar ground of Realism, but not by much: for example, we are told that Leon Green's method is "functional" but are given only the barest idea of what that means (pp. 85, 90-91) and no account of the collateral fields (such as the Chicago school of sociology, Malinowskian anthropology, or institutional economics) that tried to give it meaning. So too with the "Consensus" writers of the late 1940's and 1950's. Why no comment on the evident correspondences between their work and Parsonian sociology and pluralist political science? This is all most strange in a work whose announced design is to account for what happened in tort law by shifts in its intellectual context. The contextual ideas all come and go under their most cryptic labels — "empiricism," "behaviorism," etc. At one point, for instance, White offers to explain legal science as "Victorian" in its origins. Expectations rise at the prospect of a new cultural genre of legal history, perhaps comparing law in Victoria's reign to her architecture, novels, social theory, interior decoration — only to be dashed when "Victorianism" turns out to be nothing more than an "interest in deriving secular and scientific theories that would promote order and unity in a modern industrialized setting" (p. 6).

IV.

In conjunction with his thesis that doctrinal developments influence the subject matter of tort law, White presents a few sociological explanations. "Industrialization," banished as a cause of the negligence principle, is readmitted as the cause of the undermining of traditional stability that led Victorians to

²⁶ See, e.g., F. POLLOCK, *THE LAW OF TORTS* 1-15 (1887); Holmes, *The Theory of Torts*, 7 *AM. L. REV.* 652, 660-63 (1873). See generally F. WHARTON, *A TREATISE ON THE LAW OF NEGLIGENCE passim* (1874).

wish to reconstitute social order through science (p. 5), as well as of the "sudden complexity and interdependence" of social life, to which both Science (p. 26) and Consensus thought (p. 145) were reactions. "Professionalization" is also listed among the causes of Science: this is the familiar idea that the university as an environment for training lawyers is more likely than apprenticeship to encourage theoretical work (pp. 23-25). This explanation will do for the academics, but not for the judges: Can one explain the taste for formal generalization that characterized the Waite, Fuller, and White Courts as the product of "professionalization"? By itself, the sociological explanation based on professionalism fails, and, even when accompanied by White's suggested intellectual mechanism — judges following the lead of academics — it is unsatisfying as an explanation of this phenomenon. One is led to think that behind the generalizing impulse something deeper was at work.

Occasionally, though, White's remarks do point toward the possibility of a cultural-legal history that would be very much worth having: how "interests" in property and personality have been constructed in legal thought, how different kinds of suffering have been moved in and out of the category of compensable harms, and how losses it would once have shocked people even to think about pricing have come to be routinely valued in money.²⁷ With his doctorate in American Studies, White would seem the very legal historian most likely to realize this possibility, but the achievement falls short of the aspiration, for the examples are supported by nothing more than his assertion.²⁸ Thus, he says recognition of mental distress as a

²⁷ The mass marketing of life insurance, for example, was made difficult for decades by, among other things, the unwillingness of prospective purchasers to set a money value on human life. Even after buying life insurance became common in the 1870's there was resistance — in insurance circles as well as in society in general — to valuing the lives of women and children, and there were frequent legislative attempts to prohibit insurance of children. See V. ZELIZER, *MORALS AND MARKETS, THE DEVELOPMENT OF LIFE INSURANCE IN THE UNITED STATES* 62-63 (1979). Incidentally, this seems a more plausible explanation for the exclusion of "sentimental factors" such as the survivors' grief from damages in children's death cases in the 19th century than Professor Posner's hypothesis that "a child of working-class parents was sometimes viewed by them as an income-producing asset whose destruction could be compensated for in much the same way as the destruction of property." Posner, *supra* note 20, at 47.

²⁸ The funniest of these ad hoc sociological perceptions is the reason White suggests for the revival of Conceptualism in modern legal scholarship: that "skepticism toward previously unifying cultural values, such as patriotism, 'decency,' or 'equal opportunity'" has stimulated a "concern with personal values"; the "theoretical focus" of Neoconceptualism "becomes a form of communicating a personal statement of values to others. . . . [T]he effort seems less to ensure that the theory is authoritative than to express it as forcefully as one can" (p. 213). Can anyone resist this portrayal of the leading Neoconceptualists, Professors Posner and Epstein, as the Flower Children of Hyde Park?

legally compensable injury arose because psychologists helped make emotional injury respectable and developed diagnostic techniques for telling real from feigned distress and because in the 1920's and 1930's people came to think the state should act to relieve mental suffering (p. 103), but then fails to support this theory with a single reference. Later, he opines that the right to privacy "became important when America became more heterogeneous, crowded, urbanized, and socially mobile: it was a respite from the pressures of living in a complex world" (p. 173), which seems hardly more plausible than its opposite ("As Americans moved out of the stifling confines of village communities into urban neighborhoods of strangers, privacy was more easily obtained and therefore less urgently desired.") would be.

Similarly, the book argues that, in the late nineteenth century, the main purpose of tort law was admonishing blame-worthy persons, but gradually over the twentieth century, the purpose became the compensation of injured ones; and this shift in objectives — the result of life in increasingly "interdependent" society — explains not only the shift away from negligence toward strict liability but also the spread of insurance (pp. 147-50, 170-72, 231-32). Statements such as this are common, but what do they really mean? Is this another version of Dicey's movement from "individualist" to "collectivist" politics;²⁹ or something perhaps more subtle, a shift from a moral universe in which everything that happens to human beings is seen either as the consequence of someone's moral choice (a poor man is to blame for his own poverty) or of some unalterable natural order (the poor ye shall always have with you) to a conception that all social consequences, including so-called moral choice, are linked to all others in more or less determined or manipulable networks of causal necessity (poverty is a condition produced by the conjunction of certain "social forces")?

In any case, is it true that the jurists' view of the main purpose of tort theory has moved from blaming defendants to compensating plaintiffs? If one looks at tort damages theory, the proposition only holds true in a time frame different from White's, for, by the late nineteenth century, the practice of allowing juries in tort cases to assess "smart money" (punitive damages) against defendants they disliked was already in thorough disrepute; the treatise writers agreed that unless there was aggravation in the form of recklessness or malice, "the only available remedy which the law can give for a wrong is

²⁹ See A. DICEY, LECTURES ON THE RELATION BETWEEN LAW & PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY (1905).

an award of money estimated as an equivalent for the damage suffered."³⁰ In short, the Scientists thought compensating injuries was a purpose of tort law, just as we do, but they distinguished (as we do) compensable from noncompensable harms, and they required (as we do) justification of some kind for requiring the defendant to pay the compensation. As White's Realists kept pointing out, resolving even the question of whether the defendant caused the harm to the plaintiff involved some judgment about the desirability of the parties' conduct; is the immobile person the victim of, or a harmful obstruction to, the mobile one? Perhaps White means simply that our moral economy has been shifting from one of punishments and rewards to one of incentives and disincentives, or even to a way of thinking that fully accepts the subjectivity of preferences and seeks only their efficient maximization: the defendant must pay not because he is a wrongdoer, but because he can most cheaply avoid or insure against accidents. Yet even this opposition obscures the warfare between moral and amoral standards in our law. As White well knows, even at the height of Science, Holmes, Wigmore, and Ames were all disputing whether the "fault" standard of liability had been historically evolving towards or away from concern with actual moral blameworthiness;³¹ and Holmes, who took what is apparently White's side of this issue when it arises in the twentieth century — that tort liability has moved away from moral fault toward some objective external standard that the state happens to fix upon — immediately suggested the instability of such a single-minded approach to tort analysis when he revived malicious motive as the touchstone of liability for interference with contractual relations.³² White's proposition would surely stand no better chance of unanimous support among today's jurists, who seem about evenly divided among those who would rationalize liability rules on grounds of eco-

³⁰ See, e.g., T. COOLEY, A TREATISE ON THE LAW OF TORTS 60 (1880). For a view of the principle in transition, see T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 38-44 (1847).

³¹ See O.W. HOLMES, THE COMMON LAW 110-11 (1881); Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908); Wigmore, *Responsibility for Tortious Acts: Its History* (pts. 1-3), 7 HARV. L. REV. 315, 383, 441 (1894). Nathan Isaacs tried to compose the quarrel through the ingenious resolution that moral and objective standards for liability alternated cyclically through history: objective standards represented attempts to codify current morals into bright-line rules; these rules tended to collapse as morals changed but reappeared to codify the changes. See Isaacs, *Fault and Liability*, 31 HARV. L. REV. 954 (1918).

³² See Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894). See also the excellent discussion in Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510, 1526-27, 1535-37 (1980).

conomic efficiency, those who would rely on neo-Kantian morals, and those choosing some "trade-off between utility and fairness."

V.

I think most of the problems of interpretation in this book may stem from a common source: White's unwillingness — paradoxical in an intellectual historian who tries to hold at arm's length anything smelling like a "materialist" influence on tort law — to take doctrine fully seriously as an intellectual project. Although he perceives that the theories of the academics work a significant impact on the law, he treats his jurists a little as one would children going through a "phase": tort doctrine was highly conceptual in the late nineteenth century because Conceptualism was the going thing; when the intellectual fashion changed, the doctrine was "atomized"; now the fashion has changed back.

[N]othing about the subject matter of [torts] compels one organization of the field or another. Tort law could just as well be an incoherent mass as a tightly knit subject whose elements are arranged in a "philosophically continuous series."

. . . Thus proposals for emphasizing one or another feature of tort law do not have to reckon with some inherent tendency in the subject to lend itself to one theory of liability or another. They have to reckon, rather, with the prevailing intellectual wisdom of the time. (P. 233).

It is as if the legal intellectuals, poor beasts, cannot help getting coated with the sticky stuff of contemporary intellectual opinion.³³ But from time to time White recognizes that something much more than this is at stake, and that the efforts of torts scholars and judges to bring some coherence to the field is part of a deadly serious attempt to rationalize the ground rules of interactive life in liberal society. The jurists may be seen as engaged in a continuing effort to work out solutions to a single political problem, each successive solution trying to respond to the perceived failings of its predecessors. The problem itself is simply stated: how to prevent people, who must interact with one another in order to realize their humanity

³³ His postulate of this sort of intellectual determinism makes puzzling his later worries that legal academics have too much unaccountable power because their "value premises . . . affect decisively the contents of laws that persons outside professional communities are intended to follow" (pp. 242-43), for, if one accepts the argument of his book, they too are only soaking up the ideas of their time. Asking for political accountability for *this* process is rather like asking, "Who elected Einstein?" or even "Who elected God?"

and improve their common condition, from oppressing or destroying one another. In liberal theory the solution is to institute the state, which defines "rights and duties" — zones of action and immunity within which each person may act freely — and sanctions transgressions of those zones; but in so doing, poses a new problem in the form of its own power to oppress or destroy, which must be limited in turn. Legal thinkers of the late nineteenth century, building on the labors of predecessors, tried to work out a systematic formal solution to these problems. The task of the "rule of law" was to specify the scope and limits of autonomous conduct, through rules that would be knowable (at least to persons advised by lawyers) in advance, and general, so as to apply to all legal persons equally. Rules thus formulated would inform individuals how far they could go without infringing the freedom of others, and would keep the state in check as well by depriving its officers of discretion in handling claims of infringement.

So the passion of scientific classification of rights and duties arose from something much more fundamental than a vague hankering to share the prestige of academic science: generality of legal thought was considered a precondition to liberty and equality. The negligence principle seemed a perfect candidate for a general rule of private law, defining the rights and duties of individuals toward one another. Judges had already been at work synthesizing the principle, so that it could be shown to have been gradually evolving out of prior law. Unlike the grab bag of traditional actions on the case, it did not impose different rights and duties on parties of different status, but applied equally to everyone. Moreover, the imposition of liability for fault, like that for breach of contract, did not at first seem to involve any policies external to the will of the parties, posing no problem of potentially illicit state coercion. And, of course, in conjunction with the doctrines of contract, assumption of risk, and contributory negligence, it appeared to provide a flawless justification for the suffering routinely endured in social life.

Unless . . . a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbor against the consequences, than to make me do the same thing if I had fallen upon him in a fit, or to compel me to insure him against lightning.³⁴

The naturalism of the metaphor is striking: if your *right* (to be secure against harms resulting from my wrongful con-

³⁴ O. W. HOLMES, *supra* note 31, at 96.

duct) is not violated, no human agency has done anything to you at all, and you are to see yourself as a victim of circumstances, "industrial society," life in a "complex interdependent world," a bolt of lightning.

There is absolutely nothing new in this account of the aims of legal science;³⁵ it is all explicit, along with the seeds of its undoing, in what are probably the most famous sections of Holmes' *Common Law*.³⁶ We read it now and think, "How *could* anyone have thought that judgments as obviously socially and politically contingent as those about what is and is not reasonable risk-creating activity could be developed into general nondiscretionary rules of conduct?" But the point is that these aims led the legal scientists to think so, and, as White recognizes, that we do not *because* their successors, including the paradoxical Holmes himself, showed us so convincingly that these abstract doctrinal formulations are empty of predictive content for particular cases.

VI.

Once one recasts the beginning of White's story this way, the rest becomes a useful account of the ways in which scholars and judges have tried to salvage the liberal theory of justice from the wreckage of Science: If you can't achieve the aims of liberal justice by rules specifying the limits of autonomous conduct in advance, how can you do it? The usual response in the 1920's and 1930's was that the aims could be reached by a policy-oriented balancing of interests, founded on observable regularities in judicial decisionmaking. The most dramatic moments in this book come when the proponents of doctrine confront those of interest balancing, the doctrinalists accusing the Realist of lacking any general organizing ideas, the Realist replying that doctrine was certainly general but completely vacuous. What saved liberal legalism from the impasse, White says, were (1) the threat of Nazism (thus introducing for the first time — at pages 139-42 — an explicitly political consideration) and (2) Consensus thought, represented in torts by Dean Prosser. The first relieved the pressure to justify how liberal societies were run by means of the consolation that at least they were different from the terrifying alternatives. The second defused the confrontation between

³⁵ In fact, I would probably have just assumed these aims but for the absence of any reference to them in the book (save in the curiously parochial guise of an American cultural characteristic — "rationality as a core value of American law" (p. 142)). Maybe White *has* just assumed them, but it doesn't look that way.

³⁶ See O.W. HOLMES, *supra* note 31, at 77-163.

Realists and their opponents by lowering it a notch or two into the practical and commonsense context of a very superior hornbook. White is most interesting and even brilliant when he argues that the field was kept in equilibrium throughout the 1950's and 1960's in part through Prosser's artful, *simultaneous* embrace of the doctrinal and Realist perspectives that had over and over again demonstrated one another's incoherence (pp. 159-63, 176-78).

White himself has apparently suffered a permanent loss of faith. The claims that "the process of judging is somehow inherently rational," that "the legal system in America is based on an inexorable rationality," that "for every problem there is a consensual rational solution," strike him simply as incidents of yet another intellectual fashion, the prevailing canons of the postwar world (p. 209), that has passed and now seems somewhat quaint. The summons to rally once more around the new standards of Paretianism or Rawlsian neo-Kantianism fails to stir his blood: he sees in them little more than the professional academics' fondness for comprehensive systems, and assumes they will shortly go the way of all the others (pp. 242-43). Yet nothing about what he depicts as the collapse of the idea of the rule of law and the futility of trying to reconstitute it drives him to despair, or to the energetic attempt to imagine an alternative politics; or even seems to bother him very much. Is it wrong to see in this book the symptoms of a liberal legalism so enervated that even its historians have forgotten the urgent reasons for its creation?

A THEORY OF CRIMINAL JUSTICE. By Jan Gorecki.¹ New York: Columbia University Press. 1979. Pp. xv, 185. \$15.00.

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The problem of crime has been approached from many perspectives, including that of the offender,³ the victim,⁴ the

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³ See, e.g., S. GLUECK & E. GLUECK, UNRAVELING JUVENILE DELINQUENCY (1951); S. GLUECK & E. GLUECK, PHYSIQUE AND DELINQUENCY (1956); E. KRETSCHMER, PHYSIQUE AND CHARACTER (1936); W. SHELDON, VARIETIES OF DELINQUENT YOUTH (1949); THE PROFESSIONAL THIEF (E. Sutherland ed. 1937); Gibbons & Garrity, *Definition and Analysis of Certain Criminal Types*, 53 J. CRIM. L.C. & P.S. 27 (1962); Kessler & Moos, *The XYY Karyotype and Criminality: A Review*, 7 J. PSYCH. RESEARCH 153 (1970); Tappan, *Some Myths About the Sex Offender*, FED.

norms being violated,⁵ the supporting subcultural norms,⁶ the availability of resources and opportunity,⁷ and the system of social control.⁸ The simplification of the problem to any singular aspect, however, has not been fruitful in developing either crime control strategies or their ideological justifications. The multiple objectives of restraint, general deterrence, specific deterrence, rehabilitation, desert, and public education, though necessarily intertwined, have been impossible to reconcile, and so have intensified the problem. Criminology has thus become a tormented field where armies of theorists compete for acceptance, but without adequately preventing or controlling crime.

The intent of Jan Gorecki's *A Theory of Criminal Justice* is "to discover an optimal policy for crime control" (p. xiii). Rejecting alternative crime control policies as being "for the most part too vague ever to be tested, tautological, or evidently false,"⁹ Gorecki claims to present "not just another hunch but

PROBATION, June 1955, at 7. Compare C. LOMBROSO, CRIME, ITS CAUSES AND REMEDIES (1912), and E. SUTHERLAND & D. CRESSEY, CRIMINOLOGY 120 (10th ed. 1978), with C. GORING, THE ENGLISH CONVICT (1913).

⁴ See, e.g., PERSPECTIVES ON VICTIMOLOGY (W. Parsonage ed. 1979); M. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE (1958); Wolfgang, *Victim Precipitated Criminal Homicide*, 48 J. CRIM. L.C. & P.S. 1 (1957). See generally VICTIMOLOGY (quarterly journal established in 1976).

⁵ See, e.g., I. CHEIN, D. GERARD, R. LEE & E. ROSENBERG, THE ROAD TO H (1964); E. LEMERT, HUMAN DEVIANCE, SOCIAL PROBLEMS, AND SOCIAL CONTROL (1967); E. SCHUR, CRIMES WITHOUT VICTIMS (1965); C. SHAW, THE JACK ROLLER (1930); L. WILKINS, SOCIAL DEVIANCE (1964); Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 158 (1967); Schwartz, *Moral Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669 (1963).

⁶ See, e.g., F. ALEXANDER & W. HEALY, ROOTS OF CRIME (1935); A. COHEN, DELINQUENT BOYS (1955); R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE (1968); T. SELLIN, CULTURE CONFLICT AND CRIME (1938); C. SHAW & H. MCKAY, JUVENILE DELINQUENCY AND URBAN AREAS (1969); Lemert, *Social Structure, Social Control, and Deviation in ANOMIE AND DEVIANT BEHAVIOR* 57 (M. Clinard ed. 1964); Merton, *Social Structure and Anomie*, 3 AM. SOC. REV. 672 (1938); Miller, *Lower Class Culture as a Generating Milieu of Gang Delinquency*, 14 J. SOC. ISSUES 5 (1958); O'Donnell, *The Rise and Decline of a Subculture*, 15 SOC. PROB. 73 (1967); Yablonsky, *The Delinquent Gang as a Near Group*, 7 SOC. PROB. 108 (1959).

⁷ See, e.g., R. CLOWARD & L. OHLIN, DELINQUENCY AND OPPORTUNITY (1960); L. EMPY, AMERICAN DELINQUENCY 294-300 (1978); Cloward, *Illegitimate Means, Anomie, and Deviant Behavior*, 24 AM. SOC. REV. 164 (1959); Glaser & Rice, *Crime, Age, and Employment*, 24 AM. SOC. REV. 680 (1959).

⁸ See, e.g., M. FRANKEL, CRIMINAL SENTENCES (1973); W. GAYLIN, PARTIAL JUSTICE (1974); H. MILLER, W. McDONALD & J. CRAMER, PLEA BARGAINING IN THE UNITED STATES (1978); H. PEPINSKY, CRIME CONTROL STRATEGIES (1979); ROUGH JUSTICE (J. Robertson ed. 1974); J. SKOLNICK, JUSTICE WITHOUT TRIAL (1966); J. WILSON, VARIETIES OF POLICE BEHAVIOR (1968); Mott, Albright & Semmerling, *Judicial Personnel*, 167 ANNALS 143 (1933); Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. CRIM. L.C. & P.S. 333 (1962); Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780 (1956).

⁹ See also note 26 *infra*; p. 928 & note 51 *infra*.

a viable theory . . . about what makes and unmakes the criminal" (p. xiii).

He sees the administration of criminal justice as the most important determinant of criminality, believing criminal law to be "a tool of moral learning by the society at large" (p. xiii). Moral education inculcates an internalized aversion that "effectively prevents both calculated and emotional wrongdoing" (p. 3), since it is "a powerful motivation, much stronger than the fear of sanction" (p. xiii). Thus, Gorecki rejects retributive and other utilitarian models as the primary justifications for punishment (p. xiv), and opts instead for the educative function, which is both more effective and "nobler" (p. 3).

The social origins of moral drives, Gorecki argues, are rooted in "persuasive communications" and "instrumental learning" (pp. 6, 10). The former concept encompasses the socialization by institutional encounters (such as familial, religious, and judicial) that instill visceral "moral evaluations" — "the perception of which conduct is right or wrong and the experience of duty or guilt emerging in response to ideas of right or wrong conduct" (p. 7). Instrumental learning is essentially Pavlovian: the "behavior of any . . . organism is, to a large extent, an outcome of its likely consequences. . . . [R]ewarding effects of behavior *X* reinforce *X*, while punishing effects reinforce avoidance of *X*" (p. 10).¹⁰ Among the conditions for maximizing the efficacy of this general theory of learning are the sufficient intensity and proper timing of the rewards or punishments (pp. 12–13). Further, for a sanction to convey a moral lesson, both the observers and the sanctioned person must recognize the punished behavior as intrinsically wrong, and the punishment as "just" (*i.e.*, its distribution must match the moral experiences prevailing in the group); the sanctioning agent must be respected and trusted; and the sanctions must be consistent for like circumstances and distributed according to uniform criteria (pp. 19–22). Applied to a system of criminal justice,¹¹ the theory would provide for a "just" punishment to follow every crime. "This would, in turn, bring, through the process of moral learning, a sweeping decline in criminal behavior, and, consequently, alleviation of the crime-engendered social ills" (p. 127).

¹⁰ For an overview of learning theory principles, see, *e.g.*, E. HILGARD, THEORIES OF LEARNING (2d ed. 1956). See also C. HULL, A BEHAVIOR SYSTEM (1958); B.F. SKINNER, THE BEHAVIOR OF ORGANISMS (1938); E. TOLMAN, PURPOSIVE BEHAVIOR IN ANIMALS AND MEN (1932).

¹¹ For a good statement of the behavioral position in the criminal context, see, *e.g.*, C. BARTOL, CRIMINAL BEHAVIOR 360–62 (1980).

Gorecki would make only "the necessary minimum" changes in the legal system, though even "this implies an overhaul of considerable proportions" (p. 94). He would decriminalize homosexuality and drug abuse crimes (pp. 95-96), abolish plea bargaining (p. 109),¹² eliminate parole and the treatment of individual offenders (pp. 47-48), and, as the most effective method of cutting costs within the system, "simplify" criminal procedures (p. 111), perhaps abolishing the jury system.¹³ In addition, because acquisition of evidence "must be reasonably easy" if law enforcement is to be more certain and thus educative, and since "early interrogation of suspects constitutes a particularly valuable implement for acquisition of evidence" (pp. 81-83), obstacles in the way of evidence gathering must be rethought. This is particularly true of confessions (pp. 83-89, 117-26). Thus, Gorecki would allow "a reasonable degree of pressure"¹⁴ to be brought to bear upon a suspect (p. 120), allow the prosecution free rein to comment at trial on the suspect's refusal to speak (pp. 84, 125), and restrict or eliminate prohibitions on illegal search and seizure (pp. 81-83), coercive self-incrimination (pp. 117-26),¹⁵ and deprivations of the right to counsel (pp. 84, 125) — at the

¹² "[B]argained pleas should be perceived as conspiracies to obstruct justice rather than as components of its administration" (p. 52).

¹³ Although this Review is not intended to address Gorecki's attempt to "cut costs" within the system (pp. 109-15), that feature of his theory is not beyond challenge. See, e.g., Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 404 (1976): "[T]he application of cost-benefit analysis to crime control is dangerous. The more repressive the criminal law becomes, the more likely it will be to hide its 'costs.'" Compare *id.* and Bazelon, *The Morality of the Criminal Law: A Rejoinder to Professor Morse*, 49 S. CAL. L. REV. 1269 (1976), with Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976), and Morse, *The Twilight of Welfare Criminology: A Final Word*, 49 S. CAL. L. REV. 1275 (1976).

¹⁴ The "proper demarcation line" between reasonable and unreasonable pressure on a suspect to confess would depend "on the moral views of the society at large as perceived by the Court" (p. 119), as well as on the "judicial perception of basic social needs to be served by criminal justice" (p. 125). Moreover, Professor Gorecki argues that "[t]he economic advantages of confession are clear: a confession during interrogation, if corroborated, results, at arraignment, in a plea of guilty, and, like any guilty plea, cuts expenditure and reduces workload" (p. 117). See also note 13 *supra*.

¹⁵ Cf. *Brown v. Walker*, 161 U.S. 591, 596 (1896) ("[T]he admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence."). See also F. INBAU & J. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* (2d ed. 1967); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: CRIME AND ITS IMPACT — AN ASSESSMENT I* (1967) [hereinafter cited as PRESIDENT'S COMMISSION].

Much of Gorecki's treatment of self-incrimination is taken from Gorecki, *Miranda and Beyond — The Fifth Amendment Reconsidered*, 1975 U. ILL. L.F. 295. The reason for his emphasis on self-incrimination, rather than on, or in conjunction with, some of these other prohibitions, particularly illegal search and seizure, is never made clear.

least requiring the overruling or legislating out of existence of *Malloy v. Hogan*,¹⁶ *Escobedo v. Illinois*,¹⁷ and *Miranda v. Arizona*¹⁸ (p. 125). “[L]ife committed to crime is essentially miserable,” says Gorecki, and these changes will cause potential lawbreakers to “forego the criminal way and avoid the misery” (p. 133).

The reader who assumes that such drastic proposals would stand on solid footing would be mistaken. *A Theory of Criminal Justice* is a didactical apologetic for the reduction of individual rights of suspects and defendants in the pursuit of increased convictions and a safer society (pp. xi–xiii) — without, however, a satisfactory justifying scheme.

I.

The major flaw in Gorecki’s work is not one of law, of government, of politics, or of economics; it is one of knowledge. For a theory that is supposedly “specific enough for potential refutation” (p. xiii), his book is unjustifiably vague. He leaves undefined and unexplored the concepts and mechanisms that are at the heart of his theory, unsuccessfully finessing the intractable problems facing our criminal justice system. Gorecki then naively calls for a monolithic theoretical approach to the monumentally complex problem of crime.

The first sentence of the text illustrates the emptiness of Gorecki’s theory: “Criminal law can be applied as an implementation of moral education: following a properly arranged application of punishments, the prohibited behavior becomes more

¹⁶ 378 U.S. 1 (1964) (fifth amendment privilege against self-incrimination held applicable to the states through the due process clause of the 14th amendment).

¹⁷ 378 U.S. 478 (1964) (confession taken from defendant in custody held inadmissible because defendant had requested and was denied opportunity to consult an attorney and was not warned of right to remain silent).

¹⁸ 384 U.S. 436 (1966) (police have duty to warn defendant of right to remain silent, of potential adverse use of any statements, of right to have attorney present at custodial interrogation, and of indigent’s right to court-appointed counsel). “If faithfully implemented, the dictates of *Miranda* can only result in the virtual disappearance of confessions” (p. 86). Cf. *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in result) (“[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.”). *But see, e.g.,* Seeburger & Wettick, *Miranda in Pittsburgh — A Statistical Study*, 29 U. PITT. L. REV. 1, 26 (1967) (While the results could not be generalized, in Pittsburgh “*Miranda* has not impaired significantly the ability of the law enforcement agencies to apprehend and convict the criminal.”). To protect the innocent and still provide “reasonable procedural fairness” (p. 122), Gorecki would judicially supervise questioning by such means as sound or visual recordings of all station house interrogations, random checks of field questioning by specially trained judicial officers, and an improved system of sanctioning police misconduct (pp. 122–26).

forcefully perceived by the society as intrinsically wrong and is avoided as immoral" (p. 3). What is a *properly* arranged application of punishments? The only clue Gorecki gives is that a proper system of punishments would "grade the sanctions according to the harmfulness of the offense" (p. 98), with the highest penalties going to the most serious offenders.¹⁹ But he makes no attempt to develop a working definition of either "harm" or "seriousness."²⁰ The only guide to "seriousness" is noncommittal: "the degree of a defendant's guilt would be determined by our feeling of blameworthiness of his criminal act" — that is, "the feeling dominant in the society" (p. 106).²¹ If the most serious offenders could be isolated, moreover, how high should the "highest" penalties be? ²² Other crucial terms are dealt the same fate as "proper," "harm," and "seriousness" — for example, "justice,"²³ "basic social needs" (p. 125), and "like cases"²⁴ (p. 59). Thus, while Professor

¹⁹ "Proper" as a critical but undefined conclusory term plagues Gorecki's book. See, e.g., pp. 4, 73, 93.

²⁰ See also p. 104 (Prosecutors "should be duty bound to charge [suspects] with the crime committed — at least when the crime is serious.").

Gorecki finesses this operational vagueness by citing an example of a crime that is serious: large-scale heroin trafficking (p. 98). He only explains, however, why trafficking is serious vis-à-vis drug use (the latter harms only the offender, the former harms others); he leaves the reader at sea as to how to evaluate seriousness when the crimes are of wholly different types or neither is "victimless."

The practical difficulty of evaluating the relative seriousness of crimes has been often noted. See generally Geraghty v. United States Parole Comm'n, 579 F.2d 238, 254-59 (3d Cir. 1978), vacated and remanded on other grounds, 445 U.S. 388 (1980); United States v. Bergman, 416 F. Supp. 496 (S.D.N.Y. 1976); Lupo v. Norton, 371 F. Supp. 156, 162-63 (D. Conn. 1974); 28 C.F.R. § 2.20 (1979) (federal parole guidelines); Alschuler, *Sentencing Reform and Parole Release Guidelines*, 51 U. COLO. L. REV. 237, 244-45 (1980); Curtis, *Federal Judicial Power, Parole Guidelines, and Sentence Reform*, in 2 PRISONERS' RIGHTS SOURCEBOOK 91 (I. Robbins ed. 1980); Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 822-28, 835-38 (1975).

²¹ See also p. 110.

²² The same problem of definitional vagueness plagues Gorecki's discussion of judicial discretion in sentencing. Statutory ranges of sentences should be of "reasonable width" (p. 105), and appellate courts reviewing such sentences should strike down only "violations of justice that are gross enough to be obvious" (p. 108).

²³ To Gorecki, "the term *justice* is metaethical: its use does not imply adherence to any particular system of normative ethics" (p. 21). Rather, a criminal system is "just" if its distribution of rewards and punishments is evaluated as "morally right" by members of society; that is, "if the distribution matches moral experiences prevailing in the group" (p. 21). Given the difficulty of detecting the dominant moral experiences of society, see p. 924 *infra*, this definition is not very illuminating or "testable."

²⁴ To determine whether cases are "like," would Gorecki focus on the act, the actor, or both? See generally Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 CLEV. ST. L. REV. 147, 155 (1978) ("[O]ne of the problems of present sentencing schemes is that in the effort to avoid disparities

Gorecki is quick to recognize the ambiguities in other theorists' critical terms, his suffer the same problem.²⁵ This is most unfortunate, since questions of the administration and magnitude of punishment are at the very heart of current judicial,²⁶ legislative,²⁷ and academic²⁸ criminal justice debate.

Gorecki's theory is primarily, if not exclusively, founded on a vision of moral education, but his effort to decipher the language of morals is incomplete at best, and at worst hollow or wrongheaded. What are the actually accepted basic moral values and how are they determined? Although he suggests that public opinion polls can be useful (pp. 7, 36-37, 144 n.20, 147 n.65), Gorecki's main instrument for this task is "introspection" (pp. 4-6, 17): "observing our own mental processes and the body movements [including verbal expressions] resulting from them and inferring contents of the mental processes of others, by analogy, from their body movements" (p. 5).²⁹

resulting from punishing people differently who have done the same thing, we may now tend to punish people the same way who have committed crimes in very different circumstances."); see also Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975, 981-1008, 1059 (1978); Gottfredson, *Parole Board Decisionmaking: A Study of Disparity Reduction and the Impact of Institutional Behavior*, 70 J. CRIM. L. & CRIMINOLOGY 77 (1979).

²⁵ See, e.g., pp. xiii, 68, 130; Gorecki, *Crime Causation Theories: Failures and Perspectives*, 25 BRIT. J. SOC. 461, 464 (1974) (criticizing Sutherland's "differential association" theory and Freudian psychoanalytics). See also *id.* at 469-70 (criticizing deterrence theories); note 51 *infra*.

²⁶ See, e.g., Rummel v. Estelle, 445 U.S. 263, 283 (1980) (mandatory life sentence, imposed pursuant to Texas habitual offender statute, for a defendant convicted of three nonviolent, property-related felonies totaling \$229.11, does not violate the cruel and unusual punishment clause of the eighth amendment) ("We all, of course, would like to think that we are 'moving down the road toward human decency.' Within the confines of this judicial proceeding, however, we have no way of knowing in which direction that road lies. Penologists themselves have been unable to agree whether sentences should be light or heavy, discretionary or determinate." (citations omitted)). See also *Adams v. Texas*, 100 S. Ct. 2521 (1980); *Beck v. Alabama*, 100 S. Ct. 2382 (1980); *Godfrey v. Georgia*, 100 S. Ct. 1759 (1980); *Coker v. Georgia*, 433 U.S. 584 (1977); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

²⁷ See, e.g., S. 1722, 1723, 96th Cong., 1st Sess. (1979); H.R. 6915, 96th Cong., 2d Sess. (1980).

²⁸ See, e.g., A. DERSHOWITZ, *FAIR AND CERTAIN PUNISHMENT* (1976); M. FRANKEL, *supra* note 8; W. GAYLIN, *supra* note 8; JUSTICE IN SENTENCING (L. Orland & H. Tyler eds. 1974); P. O'DONNELL, M. CHURGIN & D. CURTIS, *TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM* (1977); R. SINGER, *JUST DESERTS* (1979); A. VON HIRSCH & K. HANRAHAN, *THE QUESTION OF PAROLE* (1979).

²⁹ Introspection tells Gorecki, for example, that "[t]oday . . . the support for some [prohibitions, such as bans on gambling, drug abuse, vagrancy, suicide, and fornication] is waning and the opposition grows: before our eyes they are becoming obviously unjust" (p. 35).

This set of words, however, provides no clue to how his theory can workably be used to guide the criminal justice system. For example, Gorecki questions whether punishment of homosexuality is "just," *i.e.*, whether the distribution of rewards and punishments matches the moral experiences that prevail in the group. He then declares that the predominant moral influence in the group is a combination of liberalism and utilitarianism. These moralities, he says, dictate punishment of harmful acts only, and homosexuality is not harmful. He thus concludes that the punishment of homosexual behavior is "unjust." This injustice "undermines the general educative power of criminal law" (pp. 33-38).³⁰ Without a better indicator of the prevailing moral influences of society than Gorecki poses, it is impossible to test this syllogism. Thus, his reasoning contributes nothing to the efforts to define the proper scope of our criminal justice system. Moreover, to the extent that one could divine such predominant moral influences, Gorecki's concentration on the moral experiences that "prevail" in the group (pp. 21, 118), the "dominant" feeling of justice (pp. 106, 129), and the "needs of society" (pp. 8-9, 119, 125) could have serious detrimental consequences. Surely subsocietal groups have different moral experiences, different perceptions of justice, and different needs,³¹ as Gorecki recognizes at one point (p. 106). If his theory is addressed only to the "basic consensus" of society at large, as it appears to be (pp. xiii, 81, 106), then not only is the thesis ingenuous, but it also likely would result in maintenance of the cultural, social, political, and economic status quo, with all that that envisions.³²

II.

Gorecki's inability adequately to identify or describe the substantive ethics he believes must undergird the criminal justice system would be less important had he dealt better with the subject he set out to discuss: the epistemology of ethics, or

³⁰ Gorecki is similarly conclusory about detrimental effects of several other issues on the law's educative power. *See, e.g.*, p. 43 (punishment of drug addicts); p. 89 (*Miranda* requirements); p. 103 (prosecutorial discretion and plea bargaining).

³¹ *See generally* sources cited note 6 *supra*.

³² *See generally* C. BECCARIA, ON CRIMES AND PUNISHMENTS ch. 1 (1767); A. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY (1905); E. DURKHEIM, THE DIVISION OF LABOUR IN SOCIETY 80-81, 108 (1933); E. DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 66, 67, 70 (1938); K. ERIKSON, WAYWARD PURITANS (1966); Gahringer, *Punishment and Responsibility*, 66 J. PHILOSOPHY 291, 293 (1969) ("We do not really know what we stand for until we know what in fact we will not tolerate . . . [T]here may be no community apart from the identification and punishment of crime.").

the educative function of normative facts.³³ A good case *can* be made for heightening our efforts to understand the educative aspect of the criminal law. Public education has been neglected in the criminal justice literature in relation to its importance. When education has been separately recognized as a purpose of the criminal law, typically it has been merely as an attribute of the "basic trio"³⁴ of deterrence, retribution, and reformation.³⁵ But rather than examine and extend the discourse that has taken place on moral education and its effects on compliance with laws and rules,³⁶ Gorecki substan-

³³ It is questionable whether neutral analyses of moral language are even possible. See, e.g., W. FRANKENA, *ETHICS* (1963).

³⁴ W. CLARK & W. MARSHALL, *A TREATISE ON THE LAW OF CRIMES* 73 (7th ed. 1967).

³⁵ See, e.g., *id.* at 71-75; A. DERSHOWITZ, *supra* note 28, at 69-77. See also G. FLETCHER, *RETHINKING CRIMINAL LAW* (1978); J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* (2d ed. 1960); W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 23-24 (1972); J. MILLER, *CRIMINAL LAW* (1934); R. PERKINS, *CRIMINAL LAW* (2d ed. 1969).

Criminal codes, too, ignore the educative function of the criminal justice system. See, e.g., N.Y. PENAL LAW § 1.05 (McKinney 1975) ("The general purposes of the provisions of this chapter are: . . . 5. To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interests of public protection."); S. 1, 93d Cong., 1st Sess. § 102 (1973); S. 1437, 95th Cong., 2d Sess. § 101(b)(3) (1978); S. 1722, 96th Cong., 1st Sess. § 101 (1979).

One theorist who does deal directly with the educative purpose is Hyman Gross, although he does not reach the question of how that education occurs. See H. GROSS, *A THEORY OF CRIMINAL JUSTICE* 400-12 (1979). See also H. OPPENHEIMER, *THE RATIONALE OF PUNISHMENT* 293-94 (1913); 2 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 81 (1883) ("[T]he sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment."); P. TAPPAN, *CRIME, JUSTICE, AND CORRECTION* (1960); E. VAN DEN HAAG, *PUNISHING CRIMINALS* 20-21 (1975); 1 WHARTON'S *CRIMINAL LAW* 1 (C. Torcia 14th ed. 1978); G. WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 26 (1978); Andenaes, *General Prevention — Illusion or Reality?*, 43 J. CRIM. L.C. & P.S. 176, 179 (1952) ("In Swedish discussion the *moralizing* — in other words the *educational* — function has been greatly stressed. The idea is that punishment as a concrete expression of society's disapproval of an act helps to form and strengthen the public's moral code and thereby creates conscious and unconscious inhibitions against committing crime." (emphasis in original)); Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 401, 404, 410 (1958).

³⁶ See, e.g., Koeppes, *Children and Compliance: A Cognitive Analysis of Socialization Studies*, 35 LAW & SOC. REV. 545 (1970); Kohlberg, *Development of Children's Orientation Toward a Moral Order, I: Sequence in the Development of Moral Thought*, 6 VITA HUMANA 11 (1963); Kohlberg, *The Contributions of Developmental Psychology to Education: Examples from Moral Education*, 16 EDUC. PSYCHOLOGIST 36 (1973); Tapp, *Psychology and the Law: An Overture*, 27 ANN. REV. PSYCH. 359 (1976); Tapp & Kohlberg, *Developing Senses of Law and Legal Justice*, 27 J. SOC. ISSUES 65 (1971). See generally J. PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (1932); G. VOLD, *THEORETICAL CRIMINOLOGY* ch. 11 (2d ed. T. Bernard 1979) (containing citations);

tially relies, though not always explicitly, on the sociology and jurisprudence of Leon Petrazhitskii (pp. 27, 136, 141-42).³⁷ Unfortunately, Gorecki does not advance the ideas of Petrazhitskii, and so the examination of the educative function of criminal law remains undeveloped.

Petrazhitskii believed that behavior is determined not so much by legal norms as by internal mental and psychological forces understandable by introspective psychology.³⁸ Along with cognition (sensations and ideas), emotion (pleasures and sufferings), and will (aspirations and active experiences), he claimed to have discovered a fourth such force, "impulsions"³⁹ — including the "impulsions of duty"⁴⁰ — which "emerge in response to ideas of (present, future, or just imaginary) conduct which is being evaluated as intrinsically right or wrong."⁴¹ He emphasized the "irrational, impulsive character"⁴² of these psychic occurrences, or "impulsive phantasmata,"⁴³ and envisioned a Darwinistic psychosocial struggle for survival

D. WRIGHT, *THE PSYCHOLOGY OF MORAL BEHAVIOUR* (1971); see also E. DURKHEIM, *MORAL EDUCATION* (E. Wilson & H. Schnurer trans. 1961); J. RAWLS, *A THEORY OF JUSTICE* 453-62, 490-96 (1971). For a criticism of the cognitive developmental perspective, see, e.g., Irvine, *Legal Socialisation — A Critique of a New Approach*, in *PSYCHOLOGY, LAW AND LEGAL PROCESSES* 69 (D. Farrington, K. Hawkins & S. Lloyd-Bostock eds. 1979). On the emotional viewpoint, see, e.g., Hogan, *Moral Conduct and Moral Character: A Psychological Perspective*, 79 *PSYCH. BULL.* 217 (1973).

³⁷ For bibliographical material on Petrazhitskii, including his works that have been translated into or commented on in English, see *LAW AND MORALITY: LEON PETRAZYCKI* xliii-xlvi (H. Babb trans. 1955) [hereinafter cited as *LAW AND MORALITY*]; Babb, *Petrazhitskii: Theory of Law*, 18 *B.U.L. REV.* 511, 576-78 (1938) [hereinafter cited as *Babb II*]; Babb, *Petrazhitskii: Science of Legal Policy and Theory of Law*, 17 *B.U.L. REV.* 793 (1937) (containing citations) [hereinafter cited as *Babb I*]; Rudzinski, *Petrazycki's Significance for Contemporary Legal and Moral Theory*, 21 *AM. J. JURIS.* 107, 107 n.2, 108 nn.4-6. See also N. TIMASHEFF, *AN INTRODUCTION TO THE SOCIOLOGY OF LAW* (1939); Northrop, *Petrazycki's Psychological Jurisprudence: Its Originality and Importance*, 104 *U. PA. L. REV.* 651 (1956); Radbruch, *Legal Philosophy*, in *THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN* 43, 81 (K. Wilk trans. 1950).

³⁸ Petrazhitskii gave us a "logical-psychological intuitionist version of the psychological sociology of law." Pound, *Fifty Years of Jurisprudence*, 51 *HARV. L. REV.* 777, 809 (1938).

³⁹ See *LAW AND MORALITY*, *supra* note 37, at 23.

⁴⁰ Gorecki, *Leon Petrazycki*, in *SOCIOLOGY AND JURISPRUDENCE OF LEON PETRAZYCKI* 1, 5 (J. Gorecki ed. 1975) [hereinafter cited as *SOCIOLOGY AND JURISPRUDENCE*].

⁴¹ *Id.*

⁴² Lande, *The Sociology of Petrazycki* (J. Slawikowski trans.), in *SOCIOLOGY AND JURISPRUDENCE*, *supra* note 40, at 22, 32.

⁴³ *LAW AND MORALITY*, *supra* note 37, at 41-42, 62, 92, 158, 165, 211, 248. See generally *id.* at 126, 215, 253. Timasheff referred to a phantasma as "an erroneous projection of individual psychic phenomena into the trans-subjective world." N. TIMASHEFF, *supra* note 37, at 213.

among legal and ethical experiences, resulting in the "unconscious, non-intentional character of teleology in the process of [social] adjustment."⁴⁴

Although Petrazhitskii elaborated on the introspective method,⁴⁵ he never adequately discussed either the fundamental questions of whose law and whose morality control an actor's behavior,⁴⁶ or how feelings of legal compliance originate in the mind.⁴⁷ More than forty years ago, Professor Hugh Babb outlined the advances necessary to implement Petrazhitskii's theories. Among other things, he wrote, "the preparatory work [for this science of legal policy] must include: . . . the systematic and methodical study of the psychological forces and laws defining the influence of law on individual and social motivation and conduct";⁴⁸ an "[i]nvestigation of the crystallizations or deposits left in the human psyche (and changing its nature) by the educative influence of law as a factor (no less than a product) of culture"⁴⁹ — *i.e.*, a theory of character formation; an "[i]nvestigation of the laws in accordance with which the successes of social pedagogy crystallize into objective views, principles and institutions";⁵⁰ and an investigation of the possible verification of the introspective technique.⁵¹

A formidable task indeed!⁵² But Professor Gorecki has not essayed any of this,⁵³ nor has he at all advanced the ideas of his mentor. Though Gorecki claims to present a workable, testable theory based on the educative power of the criminal law, Petrazhitskii's and thus Gorecki's theories remain in their conceptive stage.

⁴⁴ Lande, *supra* note 42, at 32.

⁴⁵ See, e.g., LAW AND MORALITY, *supra* note 37, *passim*. For general works on introspection, see, e.g., C. OGDEN & I. RICHARDS, THE MEANING OF MEANING 201-03 (5th ed. 1938); G. RYLE, THE CONCEPT OF MIND 163-67 (1949).

⁴⁶ See, e.g., Denzin, *Interaction, Law, and Morality: The Contributions of Leon Petrazycki*, in SOCIOLOGY AND JURISPRUDENCE, *supra* note 40, at 63, 80. See also p. 925 *supra*.

⁴⁷ See, e.g., Lande, *supra* note 42; Northrop, *supra* note 37, at 655-56, 662; Rudzinski, *supra* note 37, at 118, 127; cf. Andenaes, *supra* note 35, at 197 ("No [comprehensive] empirical study of the psychology of obedience to law has been undertaken." (emphasis in original)).

⁴⁸ Babb I, *supra* note 37, at 815; see pp. 926-27 *supra*.

⁴⁹ Babb I, *supra* note 37, at 816.

⁵⁰ *Id.*

⁵¹ See *id.* at 817-18.

⁵² "The specification of the scientific method by which the thesis of natural law jurisprudence is to be implemented is the major task of contemporary legal science." Northrop, *supra* note 37, at 662.

⁵³ In fact, *A Theory of Criminal Justice* makes no reference at all to the Babb articles.

III.

Given today's wisdom, the most portentous euphemism in the criminalist's lexicon should be "a satisfactory general theory of crime causation."⁵⁴ In the words of George Bryan Vold, "Crime must be recognized clearly as not being a single phenomenon, but as consisting of many kinds of behavior occurring under many different situations. No single theory therefore should be expected to explain the many varieties involved."⁵⁵ Perhaps this accounts for the failure of the now-languishing rehabilitation theory,⁵⁶ which has been a part of our *zeitgeist* since the late nineteenth century.⁵⁷ Modern thinking has denied that the criminal justice system existed for the purpose of punishment in the first instance.⁵⁸ This attitude has thwarted the maturation of criminogenic thinking. It is now time, however, to acknowledge the presence of antinomy and paradox, to accept the necessary eclecticism that comes with tentative knowledge, to experiment with both the molecular and the molar.⁵⁹ "It is not to be expected that criminological theory will develop wholly adequate explanations of criminal behavior until human behavior in general is better understood."⁶⁰ Thus, Wittgenstein's reply to the question, "Why do we punish criminals?" may be the most fair and seasoned abstract of contemporary knowledge on crime and its punishment:

The truth is that there is no one reason. There is the institution of punishing criminals. Different people support this for different reasons in different cases and in different times. Some people support it out of a desire for vengeance, some perhaps out of a desire for justice, some out of a wish to

⁵⁴ Nearly 30 years ago, Andenaes wrote: "The time for broad slogans in criminology has passed." Andenaes, *supra* note 35, at 197.

⁵⁵ G. VOLD, *supra* note 36, at 422.

⁵⁶ See generally Allen, *supra* note 24.

⁵⁷ "It may be that the rehabilitative ideal was too deeply and too naively held, for the failure to produce results has generated widespread cynicism in the United States . . . about rehabilitation . . ." G. FLETCHER, *supra* note 35, at 416. The British experience has been similar. See, e.g., P. DEVLIN, *THE JUDGE* 31 n.1 (1979).

⁵⁸ See, e.g., *Williams v. New York*, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.").

⁵⁹ See generally M. Wolfgang, *Developments in Criminology in the United States with Some Comments on the Future* (1973) (unpublished manuscript on file at the Harvard Law School Library).

⁶⁰ G. VOLD, *supra* note 36, at 422.

prevent a repetition of the crime, and so on. And so punishments are carried out.⁶¹

All of the purposes of the criminal justice system coalesce.⁶² This is not a confession of resignation or cynicism; it is a recognition of reality.⁶³ Whether we are dealing, for example, with Packer's theory of the rational limits of the criminal law,⁶⁴ with H.L.A. Hart's delicate balance between values and policy limitations,⁶⁵ with Devlin's philosophical emphasis on the enforcement of moral values,⁶⁶ with Morris' pragmatic attention to permissible means and potential outcomes⁶⁷ — or, indeed, with any particular perspective in the criminological spectrum⁶⁸ — there should be no doubt that any theory of criminal justice that purports to be monocausal must be viewed with circumspection.⁶⁹ As Professor Francis Allen has recently observed, "the competition of values that characterizes

⁶¹ L. WITTGENSTEIN, *LECTURES AND CONVERSATIONS ON AESTHETICS, PSYCHOLOGY, AND RELIGIOUS BELIEF* 50 (C. Barrett ed. 1966). Holmes' view is in accord:

For the most part, the purpose of the criminal law is only to induce external conformity to rule. All law is directed to conditions of things manifest to the senses. And whether it brings those conditions to pass immediately by the use of force, as when it . . . hangs a man in pursuance of a judicial sentence, or whether it brings them about mediately through men's fears, its object is equally an external result. In directing itself against robbery or murder, for instance, its purpose is to put a stop to the actual physical taking and keeping of other men's goods, or the actual poisoning, shooting, stabbing, and otherwise putting to death of other men. If those things are not done, the law forbidding them is equally satisfied, whatever the motive.

O.W. HOLMES, *THE COMMON LAW* 42 (M. Howe ed. 1968). See also H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 9 (1968).

⁶² See, e.g., J. BENTHAM, *THE THEORY OF LEGISLATION* 338-39 (C. Ogden ed. 1931); W. CLARK & W. MARSHALL, *supra* note 34, at 71-75; L. HALL & S. GLUECK, *CASES ON THE CRIMINAL LAW AND ITS ENFORCEMENT* 15 (2d ed. 1958) ("[T]here is hardly a penal code that can be said to have a single basic principle running through it."); PRESIDENT'S COMMISSION, *supra* note 15, at 2; E. SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* 289 (10th ed. D. Cressey 1955); Hart, *supra* note 35, at 401.

⁶³ See generally Nielsen, *Morality and Commitment*, 7 *IDEALISTIC STUD.* 94, 104 (1977) ("moral philosophy needs its Don Quixotes, but after a session or so with the windmills, we need the clear realistic vision of a Sancho Panza").

⁶⁴ See H. PACKER, *supra* note 61.

⁶⁵ See H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* (1968).

⁶⁶ P. DEVLIN, *supra* note 57.

⁶⁷ N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* (1970).

⁶⁸ See pp. 918-19 & notes 3-8 *supra*.

⁶⁹ See, e.g., S. GLUECK & E. GLUECK, *UNRAVELING JUVENILE DELINQUENCY* (1950); S. GLUECK & E. GLUECK, *VENTURES IN CRIMINOLOGY* (1964). "[W]e need to understand that every stance that one takes toward a complex social issue has its own distinctive and peculiar pathologies. We ought not to think that in choosing a stance one can avoid fundamental difficulties." Allen, *supra* note 24, at 155.

an open society necessarily conditions the postulates of the criminal law."⁷⁰

Yet Professor Gorecki argues that the criminal justice system should be molded to the educative function exclusively, rejecting crime control through rehabilitation and rectification of environmental ills. These latter approaches, he complains, are merely the result of the workings of "[a]n elaborate and influential system of antipunitive ideology . . . that makes nonpunishment of criminals not just expedient but worthy" (p. 67). Such a fixation, which he sees as a consequence of positivist criminology, "is wrong: it undermines certainty of punishment and makes the lawbreaker, and not the general public, the main addressee of criminal sanctions" (p. 45). Sociological theories of crime causation⁷¹ emanate from our "widespread complex of guilt" (p. 70), and psychological theories from fallacy (pp. xiv, 67, 77) and paradox (p. 75); therefore, Gorecki would ignore them in recasting the criminal justice system.

Gorecki also rejects noneducative theories as too difficult to implement and detrimental to the system's educative effects.

[I]t is much easier to improve the system of criminal punishments than to eliminate such assumed determinants of crime as lack of parental love, anomie, private property, social inequality, racial discrimination, unemployment, or density of population in urban areas. That is why the idea of eliminating all these determinants instead of improving criminal justice is not only fallacious but harmful; by influencing attitudes of judges, prosecutors, and others who carry out the criminal process, it undermines the educative force of criminal law and thus contributes to the great amount of crime. (P. 73).

What is fallacious and harmful is Professor Gorecki's theory. No credible scholar ever promised that eliminating or alleviating the crime problem would be "easy." Whether the sociological and other determinants be real or assumed, no single causal factor — moral evaluations included — has proven to be exclusive. Until that time occurs — if, indeed,

⁷⁰ F. ALLEN, LAW, INTELLECT, AND EDUCATION 111 (1979). "Thus," he concludes,

the case for the retention and enlargement of ethical concerns in the criminal law is an uneasy one . . . It is beset by competing considerations of great cogency. It is limited by practical realities and by the incoherence of modern debates on the commitments by which we are to live. In all of this the criminal law demonstrates its kinship with the modern era.

Id. at 118. See also Hirschi & Rudisill, *The Great American Search: Causes of Crime 1876-1976*, 423 ANNALS 14 (1976); p. 930 & note 62 *supra*.

⁷¹ One jurist has referred to these as the "rotten social background" theories of criminology. *United States v. Alexander*, 471 F.2d 923, 960 (D.C. Cir.) (Bazelon, C.J., concurring in part and dissenting in part), *cert. denied*, 409 U.S. 1044 (1972).

it ever does — to declare that it is “fallacious” to eliminate, for example, social inequality, racial discrimination, or unemployment is itself delusive. Moreover, is the psychological model fallacious because it is inexpedient and unworthy, or because it addresses problems that are presently intractable? Gorecki does realize that “effective implementation [of rehabilitative programs] requires prior knowledge about how each program would operate, and the knowledge is not there” (p. 77).⁷² Neither, however, is it there for his approach. If he would allow for further development of his own model, then why not permit it for others?⁷³ It is simply wrong to abandon conceivably workable plans for the control or prevention of crime in favor of a theory of moral evaluation that is based on such tenuous analysis.⁷⁴

IV.

The epistemic controversy continues.⁷⁵ The main risk in criminology today is that we will abandon our highest aspirations for the subject, and lower our expectations, which themselves may prove to have been less than satisfactory. To be sure, the task of improving the criminal justice system is not an easy one. It may not even be a feasible one.⁷⁶ But if the efforts to approach ultimate solutions, however utopian,⁷⁷

⁷² “Consequently, the theory [of psychologically based rehabilitation], at least in its present shape, does not provide grounds for effective action” (p. 78) (emphasis added). Gorecki would give new stress to “education and professional training to improve [the offender’s chances] after release” from prison (p. 129), and allow for voluntary psychological counseling of inmates — but only to “alleviat[e] the pain of being confined” (p. 129), and not to rehabilitate.

⁷³ This problem is far from unique to Gorecki’s book. See, e.g., Robbins, Book Review, 77 COLUM. L. REV. 153, 156–57 (1977) (reviewing A. VON HIRSCH, *DOING JUSTICE* (1976)).

⁷⁴ “A fact or law is explained only when a sufficient knowledge of the system to which it belongs is reached to enable one to interpret the fact or law in terms of that system” D. ROBINSON, *THE PRINCIPLES OF REASONING* 291 (1924). See also R. GAROFALO, *CRIMINOLOGY* 3 (R. Miller trans. 1914); p. 919 *supra*; p. 924 & note 25 *supra*; p. 933 & note 79 *infra*.

⁷⁵ See generally Glaser, *A Review of Crime Causation Theory and Its Application*, in 1 *CRIME AND JUSTICE* 203 (N. Morris & M. Tonry eds. 1979).

⁷⁶ See, e.g., 1 K. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 288 n.7 (3d ed. 1957):

How far should we get if, instead of introducing laws and a police force, we approached the problem of criminality “scientifically,” i.e. by trying to find out what precisely are the causes of crime? It is as if one insisted that it is unscientific to wear an overcoat when it is cold; and that we should rather study the causes of cold weather and remove them.

See also E. DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* 66, 67, 70 (1938).

⁷⁷ See pp. xiii, 72; Gorecki, *supra* note 25, at 475 n.9 (“[O]ne cannot definitely rule out future success in building a general theory of all human behaviour, however unlikely it looks today.”).

are not more painstakingly conceived and explained⁷⁸ than Professor Gorecki's, then our criminal justice system is in a deeper mire than even the most pessimistic theorists suppose. The issues Gorecki raises are real and persistent. Perhaps this is enough to require of any inquiry. In his attempt to underscore the moralizing power of the criminal law, however, he has taken great leaps of faith, and invariably has fallen into the Benthamite abyss.⁷⁹ This failure may be the transdisciplinary's plight.⁸⁰ But such an outlook should generate more careful — and less careless — thinking. Without further development, *A Theory of Criminal Justice* is unsubstantiated, definitionally inadequate, superficial, conclusory, dogmatic, and naive. The inescapable conclusion is that the serious student of criminal etiology should forgo this book, and avoid the misery.

⁷⁸ "[I]f we do not attend closely to the means [of criminal justice], the most nobly conceived ends will be futile." L. WEINREB, *DENIAL OF JUSTICE I* (1977). See also Cohen, *Moral Aspects of the Criminal Law*, 49 *YALE L.J.* 987, 1026 (1940).

⁷⁹

[W]hen [writers] come to speak about the means of preventing offences, . . . of perfecting morals, their imagination grows warm, their hopes are excited; one would suppose they were about to produce the great secret, and that the human race was going to receive a new form. It is because we have a more magnificent idea of objects in proportion as they are less familiar, and because the imagination has a loftier flight amid vague projects which have never been subjected to the limits of analysis.

J. BENTHAM, *supra* note 62, at 359. See also p. 932 & note 74 *supra*.

⁸⁰ See pp. xiii, xiv-xv. "[T]here is nothing more difficult to carry out, nor more doubtful of success, nor more dangerous to manage, than to introduce a new system of things." N. MACHIAVELLI, *THE PRINCE* ch. 6 (M. Musa trans. 1964).