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Jerome Hall

*University of California Hastings College of the Law*

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Justice in the 20th Century

Jerome Hall*

"Justice in the 20th Century" has as many meanings as there are moral and social philosophies, and academic opinion ranges over the entire spectrum. Some sophisticates think "justice" is only the symbol of an irrational hope whose function is to arouse the emotions of creatures addicted to self-deception, while at the opposite extreme are the contemporary adherents of classical natural law realism. In view of the general abandonment and criticism in contemporary moral philosophy of emotive positivism, its invalidity will be assumed in this discussion; accordingly, it will also be assumed that "justice" is a meaningful term. But instead of the currently popular linguistic analysis of the uses of that term, the present approach will be focused on specific problems; and while it is believed that 20th century justice is unique in some ways, any analysis of justice must deal with such traditional ideas as equality, desert and responsibility. At the same time, if that is done realistically, it must be "relevant," as the saying goes, to 20th century conditions and problems. Because they are frequently variations of one of Kant's versions of the categorical imperative, most philosophical discussions of justice are carried on at a very high level of abstraction; they culminate in very broad generalizations remote from the practical problems of 20th century justice. Accordingly, an effort will be made to present a more pointed analysis. If high-level abstraction is the Scylla of any venture on the tortuous path to the elucidation of "justice in the 20th century," its Charybdis is the easy reward of applause for an oration on human rights.

Another lesson to be learned from the frustration of trying to make definite sense of very abstract discussions of justice is that it is illusory to imagine that one can construct a satisfactory formula or definition of justice. One can say, for example, that justice is the ultimate social ideal or that it is the ideal ordering of the community, but such slogans do not take one very far, and they may discourage the study of justice in particular areas. Justice in this century has penetrated into so many


fields and is interrelated with so many other values that any concept of justice that is sufficiently extensive is also inevitably vacuous. Perhaps the best that can be done is to discern important changes and trends, recognize the underlying values, and concentrate on specific problems. The fact that we cannot learn much from a formula does not lessen the significance of cogent probings and partial insights into the quality of 20th century justice.

If we cast a reflective eye over 20th century world events, the obvious fact is that this century represents anything but a single-minded effort to attain justice in any honorific sense of that term. If there is increased sensitivity to the values of human dignity, we in this century have also witnessed the expression of uninhibited barbarism on a scale unparalleled in the darkest eras of history. Despite the maxim that the only thing men learn from history is that men do not learn from history, there is one fact that we should bear in mind: that is, the proved capacity and willingness of normal persons to inflict on innocent human beings what Judge Biddle, in his report on the Nürnberg trial, called “appalling atrocities.” Of course, we need to balance that by taking account of acts of heroism, devotion and compassion; what emerges as credible is a dualism or ambivalence that renders optimistic accounts of human nature irrelevant to the actual problems of justice.

The nature of human nature greatly affects the most pressing problems of justice in this century, problems that concern the criminal law and economic goods and burdens. These areas fall respectively within Aristotle’s division of justice into corrective and distributive justice; by focusing on important aspects of those two areas we may be able to discover some characteristics of 20th century justice.

I

CORRECTIVE JUSTICE

The salient 20th century fact about criminal law is widespread skepticism of punishment. Punishment is said to be ineffective; after centuries of punishment, crime seems to be on the increase, penitentiaries are written off as schools of crime and retribution is sharply disparaged as, at best, a disguised form of vengeance. Accordingly, if both deterrence and retribution are excluded from the orbit of a legal policy, only rehabilitation remains as the single rational goal. And if, as many of its proponents say, retributive punishment is the only kind of criminal justice there is, the upshot of the current criticism is that

2. Corrective justice concerns not only crimes, but also torts, breaches of contract and other harms or damage for which restitution, compensation, punishment and treatment are the appropriate sanctions. Distributive justice deals with different situations—not with harmdoers, but with the allotment of values, including economic goods.
criminal justice is obsolete. What is wanted is love or mercy and tender care—not justice.

Among the many reasons for the current mood is the popular reading of Freudian psychiatry. Freudian psychiatry seems to be deterministic and amoral and, therefore, incompatible with traditional ideas of responsibility and punishment for voluntary harm-doing. On the premise of cause and effect, a mental illness or a crime is traced back to what is viewed as the inevitable conditioning, especially by early family life, that caused the illness or crime: the allegedly unmitigated aggressiveness and selfishness of human nature are checked only by expediency. The sense of justice or, if one prefers, the sense of injustice and the voluntarism that are the foundations of western morality becomes mere superstition; talk about the justice of punishment is only a habit.

The matter, however, is more complicated than that. Freud, himself, said he was not a Freudian, and there is much in his work that raises doubts about the current criticism of punishment by some of his avowed disciples. Freud was discussing people who had serious problems, hence his psychiatry cannot be interpreted as generalizing over all human nature or as holding that the unconscious dominates everyone's conduct. He was intent on making his patients aware of their unconscious drives so that "where id was, there shall ego be." Thus, at bottom, he was a rationalist; indeed, he believed the criminal law to be the principal barrier to instinctual drive and as such the basic condition of civilization. Moreover, when Freud acted as a therapist he did not think on a deterministic basis. Rather, he reasoned from the present condition ahead to a future, improved one; he premised that effort counts and that the future is not determined. Certainly, it is plain that unless human beings are morally responsible, unless they are free agents to a significant degree, justice is only a mirage. We should, therefore, confine determinism to the arena of scientific investigation, while in the realm of daily action, personal responsibility and its corollary, punishment, remain persuasive. Moreover, there are other psychiatries than Freud's, and in some of them personal responsibility is the central thesis; there is common sense and the experience of daily life, which should not be supinely abandoned in the face of psychiatric dogmatism.

On the constructive side, psychiatry has made a very important contribution to 20th century justice by evoking a heightened appreciation of the emotional side of personality and of the conflicts and confusion that assail some persons much more drastically than they do other persons. What seemed a cold-blooded murder by a person who looks perfectly normal, may, after thorough psychiatric examination, be understood as an act of desperation or explosion by an irrational, emo-
tionally torn victim of uncontrollable forces. The old model of a "war on crime" has suffered greatly from the psychiatric exposure of relevant facts. Indeed, some persons find it easier to identify themselves with criminals rather than with their victims; even for many who identify with the victims, punishment is questioned as an inadequate response. Rehabilitation is widely espoused in this century, but the insistence that rehabilitation is the only rational goal to be sought needs to be carefully scrutinized.

Lady Barbara Wootton, the leader of rehabilitationism in Britain, takes her stand on the thesis that responsibility should be "by-passed" and allowed to "wither away." In her view, since "mental health and ill-health cannot be defined in objective scientific terms that are free of subjective moral judgments, it follows that we have no reliable criterion by which to distinguish the sick from the healthy mind." This is brilliant strategy, indeed, and if it is also sound the injustice of imprisoning some persons while acquitting others on the ground of their mental incompetence—their irresponsibility—is obvious. So, too, since punishment rests on the premise that personal responsibility is meaningful, it collapses if that premise is invalidated.

The literature on "mental health" and "mental disease" is voluminous, and literally hundreds of definitions, for diverse purposes and in dissimilar contexts, have been formulated by persons in various professions. It is no exaggeration to say, as one critic remarked, that the meaning of mental disease "is personal to each practitioner," that it reflects each definer's Weltanschauung, his vision of the Good Life. Some psychiatrists have said that everybody is mentally ill, and others, that all criminals are mentally ill, and so on and on.

Nevertheless, the thesis that responsibility must be "by-passed" and allowed to "wither away" is not a necessary consequence of the lack of an objective definition of "mental disease." In the first place, it is necessary to distinguish the definition of "psychosis" from that of "mental disease." The boundless diversity of definitions of "mental disease" does not imply that there is equally wide disagreement regarding the definition of "psychosis." Second, and more important, defining terms is a philosophical or linguistic task, while decision-making is a function of practical judgment. There is, for example, a voluminous literature on the definition of "good." But the lack of a consensus or other solution of this theoretical problem does not invalidate innumerable daily decisions that certain conduct is good or bad. Judges may be unable to define "stare decisis" or "ratio decidendi," but this does not detract from their insight and skill in deciding specific cases. So, too, the fact that there is little or no agreement regarding the definition of "mental

disease" or even "psychosis" (if that is the fact) does not imply that psychiatrists do not agree that at least some persons are seriously mentally diseased or that those judgments are wholly subjective. Indeed, some psychiatrists have said that laymen are equally able to recognize extreme cases of mental illness; that laymen cannot give a satisfactory definition of "insanity," "know," "right" and "wrong" does not invalidate their findings. The inevitable conclusion is that neither the theory of the unconscious nor the subjectivity of definitions of "mental disease" has shown that responsibility and punishment are obsolete.

We may now look directly at some of the implications of the claim that rehabilitation is the only sound objective to be sought, that deterrence and retributive justice should be discarded. From a strictly therapeutic viewpoint, any limit on the period of confinement is unsound; hence, the rule of law that has traditionally protected the individual from the arbitrariness or oppression of officials must be discarded and for it substituted the opinion of experts (whose disagreements inter se are notorious) that the offender has been cured and is no longer dangerous.

Next, certain petty harm-doers might require very long confinement to reeducate them, while, at the opposite extreme, some murderers and large-scale embezzlers may not need reeducation. A cause célèbre in the last century was that of Harvard's Professor Webster who, having socially ambitious daughters and a wife with expensive tastes, borrowed a large sum of money; when a nagging bill collector became very offensive, the professor hit him on the head, put his body in lime, and was later convicted of murder. In the last depression one Whitney, a stock broker, who had been educated at the best schools and by all other, perhaps sounder, standards was an able, successful man made off with seven million dollars when his financial need became acute. Thousands of embezzlers, perpetrators of fraud and professional thieves of jewelry and securities and many others are very talented persons; indeed, white collar crime on a large scale is predominately perpetrated by persons who are much brighter and often better educated than the personnel of even the best prisons. Rehabilitation has little meaning in these cases except for those who accept the dogma that there must be something seriously wrong with every criminal.

Other difficulties in extreme or exclusive rehabilitationism are even more serious than those discussed above. The common assumption underlying the shift in current attitudes, aided by congenital American optimism, is that if only we spend enough millions and train many more psychiatrists, vocational guidance experts and others, we will ac-

4. Pickpockets, having learned a difficult, lucrative trade, are among these petty harm-doers.
quire the necessary knowledge and the know-how to reform all, or nearly all criminals. But even Lady Wootton ruefully acknowledged that "clear evidence that reformative measures do in fact reform would be very welcome." This is the hard fact that is difficult to face: that even as regards offenders who obviously lack education and decent family background, reform remains on an ad hoc, common sense level; any knowledge of rehabilitation that might be called "expert," not to say "scientific," is wholly lacking. I do not in the least imply that we should let up in our efforts to reform criminals. The conditions in many prisons are deplorable, and the personnel can obviously be improved. Our own peace of mind requires us to do everything possible to make pено-correctional institutions humanely and intelligently administered. That is one of the principal reasons for including rehabilitation among the objectives of our criminal law; but for many reasons, some of which were discussed above, rehabilitation cannot be the only objective that is sought.

Since reform is irrelevant in some cases and impossible in many others, a place must be found for punishment that deters and is just. Deterrence, alone, is not acceptable because, unmitigated by justice, it becomes cruelty. In a country where the hands of thieves were amputated, theft became practically non-existent. The measures taken against civilians by occupying armies when one of the soldiers had been shot are well known, and were very effective. On the other hand, the conviction of Al Capone led to widespread compliance with the tax laws by many unsavory characters, guards on New York subways reduced crime there by half and the strikes of police in Boston, Liverpool and Copenhagen were marked by a sharp rise in criminal activity. For these various reasons, only an integrative theory will suffice—one in which a defensible place is found for justice and deterrence and rehabilitation. There may be cases when one of these objectives is at odds with the others, and there is no easy solution of that problem despite efforts to increase the flexibility of the law as well as the competence of judges and administrators.

In the present climate of academic opinion I must emphasize that justice in criminal law—in the strict sense of retributive justice—is an application of deontological ethics. In this view there is a significant degree of autonomy in normal adults, the principle of voluntarism is basic and, accordingly, if a normal adult voluntarily harms a human being in a way proscribed by the criminal law, he is deemed to be guilty and deserving of punishment that is proportionate to the harm done. Overlooked by the critics of retributive justice is that it is impor-

5. B. Wootton, supra note 3, at 335.
tant to make sense of our lives here and now in ways that sometimes do not have the slightest reference to a future utility. Retributive justice makes the present rational and tolerable, for example, by distinguishing a brutal attack on a defenseless person from a heroic effort to save a life; it requires that our officials express public condemnation of the former by the appropriate action of just punishment. The just treatment of human beings as morally accountable persons gives to criminal justice a hard side that is prominent in its applications to voluntary harm-doers. Some utilitarians find it convenient to forget this although they are strong advocates of freedom and oppose extreme rehabilitation-ism on the ground that "by-passing" responsibility would diminish freedom. But they do not face the limitations of a purely utilitarian approach— that justice cannot always be dissolved in utility and is needed to restrain deterrence even when it might increase the common good; and while they are very confident that they can predict and even measure the distant consequences of punishment, they ignore the rational need to make the present significant by expressing thoughtful, appropriate valuations.

In sum, what merits consideration in 20th century criminal jurisprudence is not the thesis that justice is obsolete but that it should be tempered by compassion and genuine efforts to rehabilitate. We should not forget that justice depends on truth and since our knowledge is limited, justice should be tempered by mercy. This sentiment has been implemented by the use of probation, suspended sentences, the pre-sentence hearing, parole and other methods of flexible administration within the limits set by law. There has also been a wider recognition of the difference between merely personal deviation and criminal conduct, and there has been greater realization of the futility of punishing confirmed alcoholics and drug addicts.\(^7\) Some students of the criminal law have gone even farther, urging that mere negligently caused harms should be wholly excluded from the criminal law and that the restriction of punishment to voluntary harm-doing would strengthen that institution.\(^8\) Thus, while justice now, as always, is concerned with responsibility and desert, the principles based on these values do not operate in a vacuum, for their current meaning is discovered and applied by reference to relevant facts. What is criminal justice now depends very much on the relation of the above values to the facts and knowledge psychiatry has adduced, and, also, on their relation to the feeling of compassion that motivates the rehabilitationist movement.


\(^8\) Hall, Negligent Behavior Should Be Excluded From Penal Liability, 63 COLUM. L. REV. 632 (1963).
II

DISTRIBUTIVE JUSTICE

The distinction between the two kinds of justice brings into focus differences between the 18th century state and 20th century states. More precisely, the earlier, principally negative, objective of law of maintaining order must be contrasted with the more complex objectives of 20th century law, the latter considered in the light of the state's many functions, grants, and encouragement of undertakings. The hard line often drawn between these objectives is an over-simplification of history, but even if qualitative distinctions are untenable, the complexity of these functions of the contemporary state and the quantitative rise of services that concern distributive justice are apparent. The above distinction is also involved in jurisprudential theories of the structure of law, for example, whether the Austinian or the Kelsenian concept of law in terms of harm-sanction is adequate or even relevant to the structure of social welfare law. The first question to be considered in this context is whether economic rights are substantively different from the traditional civil rights.

The recent very large literature on human rights has produced at least as much confusion as it has enlightenment of 20th century justice. Therefore the first step needed to clarify that subject is to limit the objectives of any discussion. Accordingly, I shall not try to discover whether a concept of justice that takes account of the State's social and economic functions is a unique 20th century phenomenon. Nor shall I speculate about the meaning of "social welfare state" or about justice in such a state as compared with justice in a predominantly free enterprise society. Instead, I shall first try to clarify some of the puzzles about human rights by drawing necessary distinctions; then, I shall discuss certain aspects of justice that are relevant to recent developments in American law, and, finally, I shall point to some common features of criminal justice and economic justice.

Writers on human rights should distinguish recommended from potential and emerging rights, moral from legal rights, and paper legal rights from law-in-action. Next, or perhaps simultaneously, one should ask, what is the particular writer's moral philosophy? Postivists of various types, classical natural lawyers, Kantians and utilitarians use the

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9. The difficulty of maintaining such a historical thesis is shown by the fact that even Adam Smith said that the state has the duty of "erecting and maintaining certain public works and certain public institutions" set up "for facilitating the commerce of the society, and those for promoting the instruction of the people." An. SMITH, NATURE AND CAUSES OF THE WEALTH OF NATIONS 681, 682 (1937). Road-building, canals, harbors, the post office, public education, prevention of epidemics and other health measures have for centuries been recognized as public interests that the state is expected to promote.
same words, but they mean very different things. On the one hand, Kelsen's "justice" means an irrational ideology, an emotion or a taste that is wholly subjective and personal and, therefore, quite outside the realm of cognition. On the other hand, the classical realist's justice connotes an ontological constitution—the "nature of things," including human nature, to which that term refers. Between these extremes are Kant's idealism and utilitarianism, and these underlie still other concepts or interpretations of justice. Writings on justice or rights must, therefore, be read in a relativistic way, that is, in relation to the writer's moral philosophy; also, if positivism is laid aside, as is implicit in this discussion, the other perspectives can be related to deontological and utilitarian ethics, and the reader should recall that in the above discussion of punishment I suggested that reliance on both is necessary in the construction of an adequate theory of 20th century justice.

Justice in this century concerns problems regarding which action by the state is said to be desirable; a just legal system is, therefore, the most important part of 20th century justice. But since any legal system falls short of the ideal of justice, as is shown by the fact that even the best legal system can be criticized on moral grounds, as in Plato's Statesman, the concept of justice includes, but is wider than, that attainable by just law.

That legal remedies are needed to secure justice implies the use of the coercive power of the state. In one sense coercion and freedom are antithetical, but since coercion is necessary to the maintenance of order and since order is the necessary condition of freedom, coercion, if wisely employed, results in the maximum actual freedom. If the essence of justice is equality in the sense of proscribing superficial or arbitrary discrimination, and if that is to be implemented by law, the unwarranted curtailment of freedom is a constant hazard. Justice requires that officials be free to discover arbitrary inequalities and to make and enforce the relevant laws, and, again, if anyone is to be free, there must be order. Thus, neither justice nor any of the related values can survive in a disorderly society. If the courts cannot be depended upon to function in a uniform way, if crime is rampant and people do not keep their promises, life, liberty, business transactions, and equality are all jeopardized. Since all values depend on order, since anarchy is the ultimate evil, it would seem that if any priority is to be given any one of those values, it should be ascribed to order. However, an order that is unjust and that crushes freedom cannot be indefinitely sustained. There are, accordingly, sensitive and intricate interrelations among these values, and it is only in the detailed study of specific problems that defensible decisions can be made concerning which values are to be preferred in each context, which sacrifices are to be made, which hazards raised.
The fact that extreme unfairness is almost universally recognized within given cultures is some evidence that there are rational criteria of evaluation when the problems are studied in specific contexts. Even then there are often disagreements, for example, whether homosexual practices among consenting adults should be criminal. But two points are noteworthy about such issues: First, disagreement on marginal questions does not negate or diminish the consensus, sometimes almost universal, on core questions; and, second, such disagreement does not negate the significance of relevant agreement that greatly narrows the extent of the difference. Everyone agrees that the past sentences for homosexuality—in some states, 40 years imprisonment or more—are barbaric.

Justice that depends on compulsion is limited in what it can do even on recognition that legal sanctions affect not only external behavior, but also conscience. Since the law is a relatively crude instrument in other respects, resulting, for instance, from its generality, it cannot accomplish everything that ought to be accomplished. This indicates that the justice manifested by even the best legal system, including the discretionary practices of officials, requires supplementation by well-directed efforts of lay individuals. Moreover, much more than simply recognizing the coercive power of the state and the necessity of lay supplementation is involved in elucidating the problems of justice in the 20th century. The implementation of certain economic rights by the large body of legislation concerning workmen's compensation, unemployment, old age, sickness, and poverty may not be valid or enduring. Attempts may be made to repeal all of those laws, or, more probably, many changes will be proposed. What must be studied, therefore, are the moral and philosophical foundations of those and other alleged human rights.

The Preamble of the Universal Declaration of Human Rights states, "whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . ." Then, the Declaration lists two sets of rights. Articles 1 to 20 consist mostly of our traditional or classical civil rights, those of life, liberty, equality, property, justice, freedom of speech, movement and association, religious liberty, fair trial, and others. Article 21 adds the right of participation in government directly or "through freely chosen representatives." Articles 22 to 28 prescribe so-called "economic rights," such as to "a standard of living adequate for . . . health and well-being," to insurance against "unemployment, sickness, disability, widowhood, old age 

or other lack of livelihood in circumstances beyond [his] control," to
education and participation in the community's cultural life, "to work, to
free choice of employment, to just and favorable conditions of work,"
"to form and join trade unions" and the right "to rest and leisure . . .
and periodic holidays with pay." Such a pervasive declaration of hu-
man rights necessarily raises many questions concerning distributive jus-
tice.

Obviously, all the rights listed in the Declaration are not legal
rights, and some of them may not even survive criticism as moral rights.
Some are recognized or actualized as moral duties or in legal systems,
but others are ideals. Several countries did not ratify the Declaration,
and in others whose constitutions contain many provisions on civil rights
and economic rights, the rights may be merely paper rights, with dis-
sent ruthlessly crushed, free elections non-existent, and travel, espe-
cially emigration, forbidden or strictly limited. All will agree, however,
that in the United States, 20th century justice must be more than the
mere formality of enactment; it must include law-in-action.¹¹

The justification for asserting that human beings have certain
moral rights must be examined. The three grounds of justification em-
phasized in recent literature, the dignity of man, natural needs, and
the fact that men are the only beings who make claims, are all contro-
versial assertions; they are but three of the many answers given to the
question, "What is man?"

Although under the Freudian or Hobbesian view there is little to
support assertions of the dignity of man or to stimulate respect for him,
many have disagreed with those philosophers' position that at best,
those terms are irrelevant. The classical Greeks made reason and so-
ciality the essential human characteristics, and St. Thomas postulated
the natural or normal movement of the will towards the good. The
sophistication of these philosophers—Greek drama gives ample evi-
dence that they were familiar with the seamy side of human nature—
makes it plain that they did not mean to say that all men, or most men
all the time, are rational and social. Nor, on the other hand, can we
discard their statements as mere exhortation or as exercises in utopia.
Rather, they were saying, apparently, that men at their best have those
qualities of mind and spirit; and thus "rational-social" was employed as
both a descriptive and a normative term. In that sense, human beings
are distinctive in ways that make them the only discoverers, if not
creators, of justice and other values. They share a common ineffable
quality evidenced by the fact, among others, that unfair discrimination
stimulates a sense of injustice in normal circumstances.

"Natural need" is a corollary of what is required for self-realization, the fulfillment of potential personality. To a considerable extent this is a cultural matter, and material well-being, including ownership of television sets and automobiles, may not represent the best measure of satisfaction of natural needs; Buddha and St. Francis, for example, seem to have had very positive ideas about the uses of poverty. What seems basic in the notion of natural need is that men have never been satisfied merely to exist. They have sought excitement, novelty, and experience of the higher values, often at the risk of survival. This dissatisfaction with mere existence, of course, is expressed in the asserted right to share in the educational and cultural resources of the community.

There are limits on the utility of the concept of "natural need." A man who has ten children needs three times as much money as a man with only two children if both families are to enjoy the same style of life. But even in those countries that claim to be especially receptive to the slogan, "from each according to his ability to contribute, to each according to his need," there is great disparity in the incomes of managers, leaders and scientists as compared to that of the unskilled workers. And apart from the question (and natural need) of incentives to motivate people to put forth their best efforts in order to maximize the total social product, there are other natural needs to be considered, such as the need for freedom and the normal expectation of persons who are superior because they worked hard to improve themselves.

The third recently asserted ground in support of human rights, that man is unique in that only he makes claims, is said to be evidence of his dignity. But while the recent literature on justice is full of discussions of claims and rights, there is lacking any reference to duty; consequently, the literature is often mistaken in the elucidation of "claim" or "right."

There is a very different tradition, notably the Kantian one, in which duty is primary and paramount. It is from that perspective that Hegel's otherwise puzzling statement about the right of the criminal to be punished becomes understandable. A normal adult is a person especially in the sense that he is a being or creature with moral obligations, and if he voluntarily harms a human being, he merits apt treatment as a person in the above sense; he therefore has a right to be punished, not conditioned as a child or an animal. It is also noteworthy that while rights always have correlative duties, there are some duties, for example, those of charity, that have no correlative rights. Some legal philosophers have also said that duties are paramount because sanctions are attached to their breach, and because, while all legal rights have cor-
relative legal duties, some legal duties, those concerning criminal law, for instance, do not have correlative legal rights.

One need not decide whether right or duty is the more important or "basic" concept to understand that duty must be brought into the picture if we are to understand rights. This is so for two reasons: First, since the claimant also has moral and legal obligations, for example, to contribute what he can to the common good and to develop his potentiality, to talk only about his claims or rights and to ignore his obligations is a defect in analysis; this has implications regarding claims to social welfare benefits. Second, to say that a human being has certain rights usually implies that other persons or the state or certain institutions have correlative duties. This, too, is forgotten by orators on human rights and by philosophers who discuss only claims or rights without any reference to the implied correlatives, and that does not advance the solution of difficult social problems.

The above interpretation of the classical psychology of human nature, the normative meaning assigned "natural need," and the juxtaposition of obligation to right in the indicated ways, all, despite indicated qualifications, support the thesis that men do have human rights, and that this is not a merely ideological, subjective or emotive utterance.

But are the recently asserted economic rights human rights in the same sense as the classical civil rights enumerated in our Bill of Rights? Those who see important differences argue that the classical civil rights are universal, have paramount importance, and lend themselves to relatively easy enforcement. They need not be deserved in the sense of being earned, but are recognized simply as fitting the uniqueness of being human. It is also argued that these characteristics of the classical rights of man are not truly descriptive of the alleged economic rights. For example, what possible meaning is there in asserting the alleged economic rights in a country like India? Further, in industrially advanced countries economic claims are distinguished from the classical rights, and some of them, such as paid holidays, are held to be a luxury, certainly not an inalienable right.

Others contend that economic rights are as important as civil ones, and that the implementation of civil, no less than economic, rights in any country is a matter of practicality. In affluent countries the old notion of charity gives, or should give, way to that of right; therefore, the correlative duty rests on government since it cannot be warrantably imposed on individuals. Need and fraternity are the grounds of justifica-

tion of economic rights, and the availability of adequate resources is relevant only to the time of their implementation.

"Economic right" embraces a very large area, with very different questions presented by "right to work," "right to education," "right to paid holidays," "right to a standard of living adequate for health and well-being," insurance against sickness and so on. In the analysis of these problems, it would be necessary to employ the distinctions drawn above, and the factual questions alone are so complex that the assistance of a panel of experts on each of those problems would be needed. But there is at least one aspect of the above controversy regarding which the argument of the proponents of economic rights seems persuasive and that concerns the right of unfortunate persons in industrially advanced countries to a minimal standard of living.

There are cultural differences between the right of poor people to economic assistance and the classical rights, the reasons for which are historical and linguistic. In past centuries, especially in agrarian communities, it was much easier for individuals and private agencies to discover needy persons and to help them. Accordingly we have been accustomed to think in terms of charity to the poor, and sensitive scholars like Mill and Petrajitski (and his students, Sorokin and Timasheff) drew a basic distinction between duties of beneficence and legal duties in that the former have no correlative rights. In that traditional view, it seems incongruous to say that a poor man has a right to assistance since "right," although used in a moral sense, takes on some of the demand-character of a legal right. Social conditions are very different now, particularly in the large industrial countries. If we assume that private benevolence is inadequate to the present task, then it does not seem strained to speak of the moral right of needy persons, victims of circumstances beyond their control, to decent minimal economic assistance.

But if the novelty of such speech and the recency of the new conditions lead some to reject this concept of a right of poor people to minimal economic assistance, there is another approach that leads to the same result. There is a very wide consensus among both classical liberals and proponents of a social welfare state that there is a moral duty to help poor people. There are, of course, gaps between the recognition of a general moral duty and agreement on just what that duty requires and to whom it is owed. As examples, it is a moot question whether there is a class of poor persons, a subculture, in this country; there is no way to draw a poverty line in terms of income that is not arbitrary regarding those just above the line; and it may be doubted whether persons who have deprived themselves of many things owe a duty to those who have been spendthrifts or allergic to work. Let us
assume that all these problems have been discussed and that the salient facts are that millions of our fellow citizens live in conditions of acute deprivation, that reliance on the charity of individuals is too uncertain for present needs, and that recourse to law is necessary to implement the moral duty of assistance. This duty, then, becomes a legal duty, and if that duty is to be actualized, not only officials but also needy persons must have correlative legal rights.¹

That implementation of the moral duty of assistance requires recourse to law raises the difficult problems previously mentioned, such as the bringing to bear of the coercive apparatus of the state on all citizens and in many ways beyond the requirement to pay taxes, which involves limitations on freedom as well as the generality and crudeness of legal systems. There is, also, the question of what laws should be used; should the criminal law be employed or will civil law suffice or are both necessary and, if so, at what points? It has often been argued that the values protected by criminal law, tort law and much of the constitutional law expressed in the Bill of Rights require for their actualization only that people be let alone, and that, in contrast, the economic rights require affirmative actions by all citizens and vast undertakings by the state. Although this is an over-simplification since even early criminal law imposed affirmative duties on some persons, the gravity of doing that on a large scale is evident.

One need not take a stand regarding the conflict of economic philosophies to recognize that the gap between the recognition of a moral duty and its actualization by legal methods is a very large one. For example, governmental welfare programs, obviously, have serious shortcomings. In housing renewal, the principal beneficiaries seem to have been owners of property, while many poor people, uprooted from their familiar neighborhoods, have not been provided for in the new buildings. Since need has been the criterion for occupancy, the new structures are filled with broken families, juvenile delinquency becomes concentrated, and local schools suffer. Minimum wage laws have helped some, but they have also increased unemployment. Poverty programs have stimulated graft, embezzlement and fraud and their achievements seem to be problematic. Even specialist advocates acknowledge that the “war on poverty” is a misnomer. One of them said, “the program

¹ The salient example of “absolute duty” (for which, it is said, there is no correlative right) is in the criminal law. But cf. A. KOCOUREK, AN INTRODUCTION TO THE SCIENCE OF LAW 257 (1930). (“If there is a Duty, there must be a Claim”). What has given credence to the notion of “absolute duty” in criminal law is that “legal right” is usually ascribed to particular individuals, not to the community or to the State. But particular poor persons are ascertainable and actions in their behalf and class actions do not present the metaphysical difficulty met in ascribing rights to “the State.”
could be better described as an expedition to find out what the problems were and how to deal with them." 16 Another said, "Five years is a brief period, and the full dividends—or deficits—of OEO's [Office of Economic Opportunity] work will not be evident for some time. . . . The war on poverty will be judged, ultimately, more upon its success in mobilizing the poor as an effective [political] force than upon the number of dollars it has placed in their pockets." 17 A third writes, "CAA [Community Action Agency] programs have encountered difficulty in reaching, to any significant degree, the so-called hard-core poor." 18 A fourth states that he learned "how enormously resistant institutions are to change, and that it is easier to understand how change is inhibited than to perceive how to bring it about." 19 If these are the opinions of advocates of, and specialists in, the poverty programs, one can easily imagine how the critics of those programs would evaluate them.

Nonetheless, despite all the difficulties and the failures, Americans are not likely to shed their compassion for their unfortunate and disadvantaged fellows, especially since that feeling arises from a heightened sensitivity to the precariousness of the human situation in this century and the realization that every man is vulnerable to the slings of fortune. It is not a difference in altruism or compassion that divides students of these problems. Rather, what divides them are differences regarding other values, differences in knowledge of the facts, and differences concerning the methods that should be employed to solve those problems.

CONCLUSION

There are parallels between the necessary participation of private individuals in poverty programs and the assistance rendered by private individuals and agencies to convicts after their discharge from penal institutions. There are parallels between the individualization of treatment incorporated into the criminal law by probation, parole, pre-sentence hearings and the like, and the flexibility of procedures incorporated in the administration of laws proscribing discrimination, such as the requirement of informal hearings and recommendations as prerequisites to enforcement in the courts. These developments illustrate one of the points previously suggested: that even the best legal system inevitably falls short of achieving desirable and feasible goals, and

that legal justice needs to be supplemented by the efforts of individuals both within and without the confines of the law.

Further, the commonality of current attitudes towards both corrective and distributive justice is demonstrated by a heightened interest in law-in-action. It is not that the law in the books, the statutes and decisions, is unimportant, but that what counts most is what is done about those laws, that is, which laws are enforced, against whom and by whom. Studies of law-in-action would reveal the great difference between prescribed sentences and actual imprisonment, as well as many injustices, for instance, that various uses of discretion and administrative devices sometimes transform a long sentence for a major felony into less imprisonment than that served by much less serious offenders. It is in this context, also, that current efforts to terminate the long delays that afflict litigation are significant, for “justice delayed is justice denied.”

There are other common bonds between corrective and distributive justice in the 20th century. In both areas, the values of desert, fairness, freedom, and order are involved, although in different contexts. In both areas, justice requires retention of the value of responsibility, but traditional views of responsibility are tempered by reference to relevant psychological, social and economic facts. In both areas there is a need for consensus on a few basic values, careful study of their interrelations and of the probable consequences of subordinating one value to others in specific situations. These conclusions and the above analysis provide no easy answers in the quest for justice in this century, but they may serve as premises upon which specific investigations can be carried on.