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From the Selected Works of Ira P. Robbins

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Book Review: A Theory of Criminal Justice by Jan Corecki. New York: Columbia University Press. 1979. Pp. xv, 185. \$15.00.

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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 Petrazhicki*, 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).