THE OFFENDERS. By Giles Playfair and Derrick Sington. New York: Simon and Schuster, 1957. Pp. x, 305. $3.95.

THIS book comes from the pens of a former barrister—now a dramatics professor—and a journalist. Although title and leitmotif are primarily concerned with purging the criminal law of vengeance—in the form of the death penalty—the actual scope of the undertaking is much broader. After a study of six criminal cases, the authors conclude that many of the central concepts of Anglo-American criminal law should be jettisoned. Among the discards are the classic guilt principle or *mens rea*, the test of responsibility, the maxim *nulla poena sine lege*, the methods of general and special deterrence, retribution and neutralization or incapacitation, judicial sentencing and the penalty of imprisonment—indeed perhaps any punishment. Turning about the question they asked the judges, we may ask them "how a somewhat lofty acquaintance with a few people who have *not* been deterred by fear of execution or imprisonment qualifies them as experts on the psychology of the remainder of the human race."[1]

But where do the authors stand? They proceed squarely from the tenets of the school of criminological positivism—though no explicit reference to criminological positivism is to be found in the book. These tenets were born in prefascist Italy, are the basis of the 1926 Penal Code of Soviet Russia and those of other soviet countries, and, though in a much less pure and much more liberal form, have made significant dents in the criminal jurisprudence of Scandinavian and Latin American countries. Traditional criminological positivism attributes all criminality to forces beyond the control of the offender rather than to individual decision, choice or intention. This premise leads to a denial of the propriety and usefulness of any punishment. Thus, while the concept of crime is supplanted by a concept of behavior resulting from psychopathy and similar forces, though no doubt of a socially dangerous nature, punishment is supplanted by methods of cure and social defense.

Advocacy of the positivist position is understandable in the world of today—indeed it has become a fashion—but to present it as something of new and unusual promise, the panacea for the crime problem of the world, is unjustifiable. Playfair and Sington devote only three lines to the failures of the criminological positivists.[2] They might have pointed out that thus far no country has been able to adopt the theory *in toto* and to stick to it. Even Sweden, which the authors describe as a particularly advanced country, still adheres largely to a repressive penal philosophy based on the proportionality of crime and penalty.[3] To conclude, as do the authors, that "it would seem only a logical development of this policy for all crime to be treated, eventually, clinically rather than punitively,"[4] is hopeless optimism devoid of a sound scientific basis.

1. P. 262.

2. "Nor . . . have they as yet had any marked success in solving the problem of non-homicidal recidivism, which is, in fact, their chief concern." P. 165.

3. See covert reference on p. 165; and *compare* book review by Germann of the latest Swedish works in point, 72 REV. PEN. SUISSE 335, 337 (1957).

4. P. 165.

The treatment of crime begins with a punitive, a deterrent listing of outlawed conduct and proportionate punishments; any other approach ignores the fact that man is essentially a rational animal gifted with the power of reason and self-restraint. That much learning of the classical school of criminology must remain part of our criminal law.

Of course, all countries have learned from the positivists and have, more or less successfully, integrated some measures of cure and social defense into the classical penal systems. Even our society, which "through the practice of the deterrent-retributive theory of punishment . . . violates the rights of the individual,"[5] has taken major steps in this direction, as the authors must admit in a listing of accomplishments—an extremely haphazard one, unfortunately.[6]

In one instance, however, Playfair and Sington have scored a major rational point. An argument often advanced in support of the death penalty is that it satisfies a latent emotional need of the people. The authors are entirely right in pointing out that this supposed need is "a shameful one in the present state of our civilization." The answer lies in "educating public opinion," they quite rightly conclude.[7] Perhaps the book is meant to be a start in this direction, and, true to tradition, the emotional or "dramatic"[8] approach has been used to combat what is deemed to be perverted emotion.[9] But the human feeling for retribution is such an ancient and deep-seated emotional attitude that ordinary educational methods will almost certainly fail in attempts to remove it from the heart of man, and certainly as superficial an attempt as *The Offenders* will not achieve the goal.

More difficult working material could hardly have been found than the five Anglo-American cases which the authors have chosen for demonstrative purposes. Perhaps this speaks for the authors' courage. Four of the cases actually did arouse extreme popular clamor and demands for vengeance. Two involved political fanatics, the Rosenbergs and SS concentration camp guard Irma Grese; in the other three, the offenders were dangerous criminal psychopaths [10] —double murderers Neville Heath and Joseph Redenbaugh, and an armed robber, called Rudi Brettinger by the authors. While apt for a discourse on retribution, these five cases can hardly be used in an effort to reach a conclusion of the "bankrupt ends of . . . deterrence."[11] It is well known that political fanatics and dangerous criminal psychopaths are least subject to deterrence. That deterrence fails on such offenders is, of course, no proof that it similarly fails on the great multitude of nonpsychopathic offenders. Or do the authors wish to imply that every offender is *ipso facto* a psychopath?

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5. P. viii.
6. Pp. 276-77.
7. P. 273.
8. P. vii.
9. The Swedish case of Aake Horsten is a good, though for an American lay audience a risky, example of such dramatic education. Pp. 144-66.
10. The authors so classify them, pp. 3-4.
11. P. 274.

Nothing more need be said about the authors' general approach. But a few examples should be cited to demonstrate that the book is not only poor in scheme but also superficial in detail. The oversimplified discussion of the Mc-'Naghten rules, an extremely technical subject, is a prime instance. Graver than superficiality is the failure to adhere to logic and consistency. For example, on page 180 we learn that in the case of Irma Grese "capital punishment was invoked . . . not in order to deter or as a measure of retribution. It was a response to the clamor for revenge . . . ." Yet on page 210 the authors, discussing the same case, observe that the death penalty was "cold-blooded violence in the name of deterrence." And on page 235 we read about the Rosenberg trial that "the purpose of sentencing . . . , as seems indisputable, . . . was reformative . . . ." Seven lines further down, a "retributive" motive is attributed to Judge Kaufman, probably correctly.[12]

In their zeal to demonstrate the incongruity of American federal penal law, the authors have sacrificed accuracy for dramatics resting, incidentally, on questionable value considerations. After a statement that first degree murder under American federal law carries the death penalty and second degree murder does not,[13] the authors list six "other" crimes which, they imply, are of lesser gravity than murder in the second degree but carry the death penalty. The inclusion of rape in this list is correct. But how valid is a personal value judgment on the severity of this offense as compared with a community value judgment that rape is as grave an offense as first degree murder? The authors should have added that kidnapping only carries the death penalty if the kidnapper, after interstate transportation of the victim, fails to release him *unharmed*.[14] Sabotage of a commercial vehicle, a category that now also includes airplanes, carries the death penalty only if it results in loss of life, as the authors rightly state. But this is not an "other offense"; rather it constitutes murder by common-law standards. Armed robbery and aggravated assault do not carry the death penalty, unless a human being is killed during or as a result of the crime. Here again, a common-law murder has been made out. "Dope peddling" —sometimes popularly called "installment murder"—does not ordinarily carry the death penalty. Only in the exceptional case of catering to juveniles below eighteen years may the jury, in its discretion, impose the death penalty.[15]

On such inaccurate and misleading information, the authors base their charge that our penal law lacks "any coherent philosophy regarding the use and

12. Nowhere do the authors give accurate definitions of the classic theories of punishment. In particular, the relation between retribution and vengeance, the former an ethically purified version of the latter emotionally controlled theory, has not been made clear. If this distinction is kept in mind, it may fairly be said that Judge Kaufman acted under a retributive theory.

13. The typical case is killing in the heat of passion and without premeditation and deliberation.

14. In the typical case, *e.g.*, that of Carl Austin Hall, see p. 4, the victim has been murdered.

15. The authors fail to include treason and wartime military offenses in their list of capital crimes, pp. 250-51.

appropriateness of capital punishment."[16] But the entire thesis of the book finally falls with the passage: "In the witness box [Irma Grese] . . . related how she had once been ordered to inflict part of a punishment of 25 strokes with a stick upon a disobedient colleague. Moreover, to be degraded from wardress to prisoner was not so rare in the German concentration camps. Who can say for certain that, having knowledge of such possible consequences, he would have had the courage to refuse obedience?"[17] Thus, the authors attribute a real and powerful effect to deterrence—a theory they elsewhere declare bankrupt and useless.

Undoubtedly the authors set out to espouse what they and many others would regard as a good cause. However, if their aim was educational, they have, in operating with hunches and dramatized inaccuracies, painted a distorted picture which has no positive educational value. The thinking lay reader is left with the impression that modern criminologists and criminal law scholars fail to grasp realities. But this conclusion is plainly untrue. As a criminological contribution, the book has no scholarly merit. If Playfair and Sington have succeeded in writing a book which, through its case descriptions, fascinates the ordinary novel reader, this would be the summit of their achievement.

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16. P. 251.

17. P. 202. See also p. 205.

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