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THE GENERAL PREVENTIVE EFFECTS OF PUNISHMENT

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"For what mortal is righteous if he nothing fear?"
(Aeschylus in the Eumenides)

I. THE CONCEPT OF GENERAL PREVENTION

In continental theories of criminal law, a basic distinction is made between the effects of punishment on the man being punished—individual prevention or special prevention—and the effects of punishment upon the members of society in general—general prevention. The characteristics of special prevention are termed "deterrence," "reformation" and "incapacitation," and these terms have meanings similar to their meanings in the English speaking world. General prevention, on the other hand, may be described as the *restraining influences emanating from the criminal law and the legal machinery.*

By means of the criminal law, and by means of specific applications of this law, "messages" are sent to members of a society. The criminal law lists those actions which are liable to prosecution, and it specifies the penalties involved. The decisions of the courts and actions by the police and prison officials transmit knowledge about the law, underlining the fact that criminal laws are not mere empty threats, and providing detailed information as to what kind of penalty might be expected for violations of specific laws. To the extent that these stimuli restrain citizens from socially undesired actions which they might otherwise have committed, a general preventive effect is secured.

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While the effects of special prevention depend upon how the law is implemented in each individual case, general prevention occurs as a result of an interplay between the provisions of the law and its enforcement in specific cases. In former times, emphasis was often placed on the physical exhibition of punishment as a deterrent influence, for example, by performing executions in public. Today it is customary to emphasize the *threat* of punishment as such. From this point of view the significance of the individual sentence and the execution of it lies in the support that these actions give to the law. It may be that some people are not particularly sensitive to an abstract threat of penalty, and that these persons can be motivated toward conformity only if the penalties can be demonstrated in concrete sentences which they feel relevant to their own life situations.

The effect of the criminal law and its enforcement may be *mere deterrence*. Because of the hazards involved, a person who contemplates a punishable offense might not act. But it is not correct to regard general prevention and deterrence as one and the same thing. The concept of general prevention also includes the *moral* or *socio-pedagogical* influence of punishment. The "messages" sent by law and the legal processes contain factual information about what would be risked by disobedience, but they also contain proclamations specifying that it is *wrong* to disobey. Some authors extend the concept of deterrence so that it includes the moral influences of the law and is, thus, synonymous with general prevention.[1] In this article, however, the term deterrence is used in the more restrictive sense.

The moral influence of the criminal law may take various forms. It seems to be quite generally accepted among the members of society that the law should be obeyed even though one is dissatisfied with it and wants it changed. If this is true, we may conclude that the law as an institution itself to some extent creates conformity. But more important than this formal respect for the law is respect for the values which the law seeks to protect. It may be said that from law and the legal machinery there emanates a flow of propaganda which favors such respect. Punishment is a means of expressing social disapproval. In this way the criminal law and its enforcement supplement and enhance the moral influence acquired through education and other non-legal processes. Stated negatively, the penalty neutralizes the demoralizing consequences that arise when people witness crimes being perpetrated.

Deterrence and moral influence may both operate on the conscious level. The potential criminal may deliberate about the hazards in-

[1] See, *e.g.*, TAPPAN, CRIME, JUSTICE AND CORRECTION 247 (1960).

volved, or he may be influenced by a conscious desire to behave lawfully. However, with fear or moral influence as an intermediate link, it is possible to create unconscious inhibitions against crime, and perhaps to establish a condition of habitual lawfulness. In this case, illegal actions will not present themselves consciously as real alternatives to conformity, even in situations where the potential criminal would run no risk whatsoever of being caught.

General preventive effects do not occur only among those who have been informed about penal provisions and their applications. Through a process of learning and social imitation, norms and taboos may be transmitted to persons who have no idea about their origins—in much the way that innovations in Parisian fashions appear in the clothing of country girls who have never heard of Dior or Lanvin.

Making a distinction between special prevention and general prevention is a useful way of calling attention to the importance of legal punishment in the lives of members of the general public, but the distinction is also to some extent an artificial one. The distinction is simple when one discusses the reformative and incapacitative effects of punishment on the individual criminal. But when one discusses the deterrent effects of punishment the distinction becomes less clear. Suppose a driver is fined ten dollars for disregarding the speed limit. He may be neither reformed nor incapacitated but he might, perhaps, drive more slowly in the future. His motivation in subsequent situations in which he is tempted to drive too rapidly will not differ fundamentally from that of a driver who has not been fined; in other words a general preventive effect will operate. But for the driver who has been fined, this motive has, perhaps, been strengthened by the recollection of his former unpleasant experience. We may say that a general preventive feature and special preventive feature here act together.

Let me hasten to point out here that so far I have only presented a kind of conceptual framework. Determination of the extent to which such general preventive effects exist, and location of the social conditions that are instrumental in creating them, are empirical problems which will be discussed in this paper.

II. A Neglected Field of Research

General prevention has played a substantial part in the *philosophy of the criminal law.* It is mentioned in Greek philosophy, and it is basic in the writings of Beccaria, Bentham and Feuerbach. According to Feuerbach, for example, the function of punishment is to create a "psychological coercion" among the citizens.[2] The threat of penalty,

[2] Feuerbach, Lehrbuch des Gemeinen in Deutschland Peinlichen Rechts 117 (1812).

consequently, had to be specified so that, in the mind of the potential malefactor, the fear of punishment carried more weight than did the sacrifice involved in refraining from the offense. The use of punishment in individual cases could be justified only because punishment was necessary to render the threat effective. The earlier writers were concerned mainly with the purely deterrent effects of punishment, while the moral effect of punishment has been subjected to detailed analysis in more recent theories, especially in Germany and in the Scandinavian countries.[3]

Notions of general prevention also have played a major part in *legislative actions.* This was especially apparent a hundred or a hundred and fifty years ago when the classical school was dominant. The Bavarian Penal Code of 1813, copied by many countries, was authored by Feuerbach and fashioned on his ideas. In more recent years, there has been an increasing tendency to emphasize special prevention. The judge now has greater discretion in deciding the length of sentences and he has at his disposal several alternatives to the classical prison sentence. But these changes have not altered the basic character of the system. Unlike mental health acts, penal laws are not designed as prescriptions for people who are in need of treatment because of personality troubles. While there are some exceptions, such as sexual psychopath acts and provisions in penal laws about specific measures to be used when dealing with mentally abnormal people or other special groups of delinquents, penal laws are primarily fashioned to *establish and defend social norms.* As a legislature tries to decide whether to extend or to restrict the area of punishable offenses, or to increase or mitigate the penalty, the focus of attention usually is on the ability of penal laws to modify patterns of behavior. This is the basic question in current debates about the legal treatment of homosexuality, abortion, public prostitution and drunken driving. From the point of view of sheer logic one must say that general prevention—*i.e.*, assurance that a minimum number of crimes will be committed—must have priority over special prevention—*i.e.*, impeding a particular criminal from future offenses. If general prevention were one hundred percent effective, there would obviously be no need for the imposition of penalties in individual cases.

Ideas about general prevention also have had great effects on the *sentencing policies of courts.* Sometimes this becomes manifest in a

[3] A full account of the theories of general prevention is to be found in AGGE, STUDIER OVER DET STRAFFRATTSLIGA REAKTIONSSYSTEMET (Studies in the System of Penal Sanctions) (1939). See also AUBERT, OM STRAFFENS SOSIALE FUNKSJON (The Social Function of Punishment) (1954); KINBERG, BASIC PROBLEMS OF CRIMINOLOGY (1935); OLIVECRONA, LAW AS FACT (1939); Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L., C. & P.S. 176 (1952).

dramatic way. In September, 1958, international attention was aroused when the criminal court of Old Bailey sentenced nine young boys, six of them only seventeen years old, to four years of imprisonment for having taken part in race riots involving the use of force against colored people in the Notting Hill district in London.[4] The sentences were considerably heavier than previous sentences in similar cases, and they were meant to be and were regarded as a strong warning to others.[5] Another example occurred in 1945 when the Norwegian Supreme Court sentenced Quisling to death. The first voting judge expressed ideas of general prevention in the following words:

> In a country's hour of fate chaos must not be allowed to reign. And facing the present and the future it must be made clear that a man who, in a critical time in the nation's history, substitutes his own will for the will of constitutional institutions and consequently betrays his country, for him his country has no room.[6]

Ordinarily, there is less drama in the sentencing activities of the courts. The individual decision generally remains within the established tradition of sentencing. But there is no doubt that considerations of general prevention have been important in establishing these patterns. In Norway, the Supreme Court is the court of last resort in matters of sentencing, and it gives reasons for its decisions. General prevention is frequently mentioned. For example, the Supreme Court has established the principle that for reasons of general prevention suspended sentences are not ordinarily imposed in cases involving the use of motor vehicles while in a state of intoxication or in cases involving the use of force against the police.

While general prevention has occupied and still occupies a central position in the philosophy of criminal law, in penal legislation and in the sentencing policies of the courts, it is almost totally neglected in criminology and sociology.[7] It is a deplorable fact that practically no empirical research is being carried out on the subject. In both current criminological debates and the literature of criminology, statements about general prevention are often dogmatic and emotional. They are proclamations of faith which are used as arguments either in favor of or in opposition to the prevailing system. On one hand, we find those who favor authority, severity and punishment; on the other hand those who believe in understanding, treatment and measures of social welfare. The vast majority of criminologists seem to have adopted

[4] WOOTTON, CRIME AND THE CRIMINAL LAW 100-01 (1963).
[5] *Ibid.*
[6] 116 NORSK RETSTIDENDE 109 (1945).
[7] It is particularly noteworthy that American criminological research, which is carried out mainly by sociologists, has not been concerned with general prevention.

the second position, and sweeping statements are sometimes put forth as scientific facts. Let me quote a few examples. Barnes and Teeters hold that: "The claim for deterrence is belied by both history and logic. History shows that severe punishments have never reduced criminality to any marked degree." [8] John Ellington has tried to give psychological foundation for the idea: "The belief that punishment protects society from crime by deterring would-be law breakers will not stand up before our new understanding of human behavior." [9] Frequently it is asserted in rather strong terms that the idea of general prevention is merely ancient superstition supported by conservative jurists who have no knowledge whatsoever of human nature. During a debate in 1935, a prominent prison authority in my own country stated:

> With us it is chiefly among the prison authorities and the psychiatrists that we find the supporters of the new ideas [*i.e.*, special prevention]. And this is no coincidence, for they study man, while the jurists chiefly read books and files. When a man learns to know and understand criminals he is likely to lose faith in the general preventive effects of punishment and, on the whole, to lose faith in the effectiveness of heavy penalties as a weapon in the war against crime, unless his mental arteries have hardened. He will come to realize that in this struggle entirely different methods produce the actual result.[10]

It is important that empirical questions about the effects of the penal system on the behavior of citizens become detached from ideological arguments so that they can be discussed dispassionately and without bias. As long as no research results are available, legislators and judges necessarily must base their decisions on common sense alone. We should focus on the neglected issue, which is to what degree, and under which conditions, it is possible to direct the behavior of citizens by means of the threat of punishment. This again is part of the more comprehensive problem of determining the extent to which citizens can be guided by means of legal rules.

III. Some Erroneous Inferences About General Prevention

Certain untenable contentions are frequently introduced in various forms into discussions of general prevention, and it might be helpful to clear them away before we proceed.

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[8] Barnes & Teeters, New Horizons in Criminology 338 (2d ed. 1951).

[9] Ellington, Protecting Our Children From Criminal Careers 43 (1948), quoted in Ball, *The Deterrence Concept in Criminology and Law*, 46 J. Crim. L., C. & P.S. 347, 351 (1955).

[10] Omsted, Forhandlinger ved Den Norske Kriminalistforenings Mote 42 (1935).

(1) *"Our knowledge of criminals shows us that the criminal law has no deterrent effects."*

The fallacy of this argument is obvious. If a man commits a crime, we can only conclude that general prevention has not worked *in his case.* If I interview a thousand prisoners, I collect information about a thousand men in whose cases general prevention has failed. But I cannot infer from this data that general prevention is ineffective in the cases of all those who have *not* committed crimes. General prevention is more concerned with the psychology of those obedient to the law than with the psychology of criminals.

(2) *"The belief in general prevention rests on an untenable rationalistic theory of behavior."*

It is true that the extreme theories of general prevention worked out by people like Bentham and Feuerbach were based on a shallow psychological model in which the actions of men were regarded as the outcome of a rational choice whereby gains and losses were weighed against each other. Similar simplified theories are sometimes expressed by police officials and by authors of letters to newspaper editors asking for heavier penalties. But if we discard such theories, it does not follow that we have to discard the idea of general prevention. Just as fear enters the picture when people take a calculated risk in committing an offense, fear may also be an element in behavior which is not rationally motivated. As mentioned earlier, modern theories of general prevention take into account both deterrence and moral influence, and they concede that the effects involved may be "unconscious and emotional, drawing upon deep rooted fears and aspirations." [11] This does not mean that one's general theory of motivation is of no consequence in assessing the effect of general prevention. The criminologist who believes that a great many people walk about carrying an urge for punishment which may be satisfied by committing crimes is likely to be more skeptical about the value of penal threats than is another who believes that these cases are rare exceptions. Similarly, a man who views human nature optimistically, is less inclined to advocate repressive measures than a person who believes that man is ruthless and egoistic by nature and kept in line only by means of fear.

(3) *"Legal history shows that general prevention has always been overestimated."*

It is true that in the course of history there have been contentions about general prevention which seem fantastic today. There was a

[11] TAPPAN, *op. cit. supra* note 1, at 246.

time when distinguished members of the House of Lords rose to warn their countrymen that the security of property would be seriously endangered if the administration of justice were weakened by abolition of capital punishment for shoplifting of items having a value of five shillings.[12] Even today, one might find people with exaggerated conceptions of what can be accomplished by means of strong threats of punishment. But the fact that the general preventive effects of punishment might have been exaggerated does not disprove the existence of such effects.

(4) *"Because people generally refrain from crimes on moral grounds, threats of penalty have little influence."*

The premise contains a large measure of truth, but it does not justify the conclusion. Three comments are necessary. (a) Even if people on the whole do not require the criminal law to keep them from committing more serious offenses, this is not true for offenses which are subject to little or no moral reprobation. (b) Even though moral inhibitions today are adequate enough to prevent the bulk of the population from committing serious crimes, it is a debatable question whether this would continue for long if the hazards of punishment were removed or drastically minimized. It is conceivable that only a small number of people would fall victim to temptation when the penalties were first abolished or greatly reduced, but that with the passage of time, crime would attract the weaker souls who had become demoralized by seeing offenses committed with impunity. The effects might gradually spread through the population in a chain reaction. (c) Even though it be conceded that law abiding conduct in certain areas predominantly depends upon nonlegal conditions, this does not mean that the effects of the legal machinery are not extremely valuable from a community point of view. Let us imagine a fictitious city which has a million adult male inhabitants who commit a hundred rapes annually. Suppose, then, that abolishing the crime of rape led to an increase in the number of rape cases to one thousand. From a social psychological point of view one might conclude that the legal measures were quite insignificant: 999,000 males do not commit rape even when the threat of penalty is absent. If observed from the view point of the legal machinery, however, the conclusion is entirely different. A catastrophic increase of serious cases of violence has occurred. In other words, the increase in rape has demonstrated the tremendous social importance of general prevention.

[12] KOESTLER, REFLECTIONS ON HANGING 30 (1957) (with extracts of the speech of Chief Justice Ellenborough on May 30, 1810). See also 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 231-59 (1948) (on "the doctrine of maximum security").

(5) *"To believe in general prevention is to accept brutal penalties."*

This reasoning is apparent in Zilboorg's statement that "if it is true that the punishment of the criminal must have a deterrent effect, then the abolition of the drawing and quartering of criminals was both a logical and penological mistake. Why make punishment milder and thus diminish the deterrent effect of punishment?" [13]

Here we find a mixture of empirical and ethical issues. It was never a principle of criminal justice that crime should be prevented at all costs. Ethical and social considerations will always determine which measures are considered "proper." As Ball has expressed it: "[A] penalty may be quite effective as a deterrent, yet undesirable." [14] Even if it were possible to prove that cutting off thieves' hands would effectively prevent theft, proposals for such practice would scarcely win many adherents today. This paper, however, is primarily concerned with the empirical questions.

IV. Some Basic Observations About General Prevention

There are other varieties of error about general prevention, but the five types discussed are the basic ones. I shall now state in greater detail some facts we must bear in mind when considering general prevention. While most of these points seem fairly self evident, they nevertheless are frequently overlooked.

(1) *Differences between types of offenses.* The effect of criminal law on the motivation of individuals is likely to vary substantially, depending on the character of the norm being protected. Criminal law theory has for ages distinguished between actions which are immoral in their own right, *mala per se*, and actions which are illegal merely because they are prohibited by law, *mala quia prohibita.* Although the boundaries between these two types of action are somewhat blurred, the distinction is a fundamental one. In the case of *mala per se*, the law supports the moral codes of society. If the threats of legal punishment were removed, moral feelings and the fear of public judgment would remain as powerful crime prevention forces, at least for a limited period. In the case of *mala quia prohibita*, the law stands alone; conformity is essentially a matter of effective legal sanctions.

But there are variations within each of these two main groups. Let us take the ban on incest and the prohibition of the theft, as examples. As a moral matter, the prohibition of incest is nearly universal, but violations are not legally punishable everywhere. I

[13] Zilboorg, The Psychology of the Criminal Act and Punishment 78 (1954).

[14] Ball, *supra* note 9, at 352.

doubt that the absence of a threat of punishment seriously influences the number of cases of incest. The moral prohibition of incest is so closely integrated with family structure that there is little need for the support of the criminal law. Stealing, however, is an entirely different matter. As Leslie Wilkins puts it: "The average normal housewife does not need to be deterred from poisoning her husband, but possibly does need a deterrent from shoplifting." [15] And what applies to stealing applies even more to tax dodging. In this field, experience seems to show that the majority of citizens are potential criminals. Generally speaking, the more rational and normally motivated a specific violation may appear, the greater the importance of criminal sanctions as a means of sustaining lawfulness.

Any realistic discussion of general prevention must be based on a distinction between various types of norms and on an analysis of the circumstances motivating transgression in each particular type.[16] This is a fact easily overlooked, and authors often discuss general prevention as if all norms were the same. Probably they have certain basic types of offenses in mind—for instance murder or property violations—but they fail to make this limitation explicit.

(2) *Differences between persons.* Citizens are not equally receptive to the general preventive effects of the penal system. The intellectual prerequisites to understanding and assessing the threat of punishment may be deficient or totally absent. Children, the insane and those suffering from mental deficiency are, for this reason, poor objects of general prevention. In other cases, the emotional preconditions are missing; some people more than others are slaves of the desires and impulses of the moment, even when realizing that they may have to pay dearly for their self-indulgence. In addition, psychiatrists claim that some people have feelings of guilt and consequent cravings for penance that lead them to commit crimes for the purpose of bringing punishment upon themselves.

Just as intellectual and emotional defects reduce the deterrent effects of punishment, they may also render an individual more or less unsusceptible to the moral influences of the law. While most members of the community will normally be inclined to accept the provisions and prohibitions of the law, this attitude is not uniform. Some people exhibit extreme opposition to authority either in the form of indifference or overaggression and defiance.

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[15] Wilkins, *Criminology: An Operational Research Approach*, in SOCIETY—PROBLEMS AND METHODS OF STUDY 322 (Welford ed. 1962).

[16] See Andenaes, *supra* note 3, at 176-90. Six types of violations are discussed: Police offenses, economic crimes, property violations, moral offenses, murder and political crimes.

(3) *Differences between societies.* The criminal laws do not operate in a cultural vacuum. Their functions and importance vary radically according to the kind of society which they serve. In a small, slowly changing community the informal social pressures are strong enough to stimulate a large measure of conformity without the aid of penal laws. In an expanding urbanized society with a large degree of mobility this social control is weakened, and the mechanisms of legal control assume a far more basic role.[17]

Even in countries which have reached equivalent stages of economic development, the cultural atmosphere may differ. After a visit to the United States in the 1930's, two leading European criminologists found that the American attitude toward the law was different from the attitude in the more tradition bound European societies. The Austrian criminologist Grassberger spoke of the lack of a legal conscience (Rechtsbewusstsein) in the European sense.[18] The Swedish psychiatrist Kinberg emphasized

> the apparently slight influence exercised by the penal laws on the public opinion of morals. The legislative mill grinds as it does in European countries, but the average American cares little what comes out of it. His own behavior-patterns are but slightly affected by the fact that the penal law disapproves of a certain behavior-pattern, but so much the more by the opinion of his own social group, *i.e.*, the people with whom his psychological relations are more or less personal, *e.g.*, his family, friends, fellow workers, acquaintances, clubs, etc.[19]

(4) *Conflicting group norms.* The motivating influences of the penal law may become more or less neutralized by group norms working in the opposite direction. The group may be a religious organization which opposes compulsory military service, or it may be a criminal gang acting for the sake of profit. It may be organized labor fighting against strike legislation which they regard as unjust, or it may be a prohibited political party that wants to reform the entire social and political order of the day. It may be a subjugated minority using every means available in its struggle for equality, or the dominating

[17] Military forces waging war in enemy territories might be regarded as constituting separate societies in which the pressure toward violations of law and the pressure toward conformity are both especially powerful. "There have been armies having no disciplinary punishments, no dungeons or execution platoons," says Tarde; "in every instance they soon became a horde." TARDE, PENAL PHILOSOPHY 480 (1912). The statement may contain some exaggeration, but there is a substantial measure of truth in it. In occupation armies characterized by strict discipline, as for example the German army in Norway during World War II, plunder and rape are practically unknown, while such encroachments may assume great proportions when the discipline is weak. See RUSSELL, THE SCOURGE OF THE SWASTIKA 132-33 (1959).

[18] GRASSBERGER, GEWERBS-UND BERUFSVERBRECHERTUM IN DEN VEREINIGTEN STAATEN VON AMERIKA 299 (1933).

[19] KINBERG, *op. cit. supra* note 3, at 168-69.

group of society which employs every means available to prevent the minority from enjoying in practice the equality it is promised in law. Or perhaps it may be an ethnic or social group whose traditional patterns of living clash with the laws of society.

In such cases, the result is a conflict between the formalized community laws, which are expressed through the criminal law, and the counteracting norms dominating the group. Against the moral effects of the penal law stands the moral influence of the group; against the fear of legal sanction stands the fear of group sanction, which may range from the loss of social status to economic boycott, violence and even homicide.

(5) *Law obedience in law enforcement agencies.* The question of general prevention is normally treated as a matter of the private citizen's obedience of the law. However, a similar question may be raised about law enforcement agencies. All countries have outlawed corruption and neglect of duty within the police and the civil service, but in many places they are serious problems. In all probability, there are few areas in which the crime rates differ so much from country to country. Laxity and corruption in law enforcement in its turn is bound to reduce the general preventive effects of criminal law.

V. Variations in General Prevention With Changes in Legislation and Enforcement

It is a matter of basic interest, from a practical point of view, to determine how general prevention varies according to changes in legislation or legal machinery. Such changes may be classified into four different categories.

(1) *The Risk of Detection, Apprehension and Conviction.* The efficiency of the system could be changed, for example, by intensifying or reducing the effort of the police or by altering the rules of criminal procedure so as to increase or lower the probabilities that criminals will escape punishment. Even the simplest kind of common sense indicates that the degree of risk of detection and conviction is of paramount importance to the preventive effects of the penal law. Very few people would violate the law if there were a policeman on every doorstep. It has even been suggested that the insanity of an offender be determined by asking whether he would have performed the prohibited act "with a policeman at his elbow." [20]

Exceptions would occur, however. Some crimes are committed in such a state of excitement that the criminal acts without regard to the consequences. In other cases the actor accepts the penalty as a

[20] See, *e.g.*, Model Penal Code § 4.01, comment at 158, appendix C at 184 (Tent. Draft No. 4, 1955).

reasonable price for carrying out the action—we may think of the attitude a busy salesman has toward parking regulations. Further a political assassin may deliberately sacrifice his life to his cause. But there is good reason to believe that certainty of rapid apprehension and punishment would prevent *most* violations.[21]

On the other hand there is evidence that the lack of enforcement of penal laws designed to regulate behavior in morally neutral fields may rapidly lead to mass infringements. Parking regulations, currency regulations and price regulations are examples of such laws.[22] The individual's moral reluctance to break the law is not strong enough to secure obedience when the law comes into conflict with his personal interests.

There is an interesting interplay between moral reprobation and legal implementation. At least three conditions combine to prevent an individual from perpetrating a punishable act he is tempted to perform: his moral inhibitions, his fear of the censure of his associates and his fear of punishment. The latter two elements are interwoven in many ways. A law violation may become known to the criminal's family, friends and neighbors even if there is no arrest or prosecution. However, it is frequently the process of arrest, prosecution and trial which brings the affair into the open and exposes the criminal to the censure of his associates. If the criminal can be sure that there will be no police action, he can generally rest assured that there will be no social reprobation. The legal machinery, therefore, is in itself the most effective means of mobilizing that kind of social control which emanates from community condemnation.

Reports on conditions of disorganization following wars, revolutions or mutinies provide ample documentation as to how lawlessness may flourish when the probability of detection, apprehension and conviction is low.[23] In these situations, however, many factors work together. The most clear cut examples of the importance of the risk of detection itself are provided by cases in which society functions normally but all policing activity is paralyzed by a police strike or a similar condition. For example, the following official report was made on lawlessness during a 1919 police strike, starting at midnight on July 31st, during which nearly half of the Liverpool policemen were out of service:

> In this district the strike was accompanied by threats, violence and intimidation on the part of lawless persons. Many

[21] The time element is important. Threats of punishment in the distant future are not as a rule as important in the process of motivation as are threats of immediate punishment.

[22] See Andenaes, *supra* note 3, at 182-86.

[23] See KINBERG, *op. cit. supra* note 3, ch. VI.

> assaults on the constables who remained on duty were committed. Owing to the sudden nature of the strike the authorities were afforded no opportunity to make adequate provision to cope with the position. Looting of shops commenced about 10 p.m. on August 1st, and continued for some days. In all about 400 shops were looted. Military were requisitioned, special constables sworn in, and police brought from other centers.[24]

A somewhat similar situation occurred in Denmark when the German occupation forces arrested the entire police force in September, 1944. During the remainder of the occupation period all policing was performed by an improvised unarmed watch corps, who were ineffective except in those instances when they were able to capture the criminal red handed. The general crime rate rose immediately, but there was a great discrepancy between the various types of crime.[25] The number of cases of robbery increased generally in Copenhagen during the war, rising from ten per year in 1939 to ten per month in 1943. But after the Germans arrested the police in 1944, the figure rose to over a hundred per month and continued to rise. Larcenies reported to the insurance companies quickly increased tenfold and more. The fact that penalties were greatly increased for criminals who were caught and brought before the courts did not offset the fact that most crimes were going undetected. On the other hand, crimes like embezzlement and fraud, where the criminal is usually known if the crime itself is discovered, do not seem to have increased notably.

Unfortunately none of these reports tells us whether the rise in criminality was due to increased activity among established criminals or whether noncriminals participated as well. Kinberg, basing his observations on studies of the French Revolution and other political upheavals, holds that the rate increases primarily because existing criminal and asocial elements take advantage of the unusual circumstances, but that men who were "potential criminals" before the crisis also make a contribution.

The involuntary experiments in Liverpool and Copenhagen showed a reduction in law obedience following a reduction of risks. Examples of the opposite are also reported—the number of crimes decreases as the hazards rise. Tarde mentions that the number of cases of poisoning decreased when research in chemistry and toxicology made it possible to discover with greater certainty the causes as well as the perpetrator of this type of crime.[26] A decline in bank robberies

[24] MANNHEIM, SOCIAL ASPECTS OF CRIME IN ENGLAND BETWEEN THE WARS 156-57 (1940).

[25] TROLLE, SYV MAANEDER UDEN POLITI (1945).

[26] TARDE, PENAL PHILOSOPHY 476 (1912).

and kidnappings in the United States is reported to have followed the enactment of federal legislation which increased the likelihood of punishment.[27]

A Swedish postwar experience is also worth noting. In order to save gasoline during the Suez crisis of 1956, Sweden prohibited the driving of private automobiles on weekends. While special permission to drive could be obtained (the necessary permit had to be affixed to the windshield of the car), most cars were immobilized. This prohibition, of course, greatly increased the risks involved in stealing cars on weekends. A considerable decrease in the number of automobile thefts is said to have occurred on Saturdays and Sundays during the period of prohibition, especially in the larger cities.[28] It appears that even such a youthful and unstable group as the automobile thieves in the Scandinavian countries—mostly "joyriders"—reacts to an increased risk when the increase is tangible enough.

The decisive factor in creating the deterrent effect is, of course, not the objective risk of detection but the risk as it is calculated by the potential criminal. We know little about how realistic these calculations are. It is often said that criminals tend to be overly optimistic—they are confident that all will work out well. It is possible that the reverse occurs among many law abiding people; they are deterred because of an over-estimation of the risks. A faulty estimate in one direction or the other may consequently play an important part in determining whether an individual is to become a criminal. If fluctuations in the risks of detection do not reach the potential offender, they can be of no consequence to deterrence. If, on the other hand, it were possible to convince people that crime does not pay, this assumption might act as a deterrent even if the risks, viewed objectively, remained unchanged.

Popular notions regarding the risks of convictions are also likely to have a bearing on the moral effects of the criminal law. The law's moral influence on the citizen is likely to be weakened if the law can be violated with impunity. The law abiding citizen who has subdued his anti-social inclinations might become frustrated when he observes others follow their desires without experiencing disagreeable consequences. He will not be able to confirm that his sacrifice was worthwhile.[29] Violations unknown to him, of course, will not produce similar results.

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[27] TAFT, CRIMINOLOGY 322, 361 (rev. ed. 1950); Ball, *supra* note 9, at 350 n.11. See also Sellin, *L'Effet Intimidant de la Peine*, [1958] REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 579, 590 (1960), concerning an experiment of the New York police in 1954.

[28] 1958 SOCIALA MEDDELANDEN 329-30.

[29] See Toby, *Is Punishment Necessary?*, 55 J. CRIM. L., C. & P.S. 332, 333-34 (1964).

However, for some types of crime even an occasional enforcement of the law may bring about considerable preventive effects. Criminal abortion convictions in most countries seem to be very rare in relation to the real crime rate. In Norway, a Public Law Committee in 1956 estimated that the annual number of illegal abortions was approximately 7,000.[30] During the preceding five years, on the average only twenty persons a year were found guilty of this offense. The situation in many other countries is much the same.[31] In spite of such infrequent law enforcement, however, most people who have given attention to the problem are convinced that a removal of the penal threat will lead to a decisive rise in the number of abortions. I do not believe that the threat of punishment has much deterrent effect on the women who desire abortion, but it makes it more difficult for them to find a doctor (or a quack) willing to perform the operation; moreover, the legal prohibition may influence the general attitude toward abortion. The Soviet experiment lends support to this position. To counteract quack abortions, the doors of the state hospitals were in 1920 opened for free interruptions of pregnancy. By 1930, the number of registered abortions in Leningrad and Moscow was one and one-half times as high as the number of births and still quack abortions had not disappeared.[32] In other countries of Eastern Europe and in Japan, the legalization or liberalization of abortion after World War II has been followed by an enormous rise in the number of abortions.[33]

(2) *The Severity of Penalties.* At least since the time of Beccaria, it has been commonly accepted that the certainty of detection and punishment is of greater consequence in deterring people from committing crimes than is the severity of the penalty. This notion has undoubtedly contributed significantly to the abolition of brutal penalties, and there is certainly a large measure of truth in it. Part of the explanation is that one who ponders the possibility of detection and punishment before committing a crime must necessarily consider the total social consequences, of which the penalty is but a part. A trusted cashier committing embezzlement, a minister who evades payment of his taxes, a teacher making sexual advances towards minors and a civil servant who accepts bribes have a fear of detection which is more closely linked with the dread of public scandal and subsequent social ruin than with apprehensions of legal punishment. Whether the

[30] INNSTILLING FRA STRAFFELOVRAADET OM ADGANGEN TIL AA AVBRYTE SVANGERSKAP 26 (1956).

[31] See, *e.g.*, G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 209-12 (1957).

[32] *Id.* at 213-20.

[33] See *id.* at 236; 2 EXCERPTA CRIMINOLOGICA 73 (1962). See also MEHLAN, INTERNATIONALE ABORTSITUATION (1961).

punishment is severe or mild thus appears to be rather unimportant. However, in cases of habitual criminals or juvenile delinquents from the slums the situation may be quite different.

Even if we accept Beccaria's position, it does not follow that the severity of penalties is without importance. It is difficult to increase the likelihood of detection and punishment because the risk of detection usually depends on many conditions beyond the reach of the authorities, and because improvement of police effectiveness requires money and human resources. Accordingly, when the legislators and courts attempt to check any apparent rise in the crime rate they generally increase the severity of penalties. On the other hand, for those who wish to make the criminal law more humane the problem is one of determining how far it is possible to proceed in the direction of leniency without weakening the law's total preventive effects. It is impossible to avoid the question of how important a change in the severity of the punishment may be under standard conditions of detection, apprehension and conviction. For the judge this is the only form in which the problem presents itself.

A potential criminal who reflects upon the possibilities of punishment may pay attention to the severity of the penalty to which he exposes himself, as well as to the risks of detection. He may be willing to run the risk of a year's imprisonment but he might not gamble ten. The situation is similar to those in which nature herself attaches penalties to certain actions. Sexual promiscuity has always brought with it the risk of undesired children and of venereal diseases, and consideration of these risks has certainly in the course of time persuaded many people to exercise self-restraint. The progress of civilization has lead to a diminishing of the former risk and rendered the latter less formidable. Few people will deny that these changes have had a considerable bearing on the development of sexual mores in the Western world.

One weakness in the mechanism of deterrence is the fact that threats of future punishment, especially if apprehension is uncertain, do not have the same motivating power as the desires of the moment. While some people live in a state of perpetual anxiety and concern for the future, others focus only on the present. There have always been people who have been willing to risk eternal pain as the price of satisfying worldly desires in this life. Moreover, when the risks of detection are considered small, it is possible that questions about the severity of the penalty tend to lose their significance. As we indicated earlier, the criminal often acts upon the assumption that all is going to end well; what might take place if he is caught is pushed into the background. It is also possible, of course, that the very severity of the

penalty—the magnitude of the risk—may give the illegal action a special appeal, in the way that dangerous sports are attractive to some people.

Other factors may also enter the picture. A professional criminal may be so strongly involved in his profession that he feels there are no real alternatives regardless of the penalties. The newspapers recently reported the activities of an eighty-seven year old Greek pick-pocket who was once more facing the court. He had fifty previous convictions, and had spent some fifty years behind prison walls in Greece or abroad. He was released from prison by amnesty on the occasion of King Constantine's wedding, but a few weeks later he was caught in the act of taking money from a man in an elevator. In the face of such a set pattern of life, the threat of punishment is simply ineffective.

Even more complicated than the connection between the magnitude of the penalty and its deterrent effect is the connection between the magnitude of the penalty and its moral effect. Heavy penalties are an expression of strong social condemnation, and prima facie one might assume that the heavier the penalty the greater its moral effect. However, it is not that simple. In fact, we are concerned here with two problems. One problem is that of determining the impact of stronger or lesser severity of the *entire penal system.* In the Scandinavian countries, sentences are on the whole much more lenient than in the United States. A penalty of three years imprisonment in Norway marks the crime as very grave, quite unlike the situation in the United States. Perhaps what takes place is an adjustment between the penalties employed and their evaluation by the public, so that social disapproval may be both expressed and graded almost as efficiently by means of lenient sentences as by severe ones. The second problem is that of determining the impact of stronger or milder penalties for *certain types of offenses.* Is it possible to use legislation and court practice as devices to influence where, on their scale of condemnation, citizens are to place different types of violations? Stephen seemed to have extreme confidence in the power of legislation when he said: "The sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax." [34] But it might be maintained with equal justification that while the law certainly serves to strengthen the moral inhibitions against crime in general, it is not very successful in pressing upon the public its own evaluation of various types of conduct. Experience, at least, seems to show that old laws which run counter to new ideas have a tendency to fade out of use and, eventually, to be repealed. A recent paper by Walker and Argyle gives some

[34] 2 STEPHEN, THE HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (1883).

support to the notion that mere knowledge that a form of conduct is a criminal offense has little bearing on the moral attitude of individuals toward that conduct.[35]

Questions about the importance of punishment have been discussed in great detail with reference to whether capital punishment for murder is conducive to greater preventive effects than life imprisonment. Comparisons between states employing capital punishment and states which have abolished it, as well as comparisons of the frequency of murder before and after abolition, reveal no stable correlations and have led most criminologists to conclude that capital punishment is of little or no consequence. The lack of correlation is understandable from a psychological point of view. In the first place, murder in our culture is surrounded by massive moral reprobation. Accordingly, the inhibitions against murder usually are broken only in situations of emotional excitement or intense pressure in which the criminal disregards the consequences. Secondly, if the potential criminal deliberates about the risk of punishment before he takes action, then both the death penalty and life imprisonment will appear so drastic that the difference between them may seem fairly insignificant. He relies on going undetected; if he is detected, he has lost.

The moral effects of capital punishment also must be considered. It may be said that capital punishment for murder exerts a moral influence by indicating that life is the most highly protected value. Perhaps this is what Stephen was expressing in his famous words: "Some men, probably, abstain from murder because they fear that, if they committed murder, they would be hung. Hundreds of thousands abstain from it because they regard it with horror. One great reason why they regard it with horror is, that murderers are hung with the hearty approbation of all reasonable men." [36] But it is worth noting that we find here a discrepancy between aims and means which is likely to weaken the moral effect of capital punishment. The law attempts to impress upon society a respect for human life as an absolute value while, at the same time, this respect is disregarded by employing the death penalty to punish the offender.

It would, however, be incorrect to conclude, on the basis of existing evidence, that the death penalty is always ineffective. In his book on terrorism and communism, Trotsky points out that after a revolution the deposed party fighting to regain power cannot become frightened by threats of imprisonment because no one believes in the permanence of the new regime. The death penalty by contrast retains

[35] Walker & Argyle, *Does the Law Affect Moral Judgment*, 4 BRITISH J. CRIM. 570 (1964).

[36] STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 99 (1863).

its deterrent effect—"the revolution kills a few and intimidates the thousands." [37] Experiences in my own country during the German occupation in the Second World War give rise to similar observations. To work against the occupants was considered by the great majority of the people to be nationally and morally just. To be arrested for illegal activities therefore brought about no loss of social esteem. On the contrary, the victims of the Gestapo were regarded by the population with affection and admiration. During the last part of the war, when the population counted the continuation of the occupation by months or weeks, even the threat of life imprisonment meant no more than the risk of transitory detention. In such a context, the threat of capital punishment produced a thoroughly different and more frightening effect than the notion of arrest and imprisonment. Experience during the occupation of Norway also shows how the risk of punishment might produce different results according to the national attitude of the individual and his receptiveness to danger. A large share of the population wanted to run no risks. Although sympathetic to the resistance movement, it would not become involved. Another large share of the public was willing to take part in resistance activities as long as the dangers were limited and their lives would not be in peril. Members of a third group would not allow themselves to be intimidated by notions of either death or torture.

It is unfortunate that discussions of general prevention have concentrated on the effects of capital punishment for murder. In most societies, murder is a rare crime which attracts a disproportionate amount of attention. At least in the Scandinavian countries, the victims of murder are very few in comparison with the victims of careless automobile driving, but for emotional reasons murder is more interesting than traffic deaths. Even in an emotional crime like murder, with all its pathological elements, it would be untenable to claim that the magnitude of the punishment has no effect whatsoever. If punishment of three or four years' imprisonment became the standard sentence for murder, the risk connected with murder done for the sake of profit would diminish and this kind of crime would probably increase. In the long run such a reduction in penalty might also reduce the inhibitions against committing murder in situations where murder seems a tempting escape from a situation of emotional conflict.

Interesting lessons may be drawn from an experiment launched in some of the Scandinavian countries to fight drunken driving. In Norway, for example, the motor vehicle code prohibits driving of motor

[37] TROTSKY, TERRORISME ET COMMUNISME 68 (1920).

vehicles when the alcohol percentage in the driver's blood exceeds 0.05,[38] a percentage which in clinical examinations would rarely produce behavioral changes significant enough to allow the drawing of uncontestable conclusions about a state of drunkenness or intoxication. A driver who is suspected of violating the provision must consent to a blood test, and it is not necessary to prove that the driver was unfit to drive because of his consumption of alcohol, so there is only very rarely any question of proof. And the consistent policy of the courts has been to give prison sentences for violations, except in cases involving very exceptional circumstances. The prison terms are short, usually not much more than the minimum jail period of twenty-one days, but the penalty is exacted on anyone who is detected, whether or not the driving was dangerous or caused damage.

A person moving between Norway and the United States can hardly avoid noticing the radical difference in the attitudes towards automobile driving and alcohol. There is no reason to doubt that the difference in legal provisions plays a substantial role in this difference in attitudes. The awareness of hazards of imprisonment for intoxicated driving is in our country a living reality to every driver, and for most people the risk seems too great. When a man goes to a party where alcoholic drinks are likely to be served, and if he is not fortunate enough to have a wife who drives but does not drink, he will leave his car at home or he will limit his consumption to a minimum. It is also my feeling—although I am here on uncertain grounds—that the legislation has been instrumental in forming or sustaining the widespread conviction that it is wrong, or irresponsible, to place oneself behind the wheel when intoxicated. "Alcohol and motor car driving do not belong together" is a slogan commonly accepted. Statistics on traffic accidents show a very small number of accidents due to intoxication.[39]

It should not be concluded that there is anything like absolute obedience to the laws regulating drunken driving. Every year a considerable number of people are convicted for violations, and the number has risen in proportion to the increase in the number of automobiles. In recent years, more persons have been sentenced to imprisonment for this misdemeanor than for all felonies put together. And there are, of course, a large number of citizens whose violations of the law go undetected because neither their management of the

[38] NORWEGIAN MOTOR VEHICLE CODE OF 1926, § 17.

[39] See ANDENAES & HAUGE, UAKTSOMT DRAP I DE NORDISKE LAND 78-79 (1966); Schram, *Trafikkulykker og Alkohol*, 1954 MOTORTIDENDE 10-15. Of 7,967 traffic accidents in 1951, the driver was under the influence of alcohol (more than 0.05% alcohol in the blood) in 114 cases. Of 194 fatal accidents, the driver was under the influence of alcohol in ten. In 1960 the figures were 310 and eleven respectively.

car nor their general behavior arouses suspicion. Interviews with students have revealed considerable hidden criminality even in this field. But the fact that violations occur does not interfere with our conclusion that the severity of the legislation has to a very high degree limited the incidence of driving after drinking.

It seems reasonable to conclude that as a general rule, though not without exceptions, the general preventive effect of the criminal law increases with the growing severity of penalties. Contemporary dictatorships display with almost frightening clarity the conformity that can be produced by a ruthlessly severe justice.

However, it is necessary to make two important reservations. In the first place, as we indicated when discussing the risk of detection, what is decisive is not the actual practice but how this practice is conceived by the public. Although little research has been done to find out how much the general public knows about the penal system, presumably most people have only vague and unspecified notions. Therefore, only quite substantial changes will be noticed. Only rarely does a single sentence bring about significant preventive effects.

In the second place, the prerequisite of general prevention is that the law be enforced. Experience seems to show that excessively severe penalties may actually reduce the risk of conviction, thereby leading to results contrary to their purpose. When the penalties are not reasonably attuned to the gravity of the violation, the public is less inclined to inform the police, the prosecuting authorities are less disposed to prosecute and juries are less apt to convict. Beutel has provided an excellent illustration of this in his study of the severe bad check laws in Nebraska. He concludes his examination of the policy of county attorneys and sheriffs as follows: "In all, the Nebraska picture is one of spotty performance by law enforcement officials, varying all the way from those who are frustrated by the enormity of enforcing the laws as written and consequently do nothing or as little as possible to those who try to enforce the statute literally but usually fail at re-election." [40] By comparison, he found that bad checks were rarer in Colorado, where the law was milder but enforcement was more uniform and effective.[41]

(3) *Punishment or Treatment.* There is ample reason to believe that the general preventive effects of punishment are connected with the main features of the penal system. For example, minor revisions of the rules about mitigating or aggravating circumstances in the meting out of punishment cannot easily be imagined as having demonstrable effects as long as fundamental changes in the direction of miti-

[40] BEUTEL, EXPERIMENTAL JURISPRUDENCE 366 (1957).
[41] *Ibid.*

gation or aggravation are not being introduced. From a practical point of view this means that considerations of individual prevention could be taken into account to a considerable degree without noticeably impairing the general preventive effects.

But it may well be asked what would happen if the existing penal system were abolished in favor of a purely treatment oriented system. This approach would be similar to the method currently used for children, the insane and mentally defective—incarceration is employed only to the extent deemed necessary in view of the problems of particular individuals, and any loss of liberty accompanying the incarceration is not intended as punishment.

To begin with, it is evident that even measures which are "pure treatment" may convey a deterrent influence similar to that of regular punishment. For example, a treatment program aimed at remodeling the criminal's personality and norm system often presupposes institutional treatment over a longer period than is necessary if the criminal is merely being punished. But from the point of view of general prevention the problem lies at the other end of the scale—in cases where the individual offender requires little or no treatment. This relates to one aspect of the problem which we touched on previously, namely how far it is possible to proceed in the direction of leniency without significantly reducing the preventive effects of the criminal law.[42]

It is hardly worthwhile to proceed further into discussions of the relationships of treatment and general prevention at this time. It is difficult to imagine what a purely treatment system might be. We know as yet very little about what kinds of treatment are most suitable for what kinds of criminals and even less about how, or whether, the rate of success varies according to the duration and intensity. Systems based on the treatment ideology could conceivably take forms which are utterly dissimilar from the point of view of general prevention. What appears realistic today is the application of treatment programs to limited categories of criminals. Discussions of treatment and general prevention must therefore take place in connection with such limited problems. For many categories of offenses a system of treatment does not seem to be at all a real alternative to the existing repressive system. Such offenses are, for example, espionage, careless driving, tax dodging, corruption among civil servants, violations of laws involving

[42] It has been contended that only a system of penalties representing *just retribution* will exert the desired influence on public morals. See the authorities referred to in ANDENAES, THE GENERAL PART OF THE CRIMINAL LAW OF NORWAY 64 n.12 (1965). Just retribution, according to this school of thought, is not the goal of punishment; it is the means which, socio-psychologically speaking, is most effective in securing obedience. Such general hypotheses are difficult to validate or negate.

economic regulation and all those similar prescriptions of order characterizing modern societies. In such cases, it is apparent to even the strongest believers in a treatment ideology that the basic function of the intervention of society is to create respect for social norms, not to cure individuals of their asocial inclinations.

(4) *Restriction or Expansion of the Penal System.* It may be interesting to speculate on what effects would occur if the entire penal system—the criminal law, the police, the courts, the prisons—were removed and no other apparatus of legal sanction substituted for it. According to Marxist ideology, this condition will be attained when the final Communist society has been established. The theory assumes that everyone will perform his duty willingly and habitually so that it will not be necessary to use punishment or other means of coercion, and consequently the state will wither away. But as we look at the actual developments within Communist countries we see no obvious signs that the state is withering away or that the police or punishment have been eliminated. Nearly half a century after the Russian Revolution, we find capital punishment used in the Soviet Union not only for treason but for economic crimes as well.

There may be fields where a sufficient degree of conformity could be reached without any sanction, by appealing to the citizens and making it easy for them to conform. But it does not seem probable that such techniques will be widely applicable. If it is felt necessary to interfere through legislation, it will normally also be felt necessary to put a sanction behind the rules. A threat of punishment is the traditional means of enforcement. Perhaps greater imagination should be used to develop alternatives to punishment.

It seems fairly safe to predict that no society will experiment in these matters to the extent of abolishing the basic penal provisions protecting life, bodily safety or property. The involuntary experiments created by police strikes or similar conditions support the notion that a highly urbanized industrial society can scarcely exist without police and criminal courts or a state power apparatus with similar functions. However, outside the basic areas protected by the criminal law the direction is much less certain. The regulation of economic activities through the use of criminal sanctions has varied from country to country. Religious offenses constitute another field in which there have been great fluctuations in the penal approach. Similarly, there currently is a great degree of uncertainty concerning the legal treatment of many activities rooted in or related to sex, such as prostitution, homosexuality, *crimen bestialitatis* and pornography. Abortion constitutes still another category which is subject to differing legal evalua-

tions. Political crimes also deserve to be mentioned. In some countries there is nearly boundless freedom for verbal attacks on the government and the prevailing social order, while in others any kind of criticism is considered a dangerous crime against the state.

Just an enumeration of some of these categories of crimes conveys the hopelessness of treating them as a single unit. Any discussion of the possibility—and desirability—of making citizens conform by means of the penal law must treat each category separately, and it must be based on detailed information about the activity being discussed. "Motivation" and "detection risks" are necessary key words in such a discussion. Prohibition laws in the United States and in some European countries after World War I are horrendous examples of miscalculation on the part of legislators. The experiments illustrate how difficult it is to evoke respect for penal provisions regarded by the bulk of the population as an undue interference with their freedom.

VI. Research Possibilities on the Efficacy of General Prevention

When for practical reasons it is necessary to estimate the general preventive effects of some specific alternative as opposed to another, the estimate is usually made by means of common psychological reasoning. For example, on the basis of rather cloudy notions of human nature and social conditions, law committees and judges sometimes try to predict how a certain innovation is likely to function in a particular situation in a given society. The more realistic the psychology applied, and the more thorough the knowledge about the activity concerned, the more probable it is that an estimate is somewhere near the truth.

It is now fashionable to hold that we have no knowledge whatever about general prevention. As should be apparent from the preceding material, I believe this to be a considerable exaggeration. In fact, it may well be maintained that we have more knowledge, at least more useful knowledge, about the general preventive effects of punishment than about special preventive effects. A generation ago, prison authorities and psychiatrists believed they knew a good deal about how to treat criminals. Recent research, especially that conducted in England and California on the comparative effects of various sanctions, seems to show that, on the whole, these notions were illusions.[43] This research suggests that there is little difference between the overall results of various kinds of treatment when consideration is given to differences in the composition of the population being treated. Pro-

[43] For a first rate and up to date survey, see Hood, Research on the Effectiveness of Punishments and Treatments (Report to the European Council No. DPC/CDIR 9, 1964).

bation shows almost the same results as institutional treatment; a short period of treatment about the same results as long one; traditional disciplinary institutional treatment on the whole appears to have results similar to those produced by treatment in modern, therapeutically-oriented institutions. It may be that overall success rates are improper measures of the effects of different treatments, because one type of treatment may be effective with one type of offender and not with another. The attempts to work out a typology with which to verify such an hypothesis have not gone beyond the "pilot study" stage. The present state of knowledge does not provide adequate grounds for erecting a penal system based on special preventive points of view.

Continuing research on treatment is necessary. No less important, however, is research designed to shed more light on questions of general prevention. From time to time it is held that there is no scientific method of research into general prevention. This, in my opinion, is unwarranted defeatism. The problems are difficult, especially in relation to the long range moral effects of the criminal law, but scarcely more difficult than many other problems dealt with in sociological or social psychological research. Let us examine the methods at our disposal.

(1) *Comparisons between geographic areas.* This method has been employed in discussions of the effects of capital punishment. Areas using the death penalty for murder are compared to areas where there is no death penalty for this crime, with a view to determining whether there is any connection between the punishment and the murder rates. The method certainly has its difficulties. Statistics show only the criminality which has been detected, and it is difficult to obtain full knowledge of the factors which may influence the ratio of undetected crime. Even if the comparative method reveals a real difference in the extent of criminality, we still must judge whether the difference is due to the penal system or to other social conditions. In order to draw definite conclusions we need areas with similar social conditions but drastic differences in legal systems, and such areas are difficult to find. Systems of penal sanctions are usually quite similar in countries which are close to each other in the fields of economic and cultural development. If certain behavior is punishable in one country but not in another, we may face an additional difficulty arising from the fact that in the second country the behavior not regarded as criminal will ordinarily not be investigated or registered.

In certain areas, however, there is hope for fruitful comparisons. By and large, these are fields where sources other than police or court

statistics can be utilized to measure the occurrence of a specific type of deviance. Abortion was mentioned previously as a field in which comparisons between differing areas may be both possible and valuable. Beutel compared the operation of Nebraska's bad check laws with the operation of similar laws in Colorado, Vermont and New Hampshire.[44] Information about the number and extent of bad checks was supplied by banks, and information about financial losses for bad checks in various types of businesses was obtained by means of questionnaires.

Intoxication among drivers is another field in which it should be possible to carry out sound geographic comparisons. In this field we find great divergences concerning legislation and legal practice. At the same time the effects of legislation could be studied by using a variety of techniques, for example, by conducting alcohol tests of randomly selected motor car drivers, by interviews or by means of alcohol tests on deceased traffic victims. Many practical and methodological difficulties must be overcome, but I am confident that by expending a reasonable amount of labor and money it will be possible to reach results of great relevance to the solution of a serious social problem in the motor age.

(2) *Comparisons in time.* When revisions are made in penal provisions, in the organization of the police and in the practice of the prosecuting authorities or of the courts, the extent of criminality can be examined with a view to assessing the changes. The difficulties here are similar to those encountered when making geographical comparisons. Radical and sudden changes in legal systems and the machinery of justice are rare. As a rule, change takes place through gradual alterations, for example, in the direction of stronger or milder penalties or in the degree of police effectiveness. As these alterations occur, there are changes in other fields bearing upon criminality, and it is extremely difficult to isolate each factor in order to determine what produced the final result. Changes introduced into the system may further influence the registration of crimes, so that the statistics are not comparable.[45] This difficulty is compounded when new penal provisions are introduced or old ones abolished, because generally only violations are recorded—we do not keep records of nonconformity before it becomes a crime or after it ceases to be a crime. Such statistical problems may, however, be overcome in areas where there are objective data on the extent of the nonconformity.

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[44] BEUTEL, *op. cit. supra* note 40, at 366.

[45] A strong increase in policing activities may, at least temporarily, lead to an increase in the number of convictions and perhaps in the number of reports to the police as well.

Drastic changes in law enforcement often take place during wars or revolutions, but so many other conditions change simultaneously that it is difficult to draw valid conclusions which apply to normal conditions. The most advantageous basis for conclusions about causal connections is found when great and sudden changes take place in law enforcement while the life of the community proceeds in its normal groove. The police strike, from the point of view of the social scientist, is an ideal situation, but unfortunately for the scientist, society does not permit the strike to continue long enough for exhaustive study.

In spite of the difficulties involved, the method of comparisons in time should not be underestimated. Most of what we know about general prevention comes from what history can tell us. Tarde presented a vast amount of material from various countries and periods,[46] while Kinberg concentrated on revolutions and similar conditions.[47] Radzinowicz has provided much material on the importance of a well-organized and effective police.[48] I am sure that a great deal more could become known through systematic exploitation of historical materials. Unfortunately, criminologists ordinarily are not historians, and historians are rarely inclined to concentrate on problems of general prevention.

Even better than to study the past is to watch the changes as they are taking place. This method was employed by Moore and Callahan in their well known study of public reactions to changes in parking regulations, a study more remarkable for its methods and its theoretical basis than for its results.[49] Just as new types of penal institutions should not be introduced unless opportunities are provided for research on the effects of the new measures, important changes in the law or in legal practice should always be correlated with a program of research designed to examine the effects on crime as a whole. The research does not have to be limited to the public legal machinery. Large enterprises producing or marketing easily and widely consumed goods such as tobacco and alcohol have the everlasting problem of preventing theft among their own employees. They have their own system of controls and their own means of sanction. Perhaps research in this area will shed light on how the ordinary citizen resists the temptation to steal and also will show how employees react to changes in risks when control measures are introduced. Studies of the use of

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[46] TARDE, PENAL PHILOSOPHY § 87 (1912).

[47] KINBERG, *op. cit. supra* note 3, at 127-38.

[48] 3 RADZINOWICZ, HISTORY OF ENGLISH CRIMINAL LAW (1957).

[49] MOORE & CALLAHAN, LAW AND LEARNING THEORY: A STUDY IN LEGAL CONTROL (1943).

lie detector tests in American business enterprises have indicated widespread dishonesty even among those who are ordinarily held above suspicion, and they also have shown that such tests have a deterrent value upon the future conduct of employees.[50]

(3) *Experiments.* Any change of a legal provision or a policy of the police, prosecuting authorities or the courts is, in a way, an experiment. Although such alterations are primarily made to gain certain effects, not to increase our knowledge, to a certain degree they may be made with a view to research. Moore and Callahan's study of parking included experiments conducted in concert with the police authorities. Another experiment recently initiated in Finland attempts to appraise the deterring effect of fines imposed for drunkenness.[51] The local police of three middle-sized towns have agreed to reduce heavily the percentage of prosecutions for persons arrested for drunkenness. The results of the experiment are to be measured principally by comparing the number of arrests for drunkenness before and after the change. Other towns, especially three towns with approximately the same number of inhabitants and the same number of arrests for drunkenness as the three experiment towns, are to be used as controls. The results of the experiment are not yet available. It seems doubtful, however, that the difference in stimuli in this experiment is sufficiently great to produce conclusive results.

It seems realistic to assume that legal, administrative and economic considerations will impose rather narrow limits for purely research motivated experiments. It is more economical to await alterations which are made for other than experimental reasons and to use the opportunity to promote optimal research conditions with a view to recording the effects.

(4) *Research on motivation, communication and personality development.* The kind of research I have been discussing is sociostatistical. It aims at uncovering connections between changes in the function of the legal apparatus and changes in criminality. Even where such connections have been discovered, nothing has been directly revealed about the psychological mechanisms at work, and it is therefore difficult to generalize about the results. Accordingly, research must also probe the individual links in the theories of general prevention. Instead of trying to give direct answers to questions about the effect of the penal law on behavior, one may break the main problem into partial problems accessible to research. Perhaps Aubert

[50] BERRIEN, PRACTICAL PSYCHOLOGY 454-55 (1946).

[51] Related to the author by Professor Inkeri Anttila, Helsinki. See also the 1954 experiment of the New York Police, note 27 *supra.*

is right when he contends that "the problem of general prevention constitutes a huge mosaic. The bulk of the stones constituting it must be obtained from general sociology and social psychology." [52]

Thus far in this article I have touched on a good many empirical questions to which we do not know the answers. How widespread and detailed is popular knowledge about legal norms? What are the attitudes toward the legal machinery, and how common is aggression or indifference as opposed to positive support? What proportion of the population has the feelings of guilt and the urge for punishment so often referred to by psychoanalysts? To what extent do criminals think of the risks when they plan or perform a punishable act, and how realistic is their estimate of the risks? How do people at large react to risks? These are questions which focus on the problems already discussed. In addition there are questions related to communication theory. How is knowledge about legislation and the legal machinery transmitted? What is the role of mass media as compared to personal contacts, and what connections exist between the forms of information and their motivating power?

We may also ask how the threat of punishment influences the psychological processes of potential criminals. The following two step hypothesis has been put forward. A person refraining from a desired action because of a penal threat will experience dissonance. Since an effective way of reducing dissonance is by derogating the action, he will then convince himself that he really did not want to do it. In testing this hypothesis, it is essential to determine the manner and degree to which the process depends on the severity of the punishment.[53]

We may also analyze the development and internalization of moral conceptions by individuals. What is the influence of police, punishment and prison in the socialization process? To what extent does the penal law indirectly influence child rearing practices by instilling in parents a desire to prevent their children from coming into conflict with the law and the legal machinery? What defensive mechanisms may be utilized by the criminal to convince himself that his violation is not really a criminal act? What are the psychological effects on the law abiding citizen when he sees crimes committed with impunity? Surely psychologists and sociologists can formulate such questions in a manner that makes them answerable by empirical research and in a manner that attunes them to research already completed.

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[52] AUBERT, *op. cit. supra* note 3, at 177.

[53] See 3 EXCERPTA CRIMINOLOGICA 23 (1962) (abstract of Aronson & Carlsmith, *The Effect of Severity of Threat on the Devaluation of Forbidden Behavior*, 17 THE AMERICAN PSYCHOLOGIST 300 (1962)).

VII. Comparisons With Crime Prevention Research

Crime can be combatted by both threats of punishment and various social measures. In recent years, an enormous interest in the effects of crime prevention programs, especially in the field of juvenile delinquency, has developed in the United States. According to an estimate in a recent report to the Council of Europe, about one hundred million dollars will be spent on preventive research in the United States in the five year period beginning in 1965.[54] The major objective of the well known Cambridge-Somerville Youth Study was to test the hypothesis that delinquency can be prevented and good character development fostered by the presence of an adult "friend" who will stand by the boy through ups and downs and offer him the opportunities and moral guidance normally supplied by parents. The study disproved such an hypothesis.[55] Walter Miller's recent study of the impact of a "total-community" delinquency control project reached a similar conclusion.[56] The Miller study was concerned with three possible factors behind delinquent behavior: the community, the family and the gang. The finding was that all the effort expended seemed to have a negligible impact.

There are marked similarities between rating the effects of crime prevention programs and assessing the results of changes in a penal system. In both cases a new set of conditions is introduced. The researcher is faced with the difficult task of assessing changes in criminality and, if such changes are found to exist, of judging whether the change is causally connected with the innovation. In a way, investigation of the effects of change in the penal system is usually a simpler task than estimating the effects of crime prevention programs. Such programs often are made up of a whole series of different activities so that even when we succeed in verifying that a change has resulted, we cannot know what parts of the program are instrumental in producing the effects. The same difficulties present themselves when changes in the repression of crime are introduced as part of a more extensive action plan. Let me give two examples, one from Denmark and the other from the United States.

During the first years of World War II the number of bicycle thefts in Copenhagen increased substantially. By April 1942, the number of cases was three times the average annual number in the years before the war. The police decided to strike on several fronts

[54] Christie, Research Into Methods of Crime Prevention (Report to the European Council No. DPC/CDIR 10, 1964).

[55] Powers & Witmer, An Experiment in the Prevention of Delinquency: The Cambridge-Somerville Youth Study (1951).

[56] Miller, *The Impact of a "Total-Community" Delinquency Control Project*, 10 Social Problems 168 (1962).

so as to reduce criminality in this field. The police division which dealt with bicycle thefts was expanded. The courts were asked to be strict with bicycle thieves. In addition a meeting was arranged between the police and representatives of the leading Copenhagen newspapers, during which the head of the police detection division emphasized the serious consequences of the steadily increasing number of bicycle thefts. He argued that bicycle theft should be regarded as an asocial action of a markedly serious character and that it ought to be most strongly condemned by the public, especially in view of the shortage of bicycles during the war. The press was asked to advise citizens to secure their bicycles properly and to notify the police of any information which might be relevant to bicycle stealing. The public was also strongly warned against purchasing bicycles or parts of bicycles from unknown persons. The press found the subject matter to be "good news," and the plea to the public made the front pages. The newspapers then published daily notices about bicycle thefts, emphasizing the severity of the sentences. The campaign created a lively interest on the part of the public, judging from the vast number of reports to the police which in many cases led to a solution of the crime. The outcome of the campaign exceeded even the most optimistic expectations. The number of complaints during the subsequent months was less than half the number in April, and the decline proved lasting. The author of a report on this matter does not estimate which conditions were decisive in achieving the result.[57] It may have come about because of the increase of the police force, the intensification of the penalties, the change of attitude and the growing awareness of the public, or some combination of these.

The American example concerns a program carried out by the Waterfront Commission of the New York Harbor. When the Commission was established in 1953, conditions in the harbor were said to be deplorable:

> Large-scale stealing on an organized basis prevailed. Payrolls of steamship companies and stevedoring outfits were padded with "phantom" employees who collected paychecks for little or no work. Loan-sharking existed to a large degree. The investigative bodies also revealed corrupt payments by management to labor leaders to overlook legitimate labor rights. Guards were threatened with loss of life or job if too vigorous in their attempt to prevent stealing. Many union officials were proven to be criminals with extensive records. And there were many other abuses. . . . It was felt that the Port of New York was in danger of losing its

[57] 3 GLUD, KAMPEN MOD FORBRYDELSEN 396 (1951).

> position of supremacy to which its natural advantages entitled it—all because of the mess of corruption, venality and general turbulence.[58]

The Waterfront Commission has operated both through strict law enforcement—assisted by a staff of well-qualified investigators—and by means of a series of control measures. The latter include registration or licensing of longshoremen, checkers, pier superintendents, hiring agencies, stevedoring companies and steamship companies. Individuals who have extensive criminal records or who are tied directly to unsavory activity with the waterfront mob are denied registration or licensing. It is difficult to judge what part of the program has been most effective, but on the whole it appears to have been a remarkable success. This, at any rate, is the conclusion drawn by Thomas F. Coon:

> Not yet ten years of age, the Waterfront Commission of N. Y. Harbor has had a profound impact upon the Port of New York and the lives of the men who work the piers. It has assuredly improved the manner of living of the waterfront workers and has done much to foster a more efficient, economical, and safer movement of trade.[59]

However discouraging the conclusion may be, it seems clear that at present there is definitely more proof of the efficacy of repressive measures than of those crime preventing measures that have a different theoretical basis. An enthusiastic reformer some years ago argued: "If the community cannot afford both police and guidance experts, then it would do better to choose guidance experts." [60] On the basis of our present knowledge, this must be characterized as wishful thinking. Without a police force, guidance experts would have few opportunities to do their jobs.

VIII. Ethical Problems Connected With General Prevention

The use of any coercive measure raises ethical problems. This is so even when the motive rests upon the need to treat the person in question. To what extent are we justified in imposing upon someone a cure which he does not desire, and how are we to balance considerations in favor of his liberty against the need to eliminate the hazards he inflicts on society? Such problems are encountered in the public health services as well as in the exercise of criminal justice.

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[58] Coon, *Waterfront Commission Investigator*, 3 Excerpta Criminologica 369-70 (1963).

[59] *Id.* at 371.

[60] Ball, *The Deterrence Concept in Criminology and Law*, 46 J. Crim. L., C. & P.S. 347 (1955), citing Landis, Social Policies in the Making 185 (1952).

The conflict, however, assumes special proportions in connection with general prevention. It has often been said that punishment, in this context, is used not to prevent future violations on the part of the criminal, but in order to instill lawful behavior in others. The individual criminal is merely an instrument; he is sacrificed in a manner which is contrary to our ethical principles. This objection carries least weight in relation to general preventive notions connected with legislation. The law provides, for example, that whoever is found guilty of murder is liable to life imprisonment or that whoever drives a car when he is intoxicated is to be given a prison sentence of thirty days. Such penal provisions have been laid down with an aim to preventing *anyone* from performing the prohibited acts. If we accept the provisions as ethically defensible, we also have to accept the punishment prescribed in each individual case. As H. L. A. Hart has stated:

> The primary operation of criminal punishment consists simply in announcing certain standards of behavior and attaching penalties for deviation, making it less eligible, and then leaving individuals to choose. This is a method of social control which maximizes individual freedom within the coercive framework of law in a number of different ways.[61]

The question, however, comes to a head when the individual penalty is decided by general prevention considerations, in other words, exemplary penalties. I have previously mentioned the sentences given in connection with the race riots in London in 1958. According to the newspaper bulletins, the penalties assessed in the earlier cases were lenient, ranging from six weeks to three months. As the riots continued, the courts introduced heavy penalties of four years of imprisonment. "A groan of surprise came from the audience when the judgments were read," a correspondent reported. "On the galleries were seated the mothers of several of the boys, and they were led outside, weeping. Two of the boys were themselves totally paralyzed by the sentences and had to be helped out of the dock to their cells below the courtroom." The reporter continues: "After the encounters in West London, however, the race riots have waned away just as quickly as they started. The reason why they came to an end is undoubtedly the strong public reaction against racial persecution together with the resolute intervention of the police and the courts." [62]

If the correspondent is right,[63] the unusually heavy penalties in this case had a desirable effect, but the judgment is nevertheless felt

[61] HART, PROLEGOMENON TO THE PRINCIPLES OF PUNISHMENT 21-22 (1960).
[62] Aftenposten, Sept. 20, 1958, p. 20.
[63] See generally WOOTTON, CRIME AND THE CRIMINAL LAW 100-01 (1963).

to be ethically problematic. There is an element of ex post facto law involved in such sentences. Although the judge operates within the framework of the law, such sentences are not, in fact, applications of previously established norms. The judge establishes a norm to suit the situation. Nor does the result square with the ideal of equality before the law. The procedure calls to mind a practice which—at least according to historical novels—was commonly used in former times when a number of soldiers committed mutiny or similar grave violations: the commanding officer would have a suitable number of soldiers shot in order to instill fear and give warning, and the remaining soldiers were readmitted to service without penalty.

Such ethical doubts become even stronger if the individual sentence depends upon the kind of publicity—and hence the kind of preventive effect—which is expected. Suppose a judge is faced with two similar cases within a short interval. In the first case, the courtroom is filled with journalists, and the outcome of the trial is likely to become known to millions of readers. In the second case, the listener's benches are empty and, in all probability, the verdict will not spread far beyond the circles of those who are present in the courtroom. Is it defensible for the judge to pass heavy judgment in the first instance because the sentence is likely to gain much publicity and consequently bring about strong general preventive effects, while the defendant in the second case is merely given a warning because punishment in his case would only mean personal suffering, and would not yield results from a social point of view? Such speculation upon the general preventive effects of the individual sentence easily become tinged with cynicism and for ethical reasons this approach is only acceptable within very narrow limits.