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## GENERAL PREVENTION — ILLUSION OR REALITY?

Johns Andenaes

The author is Professor of Criminal Law and Procedure at the University of Oslo, Norway, President of the Norwegian Association of Criminalists, and Chairman of the Social Sciences group in the National Research Council. The paper has been read before the Norwegian Association. It is a stimulating approach to a subject which, unfortunately, is too often considered threadbare. The author makes it obvious that we need to reexamine some of our ideas about "severe" and "humanized" punishment.—EDITOR.

The trend in penal reform in the past two generations has pointed in the direction of wider scope for individual prevention (specific prevention). As a result, the prosecuting authorities and the courts have through the years had an ever wider choice of sanctions put at their disposal, adapted to the personality of the offender. We now have special methods of treatment for juvenile delinquents, abnormal offenders, habitual criminals, vagrants, and alcoholics. These methods have been developed partly within and partly outside the framework of the penal system; hence they are partly punitive and partly non-punitive in nature. The catchword for the whole development is the well-known saying of Frantz von Liszt: It is not the crime but the criminal that is to be punished.

It would be an exaggeration to say that this development has proceeded without opposition. But the opposition has been far weaker than might be expected, inasmuch as most of those who consider the general-preventive function of penal law to be the core of the punitive system have felt they could make these concessions without any great danger.

But now and then conflict becomes apparent. It is especially among doctors and prison administrators that we often note great skepticism toward the belief in general prevention. Sometimes we see general prevention characterized as little better than a figment of the imagination, a fiction used by jurists as a defense for their traditional rules and concepts. "I shudder," says the Danish physician, Tage Kemp, director of Copenhagen University's Institute for Hereditary Biology," when I think what this essentially fictitious concept has cost us, in terms of thousands upon thousands of wasted, bitter man-years of imprisonment—and how many lives it has ruined which could just as well have been saved. We lose much of our belief in the need for general prevention if, instead of looking upon the criminal cursorily, thinking in terms of dry, unrealistic legal formalism, we think in more individualistic terms, as indicated by the latest research in criminology and social biology."

Most jurists take a more positive attitude toward general prevention.

Some go so far as to regard the general-preventive function as the only possible argument to support both punishment and the awarding of damages. Lundstedt is a good representative of this view; he in turn attacks the idea of individual prevention. "The idea that punishment aims at adjusting the criminal to society is surely one of the most fantastic to be found even in scholastic jurisprudence," he once wrote with an outspokenness characteristic of his style. "Experience teaches us that punishment has exactly the opposite effect on the criminal. Punishment has a natural tendency to demoralize the convicted person, and it frequently shunts him over to a class of social outcasts."

Even if there are not many who would go so far as Lundstedt, we can see jurists motivating their decisions with considerations of general prevention practically every day. This applies especially to lawmaking. In the premises to the Norwegian Penal Code of 1842 it is clearly stated: "The Theory of Deterrence, which in fact forms the basis for our present legislation . . . [appears] to be the main factor to be borne in mind in determining the nature and magnitude of punishments"—but as a secondary purpose there should also be consideration for the effect of punishment on the individual criminal, "in so far as attainment of the primary object permits this." The Penal Code of 1902 and the special laws passed in connection with it represent in many respects a victory for individual prevention. The father of the new law, Bernhard Getz, said in a lecture on the reform before the Norwegian Association of Criminologists that its aim was to "set up a whole system of institutions by which the state can seek to combat crime at its source or upon its manifestation in a manner adapted to each age group and category of crime." Notwithstanding a broader range of vision today than a century ago, I do not think I go far afield in maintaining that it is a primarily preventive consideration—having an eye to what is necessary to keep the people reasonably law-abiding—which today's legislators have in mind, too, when they define crimes and stipulate punishments. They defer somewhat to individual prevention, to be sure, by permitting the courts to set an appropriate punishment in each individual case.

General prevention often appears in judgments as well—especially in situations new to the courts, when they feel a need to offer a deeper explanation than simple reference to precedent.

The controversial question of the general preventive effect of punishment, therefore, is not merely of theoretical interest: it has a very practical side. And it is especially at the present time that it is important to shed light on the problem. Economic and political developments are

responsible for legislation's interfering in the individual's affairs in quite a different way than previously—especially in economic matters. And the cure-all for enforcing these rules is threat of punishment. Thus we find a new category of offenses, whose social consequences can be even more dangerous than the more traditional crimes, but which are not regarded so in the public's moral judgment. Wherever legislation breaks new ground in this way, it becomes vital to learn the answers to questions like these: To what extent are we able to direct people's conduct by threat of punishment? What are the prerequisites for an effective legal prohibition? Can we, for example, maintain a prohibition which is not sanctioned by the public's moral code? How important is magnitude of penalty as compared with the risk of disclosure? What is the effect upon general respect for law of the state's sustaining prohibitions that are openly being disregarded?

It would be interesting to try to explain the reasons for the various attitudes toward general prevention in the various professional groups having contact with crime problems. It would require a rather extensive investigation into the specific views and the grounds given for them. But certain points are already evident. Prison officials and doctors naturally regard it as their chief function to help the individual who has come into conflict with the law to make a new start. By the emotional factor alone, this means a tendency to put the main emphasis on individual prevention, at the expense of the less tangible general prevention. The personal tragedies produced by punishment that is unnecessary or undesirable in terms of individual prevention can readily be perceived, while the indirect effects of punishment escape observation. Another point worth noting is that prison officials and mental examiners are constantly coming across cases where threat of punishment has been ineffective. It is understandable that this constantly recurring observation can induce skepticism as to the efficacy of threat of punishment. Where the mental examiner is concerned, there is also the point that the picture of crime he gets is dominated by the more or less abnormal personalities which it is his lot to deal with. The lawyer, on the other hand, often has little psychological insight and little acquaintance with the sort of persons who most frequently come into conflict with the law. So he can easily lose sight of the irrational factors in human motivation and construct psychologically superficial explanations, based on a view that crime grows out of conscious, rational consideration as to what is most profitable. Such reasoning leads naturally to Feuerbach's formula of psychological coercion: the risk for the lawbreaker must be made so great, the punish-

ment so severe, that he knows he has more to lose than he has to gain from his crime.

So it is easy to find explanations for our problem by referring to the jobs and areas of experience of the different occupational groups. But I believe the differences are a bit more apparent than real. Perhaps they arise because the disputants attach different meanings to the terms "general prevention" and "individual prevention." Or perhaps they think of different types of offenders. The purpose of this paper is to contribute to a tidying up of the discussion.

## II

Before I start my exposition I should perhaps pause for a moment to offer a precise definition of the concepts in question and their interrelationship.

By general prevention we mean the ability of criminal law and its enforcement to make citizens law-abiding. If general prevention were 100 percent effective there would be no crime at all. General prevention may depend on the mere frightening or deterrent effect of punishment—the risk of discovery and punishment outweighing the temptation to commit crime. This was what Feuerbach had in mind when he designed his famous theory of punishment as psychological coercion directed against the citizen. Later theory puts much stress on the ability of penal law to arouse or strengthen inhibitions of another sort. In Swedish discussion the *moralizing*—in other words the *educational*—function has been greatly stressed. The idea is that punishment as a concrete expression of society's disapproval of an act helps to form and to strengthen the public's moral code and thereby creates conscious and unconscious inhibitions against committing crime. Unconscious inhibitions against committing forbidden acts can also be aroused without appealing to the individual's concepts of morality. Purely as a matter of habit, with fear, respect for authority or social imitation as connecting links, it is possible to induce favorable attitudes toward this or that action and unfavorable attitudes toward another action. We find the clearest example of this in the military, where extended inculcation of discipline and stern reaction against breach thereof can induce a purely automatic, habitual response—not only where obeying specific orders is concerned, but also with regard to general orders and regulations. We have another example in the relationship between an occupying power and an occupied population. The regulations set down by the occupier are not regarded by the people

as morally binding; but by a combination of terror and habit formation a great measure of obedience can be elicited—at any rate in response to commands which do not conflict too greatly with national feelings.

We can say that punishment has three sorts of general-preventive effects: it may have a *deterrent* effect, it may strengthen *moral inhibitions* (a *moralizing* effect), and it may stimulate habitual *law-abiding conduct*. I have reason to emphasize this, since many of those who are most skeptical of general prevention think only of the deterrent effect. Even if it can be shown that conscious fear of punishment is not present in certain cases, this is by no means the same as showing that the secondary effects of punishment are without importance. To the lawmaker, the achievement of inhibition and habit is of greater value than mere deterrence. For these apply in cases where a person need not fear detection and punishment, and they can apply without the person even having knowledge of the legal prohibition.

By individual prevention we mean the effect of punishment on the punished. At best this results in genuine moral improvement or in the acquisition of pro-social habits. Here the contrast to general prevention is quite clear. The same holds where the punished is rendered harmless—for good, by means of capital punishment or banishment, or temporarily by means of definitive prison sentences. In other cases the effect on the convict is simple deterrence, without any change in character being induced. When a motorist is fined \$5.00 for illegal parking he is neither improved nor rendered harmless, but he will presumably be more careful the next time he parks. Thenceforth the motorist's thinking in such situations will be influenced both general-preventively and individual-preventively. The deterrent effect which the law by itself has on every citizen will be strengthened in his case by the fact that he knows from personal experience that the law means what it says.

The disagreement over the importance of general prevention is of course largely due to the fact that its effectiveness cannot be measured. We do not know the true extent of crime. In certain areas of crime there is reason to believe that the figures available for offenses which are prosecuted and punished corresponds roughly to the true incidence of crime. In other areas recorded crimes represent only a small fraction of the true incidence. We know still less about how many people *would* have committed crimes if there had been no threat of punishment. There is a certain lesson to be drawn from the events following upon changes in the law or in other circumstances important to general prevention—such as police efficiency. We can also get somewhere by the

use of common sense and psychology. But even so, it can hardly be denied that any conclusion as to the real nature of general prevention involves a great deal of guesswork. Claims based on the "demands of general prevention," therefore, can often be used to cloak strictly retributive demands for punishment or mere conservative resistance to change. On the other hand, it is just as possible that the importance of general prevention is seriously overlooked by those who are mainly interested in a more efficacious treatment of the individual offender.

On the other hand we might also ask, what do we really know about the individual-preventive effect of punishment? We have figures on recidivism to tell how large a proportion of ex-convicts commit new crimes. Yet, even aside from the significant error that comes from the fact that figures on recidivism only cover cases where the ex-convict is *caught* committing a new crime, the figures can tell us nothing of how great the recidivism would have been if there had been no punishment, or a different punishment. We might compare recidivism according to the different methods of treatment—e.g. recidivism after the use of probation or recidivism after use of special non-penal measures, as opposed to recidivism after ordinary punishment. But the results can hardly be sure, because the different methods of treatment will always be applied against different sorts of law-breakers. If the most promising of these are selected for probation and their recidivism figures are better than others', this is no proof that probation is superior in terms of individual prevention. (If the result were the opposite, however, there would be grounds for more concrete conclusions). On the whole we can say that recidivism statistics are no more useful in measuring the individual-preventive effect of punishment than the ordinary crime statistics are useful in measuring its general-preventive effect. Both in an evaluation of individual prevention and of general prevention we can resort only to judgment based on psychology, practical experience and common sense.

### III

In our attempt to get a better understanding of the problem, it is of primary importance that we should not take all crime together but take each important group of crimes separately. One reason why the discussion on general prevention is often so fruitless, and why there is such sharp disagreement is, in my experience, that the protagonists generalize too much. They talk about general prevention in the general case, yet tend to draw from experience they have gained in particular

areas. This is, in fact, a common error in jurisprudence: on the basis of a limited material a theory is built to cover a much wider area than is logically justified. Psychological attitudes vary markedly in the different categories of law-breaking, and they can also vary markedly in the various groups and strata of the society. As obvious as it is that it is impossible to do a criminological study throwing together thieves and murders, rapists and usurers, swindlers and thugs, it should be just as obvious that a study of the general-preventive effect of punishment must also be differentiated. In a short paper like this it is of course not possible to give any more than samples from selected areas.

1) I shall begin with a group of crimes which play a modest role in the literature but which have a good deal of practical importance and are good for illustration, all these *police regulations* which are such commonplaces in modern times: traffic ordinances, building codes, laws governing the sale of alcoholic beverages, regulations governing commerce, etc. Here there is no doubt that punishment for infraction has primarily a general-preventive function. Here nearly all of us are potential criminals. A public-spirited citizen has, of course, certain inhibitions against breaking laws and regulations. But experience shows that moral and social inhibitions against breaking the law are not enough in themselves to insure obedience, where there is conflict with one's private interests. Thus the extent to which there can be effective enforcement by means of punishment determines to what extent the rules are actually going to be observed. As an example of rules which are just about 100 percent effective, because one must count on detection and punishment of all infractions, we can take blackout regulations during war. Deterrence alone suffices here, even without support of the moral authority which the law usually has. Consider a blacked-out city in an occupied country. The occupier's order has no moral authority at all—on the contrary, he is the enemy and must be resisted. But even so, hundreds of thousands of families take great care each night to prevent the least crack of light from showing. As if guided by an unseen hand, these countless householders go into action as soon as darkness falls. No one defies the order, because everyone knows that there is not enough to be gained to make the risk worthwhile. And eventually it becomes a habit, which is followed automatically, practically without thought. It would be hard to find a more impressive example of the "terror effect" of the threat of punishment under favorable circumstances.

It is not hard to find examples of the opposite: regulations which are



not observed because there is no punishment of offenders against them. The Danish state prosecutor, Jorgen Trolle, has described the problem presented by Danish tourists to Sweden in an article in *Ugeskrift for Retsvæsen*, 1947 (Weekly Law Review).<sup>1</sup> There were no restrictions on travel to Sweden, although one could only buy a one-way ticket, not round trip. It was forbidden to take Danish or Swedish money out of Denmark, and this was strictly enforced; travelers were even searched occasionally. It was forbidden to borrow money in Sweden, and any assets already there were to be called home. The logical conclusion, says Trolle, was that traffic would be minimal, comprising only those few who could persuade the National Bank to sell them some Swedish currency or who had close and prosperous relatives in Sweden. But on the contrary, we witnessed great hordes, some days up to several thousand, crossing over to Sweden and returning laden down with goods. The travelers were so numerous that the customs officials and police had to throw up their hands. They checked to see if the travelers had tobacco or other highly dutiable items, but they did not bother to ask how they had got the Swedish money.

Trolle observes that "although everyone knows that the great majority of the numerous travelers who cross the Sound with a passport issued by the Ministry of Justice and on a ship belonging to the Ministry of Transport are lawbreakers, infringing Ministry of Trade regulations, nevertheless the customs officials, who are subject to the Ministry of Finance, and the police, who are subject to the Ministry of Justice, do nothing."

His conclusion is as follows: "It is unjust that the less law-abiding portion of the population should have advantages which the more conscientious ones are deprived of. And it taxes respect for law that everyone and his brother can see and can draw the lesson that one can with impurity allow oneself a wide margin in observing the law."

This is a good example of how undesirable it is to pass laws which cannot be enforced. It is a common failing in legislation. It is so natural to resort to threat of punishment when the authorities decide they want to channel the citizen's actions in one direction or another. The legislators probably realize that many will break the rules but reason that many will observe them, so that something, at least, will be gained. Looked at from the point of view of the individual administrative branch, this can be valid enough, but if the reasoning is followed

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1. Just after the war Sweden was a land of plenty compared to Denmark, and some Danes used to take the two-hour boat trip across the Sound to buy scarce commodities. In the Swedish vernacular they became known as "locusts." (transl.)

first in one area and then in another, it can hardly fail to demoralize respect both for the law and for public authority. It makes sense, therefore, that certain thinkers have warned against this "inflation in the administration of criminal law."

I have cited two examples above to show the two extremes. In most cases the efficiency of law enforcement lies between them. How strict the enforcement must be to effect a reasonable degree of general prevention, a reasonable degree of obedience in a given area of administration, depends on many factors—including, how much a person stands to gain by breaking the law and from which strata of the society the law-breakers are recruited. For example, it makes a difference that it is not the same sort of people who break parking regulations and who break the regulations against drunkenness in public places.

2) The example of Danish tourists to Sweden has taken us, strictly speaking outside the area of true police regulations and into a new area, which we can call *economic crimes*. I do not mean primarily the traditional crimes against property like theft, embezzlement, fraud and receiving stolen goods—I shall come back to these later. I refer here to crimes against governmental regulation of the economy: price violations, rationing violations, unlawful foreign exchange transactions, offenses against workers protection, disregard of quality standards, and so on. Psychologically we can also put customs and tax evasion in this group, although logically these crimes belong in the fraud category.

In time of war and crisis economic crime of this sort can have immense importance to the nation. Outside Scandinavia we have drastic examples of the entire distribution of foodstuffs being disrupted because the goods find their way onto the black market. From postwar Germany, for instance, we have heard how the starving urban population roamed the countryside carrying their family treasures, with the hope of bartering a little food for themselves—food which the farmers withheld from the controlled channels of distribution. Even under fairly normal conditions, however, the political trend in Western Europe seems to be in the direction of more public control of the economy. If the trend continues, the problem of making these controls effective will become a paramount question in penal law—indeed, a question of far greater dimensions than the sort usually discussed in criminological circles. For whatever our opinion may be on the question of free versus controlled economy, there is no denying that ineffective regulation is the worst arrangement of them all.

Psychologically the economic crimes tend to be rather clear-cut.

A large number of the people who are affected by economic regulations or by the levying of taxes and fees feel no strong moral inhibition against infraction. They often find excuses for their behavior in political theorizing: they oppose the current government's regulative policies; they find taxes unreasonably high; and they find support for such views in their newspapers, which daily represent the state as a great vampire and governmental agencies as business enemy number one. Yet the matter of obedience or disobedience can often have important economic consequences. It is to be expected that many will calculate in cold blood the risk of being caught, and act accordingly. It is rather significant that a Norwegian religious newspaper of January 1949 carried an article with roughly the following headline: "Time for Taxpayers to Prepare their Annual Evasion." In this area, at any rate, Feuerbach's law of general prevention has a certain validity: it is necessary that consideration as to the risk involved in breaking the law should outweigh consideration of the advantages to breaking the law. The amount of threat needed varies greatly, of course, from person to person. One is a timid, cautious type; another likes to take chances. One has a social position he is afraid to lose; another has no such fear. Generally speaking, the biggest crimes in this area are committed by people with a certain economic and social position, people who can be deterred by even a rather modest risk of detection and punishment. When they break the law nevertheless, it is because they reckon it as overwhelmingly probably that all will go well.

In this connection we might consider what happened upon the calling in of paper money and the forced registration of bank accounts and securities in Norway in 1945.<sup>2</sup> Enormous values came to light which had previously escaped assessment. In some districts only a small percent of the actual bank holdings had previously been declared. On the basis of the registration we can almost lay down the rule that everyone was a tax evader who could be so without risk. The result is striking confirmation of what we could have inferred by ordinary psychological reasoning: the importance of policing to the enforcement of penal provisions. If there were such policing as to produce a risk of 25 percent in making false tax declarations, tax evasion on a grand scale would be practically eliminated.

From this reasoning I draw the following significant conclusion: in

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2. This was a measure, also resorted to in other European countries, to flush out ill-gotten gain from the war. The idea was that all liquid assets would have to be declared, and the tax authorities and investigators for economic treason would be able to trap profiteers—since the alternative to declaring the assets was to let them become worthless. (Transl.)

discussions on the introduction of new economic regulations, the question of the feasibility of effective enforcement should occupy a central place. And if it is found that such policing is not feasible, that the law will in effect reward dishonesty, the lawmakers should think twice and three times before legislating it—no matter how fine it looks on paper.

3) When we come to the traditional crimes against property, the picture is a bit more complicated. Strong moral and social inhibitions against the criminal act appear alongside regard for the penal code. Now the question is: are not these moral and social inhibitions enough in themselves to keep most people from committing thefts, frauds, and so on? And then: will these moral and social inhibitions retain their strength if the risk of punishment is removed? Is not the methodical use of punishment or other forms of reaction as an answer to such infractions of the law one of the most important factors in arousing the public's taboo attitude toward them?

The question here is not whether you or I would remain law-abiding even if there were no "switch behind the back." The question is whether there is not a fairly large group on the moral borderline who might go wrong, and whether they might not in turn draw others with them. What we are concerned with is, of course, a long-term process, where the full effect of a weakening in the judicial reaction to crime will not be felt before the passage of a generation or more.

In discussing these questions we must not overlook the fact that for numerically important groups, especially in the cities, the social reaction against crime means little, because the moral standard in these groups is too low to be of account. Likewise we must not overlook the fact that the social reaction is connected in many ways to the judicial. This means not simply that general behavior with regard to a category of acts is affected by the law's attitude toward them: but also that *it would be much easier to keep one's acts secret and thus avoid all social reprobation, if one did not have to consider the risk of their being brought to public notice through criminal prosecution.*

The exceptional conditions that prevailed during the German occupation have given us new and valuable experience, even if it must be evaluated cautiously.

In Denmark the Germans arrested the entire Danish police force in September 1944. During the rest of the occupation the policing was done by an improvised and unarmed watch corps, which was all but ineffectual except when the criminal was caught red-handed. Jorgen

Trolle headed the Copenhagen state prosecutor's office at the time, and in an extremely interesting book, *Syv Maaneder uden Politi* (Seven Months without Police), he has described what happened. The crime rate rose immediately, but there was wide discrepancy here between the various types of crime. While in the whole of 1939 only ten cases of robbery were reported in Copenhagen, the figure by 1943 had risen to ten a month, as a result of wartime conditions. After the action against the police the figure quickly rose to over 100 a month and continued to rise. Theft insurance benefits quickly rose ten-fold and more. The fact that punishment was greatly increased for criminals who were caught and brought before the court could not prevent this. Crimes like embezzlement and fraud, where the perpetrator is generally known do not seem to have increased notably.

As Trolle points out, every big city has its quota of underworld types who will exploit the opportunity given them by a crippling of the law enforcement system. In the next round new circles will be drawn into crime, weak persons who are tempted when they see crimes go unpunished. The experiment in Denmark was imperfect and of short duration. What would happen if the state's punishing function were discontinued completely and for a rather long period can only be guessed. My own opinion is that such a complicated mechanism as a modern industrial society can hardly be kept going without police and penal courts. The gangster syndicates in America between the first and second World Wars show how powerful organized crime can become, when conditions are right for it. Just imagine what would have happened if the state had not stepped in resolutely with police, penal courts and other measures, so that the gangs would have had free play: the individual law-abiding citizen would have been helpless, not only against the existing gangs, but against any newcomer who wanted to equip himself with a revolver and try his luck. If we carry the reasoning further, we can imagine how the big gangs would have found it profitable to divide the country among themselves, hauling in money by assessing the population and in return providing it with a certain security by cracking down on upstart competitors. There were actually strong tendencies in this direction. The existing society would have succumbed, and a new one would have risen to take its place—this would have corresponded remarkably to the Marxist definition of the state as a power combination whose purpose is to safeguard the ruling class' exploitation of the oppressed!

The Danish experiment is instructive, but such a radical crippling of

law enforcement will hardly be experienced under normal conditions. To illustrate the way demoralization spreads as a result of slack law enforcement under more normal conditions, I can refer to something that happened here in Norway a number of years ago and caused a small sensation. There had been thieving from a military arsenal over a fairly long period of time. It ended finally in violence, as a watchman was shot and killed by two boys caught in the act of breaking in. Now the police got busy; there were house searches and many arrests. Great quantities of stolen goods were recovered. According to newspaper accounts, whole truckloads of stolen military goods were rounded up—weapons, ammunition, radio sets, telephone equipment, fur coats, tarpaulins, searchlights, saddles, uniforms and helmets. And here I quote a newspaper report based on information given by the police and concluding with an analysis into the cause of the thefts:

There is no escaping the fact that the thefts were entirely due to poor guarding. The boys all say they heard from comrades how easy it was to steal from the arsenal, and so they went out and tried it. It is characteristic that most of the boys know the names of the two 'watchdogs,' and that none were afraid of them. The lax guarding at the main arsenal became known to all the boys; when some tried to break in, and it went well every time, the thieving gained momentum.

Such a development is no rarity. The process is as follows: Some begin to steal because it is easy and safe. Others hear about it and try their luck, too. The bigger the group implicated, the less each individual in it is able to feel he is doing anything wrong. In the above case it was a question of state property, to boot, which people seem to have comparatively little respect for. But it would hardly have made any great difference if the stores had belonged to a private firm instead.

4) When we look at *moral offenses*, we find there are entirely different factors to be dealt with. The urge for economic gain is a universal motive for crime, even if its intensity varies from case to case. Practically no one can claim to be entirely immune to the temptations of Mammon. Many sex offenses, on the other hand, grow out of abnormal or unharmonious sexual adjustments. Homosexuality, exhibitionism, sexual assaults on children, incest, and the like, have no appeal for the normal personality. The scope of general prevention is thus here limited to those few people who because of their sex impulses are especially vulnerable. At the same time, these acts are strongly disapproved socially, so that mere anticipation of discovery affords a powerful deterrent. And because the acts are determined by sex impulses, often being performed as outlets for strong mental tensions, the psychological mechanism is quite different from that at work in, for instance the economic crimes which I have discussed above.

For this and for other reasons, sex offenses belong in the area of crime where there is reason to be somewhat skeptical about the general-preventive validity of threat of punishment. It might be noted, incidentally, that the amount of rape and other sex offenses did not appear to increase particularly during the policeless period in Copenhagen. It is hard to calculate, however, what the effect of slackness in enforcement would be in the long run. In all probability the effect would be quite different for the different offenses. In some countries, such as France, incest is usually unpunishable. Whether this has had any influence on the prevalence of incest cannot, of course, be determined with any exactness. But there is at least nothing to indicate that such intercourse has become a commonplace. That rape, on the other hand, is a crime not alien to the normal human personality, can be verified in times of war and occupation. In an occupation army where discipline in this matter is lax, the incidence of rape is commonly high. If discipline is strict, on the other hand, as with the German army of occupation in Norway during the war, the crime hardly ever occurs.

5) The reader probably expects me to take up *murder* next. To mystery story writers—and often to criminologists as well—murder is the crime par excellence. Criminology is mainly the study of murder. But in the every-day administration of justice in Scandinavia murder plays an extremely modest role. In the decade 1931-1940, 43 persons were convicted of first degree murder in Norway, or four to five per year, about one-tenth of a percent of all criminal convictions. And motivation varies so markedly that it is impossible to evaluate the effect of criminal law in this area without further differentiation than there is space for here. The holdup man who kills simply for gain, the sex murderer whose crime assuages the darkest drives of his sick mind, the uxoricide who seeks desperate relief for a mental torment that is more than he can bear—there is a world of difference between these types; all they have in common is the juridical name for the act. I could hardly do better here than quote Stephens' famous words of 1863:

Some men, probably, abstain from murder because they fear that if they committed murder they would be hanged. 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 hanged with the hearty approbation of all reasonable men.

6) A similar difficulty greets us as we attempt to evaluate the general-preventive usefulness of threatening punishment for rebellion, treason and other political crimes. There can be little doubt that the provisions against treason, for example, have a certain moral weight in emphasizing the extremely reprehensible nature of treason and there-

by inducing an attitude of repugnance toward oneself committing the crime; but here as elsewhere the effect is not really ascertainable. It is also noteworthy that the risk element can even attract the opportunist who coldbloodedly calculates which course of action will be most profitable. On the other hand, it is often said that threat of punishment has no effect on the "genuine" political criminal, who is impelled by belief in the justice of his cause. That can be true enough for some, but hardly for the great mass of people to whom such political movements direct their appeal. To take an example from nineteenth-century Norwegian history: the prosecution of Marcus Thrane—the socialistic agitator whose remains have only recently been returned to Norway from America to be interred with full official honors—completely crippled the movement he had founded. The labor movement's later progress had nothing to do with this pioneer movement. From the dictatorships of our own times we know that it is possible for a brutal, relentless police system to eliminate all organized resistance to the regime. By accompanying the political trials with a vigorous propaganda, it may also be possible to induce a conviction in the people that such resistance is morally wrong. I am of course not proposing that these examples be followed: I mention them simply to show that punishment can be a deterrent and a moral force in this area as well.

It must be admitted, of course, that these uses of penal provisions are highly dependent upon the political balance of power, and on many other circumstances. During an enemy occupation threat of punishment against traitors will have little weight for those who feel certain that the occupier will win the war. And in certain cases—e.g. after a civil war—it can happen that prosecution of the rebels will not increase respect for the state's authority, but indeed perpetuate a split, in a way that can have serious repercussions. In such cases it can become difficult for the lawmakers to decide which is wiser: to overlook the crime by resorting to a partial or general amnesty, or to hold the guilty ones responsible to the fullest extent of the law.

#### IV

Up to now I have intentionally avoided the question, in what way the general-preventive effect depends on the *nature and magnitude* of the reaction. In some respects this is the most immediate side of the problem. The magnitude of punishment is a factor which the lawmakers and the courts can regulate as they see fit, while it is harder for them to vary the other factors that are important—notably the



intensity of policing and the set of mind of the public. The simplest way to make people more law-abiding, therefore, is to increase the punishment. When a certain type of crime threatens to get out of hand—blackout infringements or black market trading in wartime, for instance—the authorities often resort to stiffening the penal provisions. And when the courts are faced with the question of general prevention, they usually regard the choice as one between severe and light sentences in the individual case.

The best known example in modern Norwegian experience of such reasoning is the increased punishment for sex offenses called for in the penal code revision of 1927. The motive for the change was primarily general-preventive. The reasoning was the sex offenses were becoming more numerous, and this was thought to be due to laxness on the part of the courts. But the effect of the change as reflected in crime statistics was astonishing. Instead of the decline in sex offenses that was expected, there was a notable rise. Comparing the five-year period before the change with the five-year period after the change, the average rose from 136 sex crimes per year to 229, or a rise of 68 percent. In the following years the figure has remained at about this level.

The example hardly tells us much about the general-preventive effect of threat of punishment, but it does show how careful we must be in drawing conclusions from the ordinary crime statistics. The figures for other crimes remained fairly constant in these years, and regardless of what we may think of the efficacy of harsh sentences in preventing crime, we certainly cannot conclude that they increase it. The explanation for the rise in incidence must be that this group of crimes now received more attention than before. The discussion and agitation that went with the revision and the stricter view that the new provisions gave expression to, doubtless caused many sex offenses that would not have been reported before to be reported now—and perhaps the police now investigated such cases more energetically, as well. That this must be the explanation is supported by a glance at a breakdown of the statistics on sex offenses: the rise is found overwhelmingly in the types of cases that one would assume would often go unreported or unsolved—e.g. illicit relations with girls 14 to 16 years old.

If we think first of the purely deterrent value of threat of punishment—and with certain penal provisions this is the main point, as we have seen—it is clear that deterrence depends not simply on the risk of being punished, but also on the nature and magnitude of punishment. How important this factor is depends on the characteristic motivation for the

crime, and on many other circumstances. Magnitude of punishment should mean more for crimes usually committed after careful consideration pro and con (e.g. tax evasion or smuggling of foreign currencies) than for crimes which grow out of emotions or drives which overpower the individual (e.g. the so-called crimes of passion). Another point is the moral condemnation attached to the deed. If this is strong, the magnitude of punishment is of minor importance. The social position of the potential criminal, incidentally, is also a factor. Embezzlement, for instance, is a crime which is often committed by persons in responsible positions and having some social prestige. To the respectable cashier, fear of detection is more fear of shame and scandal, and economic and social ruin, than it is fear of the punishment itself. Such a view is certainly alien to the bootlegger, however, for whom threat of punishment is just one of the risks of the trade.

That maximum deterrence does not follow from the severest punishment even Orsted, the great Danish legal thinker of a century ago, was able to point out, in his treatise "On the First Rules of Criminal Law." He shows how a penal system which the citizens and the administrators themselves regard as cruel will lead them to hold a protecting hand over the criminal rather than to cooperate in bringing him to justice. "With general enmity toward the penal code, it will lose its force, and impunity will be the real consequence of the law's always threatening the most severe punishment." Modern experience—e.g. the tendency of the jury to acquit when it fears that a verdict of guilty will mean too severe punishment for the defendant—confirm the correctness of Orsted's reasoning.

Turning next to the moral, the educative value of punishment, we find that magnitude of punishment is of importance here too. Punishment is an expression of society's disapproval of the act, and the degree of disapproval is expressed by the magnitude of punishment. A serious crime must be answered with a severe punishment, a minor misdemeanor with a lenient reaction. But here it is rather a question of the *relative* severity of the punishment than of its absolute magnitude. The humanizing of penal law in the past generations has led to a marked lowering of the general level of punishment. What was punishment for a minor crime a century ago is today punishment for a major crime. So long as this development does not take place faster than the public has a chance to adjust its ideas on appropriate punishment, it need have little effect on the ability of punishment to express society's disapproval. It is the same as with marks in school: the same mark can be expressed

on a scale from 1 to 2 as on a scale from 1 to 6 or on one from 1 to 100. But a transition from one scale to another can cause some confusion.

A question of practical importance in this connection is: can the law influence the public's attitude toward a group of punishable acts by changing their position on the marking scale? In other words, by increasing the punishment for a group of crimes can we not only increase its deterrent effect but also increase the moral inhibitions against them? It is impossible to say for sure. Personally I think it probable that such an influence can occur in certain areas and to a limited degree, but that it is at best a long-term proposition. A deterrent effect can be achieved quickly; a moral effect takes longer.

These views on the relationship between general prevention and the magnitude of punishment are built upon abstract reasoning. No doubt there are some skeptical readers who are impatient to ask: can you give any practical examples in which the magnitude of punishment has had influence on its general-preventive effect?

It must be admitted at once that only very little support for the proposition is to be deduced from experience—in the first place because the general-preventive effect is always hard to ascertain, and second because there has never been a systematic gathering of material which could illuminate the question. I believe I can, however, give a few examples by way of illustration.

Normally it cannot be shown that it makes any difference to crime whether death or life imprisonment is the maximum penalty which can be imposed.<sup>3</sup> But that there are situations in which the death sentence can have a distinctly different effect than other punishments became apparent during the occupation. The great majority of the people came to feel that it was nationally and morally right to sabotage the occupation authorities. Thus no social opprobrium went with being arrested for illegal activity—quite the contrary. And toward the end of the occupation, when the duration was being reckoned in weeks and months, even the threat of life imprisonment became just a question of short internment. The only thing that could really worry a member of the underground was the thought of torture or death. I remember

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3. In Dano-Norwegian legal history there is one remarkable example of the death penalty being abandoned because in a certain type of crime it defeated its purpose. It was done in the Ordinance of December 18, 1767, which replaced the death penalty with penal servitude for life in cases where "melancholy and other dismal persons [committed murder] for the exclusive purpose of losing their lives." The background for the provision was, in the words of Orsted, "the thinking that was then current among the unenlightened that by murdering another person and thereby being sentenced to death, one might still attain salvation, whereas if one were to take one's own life, one would be plunged into eternal damnation." (Eunomia, Part III, p. 147).

so well the day in October, 1942, when the *Reichskommissar* issued his ordinance promising death for having any traffic at all with illegal newspapers. There were many that day who got to work tidying up their effects, and the production and distribution of illegal newspapers suffered a serious setback. It was not long, however, before people realized that the ordinance was not to be taken seriously, and activity was resumed. Experience during the war also showed how the risk affects people differently according to their individual attitudes and sensitivity to danger. A large share of the population was unwilling to take any risk—they were against the Germans, to be sure, but their main consideration was their own pockets. Another large share was willing to take part in illegal work where the risk was small, and especially where they would not be risking their lives. A third group, numerically smaller and the heart of the resistance movement, was not to be deterred at all by risk.

All this is of a certain practical value in planning the treatment to be accorded revolutionary movements whose members can be assumed to have about the same attitude toward the lawful authorities as the majority of the Norwegian people had toward the Germans during the occupation. In their recent proposal for a revision of the treason and rebellion paragraphs of the Penal Code, the Norwegian Penal Code Commission has described what might happen if an armed rebellion should be started while the international situation is tense: "If the rebellion is not at once suppressed, it can easily lead to intervention by a foreign power. Then the situation might arise where there is reason to think that a death sentence against a leader of the rebellion is the only way to bring others to their senses and thereby win mastery of the situation for the lawful authorities."

Another practical example of the preventive value of heavy punishment is enactment of a rule in Norway calling for prison sentences without access to probation in cases of drunken driving. The subject is so familiar that it hardly requires elaboration. Most Norwegians are able to see on looking about their own circle of friends that it is becoming more common to leave the car at home when going to a party at which alcohol is likely to be consumed. There is unquestionably a certain preventive effect at work here. How great it is, and how it is distributed over the different social groups among motorists, and whether it is due simply to the deterrent effect or whether the law has succeeded in bringing about a change in attitude toward driving while intoxicated:

all this is something we have no exact knowledge of; it could well be made the subject of a sociological study.

I have given a couple of examples of the effect of especially heavy sentences.<sup>4</sup> The other side of the question is whether special leniency to certain groups of offenders might not undermine respect for the law.

Attorney General Aulie, in his lecture on youthful offenders before the Association of Norwegian Criminologists in 1947, touched upon gangsterism, which is so typical in juvenile delinquency. He said:

We know from experience that when members of the gang are released after questioning pending the winding up of investigation, the young people almost invariably flock back together, usually with the idea of planning new escapades. They regard the intervention of the police as a temporary inconvenience, of negligible importance. They count on prosecution being waived for those with clean records, or at worst their being given suspended sentences. And they have reason to believe that a dozen or so new thefts on top of those already counted against them will not make much difference if they are discovered.

If this observation is correct, it shows with all desirable clarity that the humanizing of penal practice must be kept within certain limits if it is not to lead to an undermining of respect for law and authority. But it would take us far afield to go into this problem here.

## V

With the last example I come to the relation between general and individual prevention. Usually there is no great conflict between the two. This is clearly the case when measures designed for individual prevention go farther than punishment designed along general-preventive lines—such as in the case of forced labor for vagrants and alcoholics or indeterminate sentences for recidivists. Such long sentences are of course sufficient for deterrence. Neither are they objectionable from the point of view of the moralizing function of punishment—at any rate when it is clear to citizens that there is no question here of retribution for the crime but rather of a measure which aims to educate the prisoner or render him harmless. There is greater objection from a general-preventive point of view when individual considerations motivate an especially lenient treatment. But neither here should there be any real danger, so long as the milder special treatment does not become

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4. In discussion of this paper a participant (Police Chief Rode) cited as another example of the significance for prevention of magnitude of punishment, his experience from smuggling during prohibition. In his district, at least rumrunning was dealt a severe blow after the courts began to adjudge prison sentences instead of fines. The effect was not alone deterrent: the change was important also to the public's attitude toward crime. Prison, as opposed to fines, was regarded as shameful, and while smuggling had previously been looked upon as a thrilling sport, which even "decent citizens" could engage in, it now became something to stay away from.

such a commonplace that the potential criminal can count on it and behave accordingly. Both the deterrent and the moralizing sides of general prevention are based primarily on the *average* reaction to certain offenses. Waiving of prosecution and the use of suspended sentence are so widely practiced that the conflict here has become acute.

More common than an out-and-out conflict between individual and general prevention is the circumstance that a punishment that is necessary for general prevention is often superfluous for individual prevention. In certain crimes there will practically never be an individual-preventive need for punishment—or at any rate, not a severe punishment: such things as perjury (so few persons are called in as witnesses more than once in a lifetime), or bigamy. In other cases the circumstances governing the behavior of the individual offender may lead to the conclusion that punishment is not needed for his benefit—"that execution of the sentence is not necessary to prevent the offender from committing new crimes," to quote the Penal Code's §52 on conditions for probation.

Thus the judge is often put in a difficult position. A single judgment has, to be sure, seldom any concrete effect on general prevention. The question is: would general prevention be significantly impaired if it became the practice to apply probation or minimum sentence in similar cases? Something else to think about is whether people are likely to learn of the decisions and let their conduct be guided by them.

This problem came up in a treason case after the war.<sup>5</sup> A young man was charged with having served in the German army—in itself a serious crime, meriting several years at hard labor. In this case, however, the circumstances were unusual. The defendant, who was still under 20, was arrested by the Germans during the war and put into a concentration camp as a hostage for his mother, who had fled to Sweden. He felt depressed while in the camp and hit on the idea of getting out by volunteering for German war service and then escaping. He had, in fact, heard of people getting out in this way. He volunteered and was accepted, but for a while he was unable to escape. He was sent to Germany and then to serve six months at the front. But when he came home on leave at the end of 1944 he seized the opportunity to flee to Sweden.

In the lower court the defendant was sentenced to one year and put on probation. The majority in the Supreme Court, however, reversed the probation. The writer of the majority opinion held that for the

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5. The NORWEGIAN CASE REVIEW, (*Norsk Retstidende*), 1946, p. 854.

sake of precedent it was indefensible to let a person who had been guilty of such a desperate act as to join the enemy's army get by with a suspended sentence. The reasoning is psychologically a bit unrealistic. One justice dissented, holding that the use of probation in a single case which is clearly different from the majority of cases cannot be said to weaken the future preventive value of the reckoning with Norway's traitors. "This would presuppose knowledge in the future not only of the general lines of the present reckoning, but of its details—a knowledge which is theoretically possible in isolated cases, but which in my opinion can be disregarded in practice."

## VI

More than 70 years ago Lombroso wrote his famous book, *L'Uomo delinquente*, based on a study of prisoners in Italian penal institutions. Not many of his conclusions have stood the test of time. Most have been rejected as fanciful hypotheses and untenable generalizations. But he was a pioneer in his use of the empirical method in investigating the causes of crime. Psychiatrists, anthropologists, sociologists and others have continued his work. An enormous body of empirical data has been amassed to aid in appraising lawbreakers' physical and mental traits, family conditions, economic position, and so on. As a result every generalizing theory has had to be abandoned. The time for broad slogans in criminology has passed.

No comparable empirical study of the psychology of *obedience to law* has been undertaken. In a word, we are still in the pre-Lombrosian era in this field. And the discussion often gives way to cock-sure general statements like "I believe (or I do not believe) in general prevention." Much has been written about general prevention; much talented effort has been spent in exploring its operation and importance. But the empirical data are still lacking. If any attempt has been made to include it at all, it has usually—as in this paper—occurred by the use of chance observations, plus ordinary psychological theories. I believe we can make some progress in this way. But we shall not have firm ground to stand on before a systematic investigation is made into the effect of penal law and its enforcement on the citizen's behavior, and into the interrelation between the legal system and the other factors which govern behavior.<sup>6</sup> This task is in a sense much more difficult than the

6. A limited investigation of this type is SCHMIDT, GRANTZE and ROSS, *WORK AND VACATIONS AMONG AGRICULTURAL LABORERS. A STUDY IN THE SOCIOLOGY OF LAW* (1946; in Swedish).

one Lombroso undertook. He had his material nicely collected and concentrated for him in the state prisons. One who wishes to study general prevention, on the other hand, must examine the whole population. Therefore it is a field for sociologists and psychologists. And it is difficult for one uninitiated into sociological methods of research to judge how the work should be tackled, or how far it is at all possible to go. I, at any rate, do not feel qualified to enlarge on the matter for the time being. But in this paper I have tried to point out how important these problems are.