

1959

## Some Basic Considerations Regarding Penal Policy

Robert S. Redmount

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

Robert S. Redmount, Some Basic Considerations Regarding Penal Policy, 49 J. Crim. L. Criminology & Police Sci. 426 (1958-1959)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

## SOME BASIC CONSIDERATIONS REGARDING PENAL POLICY

ROBERT S. REDMOUNT

The author received a Ph.D. degree in psychology from New York University in 1949. He has had a varied experience in this field, in clinical work, research and administration. He has held positions at the University of Michigan and in the State and Federal Mental Health Services.

In 1957, he received the LL.B. degree from Yale University, where he was an editor of the *YALE LAW JOURNAL*. Mr. Redmount is a member of the Connecticut Bar. He developed the present paper while serving as a Research Associate under a National Institute of Health Grant to the Yale Law School.—EDITOR.

The three brief and separate discourses that follow are intended only to vex the mind concerning some of the critical issues that preexist any systematic understanding and application of penal policy. It is, of course, a matter of record that a spate of words has been written on the subject of penal policy, and it is sometimes thought that these conclude what is worthy of expression. As a matter of conviction, however, it is the better view that impartial study of the subject offers the prospect of only a beginning in understanding. Analysis, not synthesis, is the object of the present writing, and no effort is made to catch all of the issues in a single integration. Integration, when so many problems are outstanding, and require persistent inquiry, would be a breach of respect for the complexity and importance of the whole subject matter.

The present effort views penal policy from three perspectives. The first is concerned with the character of various alternative penal concepts, and with the consequences of conceptual cross-currents. The second views the problems that beset a penal policy, notably, the widely espoused policy of deterrence, when it is confronted by the variegated realities of personal and social dispositions and behavior. The third discourse exposes the difficulties that face a decision-maker, notably a trial judge, when he makes a conscientious attempt to apply penal policy to an individual case, once and for all and with a limited range of choice of sanction.

If the analysis succeeds in its proposal, there is no basis for any present affirmative conclusions. There is only the prospect for an aggregate of studies, reflective and empirical, which will (1) rigorously define and separately evaluate alternative concepts and operations of penal policy, and (2) systematically compose the interaction to be

achieved between policies, and between policy makers.

### I. THE CONCEPTUAL TERRAIN OF PENAL POLICY

"The end of all penal laws is, that they may *not* be applied."

Fichte, *THE SCIENCE OF RIGHTS*, p. 345

Penal policy, through the years, attests to the rationalizing skills of man. Nietzsche makes this point, somewhat acidly, in a rhetorical question sequence. "What tactics have our moral genealogists employed up to the present in these cases? . . . They find out some 'end' in the punishment, for instance, revenge and deterrence, and then in all their innocence set this end at the beginning, as the *causa fiendi* of the punishment."<sup>1</sup>

At the present time we are concerned essentially with four explanations, *qua* rationalizations, of penal policy. Perhaps the most ubiquitous, and the most grating, of these is the policy of retribution. Another policy, to which Bentham<sup>2</sup> and Beccaria<sup>3</sup> devoted passionate energy, stresses the instructional character of penalties and is aimed at the general deterrence of crime. A third policy, to use a term developed by Oppenheimer<sup>4</sup> stresses the "disablement" of the offender so as to render crime, at least theoretically, a physical impossibility. The fourth policy focuses on the rehabilitation potentials of convicted offenders and emphasizes the importance of salvaging human resources, whether for moral, practical or aesthetic reasons.

<sup>1</sup> NIETZSCHE, *THE GENEALOGY OF MORALS*, in *Collected Works*, V. 13, p. 89 (Levy ed. 1909-13).

<sup>2</sup> BENTHAM, *PRINCIPLES OF MORALS AND LEGISLATION*, particularly 170-203 (New ed. 1823).

<sup>3</sup> BECCARIA, *ESSAY ON CRIMES AND PUNISHMENTS* 73 and *passim* (1801).

<sup>4</sup> OPPENHEIMER, *THE RATIONALE OF PUNISHMENT* 254 (1913).

There are also other important rationalizations that could be, or may be, the bases for penal policy. For example, there is expiation, a theological proposition for the atonement of sin. It still finds an occasional modern contender, such as Alexander,<sup>5</sup> who asserts that it is an important operation, if not a justification, of penal policy. "Punishment results [for the neurotic offender] in little more than the fact that the criminal experiences a sense of relief; it gives him a sense of having expiated his sins and thus reduces his inhibitions."<sup>6</sup> There is also the aesthetic view, expressed by Leibniz as a "pre-established harmony"<sup>7</sup> between crime and punishment but, as Oppenheimer points out, "the ideas of proportion, of harmony, of fitness, as underlying the aesthetic views of punishment, are nothing else than the idea of justice, if not of an intellectual talion; in other words, purely moral notions behind a transparent aesthetic veil."<sup>8</sup> There are also other policies, but what the recent report of the British Royal Commission on Capital Punishment<sup>9</sup> sagely notes in relation to three penal policies, may be extended to all. In referring to the punishment purposes of retribution, deterrence and reformation, the Commission said, "The relative importance of these three principles has been differently assessed at different periods and by different authorities; and the philosophers and penologists have emphasized one or another of them, sometimes even to the exclusion of others."<sup>10</sup>

#### THE POLICY OF RETRIBUTION

It was Sir James Stephen who made the peremptory statement that it is "highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred."<sup>11</sup> "The execution of criminal justice . . . stands to one set of passions [deliberate anger and righteous disapprobation] in the same relation in which marriage stands to [sexual passion]."<sup>12</sup> Stephen provides a prototypical view for retribution as the most essential basis of penal policy. Try as we may, and we

have tried, we have been unable to divorce the moral discomfort of this policy from the present operation of penal law. We have become more "squeamish" about the policy, as Darrow says,<sup>13</sup> and we have denied its existence in our verbal policy commitments but we have been unable to expunge it from policy operation.

The explanation for the annoying persistence of the attitude of vengeance in the operation of penal policy, lies in the psychology and physiology of human behavior. Reiwald, a psychoanalytically trained lawyer, observed that, "Punishment would seem to be, then, nothing more than a kind of reflex action to attack . . . And if there is something here that requires justification, rationalization or concealment, might this not be the very fact which no criminal law will and may admit: that, in the strongest degree, it rests upon instinct and emotion and therefore upon elements which have nothing to do with law and indeed appear to exclude it."<sup>14</sup> Weihofen, who has enriched the literature with his studies of the relation of psychiatry to law, has recently discoursed at length on "the urge to punish."<sup>15</sup> He notes that the matter of the punishment of criminals tends to evoke substantial psychological reaction. "When a reprehensible crime is committed, strong emotional reactions take place in all of us."<sup>16</sup> "The urge to punish wrong doers is not always an impersonal demand that the law keep its promises. Often it is an outlet for our own antisocial aggressiveness which we have more or less effectively but guiltily repressed."<sup>17</sup> He quotes Frym, who says: "It is a weapon in our own struggle against trends and drives which do not admit to consciousness. We should be continuously aware that over-assertion of a prosecuting, punishing, attitude toward law breakers reveals the intensity of our inner struggle and the instability of our own emotional equilibrium."<sup>18</sup>

The theoretical forebears for these statements of Reiwald and Weihofen are readily identified in the literature of psychology and physiology. The theoretical nexus for both is the now classical work of Cannon<sup>19</sup> on the emotions. To use Saul's terse

<sup>5</sup> ALEXANDER AND STAUB, *THE CRIMINAL, THE JUDGE AND THE PUBLIC* (Rev. ed. 1956).

<sup>6</sup> *Id.* at 57.

<sup>7</sup> LEIBNIZ, *THE MONADOLGY*, IN LEIBNIZ, *PHILOSOPHICAL WRITINGS* 18-19 (Morris trans. 1934).

<sup>8</sup> *Op. cit. supra*, note 4 at 223.

<sup>9</sup> REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-53 (1954).

<sup>10</sup> *Id.* at 17.

<sup>11</sup> STEPHEN, *A HISTORY OF THE CRIMINAL LAW*, V. 2, 82.

<sup>12</sup> *Ibid.*

<sup>13</sup> DARROW, *CRIME, ITS CAUSE AND TREATMENT* 19 (1922).

<sup>14</sup> REIWALD, *SOCIETY AND ITS CRIMINALS* 199 (1945).

<sup>15</sup> WEIHOFEN, *THE URGE TO PUNISH* (1956).

<sup>16</sup> *Id.* at 130.

<sup>17</sup> *Id.* at 138.

<sup>18</sup> FRYM, "Past and Future of Criminal Rehabilitation," 3 J. PUB. LAW 451, 460 (1955).

<sup>19</sup> CANNON, *BODILY CHANGES IN PAIN, HUNGER, FEAR AND RAGE* (2d. ed. 1929).

synopsis of Cannon's proven theory, "under any threat or irritation every biologic organism reacts with physiologic preparedness either to fight or to run."<sup>20</sup> Crime is an irritant to the socially trained person. It is frustration. A principal consequence of frustration, as Dollard *et al.* have demonstrated, is aggression.<sup>21</sup> Aggression, in a highly primitive form, would be represented in the acts and attitudes of vengeance.

The instinctual element which is served by emotion can be identified in the theories of McDougall<sup>22</sup> or Freud.<sup>23</sup> McDougall posited a number of instincts as the directional force for behavior, more or less modified in form by social experience. One of these was the "pugnacity instinct," which was served by the "anger emotion."<sup>24</sup> Both Reiwald and Weihofen, however, identify their notions of instinct with Freudian thought. The most common psychoanalytic formulation views the counter-aggression against the criminal not so much as an expression of instinct, as a defense against instinct, compelled by the strong and continuing power of the anti-social instinctual forces in the personality. The counter-aggression is, in the phrase of Alexander, "a defense reaction on the part of the Ego against one's own instinctual drives; the Ego puts itself at the service of the inner repressing forces, in order to retain the state of equilibrium, which must always exist between the repressed and the repressing forces of the personality. The demand that the lawbreaker be punished is thus a demonstration against one's own inner drives, a demonstration which tends to keep those drives amenable to control: 'I forbid the lawbreaker what I forbid myself.'"<sup>25</sup>

But the aggressive emotion focused on the criminal may also be instinctual, and it is to this that Weihofen adverts.<sup>26</sup> The "impulse to retaliation" arises when, according to Alexander, "a painful and damaging circumstance arises from without, [whereupon] man . . . insists on injuring the assailant."<sup>27</sup> And, as if instinct and countering

<sup>20</sup> SAUL, BASES OF HUMAN BEHAVIOR 22 (1951).

<sup>21</sup> DOLLARD *et al.*, FRUSTRATION AND AGGRESSION (1939).

<sup>22</sup> MCDUGALL, INTRODUCTION TO SOCIAL PSYCHOLOGY (1908).

<sup>23</sup> Perhaps the simplest presentation of the concept of instinct in Freudian personality theory is to be found in FREUD, NEW INTRODUCTORY LECTURES IN PSYCHOANALYSIS 82-152 (Spratt trans. 1933).

<sup>24</sup> MCDUGALL, *op. cit. supra* note 22 at 59.

<sup>25</sup> ALEXANDER AND STAUB, *op. cit. supra* note 5 at 215.

<sup>26</sup> WEIHOFFEN, *op. cit. supra* note 15 at 138, 139.

<sup>27</sup> ALEXANDER AND STAUB, *op. cit. supra* note 5 at 218.

against instinct were not motive enough for aggression, there is also the "identification with the aggressor" noted by Anna Freud.<sup>28</sup> Vindictiveness and antagonism against the criminal give vicarious expression to hostile impulses under cover of the law. We are not so much against the aggression of the criminal as we are in favor of our own.

In his lectures on the common law, Holmes remarked, "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."<sup>29</sup> Implicit is the recognition that there must be some correspondence between the "is" of reality and the "ought" of the law. However repugnant the wart of reality may be, it cannot be wished away.

The political advice of Holmes, combined with our best knowledge of the psychology and physiology of human behavior, distinguishes aggression toward the criminal as an important facet of penal policy. By any name it is one of the important structural elements of an encompassing theory of penal policy, if the theory is to stand up under the test of empirical validity.

#### THE POLICY OF DETERRENCE

While counter-aggression against the criminal is a response to man's nature, the policy of deterrence is a demand for social order. The first is essentially a product of what Frank has called "inevitabilism."<sup>30</sup> The second is based essentially on a foundation of free will. The one savors of psychological hedonism, and the other of social utilitarianism.

The policy of deterrence received its greatest refinement from two penological reformers who revolted at the barbarism of an unbridled and capricious policy of retribution. For Bentham,<sup>31</sup> it was a cornerstone of moral law, and for Beccaria,<sup>32</sup> it was the essence of humanism.

A number of inferences condition the operation of a policy of deterrence and reflect on the empirical validity of deterrence theory. A psychological subsumption of the free will position is that, to begin with, individuals have developed a modicum of control over their behavior. They have stabilized the function and relation of psychological and physiological mechanisms so that they are largely able to direct their actions. In this, there

<sup>28</sup> A. FREUD, THE EGO AND THE MECHANISMS OF DEFENSE, C. 9 (Baines trans. 1946).

<sup>29</sup> HOLMES, THE COMMON LAW 41 (1881).

<sup>30</sup> FRANK, FATE AND FREEDOM.

<sup>31</sup> BENTHAM, *op. cit. supra* note 2.

<sup>32</sup> BECCARIA, *op. cit. supra* note 3.

is confirmation in common observation from experience and in the authoritative knowledge of psychology and physiology. In Freud, we find it in the concepts and the data of ego development and ego behavior.<sup>33</sup> In physiology we find it in Sherrington's classical demonstration of the integration of nervous system activity<sup>34</sup> and in such verified concepts as Cannon's "homeostasis"<sup>35</sup> the tendency to establish stability and equilibrium in physiological processes.

A further psychological subsumption is the corollary of the principle of control and stability just mentioned. Organisms must be free to register impressions and their behavior, in the light of these impressions, must be modifiable. This is implicitly and explicitly established in the work of the physiologists. It is further demonstrated in processes of learning—the subject of meticulous study by psychologists such as Hull and others.<sup>36</sup>

There is, in the technique of deterrence, a further subsumption that it is the experience of pain or discomfort that generates learning. Punishment for crime, communicated by example, serves to reinforce learned dispositions against and away from criminal activity. In this there is reasonable support from psychologists who study learning, though other techniques and effects might work just as well or better.<sup>37</sup>

Deterrence has long been considered a nobler penal policy than retribution. In the words of Protagoras, "No one punishes the evil-doer under the notion, or for the reason, that he has done wrong,—only the unreasonable fury of a beast acts in that manner. But he who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone; he has regard to the future, and is desirous that the man who is punished, and he who sees him punished, may be deterred from doing wrong again. He punishes for the sake of prevention."<sup>38</sup> It has also served, at least in principle, as a binary compound for state living and public order. In its narrowest concep-

tion, it reaches, or is intended to reach, those most disposed to commit certain crimes. In its broadest sense, it influences the largest mass of citizenry, by strengthening suppressive influences within the individual that counteract unsocialized and anti-social tendencies. It is only that segment of society best known to the experience of psychiatry, in whom mental and emotional disabilities seriously impair learning ability, that a policy of deterrence can afford no rational meaning.

#### THE POLICY OF DISABLEMENT

In its most primitive assumption, the policy of disablement treats the offender as a *bete feroce*. In the view of Fichte, "the outlaw is considered simply as a wild beast, which must be shot . . . the death of the outlaw is not a means of punishment, but merely of security."<sup>39</sup> The logic is even more distinct in the sharper delineation of the criminal propensity that has characterized some historical punishments. As Oppenheimer notes, in speaking of the technique of mutilation that has characterized some penal practices in the past, "a handless thief is no longer light-fingered, and the sanctity of the marriage-bed is not likely to be violated by an adulterer once he is castrated."<sup>40</sup>

Disablement, or preventing the offender from committing further crime, is accomplished today primarily by the technique of physical isolation. Society is secured from his depredations by, literally and figuratively, a high wall of protection, reduced in scope only as the individual *animus ferociens* is considered to be reduced in danger. Segregation is achieved not on an individual but on a class basis, the classes of criminals being separated from the classes of non-criminals. Implicit in the class of criminals, but muted by a lack of consideration, is a social tropism guided by an independent set of psychological principles. Only one psychological principle is evident. There must be, even in the "criminal class" of society, a modicum of individual self-control. Though not perfected to the degree of normality, it is nevertheless sufficient to permit the preservation of the class and the continued survival of the individual human being.

Disablement, unlike the policies of retribution and deterrence, construes the offender as both the means and the object of the penal sanction. If he is to survive at all, he will survive only on the con-

<sup>33</sup> FREUD, *op. cit. supra* note 23 at 82-112.

<sup>34</sup> SHERRINGTON, *THE INTEGRATIVE ACTION OF THE NERVOUS SYSTEM* (New ed. 1947).

<sup>35</sup> CANNON, *THE WISDOM OF THE BODY* 24 (Rev. ed. 1939).

<sup>36</sup> See, e.g., HULL, *PRINCIPLES OF BEHAVIOR* (1943) and TOLMAN, *PURPOSIVE BEHAVIOR IN ANIMALS AND MEN* (1932).

<sup>37</sup> See the discussion of the effects of punishment in various theories of learning, in HILGARD, *THEORIES OF LEARNING*, *passim* (2d ed. 1956).

<sup>38</sup> PLATO, PROTAGORAS. Jowett trans. in *GREAT BOOKS OF THE WESTERN WORLD*, V. 1, p. 45 (Hutchins, ed. 1952).

<sup>39</sup> FICHTE, *THE SCIENCE OF RIGHTS* 366 (Kroeger trans. 1869).

<sup>40</sup> OPPENHEIMER, *op. cit. supra* note 4 at 256.

dition that he, and not some others, will be prevented from further crime. It is to control him, and not to satisfy others, that action is taken against him. Society, at least according to the principle of the policy, is of course instrumentally benefited.

#### THE POLICY OF REHABILITATION

A striking feature of the modern consideration of crime is the amount of panegyric generated for a policy of rehabilitation of the criminal. Among the professions, psychiatry and sociology, most of all, have elevated the policy almost to the plane of a social ethic. There is, on the one hand, a preachment of individual and social determinism, acting as a bar to punishment based on a concept of responsibility. On the other, there is the growing conviction that man's deeds, including crime, can be molded by persuasion. Psychological and social surgery provide the life blood for a newer attitude in the relationship between man and crime, with man more the conqueror than ever before.

Rehabilitation is a social objective that capitalizes, most of all, on the resources of the individual for adaptation. Its promise lies in the circumstance that the individual has substantial reservoirs of learning ability that require only proper exploitation for a beneficial social result. It has been the predominant view of law that learning is the outcome of the attribution of effects to behavior. It is, in the early psychological formulation of Thorndike, the "law of effect"<sup>41</sup> that regulates choice in behavior. Punishment, above all, as a blend of moral and psychological persuasion, is most likely to produce the effect of legal conformity.

The prevailing view, in both sociology and psychiatry, is that learning or relearning is a more complicated process. It is a combination of biological drives, interpersonal relationships and social structure that must be conceived in mutual relationship and pursued through the span of life, if the criminal disposition is to be visited with an effect of any consequence. The expert analytic tools of sociology and psychiatry, professions whose job is the analysis of the individual and of society, are thought to be requisite to the achievement of rehabilitation.

It is the individual offender, and his group, not the crime and its effect, that provides the proper focus for rehabilitation. It is considered both

politic and proper that, if nothing else, the offender, at least, should be restored to a serviceable social function whenever possible. A tolerant society turns its cheek, that it may better be served.

#### THE COMMINGLING OF POLICY

The essences of penal theories may be succinctly stated. In retribution, punishment is society's reflex action to crime. It is, in psychological terms, instinctual or counter-instinctual. In philosophy, it perhaps measures closest to Hegelian views, which are well expressed in the following terse phrases: "the wrong act [the crime] is a negation of right, and the negation has to be negated by the reaction of society in the punishment of the offender."<sup>41a</sup> In deterrence, punishment is a learning instrument, utilized to influence the conduct of persons other than the offender. In disablement, physical isolation of the offender is used as the instrument to insure the security of society. In rehabilitation, the moral and social salvation of the offender through a sensitive process of education and manipulation is the objective.

The retributive view, carried to its logical destiny, need not measure consequences. The policy is, above all, a catharsis and any injury to the offender or any extent may be justified. The reflex is the slap that follows a sting, and it is not governed by any philosophical subtleties or immediate utilitarian considerations. Viewed, however, as a moral balance rather than a psychological pleasure, then retribution is bound by the principle of *lex talionis*. The punishment does not exceed the crime. It is a semblance of the latter view, combined with the psychological motive, that provides one dominating element in the operation of penal policy.

The policy of deterrence, carried to its logical ultimate, would appear to require no prior condition that a crime be committed. Not guilt but mere suspicion is enough to qualify the defendant as a sacrifice to public education.

#### II. SENTENCING THE OFFENDER: THE EFFECT ON OTHERS

It is frequently said that one of the most important aims of sentencing the offender is to influence the behavior of others. Bentham urged that "example is the most important of all."<sup>42</sup> And, for

<sup>41a</sup> BRADLEY, *Punishment and Moral Responsibility*, 7 MOD. L. REV. 205, 207 (1944).

<sup>42</sup> BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, 170 (1879)

<sup>41</sup> THORNDIKE, ANIMAL INTELLIGENCE 244 (1911).

Beccaria, "the end of punishment, therefore, is no other (to prevent the criminal from doing further injury to society), and to prevent others from committing the like offense."<sup>43</sup>

The thought has ripened into a consistent declaration of policy. But its execution creates a fester of uncertainty and perhaps of misgiving. As the Royal Commission put it,<sup>44</sup> in considering the effects of the death penalty on the behavior of others, "(deterrence) is an issue on which it is extraordinarily difficult to find conclusive arguments either way. Both sides are commonly argued by wide generalizations confidently expressed with little positive evidence to support them," and "the general conclusion which we have reached is that there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increase in the homicide rate, or that its reintroduction has led to a fall."<sup>45</sup>

The source of the difficulty is easy to identify: it is the complicated behavior of man. It is our inability to predict with sufficient certainty the behavior that will result upon the happening of an event. We do not know, in the event of sentencing, whether the future behavior of others is because of, in spite of or unrelated to, the sentence that is passed. We do not know, the reinforcement of the general condition of morality. A sentence based on a policy of deterrence, could bypass the defendant's crime and search only for a colorable punishment as an object lesson to others. It is as a Heath judge is reputed to have declared in condemning a horse-thief to the gallows, "You are sentenced to be hanged, not because you stole the horse, but in order to prevent others from stealing horses."<sup>46</sup> But this is not the law, however it may have been in Heath. Social utility stops short of the needs of justice and there is, at least in the eyes of the law, no punishment but for a crime, and no lesson where there has been no transgression.

The ultimate in disablement is, as has been said, that "the outlaw . . . must be shot."<sup>47</sup> However, judaic-christian morality tempers such a judgment and security is achieved, and hardly compromised, by lesser means. Disablement is roughly

proportioned to the risk of further injury, gauged primarily according to the magnitude of the defendant's previous crime. It is mostly measured in terms of lengths of physical isolation.

As a policy of deterrence, by itself, might be punishment without crime, so rehabilitation, by itself, might be crime without punishment. Punishment may be an armament of sorts in the technique of rehabilitation but it is by no means an object of the policy. Behavior free of moral consequences, at least for a time, may even be deemed essential for rehabilitation, acting as a means rather than as an end. But society's tolerance and the law's sufferance does not extend so far. However much psychological skills may facilitate moral rehabilitation, the latter is not to be accomplished by a moratorium on punishments. The individual benefit, and the ultimate social benefaction, is restricted by what is deemed the most essential mortar of a continuing society: ever present moral standards and social regulation.

Penal policies achieve compromise not only because of the intemperate character of their ultimate philosophical implications. The technical operations of each policy may vitiate the full effects of the other. For example, retribution, if exacted through the death penalty, preempts a policy of rehabilitation. And, for another, rehabilitation, where it avoids punishment, nullifies any policy of deterrence that is based upon punishment.<sup>48</sup>

But penal policies can do more than disassemble one another. They may be in such close communion that their identities become indistinguishable. Disablement, through death or through imprisonment, may be retribution. And retribution, if the punishment is mete, can be deterrence. Policies may also support or subserve one another. Disablement, of some sort, may be necessary if rehabilitation is to be achieved. Retribution, for a while, may serve the policy of deterrence.

Small wonder, when techniques can interchange policy without detection, that true policy operation has become a hive of confusion. But the confusion would appear to be partly the consequence of a missing term in policy definition. Policy declarations, if they are at all certain, generally reflect the temper of the moment. If the provocation is great and the misdeed is vicious, then the community will decree and the legislatures and the

<sup>43</sup> BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 41-42 (5th ed., 1801).

<sup>44</sup> ROYAL COMMISSION ON CAPITAL PUNISHMENT, 18 (1953).

<sup>45</sup> *Id.* at 23.

<sup>46</sup> FROM DU CANE, PUNISHMENT AND PREVENTION OF CRIME 2 (1885).

<sup>47</sup> See text at p. 429.

<sup>48</sup> WAELDER has noted a number of these policy conflicts in his discerning article, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378, 387-89 (1952).

courts will probably enact a policy of retribution, though by another name. If the spite is a general lack of response to legal intention then, as Hall notes in the actions of some courts on liquor matters during prohibition, the policy action "consciously . . . travel(s) the road of deterrence."<sup>49</sup> The policy choice, whether it has one or several dimensions of character, whether distinguishable or not, is less for the future than for the moment. There is missing any contemplation of a change of condition that would allow policy to be construed in sequences. While retribution may be the first essential, and perhaps disablement as well, the vigor of these policies may run their course. At some point in experience, their purpose and value may be diminished. Another policy may, in reason, assume primacy and serve as a proper objective in the light of changed circumstances.

Penal policy, in each instance in which it is applied, may be construed as evolutionary process. This, in fact, may be policy experience. A hard crime generates a long prison sentence. Original maximum security precautions may be replaced by minimum security measures. Adaptation, perhaps accompanied by some useful instruction, may lead to parole. And parole may lead to reintegration with society and complete rehabilitation. The process, when it operates at all, is crude, because the conception of penal policy in terms of sequence is not clear. A clear relationship between policy objectives, in relation to various points in time and experience, is not well perceived. Policy emphasis and residuals of one time overlap into another. Penal policy, as a system of policy conceptions supporting and superseding one another in reasonably precise alternation, is yet to be understood.

It can only be concluded, for the moment, that penal policy is the meeting ground of both similar and contradictory values in society. There is a selection among policies of free will and of "inevitabilism," policies favoring individual growth and social protection, psychological hedonism and social utilitarianism, punishment and favor, change and isolation. It is, in operation, a mosaic of social pressures, surface declarations and unconscious preferences, spawning a variety of rationalizations that suggest but perhaps do not adequately describe reality. Penal policy is, as Nietzsche said, a figment, one that perhaps does more to account for

behavior than to condition it, for reasons that we hope to explain. And we should emphasize, too, that we are not sanguine in our expectations. Explanation is not *ipso facto*, solution. It is only the means of understanding on which, perhaps, a solution can be based.

#### THE REGULARITY OF BEHAVIOR

Let us consider, first, the behavior of man *in extenso*. The better reasoning is that it is a product of internal drives molded into shape by external forces. It is the biology of man on which the social environment beats a cacophony of sounds. Man's overture is a system of habits, sometimes agreeable and sometimes disagreeable, that identify his relationship to society. They exercise his abilities and operate his drives, and mostly, they produce regularity in his existence.

Ordinary psychological knowledge has captured something of the flavor and the character of these habits. It has, in fact, enabled the categorization of man in terms of patterns of behavior. There are hostile persons and orderly persons, the gregarious and the penurious, the loving and the scheming. There are the exhibitionistic and the sadistic, the demanding and the retiring, the crude and the considerate, the friendly and the passionate. There are the capable and the incapable, the accomplished and the dull.

The characterization of behavior has led to the implication of a disposition to behave, and this in turn has led to predictions of how an individual will behave. Patterns of law-abidingness provide a judgment of a disposition for law-abidingness, and the prediction of future law-abidingness is the result of this disposition. It is on this rational order of events that the law is based.

In consequence of these general propositions, certain flaws follow. The degree of behavior regularity is not always the same and, in this respect, law-abidingness is no different from any other habit. De Grazia, writing on his conundrum, the psychiatrist, points out that "the superego [roughly, the conscience] . . . is by no means of equal strength or severity in all individuals."<sup>50</sup> Since patterns of internal control over behavior vary among individuals, even among those valued as "normal," and circumstances vary within us, the disposition to law-abidingness is not always

<sup>49</sup> HALL, *Reduction of Criminal Sentences on Appeal*: "I," 37 COL. L. REV. 521, 546 (1937).

<sup>50</sup> DE GRAZIA, *Crime Without Punishment: A Psychiatric Conundrum*, 52 COL. L. REV. 746, 757 (1952).



the same. And, further, though disposition may be sound, behavior may still be different.

It is perhaps in these circumstances, described by De Grazia, that a policy of influencing others through the effect of sentence achieves its greatest prospective benefit. The punishment of another for crime fortifies the personal process by which all of us achieve a determination to obey the law and a habit of law-abidingness. "Law," according to West, is "an extension of self-control."<sup>51</sup> In the language of instinct, but within the meaning of most psychological theories of behavior, he says of law that it is "an external support for a man's social instinct against the anti-social activities of his self-assertive instinct."<sup>52</sup>

#### IMPRESSIONABILITY AND MODIFIABILITY: PERSONAL CONDITIONS FOR THE INFLUENCING OF BEHAVIOR

The general influences of the operation of law presumably extend to the behavior of most of society, though we would be reassured if we had data to prove it. The influence, though, stops short of certain social statistics, on recidivism, and certain case histories, on psychiatrically deviated offenders. From the case histories and interpretations of psychiatry, certain other principles of behavior, important in addition to regularity, can be developed and applied to sentencing. Henderson, in speaking of the psychopathic personality, refers to him as "blunted emotionally . . . he shows a 'belle indifference' . . . For some inscrutable reason he fails to grow up, he remains at the level of a primitive savage with a distinct distaste for reasoning and an 'impermeability to experience' which allows him to live, think, feel, and act in a manner foreign to his more civilized neighbors."<sup>53</sup> Reich, in speaking of the same kind of personality, refers to an "instinct-ridden individual." "Broadly speaking, they suffer from an ineffective critical faculty, they have practically no sense of conscience."<sup>54</sup> Cleckley<sup>55</sup> calls the condition a "convincing mask of sanity," a "mimicry of human life." The psychopathic person is out of contact with the emotional implications of experience and does not understand its full purpose.

Comparable to the psychopath's moral insensi-

bility is the mental defective's intellectual obtuseness. In the words of Landis and Bolles, "They show inferiorities in controlled attention, memory and simple ideation, and in the ability to grasp similarities, differences and other relationships. Because of these deficiencies, their reasoning, judgment, imagination, and ability to learn are poor."<sup>56</sup> They are largely insensitive to their social surroundings because they do not have the intellectual capacity for understanding.

The perverseness of psychotic disorder is distinguished by an even greater encroachment upon personality. "The distinguishing mark of psychosis is a serious loss of contact with reality."<sup>57</sup> Whitehorn describes the psychotic patients as "those who are so seriously disturbed in their personality functions that, for the time being, they are socially unreliable, that is, insufficiently responsive to the needs and expectations and common sense of others."<sup>58</sup> . . . [They] in general have what might be called a very high 'sales resistance.' They are not receptive to advice or persuasion."<sup>59</sup> White, in outlining the characteristics of various types of psychoses, uses such phrases as "the pervasive effect of the dejected mood (in psychotic depression). Even quite incidental impressions receive a distorted meaning which fits them into the patient's depressed state of mind. His sense of sin and worthlessness is so dominating that he can no longer interpret experience in any other terms."<sup>60</sup> . . . [of manic states] disturbances of thought and loss of contact with reality are incidental results of the [manic's] overactivity and overconfidence. The patient is too distractible to perceive the environment with accuracy, too changeable to turn his flight of ideas into consecutive thinking, too elated to take account of facts that run counter to his mood."<sup>61</sup> . . . [of schizophrenic thinking] the patient has almost entirely deserted the level of realistic thinking. His thought processes are autistic, like dreams and daydreams; more than that, they are full of conceptions that seem to be infantile in nature."<sup>62</sup>

The learned opinions regarding the various disorders express a common thought. Reference is

<sup>56</sup> LANDIS AND BOLLES, *TEXTBOOK OF ABNORMAL PSYCHOLOGY* 274 (Rev. ed. 1950).

<sup>57</sup> WHITE, *THE ABNORMAL PERSONALITY* 514 (2d ed. 1956).

<sup>58</sup> WHITEHORN, *Psychodynamic Approach to the Study of Psychoses*, in ALEXANDER & ROSS, eds., *DYNAMIC PSYCHIATRY* 265 (1952).

<sup>59</sup> *Id.* at 255.

<sup>60</sup> WHITE, *op. cit. supra* note 12, at 517.

<sup>61</sup> *Id.* at 520.

<sup>62</sup> *Id.* at 567.

<sup>51</sup> WEST, *CONSCIENCE AND SOCIETY* 168 (1945).

<sup>52</sup> *Ibid.*

<sup>53</sup> HENDERSON, *PSYCHOPATHIC STATES* 128-29 (1939).

<sup>54</sup> REICH, *DER TRIEBHAFTE CHARAKTER* (1925).

<sup>55</sup> LEE CLECKLEY, *THE MASK OF SANITY*, c. 23 (2d ed. 1950).

invariably made to a person who has lost, or has never had, a necessary facility for social living—impressionability. The moral mechanism may be impoverished, the emotional response may be dried out or the intellectual operation may be confused. For whichever cause, or causes, social experience receives a distorted interpretation and learning with its normal intendment does not take place. What is meant to create fear does not result in fear, and what is meant to be a lesson turns out to be something different. Impressionability is a sacrifice to defect and illness, with a consequent loss in social participation. There can be no effective policy of influence upon others where the personal processes of thought and emotion do not cooperate to produce perceptive and responsive individuals.

It is not only impressionability but also modifiability that counts. Of course, one cannot change by reason of a stirring impression, if the impression does not register. But the psychiatric literature is also rich with descriptions of persons whose moral, emotional and intellectual capabilities are not grossly impaired, yet their behavior is intractable. Alexander,<sup>63</sup> for example, describes "the neurotic character," presumably of essentially normal intellect and emotional sensibility, and in fact overburdened with morality, yet whose social adaptation is controlled by inner conflict. "Their personality seems split in two; one acts impulsively while the other reacts to this impulsive behavior in a very moral, even overmoral fashion. . . . The powerlessness of the conscious Ego in face of the impulsive behavior of the neurotic character is a common characteristic of this type of personality."<sup>64</sup> Closely related is the neurotic personality whose illness is recognized in such symptomatic behavior as kleptomania, pyromania, etc. An inner compulsion to act, against the dictates of ordinary sense, is the dominant characteristic of this behavior. Fenichel, borrowing from Reich's concept of "impulsive character,"<sup>65</sup> labels this behavior "impulse neurosis," noting that the impulses "betray a characteristic irresistibility."<sup>66</sup> As in the "neurotic character" of Alexander's description, so here, there is an endless struggle between hostile self-assertive tendencies and the mechanisms of inhibition within the personality.

<sup>63</sup> ALEXANDER AND STAUB, *THE CRIMINAL, THE JUDGE AND THE PUBLIC* 93 (rev. ed. 1956).

<sup>64</sup> *Id.* at 97.

<sup>65</sup> REICH, *Op. cit. supra* note 9.

<sup>66</sup> FENICHEL, *THE PSYCHOANALYTIC THEORY OF NEUROSIS* 367 (1945).

The external behavior of the individual and its effects are of lesser consequence in the struggle.

One may prefer the interpretation that a lack of ready modifiability, such as the impulsive neurotic and the neurotic character demonstrate, is a mere consequence of the failure of impressionability. The practical consequences may be the same, but the point should not be missed that persons who do not deviate grossly from normality, who can discriminate the social implications of behavior, may nevertheless not be able to enlarge and sustain their learning so as to affect their behavior. Their compulsive tendencies require something more than a policy of deterrence if natural consequences are to be avoided and behavior is to be modified.

#### SOME SOCIAL INFLUENCES: MORAL PERSUASION AND LAW ENFORCEMENT

A substantial degree of regularity, and some impressionability and modifiability are the personal conditions which the process of sentencing requires if it is to effectively feed back its influence on potential and future offenders. But amenable personalities are not enough. They must be supported in their law-abiding efforts by a social environment congenial to the operation of law. In Ehrlich's trenchant analysis of law in relation to social activity, he points out that "the legal norm . . . is merely one of the rules of conduct."<sup>67</sup> "Morality, religion, ethical custom, decorum, tact, even etiquette and fashion do not order the extra-legal relations only; they also affect the legal sphere at every turn. Not a single one of the jural associations could maintain its existence solely by means of legal norms; all of them, at all times, require the aid of extra-legal norms which increase or eke out their force."<sup>68</sup>

It is merely a truism that law and order are generally highly valued in community life. Moral, legal and a variety of institutional norms generally converge so as to give to the operation of law the maximum social support. But the truth of the statement only bides for exceptions, and social experience offers a number of these.

Normally, community moral persuasion is an important force in support of the law. However, as Petrazycki<sup>69</sup> points out with great prolixity, law and morality may be separate operations. It

<sup>67</sup> EHRlich, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW*, 39 (Moll trans. 1936).

<sup>68</sup> *Id.* at 55-56.

<sup>69</sup> PETRAZYCKI, *LAW AND MORALITY* (Babb trans. 1955).

is important for us to recognize that not all of law is invested with an equally persuasive morality. Tax cheating, as Dession candidly terms it,<sup>70</sup> does not sustain the force of moral sanction that is associated with rape. And unprovoked murder, which generally bears the cross of personal immorality, brings a much quicker and more potent social response than does speeding or gambling. Where the force of morality is indistinct, the observance of law must turn to other influences for support. De Grazia correctly observes that "although most people are morally restrained from such lesser crimes, the restraint is weak and can under many circumstances be circumvented, if not directly overturned."<sup>71</sup> Into this breach may fall a policy of coercing the behavior of the many by demonstratively punishing some few. Moore and Callahan have shown that official punishment of sufficient magnitude will modify behavior in such matters as automobile parking, with a resultant increase in obedience to the law.<sup>72</sup>

The notation of Moore's and Callahan's parking and traffic study brings into view a second important circumstance that influences the operation of law, namely, the matter of law enforcement, as a necessary adjunct of legal norms. The general assumption is that patterns of social and lawful behavior are encouraged by consistent and substantial law enforcement. Documented experience, as well as common observation, demonstrate that the process of law enforcement is uneven. It may vary as to time, as to place, and as to kinds of misbehavior. Andenaes, for example, cites the effect of a failure of consistent law enforcement on the operation of a law aimed at the regulation of Danish imports from Sweden.<sup>73</sup> Danes visiting Sweden were forbidden to take Danish or Swedish money out of Denmark, and they were forbidden to borrow money in Sweden. With lax enforcement, at least of the law relating to the borrowing of money, "great hordes, some days up to several thousand, cross[ed] over to Sweden and return[ed] laden down with goods. The traders were so numerous that the customs officials and police . . . checked to see if the traders

had tobacco or other highly dutiable items, but they did not bother to ask how they had got the Swedish money."<sup>74</sup> The Danish state prosecutor, whose report was the basis for Andenaes' account, commented, "although everyone knows that the great majority of the numerous travelers . . . are lawbreakers . . . nevertheless the customs officials . . . and the police . . . do nothing."<sup>75</sup>

The lack of enforcement, or enforceability, of the legal norm, and only slight investment of the personal inner discipline of moral persuasion, discourages law abiding behavior. As the Danish prosecutor noted, "it taxes respect for law that everyone and his brother can see and can draw the lesson that one can with impunity allow oneself a wide margin in observing the law."<sup>76</sup>

#### THE ROLE OF THE INSTITUTIONAL NORM

In broadest terms, the effective operation of law and legal process depends upon social encouragement. It derives from the moral support of the community and from the diligence of operatives and guardians of the law. A third, and perhaps the most vital, social conditioning factor is the influence of the institutional norm. The values and practices that insure recognition and success in a particular line of endeavor, or in a particular community group, virtually become endowed with the power of command. When institutions, taking for example commercial enterprise, commonly espouse or utilize illegal means to best advantage, and disguise their actions so as to avoid prosecution, the operation of law is seriously compromised. Consider, for example, monopolistic practices and advertising misrepresentations, or unfair labor practices and shady financial manipulations. Group encouragement and the institutional norm, officially or unofficially, nourish these practices and bring their influence to bear in favor of violation of the law. The process is given a very adept technical formulation by Sutherland in his important treatise on white collar crime, "The hypothesis of differential association is that criminal behavior is learned in association with those who define such behavior favorably and in isolation from those who define it unfavorably, and that a person in an appropriate situation engages in such criminal behavior if, and only if, the weight of the favorable

<sup>70</sup> DESSION, *Justice After Conviction*, 25 CONN. BAR. J. 215, 225 (1951).

<sup>71</sup> DE GRAZIA, *op. cit. supra* note 5 at 478.

<sup>72</sup> MOORE AND CALLAHAN, *LAW AND LEARNING THEORY: A STUDY IN LEGAL CONTROL* 83-84 (1943).

<sup>73</sup> ANDENAES, *General Prevention—Illusion or Reality*, 43 J. CRIM. L., CRIMINOL. & POLICE SCI. 176, 183 (1952)

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

definitions exceeds the weight of the unfavorable definitions."<sup>77</sup> It may be added parenthetically that the criminal act is most readily undertaken which suffers least from the inhibitory influences of personal morality and rigorous law observance. But, if the stakes are sufficiently high, even these may be overcome.

The malignant influence of institutional norms and group practices is of course not limited to the commercial sphere. Consider some juvenile association as another example where violation of the law may be treated as a condition for acceptance or success in the juvenile community.

#### CONTINUING SOCIAL PROCESSES V. PRECIPITATE CONDITIONS

Social as well as personal malignancy may discourage or, at the very least, hamper the effective operation of the legal process. A lax or contrary social discipline, as well as personal insensitivity and incapability, may make a policy of influencing others by such techniques as exemplary sentencing, all but meaningless. Healthy institutions may compensate for those which operate ineffectively. Strong pressures toward legal conformity in social or commercial practices may compensate for a lack of moral definition. A potent and strongly vested morality may ease the problem of conformity to legal requirements. Rigorous law enforcement may counteract a weak social will or a moral gap. It is, however, important to recognize that there may be times and conditions when society does not value law and order most of all, and it is in these circumstances that a jural sentence may not operate as a discipline, at least not as a discipline on a larger community than the offender.

But generally, our anticipation, though not our certain knowledge, tells us that personal regularity, with sensitivity and conformity to law, and social cooperation, through responsive values and practices, characterize the field of operations for law. Within this field, the continuing behavior structure of the individual and of the community, constitute a policy of sentencing to influence others a reasonable possibility. But continuing personal and social processes do not account for all of behavior. However favorable they may be to the operation of the law, they still cannot insure lawful behavior.

The events that condition criminal action may

be precipitate. They may engulf the individual, or several of them, in a tremendous moment of emotion that will not suffer containment. Impulse, in the common sense of the term, may characterize the resultant action. Alexander and Staub note that the crime consequent to this sudden emotion may be a product of the psychologically normal person, with "criminality resulting from an affective state or a special situation."<sup>78</sup> Even the psychoanalytic determinist will concede, as do Alexander and Staub, that the psychological state is "acute, accidental" and hence the crime may not be foreseeable and perhaps not preventable.

Somewhat analogous in the behavior of individuals in crowds. Le Bon<sup>79</sup> was the first to describe in detail the highly volatile and virtually uncontrollable passion of an aroused crowd. The consequence may be criminal activity by normally conforming and reasonably sensitive individuals who, "in their right mind," would not commit such behavior.

Instinctive action based upon overpowering emotion is probably not an appropriate object of guidance. The influence of a sentence on prospective instinctual expression has probably not been tested, but the most liberal estimate would likely not support its usefulness.

#### CONCEPTIONS OF CRIMINALITY AND THE BREADTH OF A DETERRENCE POLICY

The total consequence of our effort at understanding so far has been no more than to reduce the potential area of operation for a policy of influencing a larger number of persons through the sentencing of offenders. We have endeavored to reduce the scope of the problem involved in translating a sentence upon one person into an influence upon others, but we may have succeeded in eliminating the problem, and the policy, altogether. We do not know, for sure, to what extent crime is a product of unimpressionable and largely unmodifiable individuals, or of crime-breeding or crime-tolerating social conditions, or of sudden fits of individual or group impulse. Perhaps crime is substantially correlated with one or another of these factors and will not be much influenced by the intents and effects of the sentencing process. But, even so, there is room for a policy of generalized influence stemming from a

<sup>78</sup> ALEXANDER AND STAUB, *op. cit. supra* note 18 at 82.

<sup>79</sup> LE BON, *THE CROWD* (1896). Cf. STRECKER, *BEYOND THE CLINICAL FRONTIERS* (1940).

<sup>77</sup> SUTHERLAND, *WHITE COLLAR CRIME* 234 (1949).

legal process. There is West's proposition<sup>80</sup> to consider, that "law [is] an extension of legal control" and does us all some good. There is the support the operation of law gives to situations where there is a weak social will or a moral gap.<sup>81</sup> And, though problematic, there may even be a remote influence of legal sanction upon the range and quality of circumstances that will generate volatile and misbehaving emotion. For instance, anger may not mount so easily in the face of insult or antagonism, if it is commonly established that violence because of such frustration will lead to serious punishment.

Further, until the proposition is thoroughly refuted, it is reasonable to claim that some prospective criminal behavior, at least, can be influenced by emphasis upon the effects some individuals suffer for crime. And, while it is true that a lack of individual or social receptivity vitiates a policy of deterrence, there are, of course, various shades of unimpressionability, unmodifiability and social discouragement. Some part of the deterrence message may get through to some individuals who are poor policy risks.

In sum, the range of influence for a policy of deterrence may cover a wider swath of humanity than narrow conceptual theories of criminal behavior propose. The conventional aim, to influence "those who are inclined to commit similar crimes," may be construed to refer only to those persons whose criminal dispositions have become well established and already channelized. On the other hand, it may refer to the broader conception, notably articulated by Alexander and Staub, that "criminality" is "a general human manifestation."<sup>82</sup> "The human being enters the world as a criminal, i.e., socially not adjusted . . . The future normal individual succeeds in partly repressing his genuine criminal instinctual drives"<sup>83</sup> and, it might be added parenthetically, law may occupy the interstices by continuously helping him to develop and insulate the process of social adaptation and by controlling some of the social situations that breed crime.

#### SENTENCING: THE ROLES OF AUTHORITY AND PUNISHMENT

For some, the influence is enough when the judge sits on the bench and wields his gavel.

<sup>80</sup> See text at p.

<sup>81</sup> See text at p.

<sup>82</sup> ALEXANDER AND STAUB, *op. cit. supra* note 18 at

<sup>83</sup> *Id.* at 30.

The exercise of authority by the judge is, of itself, comfort and security against the dangers of external violence and protection against the thrusts of internal aggressive drives. The merest action of the judge-as-father is influence and reassurance because, as Frank notes, "the demand for fatherly authority does not die."<sup>84</sup> The attitude is close to what Piaget has termed "unilateral respect," "a maximum respect for rules together with the most pronounced belief in their transcendental origin."<sup>85</sup> The respect may be coupled with fear, more properly with the fear and love of authority, bound up with personal desire, that provides the basis for identification and the subsequent development of conscience. As Hendrick describes the psychoanalytic theory of conscience development, "the Super-ego [roughly, conscience] is the composite of identifications with the authoritative and prohibitive attitudes of other personalities,"<sup>86</sup> and, Hendrick suggests, "The formation of the Super-ego by identification is a lifelong process."<sup>87</sup>

For others, it is not the merest action of authority but its consequence that operates with greatest force and influence. The fact that crime results in punishment, that there is suffering for wrong-doing, strengthens the law-abiding tendency or, conversely, retards the criminal disposition. The sentence of an offender becomes, in the words of Hull, "secondary reinforcement"<sup>88</sup> for a previously learned connection between crime and punishment.

The mere exercise of authority, or the fact that punishment is administered, or both, may be sufficient to discourage and prevent criminal expression. For many, only this degree of influence is necessary where it is to be used at all. But, for others, and for some seductive situations, the calculations of the sentencing process must be more precise and perhaps more stringent, if a policy of general deterrence is to succeed. In the language of learning theory, the success of a policy of punishments in promoting the general inhibition of crime may depend upon such factors as "the number of reinforcements [frequency with which punishment meets the crime] and the intensity (amount and quality) of the reinforcing

<sup>84</sup> FRANK, *LAW AND THE MODERN MIND* 16 (1931).

<sup>85</sup> PIAGET, *THE MORAL JUDGMENT OF THE CHILD* 88-89 (1st Amer. ed. 1948).

<sup>86</sup> HENDRICK, *FACTS AND THEORIES OF PSYCHO-ANALYSIS* 163 (Rev. ed. 1939).

<sup>87</sup> *Id.* at 164.

<sup>88</sup> HULL, *PRINCIPLES OF BEHAVIOR*, c. 7 (1943).

agent [how much and what kind of punishment],"<sup>89</sup> etc. It may require something like the elementary cybernetics, that Bentham prescribed for sentencing,<sup>90</sup> reduced to the finer measures of modern learning theory. Balance between crime and sentence may be the necessary condition for the inhibition of criminal tendencies and the development of personal and social stability. The proper balance, properly conveyed, may offer the finest prospect for deterrence.

### III. PENAL POLICIES IN THE COURTS: SOME CASE STUDIES

Declarations of penal policy have a notably consistent character. The prevention of further crime by the offender, deterrence of others from similar crimes and the rehabilitation of the criminal are the invariant objectives. Only the order of preference may be changed to accord to circumstance or to a systematic set of biases.

It is essentially to be assumed that the legislature declares penal policy in general, through a host of statutory prescriptions regulating the penal-correctional aspects of criminal behavior. It is also to be assumed that the courts operate as an adjunct in declaring policy. Within the framework enunciated by the character of statutes, courts select a choice of policy that is appropriate to the individual case. They thereby declare policy but, principally, they enforce the policies which are declared by the legislature and which, presumably, reflect community preferences.

Adumbrations on declared penal policies seem endless. What are conspicuously absent are any detailed accounts, surveys and investigations of how the policies are supposed to work, under what conditions, through what procedures and with what effects. It is to these operational matters, relating mostly to policy execution, that we address ourselves.

The present paper is limited to an analysis of the choice and application of penal policies in the courts. Mostly, courts do not declare what they propose as their sentencing policy in express terms. This is implicit, and to be garnered from fortuitous remarks about the crime, the criminal and the sentence, and from the consequences of the sentence. Interpretation of this sort is hazardous, firstly because there may be a discrepancy

between what the courts say, what they purport to do, what they want to do, and what they actually do and, secondly, because the partly objective and partly subjective operations of the courts may be misinterpreted by the observer.

It is proposed here to limit ourselves to an analysis of those cases in which policy is expressly declared and faithfully pursued through defined operations. They are the uncommon cases, mostly because courts never extend themselves so far in passing sentence, and they are very few in number. In fact, the writer has come upon so few cases that they cannot be considered a statistical sample of court sentencing for crime. They nevertheless can be viewed as provocation for a more searching analysis and consideration of the operational facets of penal policies.

Among the courts, the burden of analysis and the responsibility for determining sentence is at the trial level. The trial court determines who receives what sentence and, possibly, for what reasons. The cases that follow are from the trial courts.

In *People v. Smith*,<sup>91</sup> the court was faced with a choice of sentence between death and life imprisonment. The jury had recommended life imprisonment for a defendant who was convicted of first-degree murder while engaged in the commission of a felony. The defendant had apparently brutally killed a young girl in the pursuit of sexual ambition. The court expressly stated three objectives to be considered in the choice of sentence: "(1) That others may be deterred from similar crimes; (2) that one convicted should be deterred from future crime; and (3) that an endeavor should be made to return the one convicted to society as a useful member."<sup>92</sup>

The last stated objective, implying rehabilitation, was rejected as implausible in view of what the court perceived as a general lack of sexual restraint, presumably irremediable. Its judgment was apparently based upon the single instance of crime and without known consideration of provocative circumstances.

Pressing the matter of this "mental ailment," the court also concluded that a sentence of death would be inappropriate as a deterrent to others, since it "would not deter others of similar types of mind from the commission of similar crimes."

<sup>89</sup> *Id.* at 135.

<sup>90</sup> See BENTHAM, *op. cit. supra* note 1, c. 14, on the "proportion between punishments and offenses."

<sup>91</sup> 297 N. Y. Supp. 489; 163 Misc. 469 (Sup. Ct., 1937).

<sup>92</sup> *Id.* at 492.

It is doubtful that the court meant to imply that a sentence of life imprisonment would have this deterrent effect. The deterrence of others like rehabilitation, is conceived as an unworkable and inappropriate policy objective in the present case.

Deterrence of the offender, presumably by rendering criminal activity virtually a physical impossibility, does appear to the court as an appropriate objective. However, either the death penalty or life imprisonment are conceived to satisfy this policy equally well.

The final choice of sentence rests upon none of the honored policy objectives in criminal law. Instead, the court seems occupied with the strain of passing the sentence of death and searches its conscience for a solution to the sentencing problem. Focusing on a collateral policy objective of tempering punishment with compassion, the court decides against the death penalty. It relies for its decision upon evidence of the defendant's reduced capacity for responsibility, by reason of his "mental defect," and upon evidence, notwithstanding the "mental defect," of an honorable and law-abiding prior life.

The court's opinion offers a display of facile psychiatric knowledge that quickly rules out policies of rehabilitation and deterrence as a basis for choice of sentence. Finding these inappropriate or unworkable as a basis for choice, it turns to a collateral policy of tempering punishment with compassion as the means for decision. Perhaps this was more or less the only necessary policy consideration. The relevant statutes, by narrowing the choice of penalty to death or life imprisonment, already incorporate a policy of deterring the offender through physical restraint, perhaps the policy of deterring others of like criminal disposition, and they negate any useful policy of rehabilitation.

*Commonwealth v. Ritter*<sup>93</sup> is, in respect to the narrow range of choice in sentencing, a similar case. However, though the court reaches a comparable result, its process of reasoning is different. In the Ritter case, the trial court was again faced with a choice of penalty between death and life imprisonment for the offense of first degree murder. The defendant, angered at apparent rejection by his lover, contemplated her murder and then, failing a reconciliation, killed her. Both the defendant and his victim apparently had stable

marriage and family careers for many years prior to their relationship with one another. The court consecutively considered four policies as the basis for sentencing: (1) rehabilitation of the offender, (2) retribution upon the offender, (3) restraint, so that the offender could not engage in further crime, and (4) deterrence of others "from similarly violating the law."

Rehabilitation was rejected as of little relevance, since the court was limited to a choice of penalty between death and life imprisonment. The practical choice between the two penalties in terms of rehabilitation appeared to offer very little consequence since, in either event, the offender presumably would not again mix in society.

Retribution was rejected as inconsistent with more modern, enlightened trends of penology, though the court recognized the prevalence of this policy in practice.

Restraint, or deterrence of the offender by physical isolation, was accepted as an appropriate policy objective in sentencing the offender. The court reasoned that the restraint of death would be the most effective. However, it tempered this logic with the proposition that restraint through life imprisonment is adequate enough to serve the purpose of policy if the offender is not a "dangerous type." If he is not homicidal, savage, brutal or calculating, then presumably there is no uncommon hazard of further depredations by the offender while in prison. The court determined that the offender was not the "dangerous type."

Deterrence of others was recognized as a most essential policy of punishment. The court reasoned that the death penalty was a deterrent to potential murderers "where a murder is committed from what might be called a mental, rather than an emotional, impulse—in other words, where the murder is deliberately planned from a sordid motive or where the likelihood of its occurring is callously ignored by those who commit some other crime which may well give rise to it. . . Where, however, a murder is committed under the impulse of some frenzy or strong passion, or where it results from a mind weakened by long brooding over a social entanglement, or by alcoholism or the like, such a person is not likely to be deterred by the example of a death penalty imposed upon those who committed similar offenses."<sup>94</sup> The court decided that the offense was not the result

<sup>93</sup> 13 Pa. Dist. & Co. Rep. 285 (Phila. Co., 1935).

<sup>94</sup> *Id.* at 292.

of calm calculation, but was more nearly to be characterized as emotional or impulsive.

The court concluded, from its analysis, that there was no policy benefit in imposing the death penalty. Considering further the background of the defendant and the circumstances of the crime, it decided upon a penalty of life imprisonment.

The court's decision, including its choice and tests of policy, is worthy of analysis. Rehabilitation was not a very practical possibility. It could serve little social purpose inasmuch as the prospect of future freedom for the offender was comparatively remote. The court was probably not in a position to foresee the passage of a parole statute, applicable to the offender, one year after sentence was passed. Deterrence was the major policy premise on which the court acted. It postulated deterrence of the offender only in terms of physical isolation, calling it restraint. In declaring the policy as appropriate for consideration and choice, it did not consider the possibility that the offender might be deterred by his own mental processes, perhaps influenced by the operation of the sentence imposed upon him. Yet, in selecting life imprisonment rather than death as the appropriate choice in deterring the offender, the court did implicitly base its decision upon the manner in which mental processes operate, or fail to operate, in the defendant. It drew upon a personality estimate to decide if the offender could, as a rule, manifest self-restraint. It concluded that he could display that degree of self-restraint that would make life in prison feasible without danger to others. Ironically, but not inappropriately, a modicum of self-restraint was deemed essential to the effective imposition of external restraint.

In deciding upon a choice of penalty to influence the deterrence of others, the court used as its measure characteristics of the crime committed by the offender. It asked whether the crime is more nearly a product of impulse or of reason. It concluded that crimes more nearly characterized by the operation of impulse are not likely to be prevented by the influences that fear and reason bring to bear on behavior. Hence, those prone to commit such crimes will not be influenced in their criminal actions by the punishment one of their number suffers for his crime. Notwithstanding its finding of first-degree murder, with the necessary characteristic of premeditation, the court decided, for the purpose of sentencing, that the crime was born essentially of impulse and emotion. It concluded that the death penalty would

in this instance not serve a policy of deterring others. By the same reasoning, of course, the penalty of life imprisonment also ought to be rejected. The deterrence of others, in the measure of the court, cannot be achieved through the imposition of sentence in the present case.

Of the selected policy choices, the court is left with the deterrence of the offender through physical restraint as the only feasible possibility, but its ultimate choice of penalty is not posited in these terms. Instead, in its summary paragraph, the court changes the basis for decision from a question of choice between policies to a question of whether the death penalty is necessary to serve any of these policies. Answering this question in the negative and considering, further, "the testimony in the present case, including the history of the defendant and all the circumstances [of the crime]," it decides upon the sentence of life imprisonment.

As in the Smith case, so in Ritter, it is the profound weight of bearing the responsibility of the death penalty that seems most of all to motivate the judge's sentencing decision. And, as in the Smith case, though less expressly so, compassionate justice, imbedded in consideration of the background of the defendant and the circumstances of the crime, plays a role in the final outcome. The mechanics of decision in Ritter are both better and worse than those in the Smith case. In both cases, rehabilitation appears as an improbable objective. Ritter is on sounder ground in suggesting that this is so because of the physical impediment of perpetual incarceration. The Smith rationale that the defendant is an unremediable type suffers mostly from the highly questionable character of the diagnostic assessment. Smith, and not Ritter, considers and rejects a policy of retribution as inconsistent with modern trends of penology. Both cases reject as inapplicable the policy of deterring others from similar crimes, and for essentially the same reason. Both read the evidence so as to find crimes grounded in impulse. Smith appears to be considerably more meticulous in analyzing the criminal act to find the impulsive process, while Ritter, in what appears to be purely casual deduction, implies a personality type to go with the act. Both appear to conclude that impulsive acts cannot be deterred, and Ritter also seems to say that impulsive acts are the work of impulsive criminals, who cannot be deterred.

Smith and Ritter appear to agree that the



criminals with whom they are dealing can and are to be physically restrained from further crime. Only Smith, however, offers any analytic basis for the choice of sentence in terms of this policy. Implicit in the analysis is the concept of deterrence by self-restraint as well as, and as a condition for, deterrence by external restraint.

Both courts are unable or unwilling to satisfy their judgmental needs in the major and generally articulated concepts of modern penology. Both find some, and perhaps most, of the substance of their decision in the auxiliary policy of tempered judgment and compassion for the criminal, if conscience will permit. In Ritter, the policy is explicit, resting in legislative mandate, and is based upon tests (more accurately, impressions) of capacity for responsibility and prior social stability. In Smith, the policy is more implicit, as the court considers the "history of the defendant" and the "circumstances" of the crime.

*Commonwealth v. Levin*<sup>95</sup> is a case somewhat similar to Ritter and, in fact, arose in the same jurisdiction some nineteen years later (1949). It appropriates much of the analytic framework of the Ritter case in its solution. The court here decides between a penalty of death and life imprisonment for a crime which it judges to be first-degree murder. The seventeen year old defendant had sexually attacked a younger youth and then, fearing exposure, killed the youth.

The court, as in Ritter, finds the objective of rehabilitation pointless where the minimum sentence to be imposed is life imprisonment. It rejects, probably as too remote, the consideration that the offender might be paroled in the future, or that he might receive a commutation of sentence.

Retribution is rejected as an unworthy policy alternative, though the court considers that some compensatory punishment for crime is necessary in order that the law may not be resented for its indifference to human suffering.

Deterrence of the offender through physical restraint is seen as an objective accomplished equally by life imprisonment or death. The sophisticated discriminations made in the Ritter case in regard to this policy are deemed unnecessary.

On the matter of deterring others likely to commit similar crimes, the court concludes, without consideration of the conditions that make

it so, that either death or life imprisonment, would serve this policy.

Having as yet no policy basis for distinguishing between a penalty of death and one of life imprisonment, the court turns in essentially the same direction that was taken by the Ritter and Smith cases. It seeks to effect a just and perhaps a compassionate decision. Following Ritter, it seeks conditions to repudiate or, in this case, to justify the use of the death penalty. The basis for this decision is the degree of responsibility manifest by the defendant, and the degree of responsibility of which he appears to be capable. The test of responsibility manifest by the defendant in his criminal act is the identical test used by the court in Ritter to determine if the deterrence of others would be a feasible policy: impulsive v. planned crime. Finding in favor of the defendant—that the crime was more a matter of impulse—the court then considers his capacity for responsibility. It again finds in favor of the defendant, by reason of his youth and a degree of psychiatric abnormality characterized by expert testimony as "constitutional psychopathic inferior," or psychopathic personality. Finding mitigation for punishment and reason for tempering sentencing in the reduced responsibility and capacity for responsibility of the defendant, the court decides upon a sentence of life imprisonment.

The process of decision in Levin is similar to that in Ritter and Smith, and a pattern of sentencing may form. Traditional policy alternatives are largely inadequate for the use of the trial courts when they must make a choice between death and life imprisonment. Perhaps they are irrelevant to the function of the courts since, in setting sentencing limits for high crimes, the legislature has already largely expressed and applied the policies of choice. But courts, at least occasionally, do attempt to forge a sentence in terms of established policy objectives. In the cases that have been considered here, involving first degree murder, rehabilitation has been rejected as inappropriate. The deterrence of others has proven a difficult concept to work with for the type of crime—characterized as impulsive—involved in the cases. Deterrence of the offender, essentially through physical restraint, has been honored as an objective, but it has not been the substantial basis for discriminating between a choice of penalty. Retribution was considered to be a discarded policy, though the Levin court noted a need to

<sup>95</sup> 66 Pa. Dist. & Co. Rep. 55 (Phila. Co., 1949).

adequately compensate private and, presumably, public feelings of resentment for the harm done. In the end, however, courts turned to their conscience and relied almost exclusively upon a sense of justice as the basis for decision. The policy of tempered justice, perhaps with compassion for the criminal, dominated all other policy choices. The tests of justice and of compassion were posited primarily in terms of the responsibility of the defendant for his act, and in terms of his capacity for responsibility. In addition, the criminal's prior record for social stability and propriety may be considered.

The cases seem to be in agreement. Conventional penal policy objectives do not incorporate all of the policy alternatives that will be considered in sentencing, and certainly not some of the most important ones. There is a large gap between policy declaration and policy execution. Trial courts have a great deal of difficulty in making sense and making use of penal policies. Such generalizations are important, but they are tentative, since it is not known if the cases are representative. It is not known what the courts do when the legislatures give them a larger discretion in the choice of policy, through a wider range of sentence. The area of no-knowledge is vast and is protected by the prerogative of the courts not to explain what they are doing, and why.

Hall<sup>96</sup> has analyzed some appellate court opinions relating to sentencing from a small number of jurisdictions. He does not regard these opinions as a national cross-section, but only as a sampling of primarily agrarian areas. The cases were mostly from Arkansas, Idaho, Iowa, Nebraska and Oklahoma, and from parts of New York and Pennsylvania. The years were from 1872 to 1935, though mostly in the 1920s and 30s.

Hall interpreted what he thought to be the sentencing policies of the courts. He based his judgment upon the factors the courts took into account and the statements made in upholding or in any way changing trial court sentences.

Hall began with the assumption that the courts apply one of three penal theories: vengeance or retribution, prevention of further crime by the defendant "through education, reformation or detention," and the deterrence of others. "Other factors of course may come in, but the chief conflict is between these three ends of criminal

law."<sup>97</sup> Starting from this set of premises, and analyzing the cases, he concluded, first, that crimes against the person are punished in such a manner as will most nearly satisfy the emotional reactions of the community to the crime. With regard to first-degree murder, he concluded that "factors bearing on the moral responsibility of the defendant are almost the only matters considered in murder cases. . . In mitigation the usual matters considered are the presence of provocation and mental abnormality."<sup>98</sup> His other major conclusions were that crimes solely against property and involving more than a slight amount are punished in such manner as will, primarily, guard against repetition by the defendant, crimes against property involving personal injury are punished upon an emotional basis, and that the deterrent element tends to become more important in crimes not involving the person or property. His summary conclusion is that "some one of the three great purposes of punishment appears to be uppermost in the mind of the court in dealing with each particular type of crime."<sup>99</sup>

Hall produced system and finiteness in the reasoning of the courts about sentencing. One wonders if, left to their own devices, courts do reflect such disciplined skill and logic in the determination of sentences. There is no ready answer, and most court opinions do not provide a reliable means for finding out. Our brief but intensive study of cases suitable for analysis does, at least, raise some doubt of a favorable answer.

There are, it seems to us, several critical problems that must be explored if penal policies are to represent much more than noble chants in the courts. It is necessary to know the relationship of policy in the courts to policy in the legislature. With reference to any particular kind or degree of crime, how much and what kind of policy is determined by the legislature and what then is the range of policy choice of the courts? Is the policy of the courts in first degree murder, for example, to be limited to the exercise of a compassionate justice? And in second degree murder, or grand larceny, what are its policy choices, considered in relation to what policy determination of the legislature?

Assuming that courts have or will have a defined area of policy choice, within those limits

<sup>97</sup> *Id.* at 528.

<sup>98</sup> *Id.* at 533.

<sup>99</sup> *Id.* at 552.

<sup>96</sup> HALL, *Reduction of Criminal Sentences on Appeal*: I, 37 *Col. L. Rev.* 521 (1937).

how does it decide upon ultimate policy selection? What must it know about policy operation? For each alternative policy how far must it or should it evaluate characteristics of the criminal, the crime, the victim or the community? In the *Smith* case, for example, the court defined a "mental ailment," impulsivity. It then ascribed to this ailment a broad range of antisocial behavior and negated any possibility of deter-ability. Assuming that one could define within limits the characteristics and behavior of an impulsive personality, to what extent is the assumption of non-deterability correct? In the *Ritter* case, the court assumed a relationship between the degree of internal restraint of which an offender is capable and the amount of external restraint necessary to disarm him. On what knowledge can the court base such a judgment, and how valuable and available is this kind of information? In the *Levin* case the court mentioned the need for compensatory punishment in order

to prevent community frustration and resentment over the choice of sentence. To what extent does a compensatory or retaliatory need operate, upon whom and for what length of time? In *Levin*, the court appears to scale personal responsibility for the purposes of sentencing. By what criteria and in what way is responsibility to be scaled?

The courts' criteria in these and similar pressing matters of policy operation reveal flashes of insight adapted, sometimes frenetically, as in the *Smith* case, to the needs of the situation. The reasoning is *ad hoc*, and the information appears to be scanty.

The problems of choosing and adapting penal policies do not, of course, belong to the courts alone. But if the courts, for one, do not know their range of policy choice *and* the methods of policy operation it is futile to think of penal policies in rational terms. It is at this point, and on this proposition, that the coherence and success of sentencing policies in the courts must begin.