

Summer 1982

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### Recommended Citation

Ernest Van Den Haag, *The Criminal Law as a Threat System*, 73 *J. Crim. L. & Criminology* 769 (1982)

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# THE CRIMINAL LAW AS A THREAT SYSTEM

ERNEST VAN DEN HAAG\*

## I. INTRODUCTION

Criminal laws prohibit some acts and try to deter from them by conditional threats which specify the punishments of persons who were not deterred. Sufficiently frequent imposition of these punishments by courts of law makes the threats credible. If the community feels that they are deserved, punishments also gratify its sense of justice, and help to legitimize the threat system of the criminal law by stigmatizing crime as morally odious.

The effectiveness of the criminal justice system depends not only on its own practices, but also on independent social and psychological conditions which influence the legitimate and the criminal opportunities open to individuals, their reactions to each, and their responsiveness to the legal threats meant to deter them from crime. Opportunities vary greatly from individual to individual and group to group; so do inclinations; and so does responsiveness to threats. Here, however, I shall treat as variables only the practices of the criminal justice system, mainly the punishments the law may threaten and impose.

In addition to deterring people from becoming offenders by making the threats of the law credible, punishments may also restrain the actual convicts. The death penalty does so altogether and permanently, while punitive confinement reduces the time available to convicts for extramural offenses, and may rehabilitate some, so that after release they commit fewer offenses than they might otherwise have committed.<sup>1</sup>

Let me assume finally that, in the instances with which I am concerned, the prohibitions of the criminal law are justified, and that the moral or material cost of enforcing them by punishment need not be

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<sup>1</sup> A high, although uncertain, proportion of habitual offenders is likely to resume criminal activities upon release, unless they are too old. A much smaller proportion of non-habitual offenders do so as well. Whether punishment reduces these proportions is not known. Some convicts may make up for lost time.

excessive. The questions to be addressed, then, are: What kind of legal threats will deter crime most while least impairing justice according to what is deserved? How can we determine what reduction of the crime rate the community is willing to pay for, given the costs and benefits, material and moral?

## II. IS DETERRENCE REAL?

Since the threat system of the criminal law rests on the assumption that deterrence is effective, a word about that notion may not be amiss. General deterrence (heretofore and hereinafter referred to as "deterrence") is defined as the effect which threats of punishment, implemented by actual punishment of offenders, have in deterring non-offenders from becoming offenders.<sup>2</sup>

"Specific deterrence" is meant to produce lawabiding conduct of confined convicts upon release, and, therefore, scarcely differs from rehabilitation.<sup>3</sup> Specific deterrence must be considered, however briefly, because it is often confused with general deterrence and may discredit the latter in the public mind: failures of specific deterrence, which are indistinguishable from failures of rehabilitation, may be mistaken for failures of general deterrence. Thus, recidivism, a failure of rehabilitation, is often described as a failure of deterrence, as though the fact that repeaters seldom are rehabilitated demonstrates that threats do not deter non-offenders from becoming offenders. Even the mere occurrence of crime sometimes is thought to prove that deterrence "does not work." Offenders are asked: "Were you deterred?" and when they answer "no" (truthfully, for offenders were not deterred), their answer is taken to show that deterrence fails. It failed with offenders, but it works, as intended, if it deters most people from becoming offenders. No threat can deter all people all of the time; the attractiveness of crime to dissimilar persons in dissimilar situations differs too much; so does their responsiveness to threats.

Deterrence is a matter of immediate observation (common sense), which tells us that our behavior largely depends on the material and

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<sup>2</sup> For a concise summary of the literature on deterrence see F. ZIMRING, *PERSPECTIVENESS ON DETERRENCE* (1971). For a more verbose discussion see F. ZIMRING & G. HAWKINS, *DETERRENCE* (1973). For a discussion mainly of definitional and conceptual problems of deterrence see J. GIBBS, *CRIME, PUNISHMENT, AND DETERRENCE* (1975). For an annotated bibliography on deterrence up to 1977 see E. van den Haag, *Annotated Bibliography on Deterrence* (1977). (available from the Law Enforcement Assistance Administration, U.S. Department of Justice.)

<sup>3</sup> While the expected result is the same, "specific deterrence" is supposed to rely on intimidation or other disincentives while "rehabilitation" relies on the manipulation of positive incentives. This distinction, of limited use to begin with, becomes blurred when processes such as behavior modification are considered.

psychological costs and benefits we expect from it, on the disincentives and incentives we perceive. Deterrence theory maintains that threatened punishment is a disincentive, or cost, to which most people respond as they do to any disincentive: they try to avoid it. They violate the criminal law—which would not be needed if there were no temptation to violate it—only if they feel that the benefits warrant the risk of incurring the disincentive cost. Although estimates of costs, risks, and benefits vary from person to person, they are not independent of legal actualities.

Ever since Jeremy Bentham, psychologists have stressed that most human actions are not preceded by conscious and explicit calculations. Indeed, habit influences most non-criminal as well as criminal behavior more often than does conscious calculation.<sup>4</sup> But non-criminal habits are formed, in part, by habituation to the threats of legal punishment and by the conditioning that warns us to avoid it. It is impossible to understand the survival of the human race without realizing that people habitually tend to avoid or minimize natural and social dangers (costs) in proportion to both the severity of the injury threatened and the risk of actually suffering that injury. Given the attractiveness of a course of action, people will follow it, or avoid it, according to the expected cost.

Legal dangers or costs—threatened punishments—in principle are no less a deterrent than are natural dangers. Many readers of the present essay would refrain from reading it if the cost were a possible fine of more than \$100.<sup>5</sup> Nearly all readers would be deterred if credibly threatened with imprisonment. If prospective readers can be deterred from reading my work by the cost (risk of punishment), why should individuals not be deterred from other offenses in the same way?

Common sense does not prevent some social scientists<sup>6</sup> from raising doubts about deterrence. They point out that legal deterrence has not

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<sup>4</sup> See generally authorities cited *supra* note 2. See E. VAN DEN HAAG, PUNISHING CRIMINALS 111-15 (1975). Note that fear of punishment does restrain animals such as rats who presumably do not calculate. They can be conditioned by punishment in learning experiments. See, e.g., Singer, *Psychological Studies of Punishment*, 58 CALIF. L. REV. 405, 413-14 (1970). Singer concludes that punishment can effectively suppress criminal behavior. *Id.* at 442. See also Singer, *Psychological Studies Relevant to Deterrence*, in CRIME DETERRENCE AND OFFENDER CAREER (E. van den Haag & R. Martinson eds. 1975) [hereinafter cited as CRIME DETERRENCE].

<sup>5</sup> The size of the fine required for deterrence depends, in part, on the likelihood of imposition, the attractiveness of the essay, the income of the person threatened, and his attachment to money. It is possible to find sizes that will deter some, many, most, or (almost) all people.

<sup>6</sup> Including psychologists and psychiatrists. See S. HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME (1971); K. MENNINGER, THE CRIME OF PUNISHMENT (1968); see also the literature quoted in E. VAN DEN HAAG, *supra* note 4, at 105-37.

been demonstrated by methods regarded as scientifically satisfactory.<sup>7</sup> Others argue that it has not been shown that greater threats and more frequent implementation have a greater deterrent effect than milder threats, or threats carried out less often; still others argue that only the frequency of implementation matters, or the perception of threats, or the circumstances in which the people to be deterred live, such as their social bonds, their motivations, their opportunities, or their role models—as though the fact that some factors impel to crime were inconsistent with the deterring effect of others.<sup>8</sup> Empirical research certainly is needed to quantify precisely the role each factor, or factor combination, plays in determining the deterrent effectiveness of any threat. Nevertheless, the deterrent effectiveness of threats *per se* can hardly be questioned: our natural and social lives would be inconceivable without threats of punishment (expectations of costs or dangers) and promises or reward. Thus, incentives and disincentives are effective enough to shape the course of most lives.<sup>9</sup> It is worthwhile to question (and to do research on) the nutritional value of particular foods. But it is hardly worthwhile to question the nutritional value of food in general.<sup>10</sup>

### III. MANDATED, DETERMINATE, AND FLAT SENTENCES— SWIFTLY IMPOSED

*Ceteris paribus*, deterrence will be maximized if threatened punishments are predictable. The threat of an unpredictable punishment—for example, probation or “up to three years in prison”—cannot deter as much as the threat of a specific punishment: “three years in prison.” A price of anywhere up to \$1000, decided upon after a purchase is made, will not deter people from buying as readily as will a set price of no less than \$1000. As long as there is a good chance that the price will be less than \$1000 the person unwilling to spend \$1000 may be willing to purchase in the hope that the actual cost to him will turn out to be only, say, \$300 after all. To increase predictability and reduce the temptation

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<sup>7</sup> For a discussion of the evidence pro and con, see J. GIBBS, *supra* note 2; E. VAN DEN HAAG *supra* note 4, at 133-42; E. ZIMRING, *supra* note 2.

<sup>8</sup> *Id.*

<sup>9</sup> See ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT (G. Becker & W. Landes eds. 1974); see also M. Silver, *A Critical Survey of the Recent Economic Literature on Deterrence*, in CRIME DETERRENCE, *supra* note 4. The psychological effects of punishment and the anticipation of punishment are examined by Barry F. Singer in *Psychological Studies of Punishment* and in *Psychological Experiments Relevant to Deterrence*, both *supra* note 4.

<sup>10</sup> But see H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 337-38 (2d ed. 1951): the “contention that punishment deters from crime [is futile] . . . . The claim for deterrence is belied by both history and logic.” This view is echoed to this day. See, e.g., Wills, N.Y. Rev. Books, May 29, 1975, at 13 (“[P]risons . . . demonstrably do not deter.”). The widespread dismissal of deterrence in high school and college textbooks is described in van den Haag, *What Textbooks Say About Criminality*, University Bookman, Fall 1980.

to gamble, deterrence theory favors mandated punishments with little discretion left to judges.<sup>11</sup> Punishments thus become predictable enough to be anticipated by those tempted to break the law. For the same reason, deterrence theory favors both determinate sentences, which confine for a set span of time (e.g., five years) rather than for an indeterminate span to be decided upon later (e.g., one to ten years), and flat sentences, which are not reducible by parole boards or prison administrators. Currently, punishments are to a large extent discretionary (decided upon by courts within wide limits set by law), indeterminate (the courts often merely set the minimum and maximum time to be served), and expected to be reduced in various, often unpredictable, degrees by outside boards and prison administrators (parole and time off for good behavior). The proposed changes would minimize judicial discretion and would eliminate indeterminateness, parole, and time off for good behavior.<sup>12</sup> These changes would lead to more equal justice as well as to more deterrence. What objections might be raised?

One possible objection is that each crime is unique; so is each criminal. There are limitless individual differences in culpability, motivation, harm done, and chances of recidivism. Further, the same punishment may affect different convicts differently, depending on their ages, circumstances, and other individual characteristics. Finally, the effects of the same crimes and punishments on third persons, such as victims and dependents, are dissimilar. If one were to take full account of the uniqueness of each crime, or of each criminal, one could not have classificatory rules such as laws. Present policy compromises. It leaves wide discretion to the criminal justice system, permitting individualization of punishment but limiting it here and there through general rules. The proposed mandated, determinate, and flat sentences would reduce discretion, and thus individualization, to a minimum for the sake of deterrence and of justice.

The deterrent effectiveness of any threat depends on perception of its dimensions. Therefore, the more predictable the (non-trivial) size of a legal punishment is, the more likely it is to deter. Consider natural

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<sup>11</sup> It was wrong, I believe, to disregard Aristotle's "laws . . . should . . . leave as little as possible to the discretion of judges." ARISTOTLE, *RHETORIC* 7 (1st Modern Library ed. 1954).

To be sure, deterrence might not suffer if courts had discretion to increase but not to reduce threatened punishments. Such discretion, however, would still have some undesirable effects. The idea of equality associated with justice and implicit in mandated punishments would be weakened if punishments remain partially dependent on the discretion of judges and thus disparate and capricious. Any increase in deterrence might be offset by the decrease in perceived justice, and therewith, public support.

<sup>12</sup> The elimination of time off for good behavior may make the maintenance of prison discipline harder. Nevertheless, prison administrators retain many intramural rewards and punishments for enforcing discipline.

“law” (the regularities observed in nature). It inflicts predictable “punishment” (injury) on those who are not deterred from defying it by its “threats” (known effects). Because the size of the punishment—be it injury or death—is predictable, natural law deters most people from jumping from the sixtieth floor of a skyscraper (unless bent on suicide), and from the recklessness that may lead to drowning or other accidents.

Natural threats, as do legal ones, deter least when the threatened punishment is delayed, cumulative, or unpredictable. Cigarette smoking and other habits, such as overeating, illustrate the reduced effectiveness of delayed “punishment.” Finally, once a threatened activity has become habitual, threats tend to be discounted altogether. Swiftmess, then, as well as predictability of punishment and of punishment size, contributes to the deterrent effect of threats.<sup>13</sup> Further, threats are likely to be most effective with persons not yet habituated to the threatened activity. *Deterrence, as does any threat, influences habit formation far more than habits already formed, criminal or other.* Once deterrence has failed and criminal habits have been formed, disincentives can affect only recidivism.<sup>14</sup> Strictly speaking, we are then dealing with rehabilitation rather than deterrence.

The conditional threats of the law cannot be as automatically carried out as the conditional “threats” of the “law” of gravitation. Unlike falling bodies, individuals who have defied the law must be apprehended, indicted, and convicted before they can be punished. There is an irreducible element of uncertainty in implementing the threats of the law—but no call for increasing it beyond necessity. Yet we do so if we make the size of the punishment unpredictable. Mandated, determinate, and flat sentences would make the punishment more automatic than it is now; and punishment is more deterrent the more automatic it is. If the size of the “punishment” for jumping from a skyscraper were as uncertain as the size of the punishment for a crime—if the “punishment” depended on the discretion of a court and of a parole board—many more people would jump whenever something were to be gained thereby.

#### IV. OBJECTIONS

There are at least three major objections to mandated, determinate, and flat sentences: (A) These sentences might be unjust by not taking

<sup>13</sup> See *supra* note 2 for literature discussing the evidence for the effect of swiftness, certainty, and size. Note that as sentencing becomes quasi-automatic, much of the judicial time thereby consumed could be saved.

<sup>14</sup> See *supra* note 3 and accompanying text. On the effects of rehabilitation programs, see D. LIPTON, R. MARTINSON & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT* (1975) [hereinafter cited as D. LIPTON].

the individuality of crimes and criminals into account. Offenses legally classified as identical may deserve quite different punishments because of unique features; only judges, having discretion, could determine what is deserved. (B) Without sentencing discretion and without indeterminate sentences or parole, insufficient account might be taken of the prospects of each individual offender for rehabilitation. (C) Judges, perceiving unique circumstances, would find ways to circumvent mandated sentences. Further, the abolition of judicial and parole discretion would not decrease the discretionary power of the system but merely relocate it: prosecutorial and police discretion would increase as judicial discretion decreases. The first objection seems dubious, the second irrelevant, the third illogical.

#### A. DISREGARD FOR INDIVIDUALITY IN SENTENCING

##### *1. Injustice to individual offenders*

Would uniform sentences be unjust? Assume that A steals \$500 to clothe his needy children, B to buy liquor, and C to go to graduate school. Is the proposition, "Theft of \$500 is to be punished by X days imprisonment, unless it be done to clothe one's children (in which case there is a discount), or to attend graduate school (a smaller discount), or to get drunk (a surcharge)," more just than the proposition, "Theft of \$500 is to be punished by X days in prison"? Should the absence of needy relatives increase punishments? Should we leave it to each judge to decide whether devotion to alcohol (a vice? or a disease?) is worse than devotion to graduate study? Quite the same questions can be raised with reference to situational factors, or character traits. Should greed be less mitigating than jealousy? Should the customariness of unlawful behavior in a given environment be mitigating? Or should the unusualness? Should the poverty, wealth, or age of the victim be a factor? (At present need or age of offenders is often considered.) More generally what weight should be given to the harm done? It is easy to think of illustrative cases. (1) Smith, while drunk, steals and flies a private plane. He collides with an airliner and kills fifty persons. (2) Jones, equally drunk, does the same, but there is no collision. (3) Frank steals the plan while sober, collides with another small plane, and kills the other pilot while surviving himself. Obviously there are many combinations of culpabilities and harms. It is not my purpose here to suggest the appropriate punishments. But is there any reason to believe that judicial discretion will lead to more just (or less unjust) results than mandated punishments based on broad classifications?

Even if all judges were of one mind in deciding which factors should increase or decrease punishment, there would be disparate



sentences for the same crime, since many different factor combinations are involved in each crime, and each criminal is unique. Further, judges too are unique individuals; therefore, they are not of one mind and will evaluate similar factors differently. Even "identical" crimes do produce disparate sentences.<sup>15</sup> To be sure, each person is unique and is placed into unique situations; either of which may persuade him to criminal conduct. But what enables any court to understand and evaluate the unique personalities and life circumstances of offenders? And if understood, by what criteria are individuals to be judged in order to decide what punishment is deserved? Can judges really take into account the differences in heredity, environment, and opportunity which produce different personalities? Can criminal justice take full account of the variety, can it correct the unfairness of life?

It is possible—it has been done—to work out a uniform and fairly coherent set of punishments deserved for different *crimes*, or needed to deter from them. But to decide what is justly deserved by different *criminals* seems quite impossible for anyone but God. Our charitable attempts to do justice to individuals must end in arbitrariness and injustice (as well as in reduced deterrence). Although crimes can be punished only by punishing criminals, it appears that we come nearest to justice—and to equality—by punishing criminals according to their crimes and not according to their personalities, circumstances, or motivations. Crimes should be legally classified according to their seriousness, and to the felt need to deter from them. Determinate punishment for crimes, classified in this manner, should be mandated. The individual characteristics of criminals should be disregarded. The law should confine itself to considering degrees of culpability, the previous convictions of criminals, and the seriousness of the crime. These matters can be incorporated in the laws classifying crimes and mandating punishments; they do not require much discretion; nor do they individualize punishments.

Mandated sentences would have an additional advantage. Since discretionary sentences necessarily reflect the individuality of the judge as much as that of the criminal, the offenders to whom we try to do individual justice often will perceive the individualized sentences they receive as unjust because they are necessarily chancy and unequal. However guilty they may be, convicts may feel their sentences to be undeserved if other convicts perceived as equally guilty, receive lesser sentences.<sup>16</sup> Mandated sentences would preclude this grievance.

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<sup>15</sup> See W. GAYLIN, *PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING* (1974).

<sup>16</sup> For a discussion of the effects of unpredictability on convicts, see AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE* (1971).

Equality does not assure justice—equal injustice is quite possible. Inequality, however, necessarily implies some injustice. One, if not both, of two unequal sentences must be unjust (and will be perceived as unjust) if the crime was (or was perceived to be) the same. If one punishment is just, any other punishment must be less than just, harsher or milder than deserved; and if deterrence be the purpose, less or more than optimally deterrent. Hence, equality is reasonably felt to be part of justice in sentencing (and often is mistaken for the whole of it). Mandated punishments, which would be equal punishments, would strengthen the sense of justice having been done. They also would do away with the unresolvable issue of exemplary punishment—punishment that is harsher than customarily thought to be deserved and expected. Exemplary punishment is imposed to deter more than the usual punishment does; by example, it becomes a threat to future offenders. (Only threats deter, whether conveyed by words, or by example.) Yet exemplary punishment, whatever its deterrent effect, is unavoidably perceived as unjust, since it is not threatened before being imposed and is harsher than (and thus not equal to) the punishment given previous offenders. Exemplary punishment requires judicial discretion. If punishments were mandated they could be increased only by new laws; and, unlike exemplary punishment, the new mandatory punishment would be equal for all and threatened before it could be imposed. Hence the problem of justifying unthreatened and unequal (exemplary) punishment would evaporate.

## 2. *Justice to actual and to future victims*

The law must do justice not only to offenders but also to actual and potential victims of crime. Actual victims may reasonably contend that the offender did not take their life-circumstances into account when victimizing them, wherefore they may feel that there is no moral obligation to take into account his life-circumstances, or his individuality.<sup>17</sup> More important, courts must also do justice to prospective potential victims of offenders who could be deterred but are not because the punishment of convicted offenders was individualized. Discretionary sentences thus may be unjust to future victims by not deterring prospective offenders. If we assume, *arguendo*, that mandatory, determinate, and flat sentences, even though less just to current offenders, are more deterrent than discretionary sentences, then the mandatory sentences are more just than discretionary sentences to prospective victims, since they deter addi-

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<sup>17</sup> Retributive justice is not meant merely to reflect the feelings of victims. Nevertheless, legal retribution according to desert is an institutionalization of individual vengeance, and cannot altogether disregard the feelings it institutionalizes.

tional potential offenders from victimizing. After all, victimization is an injustice to victims which, although not initiated by the courts, might be prevented by them through deterrent sentences. And, if the victims of future crimes are entitled to be protected against the injustice these crimes would do them, their claim has greater weight than the current offender's claim for protection against the possible injustice a mandated sentence might do him. The current offender volunteered to take the risk of punishment, including the risk of the possible "injustice" mandated punishments might do him. The prospective victim does not volunteer to be victimized. He cannot avoid the injury he suffers if future offenders are not deterred for the sake of individualizing punishments of current offenders.

### 3. *Identifiable and statistical persons*

The injustice which the attempt to do justice to the individuality of a current offender does to future victims is often overlooked because the current offender is an identifiable individual who is tangibly present in court and often pitiable. The victims of future offenses cannot be present. They cannot even be identified. They are "statistical persons," abstract and ghostly figures who do not invite our compassion and scarcely appeal to our sense of justice. By nature and conditioning, we tend to be impressed by identifiable persons and try to do justice to them, often at the expense of anonymous statistical persons.<sup>18</sup> Yet, although we are reluctant to acknowledge them and to pay heed to their claims, statistical persons, at least our contemporaries in the same society, seem as entitled to justice as identifiable ones.<sup>19</sup> We can do justice to them. The absence of future victims from the courtroom does not invalidate their claim to protection from the injustice and injury of being victimized by criminals.

## B. DISREGARD FOR INDIVIDUAL PROSPECTS FOR REHABILITATION

### 1. *Discretionary sentencing and rehabilitation*

Rehabilitation—the attempt to give incentives to an offender to be lawabiding in the future—can scarcely be said to be a major function of

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<sup>18</sup> This tendency is not limited to the criminal justice system. We are more likely to spend money for an identifiable person, actually sick, than for preventing the sickness of several "statistical persons" by spending the same amount of money. We act similarly with respect to poverty. I am grateful to Alan Wertheimer for drawing my attention once more to the distinction between identifiable and statistical persons, and to the terminology in which to discuss it. See Wertheimer, *Criminal Justice and Public Policy: Statistical Lives and Prisoners' Dilemmas*, 33 RUTGERS L. REV. 730, 738-41 (1981).

<sup>19</sup> Perhaps this is too strong. But surely statistical persons should not be ignored by justice, even if charity be biased in favor of identifiable ones.

sentencing. Courts punish defendants because they are found guilty of crimes committed in the past, whether or not they need rehabilitation. Many do not. On the other hand, courts do not punish dangerous persons who have not yet committed crimes, however much they may be in need of rehabilitation. Rehabilitation is thus at best incidental to sentencing. Moreover, judges cannot determine what the chances for rehabilitation are except by means of the offender's record of arrests and convictions, factors which mandatory, determinate, and flat sentences readily could take into account.<sup>20</sup>

Even if all, or a high proportion, of convicts were rehabilitated by treatment in prison the crime rate would scarcely be reduced. The rehabilitated convicts would be replaced by new criminals, just as incapacitated criminals usually are.<sup>21</sup> In the long run crime rates (the supply of crime) depend on the expected net benefit of crimes to perpetrators, not on rehabilitation or on incapacitation of convicts. The crime rate can be reduced only by deterrence. Therefore, the rehabilitation of individuals cannot be the *social* purpose of sentencing. On the other hand, justice must be done to individuals according to what is deserved by their past crimes but not according to their future prospects. Rehabilitation, however desirable, is thus incidental to either justice or deterrence, and relevant to neither.

## 2. Parole and rehabilitation

Parole boards are presumed to be able to decide, on the basis of interviews and reports about a convict's behavior in prison, whether the convict has been sufficiently rehabilitated to be paroled. Since all other relevant factors were available to the sentencing judge, this presumption is the *raison d'être* of parole boards. Yet, even if it were fully known, behavior in prison does not tell much about conduct in a non-institutional environment.<sup>22</sup>

Even from an exclusively rehabilitative viewpoint punishment

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<sup>20</sup> Any statistical (non-individual) factor can be taken into account by the law without requiring judicial discretion. On the other hand, the predictive relevance of ascertainable individual character traits has not been shown. At present, the evidence indicates that rehabilitation (or recidivism) are best predicted by such factors as previous convictions, nature of the crime, and age of the criminal. All these are available to the sentencing judge; they may be taken account of in the mandated sentence to be imposed by him. The evidence also indicates that recidivism and rehabilitation are not significantly related to programs offered in prisons. For a discussion of on the effectiveness of rehabilitation programs see D. LIPTON, *supra* note 14.

<sup>21</sup> See van den Haag, *Could Successful Rehabilitation Reduce the Crime Rate?*, 73 J. CRIM. L. & C. (forthcoming issue, 1982).

<sup>22</sup> See N. MORRIS, *THE FUTURE OF IMPRISONMENT* 47 (1974). See also J. CONRAD, *CRIME AND ITS CORRECTION* (1965); Conrad, *Predictable Punishment*, 16 J. CURRENT SOC. ISSUES 64 (1979).

should not depend on rehabilitation. Rehabilitative treatment tries to lead the convict to choose legitimate over criminal activities upon release. This choice is likely to be based on his realization that criminal activities are counterproductive, and this conclusion, if the convict reaches it, is produced by the punishment which made the crime for which he was convicted unrewarding or, at least, less rewarding. Rehabilitation is a learning process which, whatever the incentives to lawabiding behavior, cannot be independent of punishment, a disincentive sufficient to make future crimes appear irrational to the convict. Therefore, rehabilitation cannot be an alternative to the punishment on which it depends. In practice, if the size of his punishment depends on his apparent rehabilitation, the convict has more incentive to "fake it," and less to achieve it, than he has when his punishment is independent of his rehabilitation.<sup>23</sup>

### 3. *Additional arguments for parole*

Once rehabilitation, the original reason for parole, became discredited in the face of overwhelming evidence of the ineffectiveness of rehabilitative programs and of predictions based on them,<sup>24</sup> alternative justifications for parole were offered. These include the belief:

(a) that the parole commission may correct disparities in sentencing. Such disparities can, however, be readily avoided by mandatory sentencing. Moreover, parole decisions introduce disparities of their own;

(b) that parole may mitigate excessive sentences. Such sentences, however, are best avoided on the judicial level by mandated sentencing;

(c) that parole permits gratification of the public desire for harsh sentences while allowing them to be reduced quietly.<sup>25</sup> Thus, parole is used to deceive the public in order to permit "experts" to impose the reduced punishment they think sufficient whereas the public does not. Parole as an institution cannot, however, be justified if its real purpose is to deceive the public. The loud advertising of "heavy criminal sanctions" to be later reduced "quietly" by an elite of experts does amount to deception. However objectionable, judicial discretion at least is displayed *coram publico* and lacks the element of deception.

<sup>23</sup> See authorities cited *supra* note 22.

<sup>24</sup> See Wilson, *What Works? Revisited*, PUB. INTEREST (Fall 1980).

<sup>25</sup> Thus, Zimring, *Making the Punishment Fit the Crime*, 6 THE HASTINGS CENTER REPORT 6, 14 (1976) argues that "a parole system allows us to advertise heavy criminal sanctions loudly at the time of sentencing and later to reduce sentences quietly."

## C. CIRCUMVENTION OF MANDATED SENTENCING

1. *What discretion would be left to courts?*

Laws mandating specific, determinate, and flat sentences could leave some discretion to courts. Such laws might list aggravating and mitigating circumstances, and indicate the extent to which each such circumstance may modify the punishment. They might also deal with general matters—e.g., they might allow probation for some categories of misdemeanors committed by first offenders. Further, judges might have discretion to vary mandated punishments by ten percent in either direction according to circumstances not specifically listed in the law. However, courts should be able to go beyond that variation only with a written explanation. If they do, an appeal may reinstate the mandated punishment.

Courts could not circumvent mandated sentences, if sentences can be appealed by either side on the ground that they do not conform to a legal mandate. Judges who, contrary to their sworn duty, deliberately refuse to uphold the law, can be impeached.

2. *Prosecutorial discretion*

Prosecutorial discretion would remain exactly what it is now. The absence or presence of judicial discretion, or of parole board discretion, cannot by itself affect the discretion of prosecutors. Potentially, the discretion of other authorities may be a check on prosecutorial discretion, but actually it merely adds to the discretion available in the system. There is no evidence indicating that judicial- or parole-based discretion reduces the ability of prosecutors to select charges or to accept plea bargains and, therefore, no evidence that the absence of judicial or parole discretion would increase the discretion of prosecutors.

Prosecutorial discretion to bring charges and to accept plea bargains nonetheless should be limited as much as practicable. Probably this can be done only by allowing victim representatives and others to appeal to independent statewide boards against failure to bring charges, or against the dropping of charges or acceptance of plea bargains.<sup>26</sup>

## V. PUNISHMENT SIZES

If punishments are to be mandated, how are we to determine the size appropriate for each crime?

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<sup>26</sup> Nobody likes plea bargaining since the result may be unjust to all parties. Yet it may be indispensable as long as we insist on an excessively cumbersome legal system. See Langbein, *Torture and Plea Bargaining*, 46 U. CHI L. REV. 3 (1978). For a full discussion, see 13 LAW & SOC'Y 2 (1979).

Retributionist theory requires that, given culpability, punishment be proportionate to the seriousness of the crime. That seriousness often can be measured ordinally. Rape-murder is more serious than rape; assault with intent to kill more serious than without; recklessness more serious than negligence. However, when crimes are heterogeneous it becomes harder to rank them according to degrees of seriousness. Is theft more serious than fraud or simple assault? Worse, no *cardinal* measure of seriousness is available.<sup>27</sup> Thus, when we can rank crimes by degrees of seriousness, we cannot tell how much *more* serious a crime is compared to a less serious one, and, therefore, how much more punishment it deserves, even if we can tell that it deserves more.

Imprisonment can be measured cardinally as well as ordinally (so can fines); a term of eighteen months is not only more than one of twelve months it is six months more.<sup>28</sup> But the cardinal measurement of punishment provides little help without cardinal measurement of the seriousness of crimes. From the viewpoint of just deserts, therefore, the combination of crimes and punishments is, if not capricious, unavoidably arbitrary. We cannot show why burglary deserves a particular punishment, and assault another, or why they both deserve the same.

This view—which goes back at least to G.F.W. Hegel—has been challenged by Sellin and Wolfgang.<sup>29</sup> Responses to an ingenious questionnaire led them to conclude that people do regard one crime, such as rape, not only as more serious than another, such as robbery, but also as more serious by a definite quantity. By means of a point scale people expressed how much more serious they felt rape is than robbery (205 points). Subsequent research by Stanley Turner<sup>30</sup> has indicated substantial agreement on the relative punishment deserved for each crime in view of its seriousness (given the culpability of the criminal). Thus, a cardinal as well as an ordinal scale can be constructed for the seriousness of crimes and for the deserved punishments, as perceived by a sample population.

Strict retributionists, although interested in these results, will not be satisfied. Sellin and Wolfgang answered the questions: “How much

<sup>27</sup> Ordinal measurement refers to less and more (bad and worse), cardinal measurement to how much, and to how much less or more (*how* bad and *how much* worse).

<sup>28</sup> Punishments must be distinguished from their effects. The effects are what the offender actually suffers, and there is no way to measure them. The effects of one year imprisonment—the same punishment—differ, depending on the age, status, and, not least, character of the imprisoned offenders. Note also that when punishments are not homogeneous they cannot be cardinally compared to one another: fines may be less, and the death penalty more harsh than imprisonment, but we cannot tell how much more or less.

<sup>29</sup> J. SELLIN & M. WOLFGANG, *THE MEASUREMENT OF DELINQUENCY* (1964).

<sup>30</sup> See his reexamination of the Sellin-Wolfgang scale in the reprint of *THE MEASUREMENT OF DELINQUENCY* (1973).

more serious do people think rape is than robbery?" and "How much more severe do they want the punishment to be?" Retributionists want to know: "How much more serious a crime *is* rape than robbery?" and "How much more severe does justice require the punishment to be?" For the retributionist the moral question—what is justly deserved?—cannot be answered by what people believe, although it is hard to see how it can be answered once popular consensus is rejected as a basis for decision.

Generally speaking, deontologists (and retributionists are deontologists) regard the question of punishment as a moral question and they do not accept any popular view as decisive on moral questions. They insist on an objective standard independent of subjective beliefs, although they have not found it. Now, what a majority believes to be right or wrong is not necessarily what is right or wrong in any theory. Our intuition sides with deontologists here. Surely, a person opposed to abortion would not accept a popular vote in favor of abortion as moral justification of it. Killing the members of a minority would not become right, however much the majority favors it. So with degrees of punishment. But the objective standard deontologists seek is elusive.

In practice, what people believe to be just is likely to be accepted as just even if the belief cannot be objectively justified. In turn, what people believe to be just is likely to be strongly influenced by tradition and unlikely to differ greatly from the punishment required to deter from crime to the degree desired by the community. That degree can be established by appropriate techniques and the Sellin-Wolfgang work is a step toward establishing it.

If for the time being we accept deterrence as the purpose of punishment, and disregard retribution and its moral requirements, we can in principle determine the punishment each offense calls for.<sup>31</sup> Given the culpability of the offender,<sup>32</sup> the correct punishment size is the size which supplies the socially demanded degree of deterrence, which depends on the socially perceived harmfulness of the offense ("harmfulness" may include anything that makes deterrence desirable). The size of punishments thus can be determined by two empirically measurable quantities: the social demand for deterrence from each kind of crime, and the supply of deterrence yielded by each size of punishment. In turn, the social demand for deterrence can be quantified: it is equal to the frequency of any crime which society is willing to tolerate rather than increase the size of punishment or other costs. ("Costs" here in-

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<sup>31</sup> See van den Haag, *Punishment as a Device for Controlling the Crime Rate*, 33 RUTGERS L. REV. 706 (1981) for a discussion of this view.

<sup>32</sup> Culpability ranges from neglect to premeditation, although the intervals are indeterminate.



clude moral and financial ones: anything that the community would rather not do, unless it serves to avoid something thought worse.)

If we know these two quantities, which, in principle, are knowable, we know the correct punishment for each crime. Admittedly the practical difficulties remain formidable. But deterrence theory can determine correct punishment in principle.

Since they do not justify punishment by its consequences, retributionists cannot determine the size of punishments appropriate for each crime by considering the consequences (deterrence) the punishment produces. Deterrence theory can, however, establish the appropriate punishment for each crime if the threat system of the criminal law is seen as a device for reducing crime rates to socially acceptable levels.<sup>33</sup>

From a retributionist view, punishment sizes must remain arbitrary.<sup>34</sup> Since consensus establishes only the social perception of desert, without establishing desert, retributionist theory does require more—even if it cannot supply it. Desert theory may, however, reach a consensus on punishment too, albeit by a different route. Indeed, the punishment sizes actually regarded by retributionists as deserved are quite similar to those required by deterrence theory, for the actual retributionist consensus implicitly depends on the factors which deterrence theory makes explicit. In practice, both the wickedness of crimes and what is deserved for them are decided by popular feeling, which is influenced by the perceived harmfulness of crimes, just as is the demand for deterrence. Further, the size of punishment retributionists think deserved for any degree of wickedness is unlikely to be independent of its deterrent effect. Retributionism thus tends to sneak in the deterrence elements, which it is presumed to disregard, and to produce punishment sizes not very different from those produced by deterrence theory.<sup>35</sup>

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<sup>33</sup> Acceptance of intuitive justice requirements, such as punishment only of the guilty in proportion to the perceived seriousness of their crimes, need not impair the effectiveness of the device. See van den Haag, *supra* note 31, at 711-14.

<sup>34</sup> This arbitrariness is the result, on the one hand, of abandoning the *lex talionis* which made punishments less arbitrary, and, on the other hand, of abandoning a purely restitutive penalization, which made punishments depend on market valuations of harm and/or on bargaining among the parties affected. Yet neither abandonment is avoidable from the retributionist point of view.

<sup>35</sup> The convergence of deserved and deterrent punishment sizes tends to be overlooked by philosophers hypnotized by individual cases which can be readily constructed to show that deserved can differ from deterrent punishment sizes. Nonetheless, retributionists, inspired by their intuition of justice, would not deal with crimes such as burglary, fraud, or assault by punishments that diverge significantly from those necessary for deterrent purposes. If intentionality is held constant, divergency would be further reduced. The actual extent of divergences, however, remains unknown; nobody as yet has compared the punishment size for the main categories of crime required by retributionist and by deterrence theory. For a different view see Goldman, *Beyond the Deterrence Theory: Comments on van den Haag's "Punishment as a Device for Controlling the Crime Rate"*, 33 RUTGERS L. REV. 721 (1981).

## VI. SUMMARY

In sketching the purpose and limitations of the criminal justice system (Section I) this essay tries to establish that the criminal law assumes deterrence and that deterrence is effective even though rehabilitation ("specific deterrence") may not be (Section II).

Deterrence is found not to require conscious calculation by prospective offenders and to be maximized by mandated, determinate, and flat sentences (Section III). These sentences are discussed and compared with current practices. It is suggested that deterrence affects established habits less than the formation of habits and depends on the threatened punishment's being swift and predictable rather than cumulative, delayed, and unpredictable. An attempt is made to show that the deterrent effect on non-trivial punishment increases with its predictability.

Objections to mandated, determinate, and flat sentences are considered (Section IV) in terms of individual justice and rehabilitative effectiveness. An attempt is made to show that such sentences may be less unjust to individual offenders than is judicial and parole discretion. The relative roles of justice, equality, and deterrence in criminal sentencing are discussed. A distinction is drawn between justice to actual victims and offenders and justice to future victims and offenders, to identifiable and to "statistical" persons. It is suggested that future victims are insufficiently considered by discretionary practices and would be more properly considered by mandated, determinate, and flat sentences. Rehabilitation is rejected as a reason for discretionary and indeterminate sentences and for parole. Additional arguments for parole are refuted. The discretion to be left to the courts is described, and it is argued that courts could not easily circumvent mandated sentences and that the latter would not increase prosecutorial discretion.

It is finally argued (Section V) that deterrence theory, in contrast to retributionist theory, offers a non-arbitrary way of determining "correct" sentences for every crime in cardinal and ordinal terms. Deterrence theory is found to offer a basis for mandated, just, equal, and optimally deterrent sentences.