Law Reform Commission of Canada

Commission de réforme du droit du Canada

studies on sentencing

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1974

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foreword

Following its policy of making available to the public not only its working papers but also some of the major background studies, the Law Reform Commission of Canada issues in this volume its working paper on *The Principles of Sentencing and Dispositions,* as well as background papers by Professor John Hogarth on *The Alternatives to the Adversary System* and by Professor Paul Weiler on *The Reform of Punishment.* These papers represent only the beginning work in the area of sentencing and dispositions and will be followed by further more detailed work in areas such as restitution and compensation, fines, diversion, imprisonment and release. The working paper on principles does, however, represent a framework for our future studies and the attitudes expressed in the work of Professor Hogarth and Professor Weiler set out the basic tensions that have to be understood and mastered in a contemporary re-evaluation of the criminal process.

Professor Hogarth's basic position is expressed in the title of his paper and calls on us to re-examine the adversary system and to seek alternatives to it. He describes the underlying assumptions in this system and its limitations and develops criteria for a re-evaluation. On the basis of these criteria he critically examines the criminal process in the light of present social needs and the function of institutions in the criminal justice system. Professor Hogarth then develops various conceptual models, opting primarily for a social-educative model of criminal justice. Finally he attempts to describe a working model which shows the interaction of concepts, institutions, the public and the community.

Professor Hogarth's paper seems to go beyond the question of sentencing, dealing with the function of the criminal process as a whole. However, his work on sentencing as a human process is well known and this work as well as the work on Diversion (the East York Project which will be described in a further Commission publication) have led him to the kind of conclusion he presents here. The Commission has also clearly accepted that the question of dispositions in the criminal process go beyond the traditional concerns about sentencing and involve any disposition from the reception of the complaint by the police to the release and after-care of offenders.

Professor Weiler, somewhat as a contrast and pursuing the theme from its end, as it were, concerns himself with unflinching directness

to the question of punishment. Unflinching, because for some time now there has been almost a collusion to hide this uncomfortable fact of punishment under euphemistic words and devices. Professor Weiler re-examines the philosophical and moral justifications of punishment, the varieties of punishment and their relation to concepts such as moral persuasion, reward, treatment and correction. He then addresses himself to the range of prohibited conduct and reasons for prohibitions as well as the societal reactions which are expressed in the choice of penal instruments and the selection of persons to whom they are applied. This raises the question of the nature of legal authority and concerns about standards of due process.

Having laid this groundwork, Professor Weiler examines the justifications which have been given traditionally and historically, such as deterrence and retribution. He also relates the apparent logic of criminal sanctions to the institutional framework and the nature of responsibility and liability. He finally examines the practice of corrections and the rehabilitative ideal and attempts to de-mystify these late-comers to punishment.

Thus, Professor Hogarth calls on us for imaginative developments and Professor Weiler reminds us that behind the intents and attempts to humanize the criminal justice system may lurk even greater injustices. Clearly both are right and clearly a body such as the Law Reform Commission of Canada has to find its way in this very real tension.

Law Reform Commission

Working Paper No. 3

the principles of sentencing and dispositions

Preface

This is a general introductory paper on the subject of sentencing and dispositions. It does not purport to be an academic treatise or a detailed analysis of all the issues in the area but rather seeks to identify the major issues while leaving further analyses for individual follow-up papers. For example, other papers will examine issues relating to imprisonment, deterrence, probation and compensation to victims of crime. Similarly, while the need for diversionary procedures are outlined in this paper it is contemplated that subsequent papers will examine such alternatives in more detail. In addition, other Commission papers will examine topics related to sentencing and dispositions such as the classification and definition of offences.

The purposes of this paper are to raise what are seen to be core issues in sentencing and dispositions, to indicate a general approach or position on these issues, to suggest that fairness and rationality in sentencing would be encouraged by a legislative statement of principles and criteria and to invite public discussion on these points. Consequently, the paper is not laden with detailed references to academic writings or scientific reports. Such writings and reports have been taken into account in formulating the paper. Supporting material and references are available at the Commission.

In drafting this paper, terminology has been an ever present problem. Words such as "punishment" and "treatment", for example, are used by different people in different ways. In addition, "retribution", "rehabilitation", "deterrence" and "incapacitation" have various meanings that may not be clear even to those who use them. They, nevertheless, imply ideological approaches to the question of sentencing. Today, changing values and concerns over the purposes of criminal law and sentencing suggest not an abandonment of the old terms but a decreased emphasis on them. Accordingly, in this paper rather than define "punishment" to mean any imposition by the state in the name of criminal law including medical or other treatment, the word "sanction" has been used.

In this sense, *"sanction"* means a penalty imposed; it may be imposed for purposes of punishment, protection, restitution, or treatment. The notion of "sanction" is wide enough to include such orders as conditional or absolute discharge: orders which can hardly be described as either punishment or treatment. Sanctions may be consensual as in restitution, or they may be imposed without the consent

of an accused as in the case of imprisonment. In the sense that they take note of the wrong done, sanctions have a value in themselves.

Punishment is used in the narrow sense of a sanction imposed for the purpose of giving adequate expression to the seriousness of the offence and concern over damage done to individual rights and social interests. In reflecting a need to right the wrong and to relate the disposition to the seriousness of the offence, punishment may contain elements of a limited retribution and emphasize the common good and the need for public protection.

Deterrence as used in this paper, refers both to "general deterrence", sanctions imposed for the purpose of threatening or "educating" potential offenders to stay within the law; it also includes "specific deterrence", sanctions imposed for the purpose of restraining a specific accused from repeating his offence.

As used in the paper, *rehabilitation* relates less to the common good and more to specific offenders. It refers to those procedures that are used in favour of offenders. In a sense, these procedures are by way of mitigation of sanctions.

Sentencing is used to refer to that process in which the court or officials, having inquired into an alleged offence, give a reasoned statement making clear what values are at stake and what is involved in the offence. As the sentence is carried out, it may be necessary from time to time, as in probation, to change or amend conditions relating to the sentence.

Disposition is used to refer to the actual sanction imposed in sentencing, whether this be at a pre-trial diversionary procedure or following conviction at a regular trial.

The organization of the working paper shows that we do not consider "sentencing" as a function which begins at the end of the trial and ends at the beginning of the sanction but as a process related to all stages of the administration of justice. The pronouncement of an amount of money to be paid or of a time to be served in an institution or even the imposition of such measures as probation, do not provide sufficient grounds to re-evaluate and to re-shape what many consider to be the cornerstone of the criminal process.

Introduction

The purposes of the criminal law and of sentencing and dispositions are closely tied together. Unless we know what the purposes of the criminal law are, or ought to be, we will not know how to formulate a consistent and rational sentencing policy. How a society defines those purposes and aims tells us a great deal about the kind of people who live in that society and what their values are. Quite clearly, in a fast changing society, such as ours today, it can be expected that the criminal law may be regarded differently than in a stable society which saw the enactment of the present criminal code over seventy years ago.

In those days, men were confident that they had the answers to a whole range of social problems including criminal law; today men are not so confident, for many of the assumptions of Victorian morality have been abandoned under the impact of rapid social and technological change.

This rapid and accelerating change in values is one of the most dramatic developments in the history of man. Many people grappling with the problems of drug use, of increasing petty theft or death and injury caused by automobile drivers or the risk to life and health posed by industrial and urban pollution, may agree with Alvin Toffler when he says that changes in values are now so rapid that the identity between one generation and the next is shattered. Should this generation presume to use the criminal law to bind the values of future generations?

Since the criminal law is only one of the ways in which society attempts to promote and protect certain values respecting life, morals and property, it becomes important, if we are to avoid unnecessary social conflict and alienation, that the criminal law be used with restraint. We may choose to be tolerant of different life styles and values rather than rigidly repressive.

As to certain core values respecting the dignity and well-being of the individual or the ultimate authority of state power, there may be a wide measure of agreement and support. In respect of other values relating to life style and morality, including the use of alcohol and drugs, obscenity or certain kinds of sexual conduct, there may be a wide measure of disagreement as to which values should prevail.

Where conflict arises in an area in which values may be changing or uncertain, or where the injury to the protected value is small, we may not wish to resort to the full force of the criminal trial, conviction and sentence. Within the criminal law, is there not room for settlement and arbitration as well as for adversary court room trials? Is there not room in a large number of cases for recognizing the injury to the victim as well as the injury to society? The least damaging intervention by the state and the most satisfying intervention as far as the victim is concerned may often be encouragement of restitution or other settlement or an arbitration at the consent of the victim and the offender, again with a view to restitution and compensation.

Such an approach draws from historical experience indicating the inevitability of crime and the futility of trying to stamp out conflict between individuals. It recognizes the need to protect, support and make clear core values without assuming that offenders are sick and in need of treatment. Nor does it assume that simple vengeance is an appropriate response to crime generally. Rather, it is suggested that society's interest in having certain values upheld and protected can often be met by giving primary attention to the injured victim and by promoting a fair and just reconciliation between the offender and the victim.

In framing a criminal law and sentencing policy for the next few years, can we do better than to recognize the limitations of criminal law and corrections? Can we do better than to insist that whatever state intervention is taken through the criminal law in the lives of individuals, it should be justifiable as serving some common good, and that the intervention be limited by considerations of fairness, justice and humanity?

Purposes and Principles

In the sentencing and disposition of offenders, a prime value ought to be the dignity and well-being of the individual. It is self-evident that criminal law and social change in Canada seek to articulate, distribute and protect this and other values important to society. Laws protecting inviolability of the person and sanctity of life are simply illustrations of the prime value placed on individual dignity and well-being. This value commands that attention be paid not only to the interests and needs of the collectivity but to the offender and victim as well.

Enhancement, re-alignment and protection of community values justifies intervention by the state in the benefits or rights enjoyed by an offender. Such intervention, however, cannot be justified where there is no net gain to the interests of the community, including the victim and his family.

Thus, there are two bases upon which to justify an initial intervention by criminal law and sentencing: the common good and the sense of justice which demands that a specific wrong be righted. In other words, state intervention to deprive offenders of their property or freedom may be justified on a theory of justice according to which the wrong done ought to be righted. It would seem, however, that as a preliminary justification, it should be shown that state intervention would serve the common good; otherwise it could be said that men should be subject to sanctions, even though such sanctions appear useless.

No matter which of the two bases is used as a justification for initial state intervention, it is important, in deciding questions of sanctions, that state intervention be limited so that (1) the innocent are not harmed, (2) dispositions are not degrading, cruel or inhumane, (3) dispositions and sentences are proportional to the offence, (4) similar offences are treated more or less equally, and (5) sentencing and dispositions take into account restitution or compensation for the wrong done.

The above criteria offer a place for deterrence and rehabilitation in a sentencing policy but a place that has limitations. The common good provides a means whereby deterrence, particularly through the educative aspect of sanctions, may be used, along with incapacitation, to underline the wrong done to common values and to re-affirm or protect those values. Justice, on the other hand, in focussing on the wrong done and

the need to restore the rights of the victims, provides an opportunity to individualize the sentence and to emphasize the need for reconciliation between the offender, society and the victim. Thus, within the context of a sentence which reflects the gravity of the harm done and is humane, there is room for restitution and rehabilitation.

Rehabilitation, in the sense of improving the offender's ability to cope with life, may not be an unimportant factor in sentencing. Too frequently, rehabilitation is measured only in terms of reduced recidivism, a measure that has repeatedly demonstrated the limited capacity of treatment or rehabilitation to control crime. Yet, to improve an offender's life skills or to reduce his personal suffering are simple, humane gestures that should have a proper place in sentencing policy. Such rehabilitative efforts, indeed, may even have indirect benefits in reducing recidivism in particular cases.

This indirect benefit, however, is at present tenuous and difficult to achieve. First, there is the problem of proven treatment programs. It is very difficult to point to any particular treatment program and claim proven results in terms of crime reduction. The reports are equally disappointing whether the program was designed to change attitudes and outlook or develop educational and job skills. Secondly, in selecting those offenders appropriate for treatment, science constantly confesses an inability to predict accurately who is in need of treatment. This problem of inadequacy in prediction is common to bail and parole applications as well but takes on special significance with respect to treatment of allegedly dangerous or violent offenders. If it is not possible to identify accurately those in need of treatment, nor to run programs successful in preventing crime, it would be unwise to base sentencing policy on rehabilitation and treatment. Nevertheless, as indicated above, a sentence determined on the basis of what is fair and just may well provide for rehabilitation within its confines.

Ignorance and uncertainty respecting deterrence likewise raise deep moral and practical problems for the legislator or judge who bases dispositions on the false assumption that a bigger stick is the answer to crime. While criminal laws, arrest and trial procedures, sentencing and the experience of jail probably do have a collective deterrent effect for some classes of persons in respect of some types of crimes, the deterrent effect of sentences *per se* is problematical. Longer terms, generally, do not appear more effective than shorter terms in reducing recidivism and prison appears no more effective than release under supervision in preventing recidivism.

When a judge sentences an offender to jail "to protect the community" what does he mean? Does he mean that the jail term will reduce the likelihood of this particular offender committing another

crime, or does he mean that while the offender is locked up the community will be free of his depredations, or does he mean that the sentence of imprisonment will deter others from committing similar crimes? Of these three possible meanings, only the second can be fully accepted and even then the security offered by imprisonment is short lived: the average term of imprisonment for break and enter, in Canada, for example, is fourteen months. Since the law remits one-third of the sentence as a reward for good behaviour and permits release on parole at an early stage of the sentence, the actual time spent in the institution, on the average, is less than ten months for this offence.

The first of the three possible interpretations, above, is definitely unfounded by the evidence; if anything, it is said, jail is likely to strengthen recidivism rather than reduce it. As to imprisonment serving as a general deterrent to the rest of us, the evidence is highly uncertain. Professional criminals probably are deterred by a real risk of being put out of business for a year or two. Other persons who have previously been imprisoned probably are not greatly deterred by the knowledge that the court has imposed a term of imprisonment on someone else. For the vast majority of law abiding people, arrest and trial and the shame and stigma of conviction probably are a greater deterrent than imprisonment. But even these are becoming less effective deterrents as an over-extension of the criminal law in drugs, drinking, gambling and other crimes affects greater and greater numbers of otherwise "law-abiding" citizens. In addition, for a marginal group, whose conduct is not dominated by passion or sub-conscious drives who live on the borderline of crime, imprisonment may have some deterrent effect, but how much greater it is than the deterrent effect of arrest or trial is not known.

Some further light on the probable deterrent effect of sentencing and dispositions can be gained by taking a look at what is actually happening in respect of selected crimes. It stands to reason that if the chances of being charged and convicted are very low, the deterrent effect of the threatened sentence is probably low as well. Studies show that greater deterrence is more likely to result from increased certainty of apprehension rather than increased severity of sentence.

This being the case, it is instructive to note that, among the most common offences, various crimes against property, most are not cleared up by police. In 1970, in respect of theft over $50.00, charges were laid only in ten cases out of every one hundred reported. In break and enter, charges were laid in sixteen cases out of one hundred. In addition, another six to twelve per cent of cases were cleared up in some other way than by laying a charge. If the risk of charges being laid is only about one out of ten in theft and break and enter, there is a limit to

what sentencing can do to measurably increase the deterrent effect of the law. Needless to say, if unreported thefts and break and enters were taken into account, the risk of being charged would be even lower. Indeed, certainty of apprehension in respect of some of the most common crimes in Canada is so low that it is unreasonable to expect harsh sentencing laws to compensate for this weakness.

To a lesser extent the same point may be made with respect to the most common crimes against the person: assaults (assaults constitute almost 70 per cent of offences against the person) robbery and rape. The percentages of such cases cleared by charge in 1970 were 34.5, 26.8, and 47.8 respectively, although when clearance by other modes were taken into account, it can be said that approximately seven out of ten reported assaults, woundings and rapes were cleared by charge or otherwise and one out of three robberies.

While the ability of criminal law and sentencing in particular to deter or treat offenders is obviously limited, this does not mean that nothing should be done. Without the criminal law, one could imagine that crime would flourish with impunity. From the scholarly research and examination of practices, however, we can draw some better understanding of what the criminal law cannot do very effectively; we can get some insight into what ought to be the primary purposes and emphasis in sentencing and dispositions. Is it realistic to expect the law to do more than to take note of the gravity of the offence and, through a range of dispositions, to affirm, uphold and protect core community values?

An Alternative Procedure: Diversion

Crimes brought to the courts under the Criminal Code in rank order of frequency are (1) thefts and possession of stolen property, (2) automobile offences including impaired driving, (3) being drunk or causing a disturbance, (4) assaults, and (5) break and enter. Many of the thefts involve property values of less than $50.00 and even in break and enter, in general, the average value of property stolen is less than $150.00. In short, the bulk of the work of the courts in Criminal Code offences involves rather minor violations of property values or such problems as impaired driving or being drunk in public, some of which could, perhaps, be dealt with more informally and economically as regulatory offences. The luxury of an adversary battle in the criminal courts and the stigma of criminal conviction and sentence may not be necessary in all of these offences.

To protect property values, particularly in minor cases, or to protect the value of inviolability of the person as it arises in cases of assault, the criminal trial, again, may not be all that effective. Rights of possession and dignity of the person are protected by tort law as well as by criminal law. Family law protects and enhances fundamental values arising out of domestic disputes, including assaults. In family law, juvenile law or labour law, for example, the values that are protected and supported by law are not necessarily fought out in an adversarial court setting, but in a settlement or conciliation procedure. This mode of proceeding appears to be effective in underlining and clarifying interests and community values. Moreover, unlike the adversarial setting, conciliation encourages full recognition of the interests of the victim and the need for restitution and compensation. At the same time, the issue of responsibility is not evaded but worked out with fairness, humanity and economy. Settlement and conciliation procedures might well be used in a range of rather minor offences, many of them property offences, where neither justice nor utility warrant the full exercise of the state's criminal law power through arrest, trial, conviction, sentence and custodial detention.

Provision for some consistent and rational means for diverting minor criminal cases from the court and into settlement procedures is also demanded on the basis of fairness: similar types of conduct should be treated more or less equally. Yet one of the most disturbing criticisms about sentencing and dispositions is that they tend to fall heaviest

on the young, the poor, the powerless and the unskilled. It is a fact that the greatest number of persons appearing in magistrates' courts charged with offences against property or causing a disturbance or assault are young people, either unemployed or working at low paying jobs. In addition to the purely economic factors, it may be agreed that the life styles of the young and the poor are more likely to bring them to the attention of police than is the case with business or professional classes. Discretion in law enforcement tends to divert business or professional classes from the criminal courts. Business frauds or thefts may often be dealt with by way of private settlement or restitution. On the other hand, people without money or influence, when caught in petty theft or shoplifting frequently are given no opportunity to make redress, and large numbers of them are prosecuted directly in the courts. These ordinary people, frequently, do not have the prestige, possess the bargaining skills, nor command the psychiatric, educational or economic resources to enable them to enter into settlements that result in a diversion of cases from the criminal courts. One of the most important things sentencing and dispositions can do is to attempt to overcome this inequality. To allow it to continue undermines the legitimacy of law itself.

Hence the importance of procedures that permit a consensual settlement of minor cases involving restitution, work, education or the taking of treatment where necessary. Where the accused is unemployed or without economic resources, he should be provided the opportunity to do work in private industry or the public service at no less than a minimum wage, paid by the state, if necessary. Educational opportunities already exist, many at state expense, as do psychiatric or general medical treatment. That is to say, the services necessary to make diversion operational are already available in many areas. What is needed, is not necessarily more services but a means whereby the services are made equally available despite social and economic differences among alleged offenders.

As already indicated police, prosecutors and judges now engage in diversionary practice on an *ad hoc* basis. A policeman will induce a thief to restore the goods and the victim agrees to drop the complaint. A Crown prosecutor agrees to stay proceedings providing the accused seeks psychiatric treatment. A judge adjourns a case *sine die* on condition that the accused be of good behaviour and finish his year's education. Indeed, in juvenile cases, family disputes and, to a lesser extent, in shoplifting cases, police in some cities and towns have developed a policy of diversion. In some centres, special units of the police are set aside with skilled personnel trained in handling these special kinds of disputes. In the United States, projects conducted by the Vera Institute

for Justice and others have demonstrated the value of court employment projects and other types of diversion schemes both before and following conviction. In certain Canadian cities, various judges and crown prosecutors have run informal diversion schemes over the years. More recently, in various provinces, the Native Peoples' Court Communicator Projects are trying out the feasibility of diversion schemes integrated with intensive follow-up services. Experience to date tends to show not only that diversion is feasible but that it reduces costs and offers a satisfying disposition without encouraging impunity.

As an alternative to the full adversary contest in the magistrates' courts, then, certain cases could be diverted for settlement or conciliation before a justice or other official. The settlement would result in a court order embodying the terms of the settlement and subjecting the offender to recall in default of performance. The justice would then have a discretion to vary the terms of the settlement or refer the case for trial in the usual way. References to alternative procedures will also be found in future Working Papers relating to criminal procedure and further reference to the functions of judge and prosecutor will be found later in this paper.

While there would be no conviction or sentences as such involved in the settlement, the process itself would have a deterrent effect in that it would be a valuable learning process for the offender. This would stem from his having to appear in answer to a charge, face the victim, acknowledge responsibility or partial responsibility for the alleged wrong and meet the challenge to come forward with some concrete undertaking to restore the wrong done. The settlement process itself would underline the values that society insists be respected. The settlement or conciliation procedure in its educative effect would thus promote the protection of core community values.

For the offender, such an experience may have an additional positive value. To see the victim as a person whose rights have been violated, paves the way for expiation. This incidental effect of settlement procedures may be especially helpful to some offenders. Unfortunately, the adversary nature of the criminal trial, where positions are polarized and where the psychological effect is such that the offender might well begin to believe himself blameless in a winner-take-all situation, is not conducive to an acceptance or responsibility or a recognition of the rights of others.

For the victim, the criminal trial may be equally unrewarding and destructive, whereas, the proposed settlement process restores him to the centre. What was his role in the alleged offence? What does he demand by way of satisfaction? We should not overlook the fact that,

historically, before the king took collection of fines for revenue purposes, compromise and settlement were commonly used. Now that Her Majesty is no longer dependent upon fines in order to balance the budget fresh consideration should be given to using diversionary or settlement processes as an alternative disposition.

Intake Service: Criteria

A diversion program such as is proposed here assumes an Intake Service to screen cases as they come in. The precise details of the screening service remain to be worked out but presumably a magistrate or some other person with experience and training, working according to certain standards and criteria, would make an initial determination whether a case should be sent on to trial in the ordinary way or diverted for settlement. In keeping with the philosophy already expressed, serious cases would not be appropriate for diversion. For these, the adversary contest of the criminal trial and the emphasis on a just and fair sentence should be retained. At the other extreme, there are cases where diversion clearly ought to apply, and in the middle, a range of cases where diversion might be appropriate depending upon the circumstances. For example, petty theft or having possession of stolen property under $200.00, common assault, homosexual offences, bestiality or exhibitionism, family disputes, mischief to property, joy riding, minor break and enter cases or cases involving certain types of mental illness, probably should be diverted unless there are strong factors pointing to the desirability of a trial. Other factors that might well affect the decision to divert would include whether or not it is a first or second offence, whether or not the offender is a juvenile or youthful offender, and whether there are community agencies or services available to assist in a satisfactory settlement of the case. Another consideration should be that the facts of the case make it reasonably clear that the offender committed the alleged act. Where there is a great uncertainty as to the facts, the case should be referred for trial with the option of having it sent back for settlement at the discretion of the trial judge. Needless to say, the consent of the victim and the offender are pre-conditions to diversion, settlement or mediation. A working paper on diversion procedures should also be concerned with who is to make the decision to divert, and on what kind of evidence.

To ensure justice, the decision whether or not to divert should be made in an open hearing. This also means there must be some record of the decision and the reasons for it. Without such protection, the intake officer would be open to charges of influence and bias that might be difficult to refute.

Custodial or Non-Custodial Disposition: Criteria

Although a diversion procedure may provide an alternative disposition for certain kinds of cases, more serious cases would still be dealt with by way of trial with imprisonment as a possible sanction. Because of the doubtful effectiveness of imprisonment in reducing recidivism, however, and the high costs of imprisonment, both economic and social costs, as well as direct and indirect costs, economy demands that imprisonment be used with restraint. This is not to say that complete deprivation of liberty may not be a deterrent in some cases. After all, it is estimated that from 35 per cent to 60 per cent of those imprisoned as first offenders do not return. It may well be, however, that had they been placed on probation or fined they may not have returned either. No one really knows much about the effectiveness of sanctions. Because there is some reason to think that one sanction may be as effective as another, however, the principle of restraint may be a wise one. To assist the courts in deciding whether a custodial or a non-custodial sentence is proper, a Sentencing Guide should contain a statement of priorities and criteria to be considered in reaching such a decision. It is suggested that as a rule, the priority should be to impose a non-custodial sentence unless otherwise indicated upon consideration of the following criteria:

(1) the gravity of the offence;

(2) the number and recency of previous convictions; and

(3) the risk that the offender will commit another serious crime during his sentence unless he is imprisoned.

In applying the foregoing criteria it is suggested that a Sentencing Guide list factors such as those proposed in the New Draft Code (U.S.) that ought to be accorded weight in favour of withholding a custodial sentence:

(a) the defendant's criminal conduct neither caused nor threatened serious harm to another person or his property;

(b) the defendant did not plan or expect that his criminal conduct would cause or threaten serious harm to another person nor his property;

(c) the defendant acted under strong provocation;

(d) there were substantial grounds which, though insufficient to establish a legal defence, tend to excuse or justify the defendant's conduct;

(e) the victim of the defendant's conduct induced or facilitated its commission;

(f) the defendant has made or will make restitution or reparation to the victim of his conduct for the damage or injury which was sustained;

(g) the defendant has no history of prior delinquency or criminal activity, or has lead a law abiding life for a substantial period of time before the commission of the present offence;

(h) the defendant's conduct was the result of circumstances unlikely to recur;

(i) the character, history and attitudes of the defendant indicate that he is unlikely to commit another crime;

(j) the defendant is particularly likely to respond affirmatively to probationary treatment;

(k) the imprisonment of the defendant would entail undue hardship to himself or his dependants; and

(l) the defendant is elderly or in poor health.

There may also be need in a Sentencing Guide for extended terms of imprisonment for selected offenders such as habitual offenders and sexual offenders. Whether the so-called dangerous offender should also be dealt with by way of an extended term or by way of civil commitment, following completion of his ordinary term, will be the subject of another paper. In all such cases standards and criteria should be clearly spelled out in a Sentencing Guide as an aid to the court.

Where a court decides that a sanction involving complete deprivation of liberty is necessary, it should not, at the same time, ignore the question of treatment. The Commission will want to consider whether or not custodial sentences, in some cases, for humanitarian and rehabilitative reasons, should be served in a treatment institution. In such a case, the sentence ordering deprivation of liberty may be combined with a hospital order, permitting treatment on consent.

In addition, neither punishment nor public security demand that all custodial sentences involve absolute deprivation of liberty. There is room for week-end detention or detention in community hostels or work camps with varying degrees of control over residence requirements.

Release Procedures

Where imprisonment is imposed, a further problem arises in release procedures. Should the prisoner be detained until his full sentence has expired or should the sentence be shortened for various reasons? At present, sentences of imprisonment are almost always shortened either through remission for good behaviour or by parole. Under provisions of various statutes, a prison sentence is reduced by one-third if the prisoner behaves himself. In addition, prisoners can be released even earlier on parole supervision. Do these release procedures make sense or should the law be straight and simple, so that a two year sentence means that the prisoner walks out a free man only when the two years have expired, no more, no less? Is remission for good behaviour essential to good discipline in the prisons? Can parole still be justified on the ground that it reduces recidivism? If parole cannot be shown to be effective in this respect, and there is some evidence to show that it cannot, should parole continue to be an integral part of sentences that deprive offenders of their liberty? Does common humanity or a desire to save public expense suggest an amelioration of loss of liberty by release under supervision where such release does not pose any substantial risk to the community?

One of the problems associated with release procedures involving remission and parole is that of fairness. Remission and parole decisions as well as those involving probation increase greatly the amount of administrative control over the prisoner. Is such increased control justifiable in terms of the purposes to be achieved? If increased administrative control over the offender can be so justified, is the power exercised fairly and according to criteria that the offender knows and understands? If remission and parole release procedures are not effective in achieving agreed-upon goals and if they increase the dependency and frustration of prisoners why should they be retained? These questions and others related to the need for standards of fairness in release procedures will be examined independently in a forthcoming paper.

Supervising the Execution of the Sentence

Once the judge has passed a sentence of imprisonment, the offender passes into the hands of the correctional system which supervises the carrying out of the sentence. The prison system may classify the offender according to various criteria and transfer him from one institution to another: work, educational or therapeutic programs may be made available to the offender, or denied him for various reasons. While in prison, he is subject to the rules governing the institution and may be punished for their breach. Such punishment no longer involves corporal punishment but it does run, for example, from isolation cells to loss of remission time, loss of work or recreational privileges, refusal to grant parole or revocation of parole. In addition, the prisoner may be subjected to brutality and degradation at the hands of guards or other prisoners.

Until very recently, the courts and Parliament have taken the view that what happens to the prisoner within the correctional institutions is entirely a matter of administrative discretion and not an area in which the traditional rules of fairness must apply. There is now some evidence that the courts, at least, are not willing to continue to turn their backs on abuses and unfairness within the prison and parole systems.

With minor exceptions, an unchecked and unstructured discretion runs throughout dispositions and sentencing down to and including parole hearing and release, and dispositions within the prison Warden's court. It is important to the credibility and legitimacy of the administration of justice that decisions taken within that system be perceived to be fair and rational. It is no longer sufficient to excuse correctional law from the usual standards of fairness that prevail in other areas involving discretion. For this reason, a Sentencing Guide should contain a part setting forth standards that should prevail in key areas of correctional decision-making.

Clearly, in evaluating the quality of justice in the execution of the sentence, some considerable emphasis should be given to devising techniques that render decision-making more open, more visible and more accessible to the community. Various techniques other than judicial review and legislative guidelines can be suggested for further analysis including the concept of an ombudsman for prisoners, the French and Italian institution of "le juge de l'exécution des peines", a Visitors' Committee along the English model or the provision of legal aid services within the institutions.

Roles and Functions within the Sentencing Process

The Victim

In the administration of justice, concern for protection of core values or protection of the community as it is sometimes called, means that one of the goals of the system should include satisfaction of the victim's needs. This in turn means that fresh consideration should be given to the role of the victim in sentencing and dispositions. The alleged offence, having injured a protected community interest, finds its origins in the infringement of the victim's rights and expectations. The extent of the injury to the community and the victim will depend, in part, upon the circumstances, including the role of the victim in relation to the offender. Was the assault, for example, the result of a long standing feud over landlord-tenant relations? Did the victim share some responsibility in precipitating the alleged offence? If so, can the victim's interests, society's and the offender's be met through a settlement or an arbitration, or is the injury so serious that a criminal trial is the best way of protecting the community interest?

In any event, the need for the victim's active and informed participation in settlement and arbitration are self-evident. Even at trial, concern for the violation of the victim's interests should manifest itself in several ways including (1) respect for the convenience of the victim in granting requested adjournments, (2) an opportunity for the victim to express a view as to the appropriate sentence, and (3) priority in sentencing and dispositions to restitution and compensation for the loss or injury suffered.

The increased role of the victim may give rise to fears of disparity in sentences. However, such disparities, if they do occur will be within the moderating confines of legislative principles and criteria applied by a court. Similarly, the risk of intimidation of victims cannot be overlooked and must be provided for.

The Offender

At the same time the role of the offender ought to be viewed differently. Rather than the passive role he is now encouraged to assume in denying total guilt and seeking acquittal on legal grounds, the offender ought to be encouraged to meet directly with the victim in minor cases where the facts are not in dispute, and to accept his share

of the responsibility for the wrong done by proposing a fair and equitable settlement. In giving the offender some control over the decisions that affect his life, rehabilitation may be truly effected. Even at trial, the sentence should as far as possible encourage the offender's active participation and encourage him in restoring the harm done. To encourage the offender to accept responsibility and to exercise some power over his own destiny not only enhances respect for individual life and well-being but in encouraging a reconciliation of the offender, the victim and the community, greater community protection may result.

The Prosecutor

To protect the social interest in fair and equitable settlements or dispositions, the crown prosecutor may be expected to play an active role. Already the prosecutor under existing law enjoys a wide discretion in screening charges, withdrawing charges, suspending prosecutions and negotiating pleas. In a system where greater emphasis is placed on pre-trial settlement procedures or on arbitration, with the trial reserved for more serious cases, the functions of the prosecutor take on added importance. First, the prosecution would serve as a back-up to absorb those cases not settled voluntarily by the parties or by the police. Secondly, the prosecutor, presumably, would always be available to receive a complaint or information in those cases where the victim for one reason or another is unwilling to settle the case at the police level and wishes to proceed either to mediation or trial. The prosecutor in such cases would exercise a discretion whether the complaint should be proceeded with, and, if so, in what manner.

If the case proceeds to mediation, the functions of the prosecutor would come to an end, for it is not contemplated that the prosecutor should also serve as the mediator. If the case proceeds to trial, the prosecutor again ought to represent the state's interest. Traditionally, the Crown prosecutor, unlike his American counterpart, was supposed to have a benign disinterest in the outcome and disposition. Indeed in some provinces, this has been carried so far that it is considered to be improper for the Crown to make a recommendation as to sentence. Another view, however, is that the state, through the prosecutor, has a very real interest to protect through the trial, conviction and sentence. It is not the function of the judge to represent the state's interest or to reflect community desires in particular cases. Rather such interests can best be put forward by the prosecutor.

The judge at sentencing, however, has a prime function to see that justice is done with fairness and humanity. Where imposing a sanction would appear to serve no purpose in protecting societal values or in giving fair satisfaction to the victim's needs, the judge should have

authority to determine that justice and the common good would both be served by passing a sentence that clarifies the conflict but does not involve a sanction. The function of the judge, then, ought not to be to represent the state's interest in sentencing or disposition but, having listened to the victim, the prosecutor and the offender, to determine, with reason and compassion, what sentence is just and equitable within a framework of sentencing policy.

Judges or Sentencing Boards

At present, the trial judge makes the sentencing decision. In other countries, the jury or the sentencing board may pass sentence. Still other variations provide for lay assessors to sit with the judge and to assist in sentencing. More recent proposals in the United States stemming from a strong concern over inequalities in prison terms suggest, that when a judge decides to impose a sentence of imprisonment, the term should not be within his discretion but should be a mandatory term provided by statute.

Very few people in Canada, at least, seriously suggest that the sentencing power be taken from judges and given to juries. There is some support, however, for the notion of sentencing boards. This support derives from several motives. First, there is a recognition of the complexity of sentencing, particularly where rehabilitation is the primary aim. Accordingly, sentencing boards are looked to by some people as devices whereby the expertise of the social sciences may be brought to bear in support of the criminal law. Secondly, there is a discontent with wide disparities in sentencing: boards are looked to as devices whereby consistent policies and practices may be followed by a handful of men and women, thus bringing a greater uniformity to the administration of the criminal law.

The desire to bring expertise to the sentencing process, as indicated, stems from a belief that, in sentencing, the disposition must fit the offender rather than the offence. It reflects a faith in rehabilitation and treatment and an assumption that the means to treat and cure are at hand if only we have the wit to use them. It has already been said that this paper rejects this approach to sentencing as mistaken and unfounded. Where the basic approach reflects a just but humane sentence, there is no need for the special knowledge of the social scientist to displace the common sense of the judge.

The social sciences should rather be used in testing assumptions in a sentencing policy and providing evaluation to the effects of sentencing practices, thus contributing to improved sentencing options and policy.

As for greater uniformity in sentencing, it seems reasonable to suppose that a board might be able to proceed with less disparity and greater consistency than one thousand or more individual provincial court judges and magistrates spread across half a continent. Logistically, however, one board could not begin to handle the almost one hundred thousand convictions recorded annually, under the Criminal Code. There would have to be many boards, one in each judicial district, for example. Even then, it is not likely that the Boards would be expected to deal with anything other than the more serious cases. As between the boards there would still be need for coordination and consistency.

Where sentencing boards are in operation, in California and in the state of Washington, their function is limited. Neither of the Boards in those states has jurisdiction unless a judge first passes a sentence of imprisonment. Thus one area of disparity remains even with those boards, and that is in the initial decision to impose a custodial as opposed to a non-custodial penalty.

In the state of Washington, once the judge decides that imprisonment is called for, he must impose the maximum sentence set out in the statute; the judge may, however, set the minimum term to be served before release on parole. The Board may then re-examine and re-determine the term of the sentence that must be served. The California Board has similar powers, but in addition, the Board, not the judge, sets the minimum term. In addition, both the Washington and California Boards serve as the state parole authority.

The experience with the California Board has given rise to persistent criticism both by prisoners who resent the uncertainty of the indeterminate sentence and writers who point to the long terms of imprisonment served in California and the inequality and disparities that have resulted from the Board's work. Incidentally, the California Board has not lived up to its expectation of providing social science expertise in the sentencing process. Most Board members, until recently at least, were former policemen or correctional personnel.

From the above, it can be seen that sentencing boards offer no panacea to the problems of expertise or uniformity. Indeed, the elusive goal of justice in sentencing has given rise to legislation where discretion in determining the length of the terms of imprisonment to be imposed is removed altogether. The disparity problem, however, is not cleared up, it is simply removed to the parole release stage. The disparities are not so visible but may be even greater at that level. As yet another level, sentencing boards may promote disparities. The Washington Board, for example, leaves power with the judge to set a minimum term

before the parole board can release. This discretion can give rise to disparities, albeit on a reduced scale.

If discretion is removed altogether as to the length of the prison term, judges may respond by increasing the proportion of cases disposed of by non-custodial sentences. While this may have the desirable consequence of reducing the number of offenders sentenced to imprisonment, it ought not to be achieved at the expense of justice. In addition, where judges or Crown prosecutors wish to avoid a term of mandatory imprisonment, there may be attempts to alter the charge or accept a plea to a lesser offence. It goes without saying that plea bargaining can nullify the purposes of sentencing and reduce dispositions to a level of bargaining devoid of justice or fairness.

Structuring Discretionary Power in Sentencing

Rather than resort to drastic curtailment of discretion in sentencing and dispositions, attempts have been made in other jurisdictions to promote uniformity through structuring and channelling discretion. One important means of doing this is through a legislative statement of basic policy setting forth the philosophy, the purposes, standards and criteria to be used in sentencing and dispositions. These provide a common starting point, common assumptions and common goals. Discretion remains in the sentencing judge to apply the policy to particular cases. In so doing and in weighing the various circumstances and factors, individual values and beliefs of the judges will inevitably influence the final outcome. It is unavoidable. The most that can be hoped for is that such subjective influences do not produce results markedly different from agreed upon objective criteria.

As another device to develop uniformity in application of criteria and in weighing circumstances, sentencing councils have been used. Judges, within a particular area, study and discuss cases coming up for sentence. Each judge retains responsibility for ultimately imposing sentence in his own court but through the council "the moral solitude of the sentencing decision is lifted from his shoulders" and he is put to the test of defending his sentencing decisions in the face of an honest and rational appraisal by equals. Such an approach is currently being taken in various forms by judges in Ontario and New Brunswick, for example. In different cities and regions in Canada, judges are involved in sentencing seminars or regular sentencing councils. Indeed, various jurisdictions have used sentencing councils to some advantage and the expanded use of sentencing councils has been recommended in recent years by several law reform bodies.

Sentencing Institutes, such as those used in British Columbia, are yet another institution whereby information can be brought to judges respecting the availability or effectiveness of various sentencing options. Unlike the sentencing council which provides for a weekly discussion, institutes may be annual conferences drawing on a larger body of judges and others with interests in sentencing and dispositions with a view to discussing a wide range of issues including objectives of sentencing, current services in corrections and statistical feedback on current practices. Such meetings should help to foster a common understanding and

a common perspective with respect to purposes and dispositions in different types of cases.

Another aid to structuring discretion in sentencing is the requirement for written reasons for sentence. It would be an impossible administrative burden and quite unnecessary to require reasons in every case. At the crucial point of determining that a custodial sentence is required however, written reasons would help promote uniformity in application of criteria and in weighing various factors. Written reasons are also an aid to greater rationality in sentencing and a guide for judges on appeal. In addition, not only may written reasons have therapeutic values for the offender, but they should be of help to correctional authorities.

It goes without saying that justice demands that sentencing procedures, particularly in serious cases, should require specific findings on all disputed issues of fact relevant to the question for the sentence. This record along with the stated reasons for the sentence and the precise terms of sentence should not only promote greater uniformity of approach in sentencing but also increase the feeling that justice is being administered openly and impartially.

Essential to sentencing and dispositions is an adequate information base. This is particularly important where the conviction results from a guilty plea. In such cases, the facts may be only partially known and the wider surrounding circumstances may never come before the court. To a certain extent, this is true even in a contested trial. The rules of evidence and the demands of the trial are such, that, frequently, the situation that gave rise to crime is presented to the court within the narrow restrictions of legal issues and relevant evidence. The background of the case may never clearly emerge.

Where the offender is represented by counsel, and if counsel is conscientious, the judge should be able to get considerable assistance from the defence counsel's presentation. Too often, unfortunately lawyers view their function as all but terminated as soon as the conviction is entered. A Canadian study, for example, showed that Crown counsel spoke to sentence in 72 per cent of the cases while defence counsel spoke in only 24 per cent of the cases. The more recent diversion techniques, especially those that are operational in New York City and elsewhere indicate the important role that defence counsel can serve, not only in bringing information before the court, but also in arranging for community support services to assist in the supervision of a non-custodial sentence or in arranging for pre-trial diversion.

Currently the pre-sentence report is commonly relied on as an information base where the judge is not certain in his own mind as to the proper disposition. Studies on pre-sentence reports raise questions as to

the effectiveness of these reports and point to conflicting views as to their purposes. There is some evidence to suggest that the contents and recommendations of a pre-sentence report are not solely determined by sentencing policy but by what the probation officers think the judge wants. As in police work, interests in professional advancement and the perceived expectations of others influence dispositions. Since a great deal of the professional probation officer's time is spent in preparing pre-sentence reports, consideration should be given to the best use of pre-sentence reports as an information base in sentencing and dispositions.

Community Input in Dispositions

Throughout this paper, emphasis has been placed upon the need to keep open contact between the administration of justice, the victim and the community. In comparison with social controls arising from the community, law is a frail last defence of fundamental values. Thus community support and resources to enhance family life, individual physical and mental health, satisfying economic opportunities, decent housing and sound social relationships are the best investment people can make in protecting core values against attacks by others. Where individuals and agencies within the community do not provide the police and the courts with helpful alternatives to conviction and imprisonment, justice suffers. At the pre-trial level, especially in connection with diversion programs, there is room now for much help from volunteers to assist in providing counselling, friendship, work, guidance, education and jobs for many young offenders. Following conviction, the need for a sustained relationship between the community and the offender remains paramount. To reduce the criminalizing and injurious effects of conviction and imprisonment, there is need for individuals and organizations to provide an array of visiting services, counselling, therapy, work, recreational or other services.

Indeed, at the sentencing stage itself, one way of maintaining contact with the community and its sense of values is to have individual citizens from the community sit with the judge to assist in the disposition and sentence. Countries such as Denmark have used this device for years and while judges may not be enthusiastic about such a procedure, the community, at least, seems to welcome the opportunity to participate.

Whether it is feasible in Canada to have community input at the sentencing stage, as in Denmark and other countries, is difficult to say without further investigation. If there were to be such a contribution, persons should probably be selected from the voters' lists and asked to sit one day a week for four months. Assuming a modest fee were payable for this service, the cost should not be prohibitive.

Citizen participation in sentencing, particularly where citizens have the power to out vote the judge may raise a problem of increasing disparities in sentences, or bias, or even prejudice in sentencing unpopular offenders. If there are two citizens to assist each judge they may out vote him but it is more likely that lay persons would seek an

accommodation of views with the judge. If the judge is out voted, as long as the sentence is in accordance with the principles and standards set forth in a Sentencing Guide, there can be no real objection. Sentences would, as now, be subject to appeal, so that if a sentence were out of line with other sentences in similar cases it could always be corrected. The risk of prejudice, irascibility or unreasonable disparities is probably not greater with individual citizens than with judges. Studies of sentencing by juries as compared with judges do not support fears of undue bias or prejudice among lay members. Moreover, abuses in discretion can be guarded against, as suggested, by a statement of purposes, criteria and standards in a Sentencing Guide and through provision for review of sentences on appeal.

The benefits to be gained from citizen participation in sentencing and dispositions would reinforce the socializing effect of the criminal law upon many persons in the community. It should strengthen the forces tending to reduce crime and enhance community interest and participation in the administration of justice. At the same time, the primary values and interests that the community wants to see protected can be made clear in a variety of differing circumstances. Participation of citizens should thus foster the main purposes of sentencing and dispositions: the protection of the community by reinforcing fundamental values relating, for example, to privacy, property or inviolability of the person.

Compensation

Finally, if sentencing and dispositions is to give satisfactory recognition to the role of the victim and the need for restitution, it will be necessary to make renewed efforts to provide offenders with employment and to pay them wages that do not fall below minimum standards. Even so, there may be cases where the offender is not able to make adequate restitution. In such cases and in cases where the offender has not been apprehended or convicted, the state should supplement the payments of the offender or, on its own initiative, provide compensation so that the victim is fairly compensated for his loss. Various types of compensation schemes may be found in different countries but relatively few are soundly tied to a theory of sentencing or corrections.

The justification for a compensation scheme may be said to arise from the social reciprocity which H. L. A. Hart suggests is the basis of society. As Workmen's Compensation is a recognition of the social obligation to make good individual losses arising out of exposure to risk in performing highly useful industrial work, so, too, in a society that places a premium on openness and freedom from pervading police control, the citizen who falls victim to a crime should be compensated as a matter of social reciprocity. Thus, compensation to victims of crime is not purely a matter of private civil law, for a public interest is at stake; it is not only a matter of humanitarian concern and welfare law but a matter of fairness and justice. Indeed, on a practical level, a comprehensive compensation scheme serves to promote over-all security. The victim's as well as the public's apprehension, resulting from a crime, may be allayed in part by prompt compensation. To the victim, particularly, such support is likely to be as great a psychological support as it is financial. Forthcoming papers will examine this aspect of sentencing policy in greater detail.

Summary

Assuming that one of the purposes of the criminal law is the protection of certain core values in society, is it not an important function of sentencing and dispositions to assist in making clear what those values are? The educative effect of the sentencing process cannot be lost sight of. Through the sentence the court may influence the behaviour of others by confirming for them that their law abiding conduct is approved and that it is still worthwhile to resist temptation. In other cases, the sentence of the court may make clear that certain conduct is more blameworthy or less blameworthy than was the case in former days. This may be particularly true in a transitional society where values are undergoing constant reconsideration.

History and the social sciences indicate that almost all human societies, regardless of their political structure, must be prepared to accept the reality of criminal activity. At the same time, an accumulating body of research and writing throws growing doubts upon the deterrent effects of sentencing itself as opposed to the total deterrent effect of apprehension, arrest, trial and public conviction. Moreover, penological studies indicate that the rehabilitative ideal is not the heralded remedy it was once thought to be. Both rehabilitation and deterrence, moreover, raise ethical questions concerning the moral right of society to use one man solely as an example to others or to give treatment to prisoners without their consent, especially where such treatment may be "experimental" or result in lasting bodily or personality changes.

Despite doubts about the rehabilitative or deterrent effects of sentencing, however, common sense demands that the criminal law continue to impose sanctions in order to discourage criminal conduct. On the positive side, sentencing and dispositions can be used to take note of the wrong done to protected values, can re-affirm the values that are at stake in the particular criminal offence and can assist in restoring the social balance after the crime has been investigated.

If emphasis is to be placed on sentencing and dispositions as a learning process, in classifying and re-affirming values, alternative procedures may need to be developed. In many crimes, the offence is not one between two strangers but arises out of family or neighbourhood disputes. Need such criminal offences be dealt with in the adversary context of a criminal court? Is there not room for developing settlement and arbitration procedures for this type of offence?

To recognize crime as a form of conflict has implications not only for the procedure to be used in resolving the conflict, but also for the role of the state and the victim in such procedures. It is suggested that in many crimes the state can afford to forego its paramount role and permit the victim to take an active part in settlement and mediation. Even in cases proceeding to trial, the victim's role and interests should be given greater priority than they are in the usual criminal trial.

Recognition of crime as conflict and the importance of criminal law in clarifying the values at stake in the conflict, places importance on providing for dispositions of cases without conviction or, in some cases, disposing of a case, even on conviction, without imposing the usual sanction. It would be a matter of judgment, exercised according to specified criteria, whether the wrong done in each case deserved the elaborate ritual of a trial and sentence or whether settlement, mediation or a simple conviction would be sufficient. The arrest and trial and the settlement and mediation procedures in themselves are seen to carry an educative and sanctioning effect. In this way, sanctions may be seen to be operating at three levels: (1) pre-trial diversion by settlement or mediation, (2) the trial itself, and (3) the sentence of the court.

To fulfill the educative function of sentencing and dispositions, and to recognize the wrong done to the victim, emphasis may well be placed on restitution supplemented by a comprehensive compensation scheme to take care of criminal injuries. Through restitution, the reconciliation of the offender, victim and society is encouraged. Even in more serious cases that go to trial, restitution and community oriented sanctions should not be lost sight of. Imprisonment, because of its costs and doubtful efficacy, should be used with great restraint while various forms of limited deprivation of liberty, coupled with probation, may be seen as an alternative to traditional imprisonment for some offenders. Indeed, restitution, imprisonment and probation will be the subject of forthcoming papers.

The above view of the nature of crime and the function of the sentencing process means that dispositions and sentences should be governed by what is fair and just. It has already been suggested that the justification for the state's intervention through sentencing and dispositions is that it serves to protect core values. The extent and degree of intervention, however, ought not to be measured solely on the basis of the common good but ought to be limited by common notions of fairness and justice. Thus, the innocent ought not to be subjected to the sentencing and dispositions process; dispositions and sentences ought not to be inhumane or cruel; dispositions and sentences ought to be proportional to the offence; and similar types of situations ought to be dealt with more or less equally.

At some future day, more may be known about treatment, rehabilitation or deterrence and dictate a sentencing policy framed in those terms. At present, rehabilitation should not be ruled out entirely but given scope within the confines of a sentence or disposition determined on the grounds of fairness and justice. Similarly, deterrence, to the extent it is operative, and incapacitation may give expression to the need to serve the common good.

In application of the above principles, it is expected that many offences can be dealt with fairly and with justice on the basis of restitution. Undoubtedly, deprivation of liberty will be necessary in some cases, particularly where the offence has been extremely grave, or where the offender has had repeated convictions, or where there is evidence to suggest the likelihood that the offender, if released, would soon commit another crime of violence.

An important aspect of sentencing philosophy as suggested here is the claim the victim has upon society for compensation for criminal injuries. While compensation could be based on charity, or on a notion that society is in breach of its promise of protection to the individual, it may be preferable to see compensation as a claim arising from the reciprocity of social living. In the interests of a free and open society, some minimal level of crime must be tolerated; the alternative is a closed society, heavily fortified and severely repressive. In the interests of pursuing a relatively open society, however, recognition should be given to those who are victims of crimes and whose injuries cannot be totally compensated through restitution.

Another issue in sentencing and dispositions relates to disparity, particularly among prison terms. This is of concern to the extent that the disparity arises out of a failure to follow common principles. The solution does not lie in taking all discretion away from prosecutors, judges or parole personnel but rather in channelling and structuring discretion through a statutory statement of principles, purposes, standards and criteria. Other aids to the uniform exercise of discretion include written reasons for decisions, sentencing councils and decisions openly arrived at with provisions for review and appeal.

Finally, a primary concern for justice in sentencing and dispositions requires that further attention be paid to the whole question of fairness in decision making in matters affecting prisoners' interests. This will be the subject of a separate paper, as will compensation for victims of crime.

This paper has attempted to lay out the basic principles which will guide our approach to specific issues and concrete recommendations. Responses to this working paper, at this time, are important for our further work.

alternatives to the adversary system

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Part 1

Introduction

In western society, particularly in North America, the criminal justice system has come under increasing attack. Critics of the system fall into four main categories.

The first category consists of social scientists who have tried to show that the system does not achieve its objectives through the classical mechanisms of rehabilitation, deterrence and so on. They call for more research into the technology of corrections and the better application of existing knowledge concerning behaviour modification, thereby enhancing their role in the process. The second group consists of lawyers who demand that "due process" be guaranteed to persons caught up in the legal system at all stages regardless of the economic or social position of the individual. The assumption made by this group is that if everyone had access to a lawyer from the time of arrest to release on parole the basic problems in the administration of justice would be greatly reduced. All correctional decisions would be open to adversarial scrutiny in which the lawyer would play a dominant role. Arguments coming from lawyers appear to be self-serving as well. The third group consists of political radicals who view the criminal process as serving illegitimate socio-economic interests. They do not object to the process as such, but merely the way in which it selects its targets. Indeed, most individuals in this category would extend the power of the state in an effort to achieve its goals. The final group consists of average citizens who have become concerned about the capacity of the state to protect them. They call for greater police protection, longer sentences and tougher correctional measures in the belief that present policies pursued more vigorously will lead to better control.

While each of these groups can make valid criticisms of our existing system and together have created a major crisis of confidence it is my belief that none of the points made are fundamental. None of them examine the mechanism itself. My thesis is that the present criminal process as a technique for problem-solving is inherently unsuited to deal with many of the issues to which it presently addresses itself. Adversarial proceedings, with their concentration on due process, all or nothing outcomes, and formally defined rights and wrongs, lack the capacity to reconcile differences that exist between individuals or between individuals and the group. Improvement in correctional techniques will not achieve more than new rationalizations for essentially punitive behaviour, because corrections is based on the mistaken notion that the majority of offenders are "sick" and in need of involuntary "treatment". The selection of a different group of people to be processed by the criminal justice system in the interest of a new political order will do nothing but change the intake. Stepping up the war against crime will provide employment in the anti-crime industry, but will do little to solve the underlying problems that exist in society.

We must now recognize that there are serious limits to what the state itself can achieve through the formal agencies of social control. Such an examination will hopefully lead us to criteria for determining the kinds of human conflict that can properly be a subject to legal control and alternative intervention strategies that are more likely to be appropriate to the resolution of others, leaving a broad area of human interaction untouched by both law and bureaucracy.

Basic Assumptions

1. In a period of rapid social change a healthy society is one in which there is much expressed conflict over values, goals and competing interests. Conflict is one of the ways in which individuals and groups define themselves in relationship to their community. The expression of such conflict is an important means by which a society learns about itself, sets priorities among competing interests and adapts to change. It is therefore important that the state does not attempt to eradicate conflict but rather provide appropriate means through legal and other institutions for their expression. This does not mean that all conflict should be institutionalized but rather that institutional forms of expression be made available.

2. The criminal law is one and not necessarily the more important of the ways in which individuals learn to determine their relationship to each other and to the group. Standards learned in the home, the

school and the community are equally if not more important. We should not allow legal institutions to become the sole arbiters of values in society.

3. The sanctions available to the law are only effective to the extent that they operate within a set of shared definitions of appropriate and inappropriate behaviour in the specific community within which it operates. The law should not be merely a reflection of public opinion in a particular community for it then would fail to fulfill its essential conservative function of linking past values to present concerns. On the other hand, if the values imbedded in law are antithetical to present needs, the law loses its moral force. While one cannot expect the law to be identical to social mores at a given time, one can demand that it be able to coexist with them.

4. Most people wish to obey the law provided they know its demands and believe it comes from legitimate authority. For most individuals the costs of obedience to law are outweighed by the gains derived from knowledge that other individuals are similarly constrained. Therefore, law and freedom are prerequisites for each other in a stable social order. This breaks down, of course, for individuals who question not only specific laws but the legal order itself. It is also inapplicable to those individuals who are unaware of their legal responsibilities or whose circumstances make it impossible for them to obey particular laws.

5. The criminal law can be no more than a framework of *reasonable* expectations within which individuals may act. Our criminal law for the most part is written, interpreted and enforced by individuals who enjoy a relatively successful position in society. They usually experience very little difficulty in conforming to law. The targets of the criminal process, on the other hand, are less favourably situated. Due to personal, economic and social circumstances, many of them experience great difficulty in conforming to standards established for them. It is important, therefore, that the standards of conduct imbedded in our law be those that are within the reach of a majority of the individuals to whom they are addressed.

6. The criminal law as a body of rules has little meaning to the average citizen. Those rules are demonstrated and made real by the *criminal process* which can be defined as the activities of the police, of the courts and of the correctional agencies. People come into contact with individuals representing the law and it is from interaction with these people that most people learn about law.

"Law in action" as opposed to "law on the books" consists of *rules* (the Criminal Code), *formal structures* (the police, the courts

and the correctional agencies) and *individuals* interacting with one another in both authorized and unauthorized ways. Law reform traditionally concentrates on formal rules with little attention being paid to how those rules will be administered by agencies and individuals. If legislative enactment is to have impact on society it is therefore important that the drafters of those rules be sensitive to the ways in which institutional structures and individual dynamics can modify, extend or abort the purposes of legislation.

Criteria for a Criminal Justice System

Within the framework of the assumptions outlined above, we can now establish a number of minimum requirements of the criminal process if it is to be seen to be legitimate by ordinary members of the public. We can then go on to examine our present system in the light of these criteria. Finally, it will be possible, at least theoretically, to explore some of the alternatives that might be available to deal with the problems identified.

Visibility

The criminal process should be visible so that it can be subject to effective public scrutiny. Low-visibility decisions should be brought into the open so that they can be evaluated not only by specialists but by ordinary members of the public.

Accessibility

The agents of social control including the police, court officials and correctional workers, should come into direct face-to-face contact with the public. This is necessary not only to ensure that these officials are aware of public opinion but also to ensure that citizens do not abandon their responsibility for guiding the processes of decision-making as it may affect their interests. Whenever possible, the ordinary person should have direct access to state officials without having to rely upon intermediaries such as lawyers, politicians, or community "spokesmen". In order to make this criterion effective it is necessary to guard against over-centralization of government services in the criminal justice field. Courts should be localized and police officers should be required to become involved in their community. To the extent possible, volunteers should take over tasks presently exclusively reserved for professional and semi-professional persons.

Simplicity

The rules of law and the values underlying them should be expressed in simple language so that ordinary citizens can understand them, criticize them and participate in the process of changing them. Law reform becomes the exclusive jurisdiction of experts once the language of the law becomes specialized. It is also important to ensure that ordinary citizens are capable of understanding the law as it affects their rights and responsibilities. The present rules are unnecessarily complex. While most of them are based on common sense and experience, they are expressed in language that makes it difficult for the public to comply with their demands.

Concordance

There should be a degree of concordance between values imbedded in the law and those operative in a specific community. While the two sets of values need not be identical, effectiveness of law depends upon public support. In a rapidly changing society it becomes increasingly difficult to keep the law up to date. It becomes even more difficult when social mores vary so widely from one community to another. Even the word "community" needs a new definition in the post-industrial era as geography no longer defines community in social terms. It may be necessary to define community in terms of a "community of interest" or, a "shared activity". This means that an individual may function in several communities at the same time with a number of different sets of norms governing his behaviour in his work space, his family space, his recreational space and so on.

To the extent that law should attempt to govern his behaviour in any of these areas it becomes necessary to think of a number of different sub-systems of law. A national criminal law system would concern itself solely with serious crime of national significance and those offences the facts of which are likely to be interpreted fairly similarly in different communities. These two categories would include organized crime, treason, large scale commercial crime, murder and so on.

The bulk of crime is of an essentially local and private character. The meaning and social significance attached to these offences would also vary depending upon the type of community within which they took place. Moreover, what might be considered necessary by way of punishment or control would also vary depending upon the mores and folkways of the community within which they took place.

The crime of assault is a good example. The very definition of what constitutes an "assault" should vary depending upon whether it

occurred within a family, in an urban or rural setting, at a dance, on a dock, or between friends, enemies or lovers. The law's present definitions of justifications or excuses around the notions of self-defence, provocation, and duress seem strangely out of place in some contexts. Nonetheless, the definitions of the ingredients of this offence tend to be "objective" and fairly rigid.

The doctrine of uniformity of sentence requires the court to operate within a relatively narrow range of sentence in "apparently" similar circumstances. But even here the courts, in determining what will be relevant as to sentence, typify crime in terms of criteria that may or may not be considered important by individuals in specific communities.

Throughout the criminal process we see the construction of legally relevant categories of meaning in the typification of crime which serves the function of reconstructing the facts in ways which may be relevant to the law but not necessarily to the community. By limiting the range of possible interpretations of the behaviour in question a legal process also limits its capacity to deal with every day, commonsense interpretations of that behaviour. To the extent that legal typifications and every day meanings diverge the law loses its social impact and moral force. In order to make the law concordant with community values it therefore becomes necessary to decentralize the criminal process not only in its administration but in its law-making and law-interpreting functions.

Accountability

At the present time, legal actors such as police officers, lawyers, judges and correctional workers are accountable for their behaviour to members of their own professional hierarchy. Thus, a police officer's behaviour is subject to supervision and review by senior officers, judges' decisions are appealable to higher courts consisting of other judges, lawyers are subject to discipline by their professional bodies and the work of correctional people is subject to evaluation and review by superiors within their agencies. At no stage in the process does the public have an effective opportunity to influence decisions ostensibly made on its behalf.

Formal accountability is no guarantee of effective influence. The establishment of citizen review boards or the appointment of one or two professional "laymen" to governing bodies does not appear to be a satisfactory answer. Attention should be directed towards creating structures which promote officials to *feel* accountable towards the public. Formal bureaucratic structures tend to restrict the type of face-

to-face contact between officials and the public that would be necessary to promote such accountability. If citizens are to be treated as people and not as "cases" it becomes necessary to reduce the social distance existing between officials in the administration of justice and the public. The required destructuring of bureaucracy entails a commitment to decentralization which may be resisted by certain officials currently wielding power.

Effectiveness

In order for the criminal justice system to be seen as legitimate it must also be shown to be effective in delivering on its promises. Effectiveness should be seen in terms of the economic and social costs borne by both society and the offender as the result of existing practices. The unfulfilled promise of rehabilitation as an achievable goal within the existing correctional system has led to widespread disillusionment among the public and cynicism among offenders. The gap between aspiration and fulfillment in corrections must be narrowed. There are two ways of doing this. First, we should reduce the level of public expectation about corrections as an effective method of crime control. Certainly the most favourable interpretation that can be placed on recent research evaluating the efficacy of corrections leads to very modest conclusions. Secondly, some improvement in correctional methods may not be beyond our grasp even within the state of present knowledge and facilities. What is needed is a commitment to implement those measures believed to be effective across the board so that they become more than merely token efforts for the purpose of public relations. Thus, it becomes important to ensure that everyone interested knows the extent to which specialized treatment services are made available to those offenders requesting or requiring them. Only in this way is it possible to generate a favourable climate of public interest and support for the translation of goals into broadly based correctional programmes.

Many apparently useful programmes tend to be symbolic gestures only. Born out of a sense of crisis and the need to demonstrate to the public that "something" is being done, a new programme is launched. It tends to be a token effort only, its impact minimized by subsequent administrative inertia, budgetary starvation and other little publicized means. Harold Lasswell put it as follows:

> It should not be hastily assumed that because a particular set of controversies passes out of the public mind that the implied problems were resolved in any fundamental sense. Quite often a solution is a magical solution which changes nothing in the conditions affecting the tension level of the community, and which merely permits the

> community to distract its attention to another set of equally irrelevant symbols. The number of statutes which pass the legislature, or the number of decrees which are handed down by the executive, but which change nothing in the permanent practices of society is a rough index of the role of magic in politics. (Harold Lasswell, Psychopathology in Politics, New York, 1930, page 195).

Little wonder there is so little money spent in evaluating the results of changes in law enforcement and correctional policies. Neither the public nor the agencies concerned really want to know. But the long term interests of both require adequate evaluation and re-evaluation of existing programmes. Some profound and terrible truths may emerge from such evaluation but it is the measure of the maturity of a society in the degree to which it is prepared to acknowledge its own impotence in dealing with social problems such as crime.

This acknowledgement would force us to recognize the enormous social costs of proceeding on the basis of conventional wisdom. If particular correctional programmes are proven to be ineffective or at least no more effective than any other programme then we would be able to choose the least expensive one. If two or more programmes can be shown to be manageable within acceptable economic costs then we might be tempted to choose the one that involves the least interference in the life and liberty of the individual. Cost-benefit analysis is no longer a luxury but a compelling need.

Catharsis

The legal process is one of the ways in which the values in a community may be expressed. A good legal system allows both for the expression of dominant values and challenges to them. Courts are a forum in which symbolic struggles take place in a highly ritualized and dramatic form. Such rituals may have little concrete value in terms of actually bringing the problem concerned under control but they have high symbolic value which cannot be ignored. The public wish to participate in the dialectic between good and evil, challenge and response, fear and reassurance and to feel a catharsis at the end of such struggles. The public need to feel reassured that "justice" triumphs.

Legal symbolism brings out in concentrated form those particular meanings and emotions which members of a community create and reinforce in each other. The drama of the courtroom has great appeal because it calls to public attention those felt needs and concerns which are shared in a society. The more ambiguous and confusing life becomes, the greater becomes the need to find meaning and order in social life. A good legal process maximizes public participation in

a common symbolic enterprise calling attention to joint interests in a compelling way.

The quantum of punishment demanded by the public does not simply depend upon the degree to which misdeeds depart from acceptable norms. The dramatic display of collective will through the legal process can of itself have a cathartic and tension-reducing effect. Whether this occurs depends on at least two factors. First, the need to impose savage punishment upon offenders at least in part on the degree of generalized and non-specific anxiety existing in the community. If offenders are merely scapegoats for other concerns, their punishment merely serves to divert attention from underlying problems. The answer to this does not lie within the courts alone but in a broadly based programme. Second, catharsis cannot take place if the moral issues involved become obscured. Paradoxically, the attempt to eliminate retribution as a legitimate purpose of sentencing leads to rather more severe sentencing practice. The rehabilitative ideal, in particular, leads to massive inconsistency in the name of individualization and rather more severe sentencing practice in the name of treatment. Since research evidence seems to suggest that within the framework of existing knowledge and resources rehabilitation is a myth and deterrence depends more on the certainty of punishment rather than its severity, it would appear that retribution should be given a more prominent place. It also seems likely that if such were done the tension level in the community would be reduced, allowing the courts to moderate existing sentencing practice.

Part 2

Having specified the criteria that will be used for evaluating the criminal justice system we can now trace its development, setting the stage for an examination of alternatives.

The Diminishing Role of the Victim in the Criminal Process

Our criminal law originated from a variety of customs employed to settle disputes between individuals and groups. Primitive customary law was directed towards laying down a body of rules that would permit rights to be determined and disputes to be settled in a uniform if not predictable way. Elaborate schemes of compensation developed with a relatively fixed scale of penalties for specified "crimes". The process was victim-initiated and the offending party or his group "repaired" the loss or injury according to a prescribed schedule. The role of third parties was minimal, essentially restricted to ensuring that the rules of the game were observed.

The social need for a jurisprudence governing disputes existed then, as now. Individuals gained from being able to predict with reasonable certainty, the likely social response to their conduct. Groups gained, as social ordering within an organized group would have been impossible if individuals did not submit themselves to rules.

Institutions developed governing aspects of human interaction and conflict in terms of a specialized jurisdiction and language. Law is, as Fuller points out, a special language of human interaction and the grammar of much contemporary criminal law can be traced to early

attempts to control conflict by subjecting it to rules. Early law had no higher objective than to ensure that aggrieved parties were compensated by the aggrievor in the exact amount due, no more and no less. Thus, early criminal law can be categorized as a mechanism of dispute settlement with social order being the possible payoff but not a manifest goal.

With the emergence of the nation state comes the formalization of customary law and gradual shift away from dispute settlement towards social control. The state acquired a monopoly over the legitimate use of force. Victims, their kin and kadis, were denied their previously exercised power to determine, within limits, the penal consequences for crime. They now became mere witnesses to breaches of the King's peace. Offenders paid their debts to "society" and not to the person injured.

In the course of this transition a redefinition of the parties was effected. The state began to assimilate victims' interests, recognizing and supporting only those which were deemed synonomous with its own. Compensation for the harm done became a civil matter and the role of the victim in precipitating if not participating in the crime was largely ignored.

There is little evidence that the King or Parliament really felt threatened by crime when they began to exercise jurisdiction over it. Rather, it appears that the main motives were to wrestle control from the manorial lords and to obtain the revenues derived from courts. The earliest state run criminal courts were used as a direct method of taxation.

With the industrial revolution came the creation of hundreds of new offences, mostly concerned with protecting the use and enjoyment of property. The criminal law became a class weapon protecting the group interests of the "haves" from the aspirations of the "have nots". But even here the individuals actually victimized were not compensated, rather offenders were hung or transported, effectively removing the possibility of accommodation between the parties.

There were a number of consequences flowing from this shift, not the least important being a severe loss in the integrative function of law. The law's capacity to reconcile differences is rooted in age old concerns for natural justice. This concern in turn is based on a notion of returning things to their natural order—a state of equilibrium between the parties that existed prior to the event. While there was no way to undo the harm, it was possible to subject the offender to an equivalent evil and thereby bring things into balance. Crimes were originally understood as the gaining of an advantage by one person over another. Once gained, this advantage cannot be lost unless

and until the criminal undergoes a disadvantage in a precisely relevant aspect, namely, his subjugation to the victim whose rights he freely flouted in the criminal act. Thus, the balance of advantages and disadvantages as between citizens could be restored. The victim would feel that justice had been done and the offender, treated always as a responsible moral agent, could expiate his guilt and thereby retain all the advantages and obligations of community membership.

The modern criminal process, with its concentration of social defence, rehabilitation, deterrence and incapacitation, denies the victim remedy. Many victims feel doubly victimized: first by the offender and second by the criminal process to which they are subjected with no apparent payoff for them. They are not consulted at any stage of the process nor are its technicalities usually explained. They may suffer further financial loss due to attendance at trial, and the possible conviction and sentence to imprisonment of the offender virtually guarantees that compensation will not be made. Due to cost, embarrassment and the uncertainty of outcome, many victims choose not to initiate the criminal process by informing the police about the commission of an offence. The result is a growing mistrust in the capacity of the state to adequately protect citizens and a feeling that appropriate "justice" is not being meted out in the courts.

The Growth and Mystification of Law

During the past one hundred years criminal law expanded exponentially. Penal sanctions are being attached to all kinds of behaviour as the state attempts to exercise control over social life in a manner that has no precedent. The decriminalization of certain types of conduct (private homosexuality between consenting adults, for example) has attracted much publicity and serves to mask the extension of the criminal sanction to a wide variety of human activity that is not considered either immoral or socially dangerous by the majority of citizens. In Canada, only about 6% of federal offences are now contained within the Criminal Code. Moreover, the largest number of offences with penal consequences are not contained within federal legislation at all, but rather in provincial statutes and municipal by-laws. Many of these new "crimes" are almost impossible to enforce effectively. The result is that the frequent commission of offences of some sort becomes almost inevitable for most people, particularly if they drive a car, are engaged in economic activity or function within any area of social life governed by statute or regulation.

Most of these newly created offences hold the offender strictly liable whether or not he intended to commit the offence and whether or not he was reckless or even negligent in committing it. A man may do his best and still be held criminally liable.

These factors combined effectively to neutralize the law as an effective moral force. While some people may be able to draw a distinction between serious common law crimes (*mala in se*) and new regulatory offences (*mala prohibita*), for others the distinction breaks down leading to disrespect for law in general.

It is not suggested that there is no need for legislative activity to deal with new problems in which the public interest is affected. Nor is it suggested that one should not consider using penal sanctions as a method of encouraging compliance to that interest. It is fair, however, to point out that the simple prohibition of conduct by penalizing it frequently does little more than to give assurance to the public that "something is being done". Murray Edelman makes the point that many economic and other regulations are nothing more than exercises in symbolic reassurance. He goes further to suggest that some of these statutes are passed with certain knowledge that they will not be enforced. He comments:

> ... one of the demonstrable functions of symbolization is that it induces a feeling of well being: the resolution of tension. Not only is this a major function of widely publicized regulatory statutes, but it is also a major function of their administration. Some of the most widely publicized administrative activities can most confidently be expected to convey a sense of well-being to the onlooker because they suggest vigorous activity but in fact signify inactivity or protection of the 'regulated'.

A large proportion of infractions of law do not become detected or penalized. Automobile drivers and policemen are both aware that most speeders will not be caught or fined, and both adapt their behaviour to this assumption. The gain of taking calculated risks in filing income tax returns is so clearly understood and so universally played that it needs only to be mentioned here.

Since we all are "criminals" as far as our habitual and routine activity is concerned, it becomes necessary to create a "second code" which determines how the "game" of law enforcement will be played. This second code consists of all the hidden rules which determine the exercise of discretion in the enforcement of law. Law then becomes, as Edelman points out, not a command but rather a "virtuous generalization around which a game can be played".

Thus, we can seem to eat our cake and have it too. We can on the one hand believe in the power of the state to deal with perceived threats

in our environment through the uniform application of law, and on the other hand see to it in its daily application that it does not interfere with or jeopardize important interests. The hypocrisy in the situation arises precisely because individuals are differently situated with respect to their capacity to make the game of selective enforcement work for them. It is no accident that it is the activities of the politically and economically powerful that are not effectively circumscribed by law despite the existence of a mass of legislation ostensibly dealing with such activity.

Coupled with the growth of law in recent years, has been an increased tendency towards its mystification. Mystification occurs when legal procedures become sufficiently complex that they cannot be understood by ordinary citizens and thus become the property of a select professional group associated with the courts. The elements of ordinary crimes such as theft have become so difficult to understand that it took the English Law Reform Commission a full three years to reformulate the rules on a slightly more rational basis. Even then it is highly unlikely that most lawyers in England will fully understand the new law of theft creating the need for a specialty bar with a select group of experts having a proprietary interest in maintaining mystification. Law thus becomes "privatized".

The history of increasing complexity in criminal procedure is instructive on this point. The earliest King's judges in England had a severely circumscribed jurisdiction over the trial process. They conducted criminal trials at the assizes of those accused persons whom the local Grand Jury presented to them. They were required to accept the "facts" of the cases as found to be true and submitted. Accused persons were not entitled to testify on their own behalf and there was little need for much evidentiary law. The Grand Jury was free to determine the issues and facts unfettered by legal technicalities, assessing in the course of their judgement much information that would now be excluded. Such evidence would include what is now known as hearsay, reputation or character evidence together with testimony which would not be considered relevant, material or trustworthy in a modern criminal trial. In other words, local citizens were able to interpret the meaning and relevance of all the circumstances surrounding an alleged offence as they saw fit. Justice was very much the property of the local community, each community defining it for itself depending upon its needs, interests and concerns.

Undoubtedly the potential for abuse was high in these locally controlled courts. It is clear that not all citizens had equal access to the process and it is likely that there were many instances in which individuals and groups used it as a weapon to "get at" other individuals

and groups. "Outsiders" were particularly vulnerable to abuse by the local citizens. At the same time it seems fair to point out that these courts operated within the fabric of community norms, with checks and balances built in, not in formal rules, but in public knowledge and public participation.

From the fifteenth century on we see the slow and steady erosion of local autonomy, a decline in the role of both the Grand and Petty Juries, the development of a body of technical rules governing both procedure and evidence, the birth of a new profession—that of the lawyer, and generally the pre-emption of the layman from the criminal process. The trend is continuing with the narrowing of the category of offences for which an accused person may opt for trial by judge and jury, a tightening of the rules governing standing for lay advocates, the professionalization of the judiciary at all levels and the growing complexity of the legal rules themselves.

Lawyers secured for themselves a radical monopoly over the criminal process. The courts became private clubs with full membership rights to judges and lawyers and guest privileges to a few psychiatrists and social workers provided they agreed to submit themselves to club rules.

The key to exclusive membership is knowledge of the special language of the law. Those with such knowledge can only maintain their monopoly by refusing to share it. Thus lawyers, like all professional groups, have a vested interest in mystification. Little wonder that impetus for simplification does not come from professionals.

The gains hoped for in the centralization of authority do not appear to have materialized. Bias, prejudice and the protection of the socio-economic interest of the elite did not disappear, as such recent research shows. Rather, these processes became submerged in the rules and procedures themselves and are less vulnerable to challenge because of their apparent complexity. Thus, the power of the law to maintain the *status quo* lies in its magical properties. Mystification therefore is one of the main bulwarks against social change. It follows that simplification of rules is not simply a technical question. It necessarily involves a fundamental shift in power relations and is therefore a political question.

Berger and Luckman describe the techniques employed to maintain the barriers between professional groups and the laity:

> ... this is done through various techniques of intimidation, rational and irrational propaganda (appealing to outsiders' interests and to their emotions), mystification and, generally, the manipulation of prestige symbols. The insiders, on the other hand, *have to be kept in.* This requires a development of both practical and theoretical procedures by which the temptation to escape from the sub-universe

> can be checked ... An illustration may serve for the moment. It is not enough to set up an esoteric sub-universe of medicine. The lay public must be convinced that this is right and beneficial, and the medical fraternity must be held to the standards of the sub-universe. Thus the general population is intimidated by images of a physical doom that follows "going against doctor's advice"; it is persuaded *not* to do so by the pragmatic benefits of compliance, and by its own horror of illness and death. To underline its authority the medical profession shrouds itself in the age-old symbols of power and mystery, from outlandish costume to incomprehensible language, all of which, of course, are legitimated to the public and to itself in pragmatic terms. Meanwhile the fully accredited inhabitants of the medical world are kept from 'quackery' (that is, stepping outside the medical sub-universe in thought or action) not only by the powerful external controls available to the profession but by a whole body of professional knowledge that offers them 'scientific proof' of the folly or even wickedness of such deviance. In other words, an entire legitimating machinery is at work so that laymen will *remain* laymen, and doctors doctors, and (if at all possible), that both will do so happily.

What a striking parallel between medicine and law in this regard!

Law and the Construction of Reality

Ever since the work of Schutz, sociologists have employed the term "typification" to describe the ways in which individuals and groups construct realities in specific social contexts. What is "real" about an alleged crime will differ depending upon the context of the discussion. Moreover, the "meaning" of the event would be different for the offender, the victim, or the criminologist. Once the issue is presented to the legal system a process of redefinition takes place for the purpose of identifying the "legally relevant" facts and issues. What is really legally relevant does not arise intrinsically from the subject matter, nor does it depend upon what the witnesses or parties deem important. Rather, the legal process constructs meanings in a highly particular way in order to create a "case" with which it can deal.

In other words, it is necessary for the lawyer and the judge to make cases out of facts, the imposition of a reality which may bear little significance to the subjective experience of the original parties or witnesses. By constructing cases in this way, the legal process legitimizes itself. Since it cannot deal with the problem as understood by the parties it must redefine the problems in terms of "typical" problems capable of solution by "typical" responses available to the court. Because of the power and majesty of the law, offenders and victims can see themselves as the law sees them and begin to respond to one another accordingly.

Typification is essential in the legal process. It enables lawyers and judges to give meaning to the ambiguities of the fact situations with which they deal. It allows for categorization of problems in a manner relevant to the task and the court is thus saved from the time consuming and sometime painful process of working out *de novo* how it should respond to it. Thus, the real question is not whether typification should or should not exist (it is essential to the process) but rather whether the existing constructs or typification utilized by the law in the criminal process are useful means of interpreting crime. How then does the law presently typify crime?

Hans Mohr has provided a useful paradigm for analyzing crime in terms of offender-victim-act relationships. He points out that the bulk of recorded criminality occurs within ongoing relationships—familial, friendship, neighbourhood or commercial. Research shows that 60% of crimes of violence occur within the family and 80% between people who know each other. As far as offences against property are concerned, the bulk of these are thefts which consist, for the most part, of offences committed by employees and regular customers of stores.

Parliament, in an effort to protect victims, creates offences which are almost always defined in terms of the act alone with little consideration given to the relationship between the parties. At trial the court shifts in interests to the relationship between the accused and the alleged act and, apart from narrowly circumscribed justification of self defence or provocation, does not deal with the role of the victim in precipitating or participating in the offence. At the sentencing stage the focus of interest is almost exclusively on the offender and at the post-sentence stages of correction the victim is totally ignored.

The criminal process is designed to deal with crimes committed by strangers on unsuspecting and completely innocent victims. This forces it to typify crime in these terms and serves to protect the community from acknowledging the reality that most crime committed today is a normal and inevitable outcome of group living. This leads to exaggerated concern about the nature and extent of criminality in society and diverts attention away from those strategies most likely to be effective in dealing with them.

Research by McLintock, Chappel, Mohr and others have shown that it is possible to classify crime in ways that are more meaningful for the purpose of intervention at the police, court and correctional stages. The fact that this has not been done to date indicates the degree of resistance from acknowledging the normality of crime.

Legal typification goes further than this. In the routine handling of cases under pressures of high volume and production norms it

becomes necessary for the criminal process to restrict the range of its enquiry to the last link in a chain of events leading to the commission of the offence. A complex problem usually arising out of a long history of conflict and/or alienation becomes translated into a discrete issue severely bounded in time and in space to the precise moment and place at which the final act constituting the crime occurred. Even this act is evaluated in terms of formally defined rights and wrongs. What is now prohibited becomes permissible. What is not provable in court did not happen.

Both the offender and the victim begin to see themselves as the legal process sees them. The victim denies his role in the commission of the offence and the offender limits his responsibility to what the state can prove. Having mischaracterized the problem, neither the offender nor the victim, nor indeed the state itself, can deal effectively with it. Legal typification is designed to spawn the magical problems to which the magical solution available to the court can be applied.

The Adversary Process as a Zero-Sum Game

The criminal trials in common law countries are usually characterized as having three distinguishing elements. First, it is an accusatorial as opposed to an inquisitorial system. It is alleged that in our system the state must prove beyond a reasonable doubt every allegation made against the accused. The presumption of innocence and the privilege against self-incrimination are seen as protections for accused persons against the overwhelming power of the state to investigate crime and prosecute alleged offenders. Second, the trial itself is characterized as an adversary system, founded on a struggle between two contesting parties before an impartial tribunal. Counsel on each side does his best to establish his client's case and destroy his opponents' arguments, and from this conflict truth and justice are expected to emerge. The parties maintain in combative positions with no thought of flexibility or compromise, and from their polar positions a win or lose outcome results. Third, the judge acts as an independent adjudicator with no stake in the outcome except to see that the rules of evidence and procedure are upheld and to ensure relative equality between the parties.

This process seems to have the advantage of presenting to each party the opportunity of presenting evidence and making relevant arguments for a decision in his favour. All evidence is subject to cross examination and arguments on the law are open to attack. In his passive role as adjudicator, the judge decides the case on the evidence,

the arguments put forward by the parties and on his interpretation of the law. No solution other than a guilty outcome is considered.

As may be readily seen, the above description has all the elements of a zero-sum game. At the end of the day there must be an ultimate winner or loser and at each stage of the game, a point won by one party is a point lost by the other.

Two important consequences flow from this. First, the criminal trial guarantees that 50% of the parties go away disappointed with the result. Second, the process leads to further alienation and polarization between the parties. They come to see each other in terms of winners and losers and more importantly, see the world as made up of these two classes of people. Habitual prisoners see themselves as losers, a condition that can only be overcome by becoming a winner. Both the offender and the victim develop attitudes which are antithetical to responsible social living. Social responsibility depends upon the capacity to see an identity of interest with a potential adversary, to know how to compromise, to give a little and to take a little. If parents taught children how to relate to other children in the way in which the criminal process teaches victims and offenders to respond to one another, social life would become impossible.

Lon Fuller, in *Forms and Limits of Adjudication* (1958), laid down a number of criteria that must be met before adjudication becomes an appropriate device for dealing with conflict. He states the essence of adjudication lies in the office of the judge; he must be impartial and must be willing to hear both sides. Further, if the arguments of the parties are to have any meaningful influence on the decision, the process must assume the burden of rationality not borne by any other form of social ordering. A decision which is the product of argument must be prepared to meet itself the test of reason. Second, opinions should accompany the decision; otherwise the parties must take it on faith that their participation in the decision was real and that the adjudicator had in fact understood and taken into account their proofs and arguments. Third, the decision should rest on grounds argued by the parties or the meaning of the parties' participation will be lost. Fourth, the adjudicator must be qualified and impartial. A strong emotional attachment by the adjudicator to one of the interests involved in the dispute is destructive of the participation of the parties. The adjudicator's life experience must not embrace the area of the dispute but he must be able through personal research to understand the social context in which it arose. Fifth, the decision must be retrospective. It is not a function of the courts to create new aims for society or to impose on society new basic directives, although courts should develop case by case what these aims or directives demand for

their realization in particular situations of fact. Finally, Fuller states that a necessary condition for adjudication is that the problem before the court may be isolated as a single issue capable of a zero-sum outcome. He contrasts this with a polycentric problem—one in which there are many interacting centres, so that a change in one will have some effect on each of the others. Such a problem is unsuited to adjudication because the adjudicator must be able to consider the repercussions of his decision, which becomes increasingly complex as the number of interacting centres grows, and because it is difficult to give each effective party meaningful participation through proofs and arguments from which to derive a decision that meets the test of rationality. Fuller states that the ultimate test is whether "the underlying relationship (between the parties) is such that it is best organized by impersonal act-oriented rules". If, on the other hand, effectiveness of human association would be destroyed by the imposition of rules, then adjudication is out of place.

Let us briefly examine the temporary criminal process in the light of Fuller's criteria. First, the criminal process is initiated by the police or the Crown Attorney, both agents of the state. The deciding tribunal, the judge, is also an agent of the state, and therefore the state is initiating the process and adjudicating it. In design, the judge maintains that independence from the interest of the state represented by the Crown, but where the line is drawn in fact is not altogether clear especially in the eyes of many accused. Suspicion of partiality grows in those courts where judges and Crown Attorneys have expressed personal rapport from continued association with each other. Opinions rarely accompany decisions, if only because of the backlog of cases that must be processed quickly. In cases where written reasons are given the accused rarely sees them. In any event, in about 90% of cases the accused offers a plea of guilty. Moreover, plea bargaining has replaced the traditional adversary trial process in the majority of cases dealt with by urban courts. It is becoming more common that the judges' participation is simply to give the stamp of approval to a "deal" made between counsel. One of the main problems of plea and sentence negotiation between counsel arises from the fact that the original parties to the dispute do not participate. The inherent problems in this process have been commented upon elsewhere and need no further comment here. The answer to the question as to whether most judges are both qualified and in fact impartial can be found in the fact that all lawyers in criminal matters "shop for judges" in the firm belief that justice is a very personal thing. It is becoming increasingly difficult for judges to have some experience with the social conditions leading to breaches of the Criminal Code and other quasi-criminal

statutes encompassing conduct from the whole range of human experience. This may be an inevitable and unavoidable problem in any form of dispute resolution and indeed it may even contribute to a more impartial decision. But since the office of the judge is so crucial to the integrity of the entire adjudicative process, this factor must be examined. If nothing else, the criminal process seems to satisfy Fuller's fifth characteristic in that its decisions are retrospective based on past authority and with little apparent impact on changing the future course of society.

It's on Fuller's final point that the effectiveness of the adjudicative process in criminal trials seems to fall far short of the mark. Apart from professional crimes and few isolated offenses committed by individuals, most crime occurs within continuing relationships which are exceedingly complex and difficult to unravel. In other words, they are polycentric problems. Willoughby Abner, Director of the National Centre of Dispute Settlement, describes a typical criminal case:

> Much like the visible tip of an iceberg, the private criminal complaint... frequently deals with relatively minor charges growing out of deeper human conflict, frustration and alienation. In such cases, more often than not, neither the complainant nor the defendant is entirely blameless, yet... the criminal law with its focus on the defendant alone is ill-equipped to deal with this basic fact. The judge faced with an overcrowded court calendar, "beyond reasonable doubt", criteria for conviction, conflicting stories and minor charges, typically dismisses the case or lectures the defendant, threatening possible punishment for future offences. This is not conflict resolution; it is not problem solving in a community nor is it intended to be. The tip of the iceberg has been viewed but the underlying problem mass remains unseen and potentially as destructive as ever. Neighbourhood tensions have not been reduced. Relationships have been ordered.

As an alternative course of action Abner proposes the submission of the dispute, if agreed by the parties, to voluntary arbitration under the auspices of the National Centre for Dispute Settlement. One may question whether a national centre can bring the proper prespective to what is essentially a local dispute, but the redeeming feature is of course the expertise the arbitrators bring to bear on unpacking the underlying problem. I shall quote one further passage from Abner's address, which neatly sums up the advantages of such a plan:

> These procedures provide a greater opportunity to deal meaningfully and sensitively with human beings in conflict, to probe for the underlying causes and to address them. It provides a far greater opportunity for accommodation, meaningful dialogue, and the clearing up of possible misunderstandings. It also provides finality through the arbitrator's award if agreement is not reached. However, the process itself makes far more acceptable the award rendered. The conflict

arises in the community, is settled in the community and under conditions of maximum involvement and participation by the parties to the dispute who reside in the community.

The Influence of Urbanization in our Reaction to Crime

There is considerable evidence to suggest that punitiveness is a function of social distance between the punished and the punisher. That is, the less we know about the offender and the less contact we have with him the more we fear him. "To know is to forgive" is an apt phrase in this connection.

In the growth of cities, which Durkheim called "citadels of loneliness", people are thrown into a larger number of relationships with strangers. Informal social control tends to break down and responsibility for one's safety tends to be given over to bureaucratic agencies which have enormous power, but over which the individual has little control. Moreover, our dependency upon strangers is becoming increasingly important in a modern industrial society as our safety depends more and more on the good conduct of many people we do not know. Take, for example, the havoc that one irresponsible driver can cause on the busy highway or the mass destruction that one saboteur can cause by destroying an aircraft or some other form of mass public transportation. Neighbours are seen as potential threats rather than potential friends. The sense of *anomie* that arises lessens the bond of social interdependence which in turn creates conditions in which crime can flourish. The combination of social distance between people plus dependence upon professionals for safety creates fear and this fear produces further social distance. The mass media feeds it by giving extravagant attention to crime. Crime and crime control has thus become a major political issue in North America. Rather than dramatizing the evil, efforts must be found to normalize it.

The Bureaucratization and Centralization of Government Services

The bureaucratic process replaced the legal process when the primary function of government changed from regulation and resolution of disputes between individuals and the group to direct intervention in and control over social relationships. This is as true for economic and welfare systems as it is for the criminal justice system. In fact, the parallel developments in each of these fields are striking. In a sense, modern law enforcement and correctional practices are based on the

social and political values of the New Deal, which may be summarized as confidence in big government to solve society's ills. Of prime importance in this change is the need to legitimize governmental processes in terms of legal and correctional philosophies. Hence, the change in nomenclature by which crime is seen as a "threat" to society, offenders are seen as "sick" and in need of treatment, "peace" officers are seen as law "enforcement" officers and "social" workers as "correctional" officers.

There were many results flowing from this change, not the least important of which was further isolation of the mechanisms of social control from the fabric of everyday life. Giving of power to the police has as necessary corollary taking away responsibility from ordinary members of the public for their own protection. "Let the police do it", "I do not want to become involved", are examples of public attitudes which developed as a result of this process. It also yields certain changes in attitudes of police officers. It should be of some concern that police are becoming more and more alienated from the main stream of society, despite recent attempts by some police forces to counter the trend. The hypocrisy of our present attitude towards police officers, in which we give them enormous power without guidelines as to how that power is to be exercised, wait for them to make mistakes and then criticize them, is likely to yield a closing of ranks among law enforcement officers, which in turn, blocks meaningful dialogue between police and members of the community at large. Moreover, denying to the police the legitimate peace keeping and dispute resolution role can only lead to further social distance between the police and members of the public.

Whatever gains in efficiency that might have been made by replacing the foot patrolman by officers isolated from the public in patrol vehicles is far outweighed by the cost involved in terms of police-community relationships. The results of all of these factors have been to make the police a minority group in society.

The Abuse of Science

One of the features of the modern industrial state has been growing confidence on the part of most people in the capacity of science to solve problems. Great stress is placed on measuring the efficiency of an operation in terms of concrete properties amenable to be reduced to quantitative terms. Thus correctional programmes are being measured in terms of their success in reducing recidivism and attempts are being made to justify certain kinds of correctional measures on the grounds of their alleged superiority in these terms. In my view, this has

not only doomed the correctional process to be seen as a total failure (when it is not), but it has also stepped up the war against crime. Most importantly, it has a tendency to obscure the human and legal values involved that are not as easily amenable to the same kind of treatment that can be provided within the framework of existing resources. The truth of the matter is that if there is sickness in the crime area, it is more likely to be found in the way in which society responds to crime rather than in the behaviour of most offenders caught up in the criminal justice system. Not only do we lack the technology to diagnose offenders accurately in terms of any known psychiatric or psychological classifications, but it is also clear that we do not have the mechanisms of intervention which are likely to yield better results than can be achieved by not treating offenders at all. Moreover, there is evidence to suggest that efforts to deal with offenders as sick persons is likely to further their criminality rather than to reduce it. The main thrust of sociological writing in recent years has been directed towards the labelling, stigmatization or moralizing functions of the criminal justice system. The impact on an individual being caught up in it is to reinforce his self image as a helpless deviant rather than as a responsible human being. Whether our motives are treatment oriented or punishment oriented, the result is the same, namely, a further degradation of the concept of self as a worthwhile member of the community.

The Overselling of Corrections as a Method of Social Control

Correctional administrators are under increasing pressure to justify the performance of their agencies in terms of crime control. Many administrators seem to have capitulated to this pressure by agreeing to assess the performance of their work in terms of simple recidivism rates. A parallel pressure is placed on police administrators to measure results in terms of "crime known to the police" and "clear-up" rates.

In the beginning, of course, it was possible to convince an unsophisticated audience that measures such as probation are measurably more effective than imprisonment in reducing crime. However, it is widely known that these measures appear more effective solely on the basis of the fact that they deal with much better risks than an offender sentenced to imprisonment. In fact, research suggests that the relative success of probation *versus* imprisonment would be exactly reversed if everyone sentenced to imprisonment was placed on probation and *vice versa*. The public relations job based on the alleged success of treatment is a losing strategy, as it is likely to lead to a cut-back in budgets

for programmes which may be more superior on humanitarian grounds. Moreover, even if all measures are equally effective, then it would appear on economic as well as on humanitarian grounds that suspended sentence, fines and probation should be used whenever the risk allowing the offenders concerned to remain in the community is tolerable.

Measuring police performance in terms of law enforcement, rather than crime prevention criteria, indicates an implicit devaluing of the traditional peace keeping role of the police officer. Measurement criteria are good indices of the ordering of priorities in the criminal justice system. If we are truly committed to closing the gap between the public and the police there is bound to be a rise in "crimes known to the police" and a lowering of the proportion of crimes "solved" by charge. Without alternative ways to measure police effectiveness we will contribute to the public perception of the criminal justice system as a failed method of social control.

To the extent that law enforcement and the treatment of offenders have tended to move away from treating the offender as a human being who is morally responsible for his conduct and towards crime control through rehabilitation and deterrence, the more dehumanizing the criminal justice system has become for everyone caught up in it, including not only the offender, but all those dealing with him. Attempts to achieve social control through arrest, reformation and deterrence have not only failed, but have also lead to penal practices which, if stripped of their euphemistic labels, are nothing more than abuses of fundamental freedoms in the name of enlightenment. The historical transformation from punishment to treatment, as Matza points out, has been the opposite of enlightenment. It has, at best, been mystification and, at worst, a cruel hypocrisy. What is needed is a return to much more modest goals in the crime control area. If effectiveness cannot be demonstrated, then at least justice and fairness should be our goals. Public participation is needed if for no other reason than to secure public confidence in our system. At the same time, there is an urgent need to find other channels for the handling of conflicts that inevitably arise in society. The criminal process should be seen as only one among many forms of dispute settlement and attention must now be given to finding alternatives.

Part 3

Practical and Ethical Considerations in Criminal Law Reform

This section addresses itself to an exploration of the issues involved in effecting legal reform in the criminal law area. While the need for substantial change is becoming more obvious to a larger number of people, operating both inside and outside the official legal system, the processes involved in bringing about such change are poorly understood.

Two things are clear. First, remedial moves at the legal-technical level designed to give the appearance of rationality and internal consistency to the formal rules without changing either institutional structures or individual behaviour patterns will not suffice. Second, short of revolution, effective change within the legal system is inevitably incremental as the extent of its impact on society depends upon the beliefs and purposes of individuals within the legal subculture (*i.e.* victims, offenders, police officers, lawyers, judges and correctional workers) and the attitudes and expectations held by persons in the wider culture, *i.e.* society generally. If these cultural patterns are changing relatively slowly (which seems to characterize Canadian society) one should not expect radical transformation of society through law alone. Law is, after all, but a surface manifestation of deeper structures in society—structures which reflect long established differences in power relations. This assertion does not imply that law has no impact on social change, nor does it provide the excuse to refrain from conscious efforts to improve the law. What is claimed is that law reform in a relatively stable society is negotiable within severely bounded structural limits. This means if one is serious about substantial legal change one has to concentrate on opening up structures and on changing the level of social consciousness held by both legal actors and the public generally.

In any event, change is taking place within the legal culture without the guidance of parliament, law reform commissions or the public. Indeed, many of the more important recent changes in the criminal justice system, the evolving role of police officer as social worker and the gradual replacement of the trial process by plea and sentence negotiation, to give but two examples, have been implemented within subsystems of the legal structure as "in-house" responses to particular needs and interests as defined by the specific legal actors concerned. It becomes obvious that the challenge to law reformers is to become involved in *doing* law reform through innovation, experiment and public education as opposed to merely *recommending* it to parliament. This immediately involves one in the ethical and practical issues in achieving this objective.

The Myth of Objectivity

It seems curious that at a time of profound examination of all social institutions, from the nuclear family to the nation state, many academics and some legal reformers claim that they can maintain an "objective", "neutral" stance with respect to the issues of the day. This posture is not only illusory, it is dangerous. It is dangerous because the liberal-academic's penchant to obscure value questions by seeing all sides of every issue and weighing all factors equally leads to the emasculation of both thought and action. The myth of "effective neutrality" has lead many people to become immune from their social environments, an environment which they can no longer experience in human terms. This in turn yields widespread disillusionment about the capacity of the individual to control his world, with the resulting retreat into narcissism in which short term self-interest replaces concern for others. The resulting immobilization of spirit destroys purpose and intent and merely serves to support the *status quo*. Whether or not the liberal reformer views the basic hierarchical structure as essentially correct or in need of substantial change the result is the same, the creation of a sense of exceeding complexity to social issues requiring the expertise of a few extra-privileged technocrats. The production of technical reports, social surveys and complex statistics buttresses the impression and serves to enhance the power of the liberal establishment.

This process must be seen as leading to no more than false rationality and pseudo-excellence. Moreover, the so-called "ethical" posture of neutrality must be seen for what it is—the preservation of hierarchically ordered relationships in society.

But the stubborn facts of social life will not go away despite all the statistics and technical reports. More and more people have come to realize that social structures have grown beyond human scale and

dimension. They are looking for a way out and if liberal reformers wish to play a role in the restructuring of society they must be prepared to commit themselves in a directly practical and relevant way. The risks involved are, of course, real. There is no escape from the ethical burden of evaluating the consequences of one's behaviour in terms of its impact on others. There are no guarantees of success and there are personal costs in failure. Most importantly for a well socialized liberal-academic, the personal commitment to analyze one's social behaviour in terms of its political and ethical purpose, its utility and its impact on others, involves him in a painful process of change within himself.

Fortunately, he will not find this a lonely quest as the claim to obedience to liberal authoritarianism is rapidly losing its force and legitimacy. The legal reformer will find help from surprising quarters. Many police officers, judges, correctional workers, lawyers, and laymen share his sense of a dehumanizing criminal justice system even though they may differ as to its original and final solution. What is possible is the collaborative development of strategies of collective action designed to deal with specific issues in a more humane and effective way.

There seems to be no easy way to discharge one's ethical responsibilities for social intervention. Many tempting escapes are provided. One can delegate responsibility to a formal procedure consisting of review committees, statements of principle, codes of ethics and written releases from civil and criminal liability. Experience seems to show that in many instances this process offers the researcher an opportunity to escape real responsibility since once the formal requirements are met he is free to act without further considering the impact of his work. It also seems to be the case that in some instances ethical considerations have been used by university administrators, governments and funding sources to prevent significant social intervention from taking place. Ostensibly acting as the "conscience of the community", these bodies have steered research and action into safe, non-controversial areas which do not challenge the existing social order.

The Escape into Ideology

Another convenient escape from responsibility is for the researcher himself to espouse a philosophy which is so radical in concept that it clearly will not gain acceptance either from the subjects directly effected or the potential sources of funding. By refusing to deal with practical everyday problems that are recognized as ripe for change the ideologue protects himself from the need to act, guaranteeing that he will have little impact on society. The most genuinely radical movements in today's society appear to be those which eschew a specific ideological

orientation. They are issue-specific and are able to catalyze change in a way that few of the ideologically oriented movements appear to have done. Examples include the ecological movement, the women's movement, ratepayer and neighbourhood groups.

Citizen involvement in the political process is undergoing a remarkable change. Grass roots movements are springing up everywhere. Most of them lack formal structure, membership lists, voting procedures and all other due process games which divert energy from immediate tasks. Daniel Bell in his book *The End of Ideology* might, after all, be shown to be correct, but paradoxically for the very opposite reason he espouses. Ideology is dead (at least for the time being) not because basic goals of society have been settled once and for all but precisely because there appears to be no basis for agreement among people as to those goals. In the meantime, people are putting brackets around their ideological differences and getting on with the task of attempting to deal with specific problems that they share. Interestingly enough this denial of ideology and formal organization has allowed social activism to cut across traditional class and political lines. Whether this is a temporary phenomenon or whether a genuine "new politics" is emerging remains to be seen. For the present it may be stated that new forces are at work in society which are egalitarian in structure, diffuse in membership and narrowly mission-oriented. This provides new opportunities for legal-institutional reform with a high level of public involvement in the process of change.

This new dynamic also provides an ethical framework within which social intervention can take place. The reformer is forced to live with the results of his own work. Political and legal theory, formal statements of ethics and ideological postures find their ultimate test in practical experience. Law reformers are in a stronger position ethically and politically once they can demonstrate the validity of their proposals in terms of a successful experience.

Blocks to Public Participation in Law Reform

While the position taken here is that law reform works best when it proceeds within the boundaries of the collective consciousness of the people affected, around felt needs and practical problems, it is not argued that an activist approach to law reform is permanently locked in to the current perspective of the majority of people directly concerned. It is argued that it is ethically defensible to attempt to change these attitudes and beliefs if the reformer is convinced that they reflect a false and debilitating consciousness. Justification for such action rests on the conviction that each individual in an open society has the right to express his views as forcefully as possible provided that he is tolerant of

other views and is genuinely interested in others as *people* as opposed to *things*. This means that the strategy of public education must be one in which the individual pressing for reform does not present himself as an expert but rather as a participant in a dialogue with those members of the community who wish to participate in the development of social intervention strategies. Humility cannot be legislated, nor can it be forced upon those whose personality tends towards intellectual and moral imperialism. It occurs naturally in those individuals whose life experience has taught them that creative problem-solving with respect to complex social problems cannot be derived from theory or ideology alone but are usually fashioned out of concrete experience.

Two myths block effective community involvement in criminal law reform. The first is that crime is ever present in community life—that neighbours, strangers and all those with whom we share space are potential criminals. While it can be empirically demonstrated that in Canada the life chances of being a victim of a serious crime is relatively low compared to other risks from illness, accidents, and so on, many people in large cities view their social environment as threatening. The second myth is that while individuals are potential threats to life and liberty, the state itself is benign. These two myths are the main underpinning of liberal authoritarianism. It inhibits involvement of citizens in matters touching directly upon their lives and promotes a retreat to the protection of mother institutions of the state, the church, the school and the professions.

It is interesting to note that the main thrust of North American social policy (perhaps more clearly visible in the United States than in Canada) has been to emphasize both the smallest and the largest units in society, *i.e.* the individual and the mega-institution. Very little attention has been paid to the building blocks of society, the family, the neighbourhood, the borough and the city. This is a prescription for alienation, the consequences of which we can now witness. The anomic existence of the individual in the large city who is a stranger to his neighbours, and is forced to relate to his community through large impersonal organizations which affect his daily life but over which he has little control, is leading to a breakdown in social order as all standard social indicators seem to indicate. Relatively high rates of suicide, divorce, mental illness, crime and juvenile delinquency in large cities as opposed to rural and small town communities reflect the social disorganization which occurs when individuals can no longer relate to one another in human terms. While the return to the village is a hopelessly romantic notion, as many people who have experienced the communal movement have learned through bitter experience, it should not be beyond the wit of urban dwellers to fashion their environment in

ways that enable them to get a sense of well being through sharing in the processes of decision-making as it affects their community. To get involved in this, one must be able to tolerate ambiguities of direction, and the confusion and upset of change. The choice appears to be between striving for a clean, predictable, antiseptic society (the failure of achieving this is visible for all to see) and an open, dynamic yet unpredictable society. Let us now explore some of the elements that will be involved in restructuring the criminal justice system to this latter end.

The Natural Development of Criminal Law Reform

Due to enormous discretionary power not to invoke the criminal process at each stage, from the calling of the police by the victim to the final release of an offender on parole, there is considerable room for manoeuvre on the part of officials to change institutional practice without requiring legislative approval. In Canada, this is particularly pronounced as lower officials in administration of criminal justice have more discretionary power vested in them than ordinarily given in common law jurisdiction. Thus, the Canadian police officer has a far more discretionary power in matters of arrest, search and seizure than that given to his American counterpart. Lower court officials such as Provincial Court judges and Magistrates have a broader jurisdiction and greater sentencing powers than that given to single lower court judges in any commonwealth country, the United States or continental Europe. Parole is strictly a matter of grace in Canada and correctional decisions are relatively free of legal control. It is interesting to note that while the legal room for manoeuvre of these officials in Canada is very wide, the actual behaviour patterns appear to be more circumscribed than in other countries. This is probably due to the fact that the elements of the legal culture within which the officials operate provides standards of conduct that have a real impact on decisions made. In any event, a great deal can be done prior to asking parliament for changes in the written law. Indeed, when one examines criminal legislation during this century one finds that significant changes in "law in action" as opposed to "law on the books" have always emanated from the bottom, parliament merely giving the final stamp of approval to something that has been operative for some time. A lesson to be learned from this is that law reform must begin at the cultural-institutional level.

The following is an outline of the steps to be taken in a natural evolution of criminal justice reform. This evolution is more likely to "take" than forced changes from the top and is one in which the full consequences, practical and ethical, will be revealed in time to change direction if the need should become apparent.

1. At the least consequential level there is change of the most informal and imperceptible kind. This involves redefinition of the nature of the problem as understood by ordinary members of the public. Irrational fears of specific offences tend to diminish once there is a better understanding of the nature of those offences and the individuals committing them. In Toronto, the Clarke Institute of Psychiatry contributed greatly to a lessening of fear about the pedophile through a public education campaign carried by the mass media. This in turn led the public to lower their demands on the criminal justice system which eventually resulted in a less punitive approach towards this category of offender.

2. The second change is in the working languages of the courts, lawyers, policemen, and judges involved in the process of administering the law. Once officials begin to see crime in a different light they tend to respond consistent with their altered perceptions. Many examples abound concerning shifts in perceptions and attitudes of police officers as a result of becoming involved in family crisis intervention, community service work and crime prevention.

3. The third change can be characterized as genuine cultural innovation. It occurs when the working norms of legal control agents are expressed not only in what they *say* but also in what they *do* in exercising their power. The use of discretion not to lay criminal charges when alternative intervention strategies are available to the parties is a good example of this. Another example involves the increased use of suspended sentence, absolute and conditional discharges by courts once they recognize that the criminal event is merely a technical violation or an offence arising out of a larger social problem better dealt with by non-coercive agencies.

4. The fourth step occurs when cultural innovation becomes formalized by the creation of new strategies, units or agencies, or—more likely at this level— by significant reallocation of resources. The creation of specialized youth bureaus, community service programmes are examples.

5. The fifth step indicates a still higher degree of innovation. At this stage there is a formal statement of new policy with respect to specific types of crime—a policy which is no longer experimental and is applied across the board. An example of this would be the decision not to charge certain youthful marijuana offenders with respect to possession of "soft" drugs. Another example, three years prior to the removal of homosexuality between consenting adults from the statute books as a crime, was the decision of the Toronto police that they would no longer arrest a person falling into this category.

6. The final step is the creation of a new law, removal of an old one or a substantial modification in existing law based upon changes that have already taken place at the enforcement level.

There is a final change which is *supra*-legal in its import. It involves fundamental changes in the value premises of the legal culture and in the technological premises at the legal-social structure. Such changes are so emphatic and thorough that it can be said a legal revolution has occurred. The hierarchy of values has been completely upset. In terms of this paper such a change will have taken place when legal organizations are no longer hierarchical in structure, control decisions are disbursed and the criminal process returns to its main task of peacekeeping through dispute settlement. The objective conditions for such a change in the relatively near future do not exist. Canadian society may evolve towards this goal or it may continue towards centralization of authority. The Law Reform Commission of Canada can have an influence on this choice. If it chooses to implement a process of substantial legal reform along the lines outlined it would appear that a useful first step would be a public statement of its own inability to bring about substantial law reform without public involvement in a manner far exceeding the traditional calls for written briefs and opinions. It should seriously consider the establishent of local law reform committees with a mandate to innovate and experiment as local conditions permit. It should offer encouragement, advice and consultation to those committees without controlling the direction of their work. Finally, it should communicate the funded experience of each participating group to all other groups and finally to the Canadian public. In the meanwhile, the Commission can busy itself with essential lawyers' work at the technical level and with those reforms that are so manifestly obvious that further experiment is not required.

Part 4

Towards a Social-Educative Model of Criminal Justice

Very few people would argue that the criminal justice system can resist change. Nearly everyone recognizes the urgent need to understand the marked changes that are taking place in patterns of crime and to know how to respond to new demands made on our institutions. It would appear, therefore, that we are beyond debating the inevitability of change. The contemporary debate has swung from change *versus* no-change to the methods that should be employed in controlling and directing the forces of change. The predicament we confront, then, concerns methods; methods that will maximize the freedom of individuals and encourage the potentiality for growth and adaptation; methods that will realize man's dignity as well as bring into fruition desirable social goals. The practical challenge lies in inventing and developing a theory of change, consistent with our best social and behavioural knowledge and adequate to the moral and practical tasks of creating a system of criminal justice that has the capacity to respond and adapt to new pressures and demands made upon it. This section addresses itself to questions of creating a system that not only provides prescriptions for solving today's problems but also the generative capacity to identify needs for change in the light of new conditions and to work out improved knowledge, technologies and patterns of action in meeting those needs. The model presented will be called a *Social Educative Model* and it will be distinguished from a *Rational-Empirical Model* and a *Power-Coercive Model.*

The Rational-Empirical Model

This is the traditional model arising from the Age of Enlightenment and classical liberalism. The assumptions of this model permeate the

thinking of most planners in the criminal justice field. Norms of expertise, professionalism and formal education are emphasized. The basic assumption underlying the model is that the criminal justice system can be a rational system achieving its stated goals provided that key positions in the system are filled by persons possessing a high degree of professional expertise. Experts play a key role in policy development and occupy nearly all positions of power, from law reform commissioner to agency head. Scientific investigation and research represent the chief ways of extending knowledge and reducing the limits of ignorance. The model is highly elitist in nature; plans emanate from the top and are disseminated down through the ranks by way of regulation or prescription.

The traditional approach is to commission the talents of acknowledged experts to develop a "rational" plan. This may take the form of a Royal Commission, task force or other group of outside professionals or it may be a plan emanating from top civil servants. The responsible government minister may release all, some or none of the resulting report and he may or may not commit the government to implement its recommendations. Public participation is limited to a negative role of reacting to decisions already made. Unless the media takes up the issue it is unlikely that changes will be made. Opinion may be mobilized by a special interest group adversely affected by this proposed change but here again the impact is more likely to be to destroy a proposal rather than to suggest one.

It is for these reasons that rational-empirical approaches are more suited to deal with problems which do not reflect underlying value conflicts in society. Once there is basic consensus as to purpose and direction, intelligent action requires the mobilization of expertise towards those ends. Paradoxically, rational approaches to criminal justice planning often reveal hidden conflicts as research frequently shows the gaps that exist between "what is" and what people believe "ought to be". The simple point is that empirical research in the planning process may reveal or heighten conflicts but cannot resolve them.

At the decision-making phase, rational approaches must deny contradiction. Creative solutions to value conflicts can only be forged within the crucible of those contradictions. The necessary dialectical process can be initiated by rationality but creativity requires another element; a synthesis of conflicting thoughts and actions. Once synthesis is achieved rationality once again assumes an important role. The big issues in our society are not technical ones for which technical experts can produce technical solutions. They represent genuine dilemmas as to how to harmonize competing interests. An open society is one that admits of basic conflicts in both means and goals and provides ongoing

mechanisms for coming to terms with its internal contradictions. Technocrats deny contradiction because their training is irrelevant to deal with it. Technocracy becomes authoritarianism when all issues become technical issues.

Change taking place within the framework of this model is discontinuous. It cannot take place until expertise is mobilized and this does not happen until the experts themselves see the need to act. In Canada, the result is a twenty-year time span between major reviews of the system, the intervening years being filled with minor remedial recommendations to improve the efficiency of the then existing systems.

The rational-empirical approach depends upon knowledge as a major ingredient of power. In this view, men of knowledge are legitimate sources of power and the desirable flow of influence is from men who know to men who don't know through the processes of education, dissemination of valid information and, in some instances, simply by fiat.

Knowledge tends to be equated with formal education. Knowledge based technologies develop which are immune from pressures for change, as the challenges usually come from people who do not have the formal qualifications to question the existing order. Training and vocational upgrading become the key to success, creating a growing demand for vocational upgrading among police officers, correctional workers and others.

There is little evidence that formal training leads to better job performance for line staff at least. Giving degrees for basic level work in corrections and law enforcement tends to disguise the real nature of that work. Indeed, a professional education may be disfunctional for many occupational roles. Attempts to bureaucratize empathy (which most agree lies at the roots of this work) increase social distance between the worker and the client and sets up communication blocks. Moreover, the felt need among professionally trained people to categorize people and complex social situations in the terms of the theoretical perspective of their discipline frequently makes it more difficult to achieve the practical, *ad hoc* solutions needed in concrete situations. Finally, there are tremendous social costs in pre-empting the amateur from work in this field. At the time when interest in lay involvement in the penal-correctional process is on the rise, one should be cautious about creating new professional groups with pecuniary and status interests in excluding the amateur.

There is also a tendency in the rational-empirical approach to create professional specialties with exclusive jurisdiction over particular components of the criminal justice system and to harden the boundaries between them. The lawyer, the judge, the police officer and the

correctional worker demand exclusive rights to deal with their particular aspects of the problem. Overspecialization not only leads to lack of understanding between professional groups but also contributes to a lack of unity in both purpose and method for the system as a whole. The conversations that do take place between professional groups tend to center around jurisdictional conflicts. Thus debates are dominated by territorial fights between judges and parole authorities, police officers and defence lawyers, provincial and federal governments, public and private agencies, and between prison and after-care workers. The result is a rigid system, paralyzed by internal conflict.

The tendency to specialize knowledge in the criminal justice field also leads to partial views of the problem. Crime is a multi-faceted phenomenon. It does not naturally divide into the imposed categories of each professional group. Each group has a particular method of describing the reality of crime from a specific observational standpoint. Constructed realities emerge within distinct contextual framework of meaning. These realities are described in language systems which are asymmetrical to one another. Professional jargon facilitates communication within professions but not between them. Each professional group within the criminal justice system operates within its own closed system of meaning. The everyday meanings of laypeople are lost in the process.

In any given criminal case there are at least five realities: the "facts" believed by the accused and his lawyer, those put forward by the Crown Attorney, those found to be true by the judge, those of the correctional worker, and those of the public formed for the most part from the media. Our criminal justice system does not provide sufficient opportunity for the sharing of these perspectives and will not be able to do so until the barriers between professional disciplines are removed. This will involve a commitment not only to the sharing of ultimate goals but also of decision-making tasks. The sharing of concrete tasks is essential because it is only around a living problem that diverse perspectives can be integrated. More importantly, the removal of barriers between disciplines and professional groups will inevitably make it easier for the layperson to play a more significant role in the penal correctional process.

In sum, learning in the rational-empirical model tends to be highly specialized, partial and elitist. The professional structures which developed within this framework spend most of their energy preserving and enhancing their own particular professional interests. This, in turn, leads to internal squabbles and paralysis. The public are left out of these debates except to play a minor and negative role. Rational approaches are suited to deal with problems which do not reflect underlying value conflicts in society. They are useful in revealing gaps between aspirations

and fulfillment and sometimes uncover hidden contradictions. But they must be combined with other strategies if such contradictions are to be resolved. A way out of the dilemma is to remove the walls that exist between professional groups which, among other things, will allow for public participation in the shaping and implementation of policies.

The Power-Coercive Model

Power-coercive strategies characterize much of the new movement for change within the criminal justice system. Thus, lobbying, civil disobedience, prisoners' strikes, staged court room dramas and other methods have been used to demonstrate injustice, unfairness or cruelty in the existing system. Attempts to weaken or divide the opposition through physical or moral coercion combined with methods to provoke officials to overreact to perceived threats, thereby demonstrating injustice, are standard moves within the repertoire of the modern activist. The purpose is to open up conflicts and the result is to polarize ideological positions. These strategies are based on the assumption that the only way to change power relations within the penal system is to bring existing processes to a halt.

Some of the difficulty with this model arises from an over-estimation by change agents of the capacity of symbolic action to effect change in practice. Recent history seems to show that there are more failures than successes with these strategies. More often than not they lead to the mobilization of opposition to real change.

Even when concessions are made they are frequently symbolic. It cannot be assumed that desired change has been made if, as the result of pressure, a new administrative ruling or law has been announced. All that has been done is to bring the force of legitimacy behind some proposed change. The re-education of persons who are to conduct themselves in new ways still has to be carried out. It is necessary that new knowledge, new skills, new attitudes and new values in orientation be adopted.

This is not to discount the importance of formal action symbolizing the desire for change, it is rather to emphasize that normative – re-educative strategies must be combined with symbolic action if acceptable changes in practice are to be achieved. For example, legislation designed to redress the balance of power between racial groups in the United States, arising in part from coercive strategies of individuals in the civil rights movement, appeared to have worked only to the extent that they have allowed for genuine change in the value orientation of the target population, i.e. racists in positions of power and among the public generally. Where, on the other hand, the coercive strategy simply

led to the polarization of opinion, a "backlash" effect was the more likely result.

Another problem with the model is the fact that if threats are to be made they must be carried out, at least occasionally, or the movement loses its credibility. In its pure form, it is an all-or-nothing strategy in which the risks of failure are high. The risks are high because those entrenched in power have at their command not only political legitimacy but an array of political and economic sanctions backed by the legitimate use of force. That is why coercive strategies emphasizing the utilization of moral power, playing upon sentiments of guilt and shame, are more likely to be effective than those that emphasize physical, political or economic power. There is a modest record of success in manipulating power elites either by co-opting them to the cause or at least neutralizing their impact. Power relations within our society are not entirely stable and fixed. This provides opportunities for the radical activist to pressure, cajole and threaten, provided he is constantly aware of the needs of his opponents and provides them with avenues of escape which meet those needs. The alternative is a fight to the finish in which only the most powerful group will survive.

Power-coercive strategies, if successful, are likely to lead to new structures of power which are themselves coercive. What usually happens is that a new elite is created protecting its interests against aspirations of the majority of people for whom it ostensibly acts. Examples of successful populist movements being transformed into new forms of coercive control are too numerous to mention. Finally, as with change agents operating within the Rational-Empirical mode, radical activist strategies tend to confirm the intellectual and ethical assumptions of the agent. But, instead of shrouding issues in social science or legal complexities, the radical overly simplifies issues by producing a simple, brutal response from the establishment. The need for revolution is thus confirmed.

The main difficulty is one of fitting the model to the "data", *i.e.* what we "know" about the operation of the criminal justice system. Our criminal justice system is not monolithic. The further one moves from the formal law as expressed in legislation and reported cases toward a phenomenological examination of what people do, the harder it is to fit the data.

Social ordering does not depend wholly or even largely upon coercion. Such a community would be very unstable. Stable political systems consist of a web of converging and diverging interests. Traditionally, conflict was over means not ends. In our society, there is more consensus than conflict in ultimate goals, although recent developments tend to show a breakdown in both goals and means.

Power is not so neatly and unevenly distributed as the radical position would make us believe. Personal, cultural and organizational dynamics frequently conflict with the manifest aims of a dominant group in a political system. Internal bureaucratic as opposed to external political pressures tend often to dominate. The police, for example, tend to behave in quite different political systems. Conversely, within any given political system, tremendous variation exists in the exercise of discretion among members of law enforcement agencies. The same holds true for prosecutors and courts, *et cetera.* Each individual actor in the criminal justice system responds to a host of personal and social pressures and is not merely an automation serving the interests of superior forces. The threat posed by criminality becomes significant to the police, for example, not in political terms, but more often in personal terms. Their response is, therefore, more likely to be determined by such facts as personal security, job competence, administrative support, *et cetera.*

The determinism inherent in neo-Marxian analysis is subject to all the criticisms of deterministic views of man that one frequently sees in certain writings in sociology, political science, and so on. Even Darwin could not explain why man's brain was five times larger than needed for survival. The relationship between man and society is reflexive; *i.e.* society influences man—man influences society.

Much law and law enforcement is an expression of more general cultural forces in society that cannot be fitted to a model of conflicting economic interests. Tradition, sentiment, *et cetera,* work to ameliorate the impact of power.

The legal system is inherently conservative. The concept of legality is not neutral, but contains within it a bundle of notions, some of which are authoritarian, but many of which are egalitarian. Procedural law does in fact restrict the power of the state. Legal culture, *i.e.* the standards, expectations, and norms of behaviour, tends to socialize the agents of the state into accepting certain restrictions on their behaviour. How then can one explain the fact that in the exercise of discretion most police officers, crown attorneys, judges, do not utilize the full extent of their power? Legal room for manoeuvre, formal power, is much broader than what individuals can justify as socially permissible (*i.e.* effective room for manoeuvre). All is not power.

In sum, power-coercive strategies are sometimes useful to focus attention on particular problems. If power is unevenly balanced in society, these strategies are more likely to work if they operate at the level of moral persuasion or through the manipulation of power elites. There are great risks of simply mobilizing opposition to change or of

transforming genuine populist movements into authoritarian power structures.

The Social-Educative Model

This model is based on the belief that the challenge of responding appropriately to the need for change can best be met by the widest possible participation in the shaping of alternatives. Change is seen as a continuous process of adaptation to new conditions and it will arise from within the criminal justice system and does not have to be imposed from the outside. People will be the targets of change within such a system rather than rules of law or formal policies. The strategy is designed to release and foster growth within individuals who make up the system. In order to achieve this, the model emphasizes norms of openess of communication, trust between persons, removal of status barriers between parts of the system and a recognition of identities of interest between various parts. The identification and reconstruction of basic values is pivotal to change within this model. The value systems that are particularly important are those associated with informal organizations that grow up within each of the formal sub-systems. According to this model, it is only through the sharing of concrete experience among different legal actors within the system that integrative solutions to complex problems can be worked out. These solutions cannot be worked out in advance but only in the context of real, live problems.

By not emphasizing the formal and highly visible aspects of the criminal justice system it is possible to view the system as part of a larger social defence network. This wider network consists of all the mechanisms that work in society which lead to conformity to the values protected by the criminal law. These mechanisms cover a range of activities from gossip at the soft end to penitentiary sentences at the hard end. Each of the mechanisms contain one common element: a set of interactions between individuals from which the participants learn something about themselves, the other people involved and the society in which they live. Thus, victims and offenders interact and learn from it as do police officers and accused persons, judges and lawyers and so on. For those who have repeat experiences of a similar nature, namely professionals on either side of the law, there is a tendency to be reinforced in a particular view of themselves and of the other individuals involved. Thus, police officers, judges, lawyers and other professional persons within the criminal justice system, as well as habitual offenders, tend to have a set of reinforcing life experiences out of which are fashioned not only their working styles but also their

value systems. These experiences promote fairly rigid conceptual systems that cannot be undermined unless the individuals concerned are required to experience reality in radically different ways. The Social-Educative Model would suggest two strategies to deal with this.

The first strategy would involve training, but not of a narrow vocational kind. The pace of change taking place within society generally and within the crime field in particular makes both professional and non-professional persons open to radical change in their belief systems several times in one career. The challenge to educators is to fashion learning experiences that provide for each individual a primary reality focus appropriate to his immediate occupational choice, with a number of secondary and contrary foci to challenge it and thereby open him to change when the situation requires it. This means that while individuals may end up as lawyers, police officers, correctional officers and so on, their basic training would be generic, giving them a broad perspective on the criminal justice system as a whole. Even during the vocational aspects of their education each student will serve short internships covering a range of roles from community worker to correctional officer.

All officials in the criminal justice system should be trained to know how to mobilize community resources. This will necessarily involve the examination of grass roots political structures and the development of skills in functioning within them.

While recognizing the role for formal education, the Social-Educative Model places more emphasis on experiential learning. Learning is seen as a continuous process and the challenge posed by this model is to create learning structures that teach appropriate things to all the actors involved from the ordinary citizen to the highest official.

The task is, therefore, to let the data of shared experience get into the processes of perceiving crime, criminals, victims and other actors in the system of new ways. Since people are the targets of change and experience, the main vehicle for change, the first goal of change agents must be to open up structures which create lines of communication between people so that sharing of experience becomes possible. This view highlights current problems on the centralization of authority, heavy handed supervision and communication blocks.

It also means that we must create a system that meets the tests set out earlier in this paper: visibility, accessibility, simplicity, concordance, accountability and effectiveness. It must be a system which is *just* both in the sense of protecting basic freedoms and in ensuring that the punishment passed on individuals bears some relationship to the harm experienced by their victims.

The Social-Educative Model would place justice in the context of searching for shared interests between adversaries and would attempt to instill in each a thorough going respect, not only for their legal rights to attack one another in court, but also for their social rights to seek solutions which allow them to maintain relationships with each other.

This model emphasizes learning that takes place at all stages of the criminal process. The unfortunate tendency in present methods to conceive the education, rehabilitation, and training of offenders as starting after sentence fails to take into account that the offenders concerned have probably learned their most enduring lessons through earlier interactions with victims, police officers, lawyers and the judges who conducted their trials. All subsequent learning in the post sentence phase is done against the background of these earlier experiences. If the rules of criminal procedure are seen as setting a framework within which learning takes place, then the artificial splits between procedure, substantive criminal law and sentencing must be removed if we are to avoid the present tendency to teach contradictory lessons at different stages of the process.

This approach does not deny the existence of power imbalances in society supported by groups with vested interests in the *status quo*. Nor does it discount the need for research and rational planning. Where it differs from the models described earlier is in the strategies to be employed in utilizing both power and knowledge in the change process. It views the criminal justice system not only as a system capable of fundamental change but also as a system undergoing continuous change. It suggests that radical transformation of our system cannot be forced upon us by an elite group of technocrats, nor by pressure from outside radical activists, but by liberating individuals who make up the wider system to participate in innovation and experimentation as both a right and as a duty. In the process of such involvement, social consciousness will heighten as to what further changes are deemed necessary, what knowledge is relevant to those changes and where the sources of power are to effect or to block change.

So it can be seen that this approach is both conservative and radical. It is conservative in restricting change agents to operate within the collective consciousness of the people directly affected by change. It is radical in challenging everyone to transform both themselves and the social structures in which they live.

Part 5

A Working Model

So far this paper has avoided dealing with the classical aims of the penal system. It has not confronted directly the well known debates about the relative merits of retribution, rehabilitation, deterrence and incapacitation. Whilst these debates can be interesting as exercises in logic and sometimes lead to greater clarity about what *ought to be* the aims of the penal system, it is unfortunate that philosophical discourse does not seem to lead to measurable changes in penal practice.

It is interesting to note that very similar penal practices have been labelled and justified in quite different ways depending upon the mood and temper of the time. Thus, as retribution becomes unacceptable as a justification for imprisonment, deterrence was used and later, when many considered it morally offensive to punish one individual to deter another, prisons were presented as "treatment" centres designed to "reform" the offender. Institutional regimes have not changed as much as the labels used to describe them. So it would seem that statements of philosophical principles have not yielded more than new rationalizations for old conduct.

In any event, it should be recognized that the so-called aims of rehabilitation, deterrence, *et cetera,* are not *ends* in themselves but rather *means* used to protect certain personal and proprietary interests in society and to promote public order and tranquillity. What might be necessary to create a sense of public order and tranquillity and what personal and proprietary interests need protection by the criminal law are not fixed and immutable but change over time and vary from community to community.

For all these reasons it would seem more practical not to deal with philosophical principles as abstract doctrines but rather to describe

what a model system would actually *do,* concentrating on the roles of individuals who would make up that system. What is presented here is not intended to be more than a working model designed to provide a framework for specific discussions about concrete proposals for action. This model cannot be implemented immediately and the forms of implementation that might be employed will depend upon local needs, resources and people.

First, some general observations: emphasis would be placed on providing offenders and victims with opportunities, as a matter of first refusal, to deal with problems that exist between them without intervention on the part of the state. The criminal justice system as we now understand it would be seen as a back-up system to be used when the seriousness of the crime makes it impossible to consider an out of court settlement or where either party to the offence feels that there is a threat to his civil rights in subjecting himself to less formal mechanisms.

The entire system would not be founded on the concept of a battle between the parties based on the notion of irreconcilable interests between them and would instead be directed towards reconciliation. Arguments as to whether we should have a "due process" or "crime control model" would become irrelevant, as both those positions can be seen to be based on a common false assumption, namely, that the criminal process must always be a struggle between two contending forces whose interests are implacably hostile. As John Griffiths points out, the assumptions underlying the battle model of criminal justice based on a "struggle from start to finish" defines out of existence any question of reconciliation. Griffiths also points out that the ideological assumptions underlying the battle model work as self-fulfilling prophesies in as much as they promote hostility, alienation, and polarization between the parties.

The Social-Educative Model would be a multi-tiered one, involving mechanisms of conflict resolution in the community without intervention of any kind, the use of individuals and agencies that might facilitate solutions to conflicts that cannot be settled by the individuals directly concerned, diversion back to the community whenever police officers and court officials can achieve a mediated settlement between the parties, and the formal adjudicative system containing most of the elements of our existing system with a vastly reduced intake.

Finally, a commitment to this model will involve significant changes in the roles that individuals currently play within the court system.

The Role of the Court

Crown attorneys and defence counsel would be encouraged to replace adversarial posturing *vis-à-vis* one another with roles which are

co-operative, constructive and conciliatory. Together with the judge they would be asked to direct their energies toward assisting the tribunal to come to decisions which best incorporate and reconcile the interests of all concerned. Certain structural changes would be required to make this workable.

An intake policy would have to be established at each court. The elements of the policy would include mediation between offenders and victims, voluntary arbitration, possibly on the Philadelphia model, and diversion to voluntary social services. The difference between mediation and voluntary arbitration lies in the fact that in the former case the settlement is entirely voluntary and cannot be legally enforced, while in the latter only the agreement to submit the case to arbitration is voluntary—the ultimate award being an enforceable order of the court. The two mechanisms are, of course, complementary, as one can easily envision cases suitable for one but not for the other.

Mediation or voluntary arbitration would be explored in all cases of crimes committed within continuing relationships, while diversion would primarily be used in cases of crimes without direct victims, such as drug offences. Selected for formal adjudicative trials would be serious crimes where reconciliation is out of the question, crimes committed by strangers on strangers and cases where there is a dispute as to the truth of the allegations.

Absent would be the notion of absolute irreconcilability of interests between the state and the individual. Underlying this would be the assumption that public officials in the administration of criminal justice, in most instances, can be trusted. It would no longer be a system based on the view that all legal actors are potentially bad men who wittingly or unwittingly misuse their powers. Having abandoned the concept of battle, in all but the most serious of cases, it is possible to see that solutions to most problems will not necessarily be imposed either on behalf of the accused person or on behalf of the state.

Offenders would be seen as responsible persons having both the right and duty to make restitution rather than members of a special category of irresponsible criminals needing help. The victim's role in contributing or participating in the crime would be examined. This means that the information base to decisions would have to be broadened to include not only the elements of the offence but also the history leading up to it and relationship between the parties.

To mediate a long standing dispute between individuals or to find a solution by way of voluntary arbitration requires skills that are not learnt through court experience. To get litigation lawyers to think in terms of "solving problems" instead of "winning cases" will require more than formal education. It will mean setting up an incentive and

reward system in professional practice which accords the same measure of prestige, income and personal satisfaction in settling cases as in winning court battles. Leading members of the bar and bench could do much to symbolize the importance of finding alternatives to the adversarial process by taking an active part in developing these mechanisms. Once established they must be adequately supported by appointing prestigious arbitrators with all necessary ancillary services. The intake programme would therefore likely include: a court administrator, trained mediators, an umpire or arbitrator, social service personnel and an adequate physical plant. While the costs of such a pogramme would not be minimal, they would be more than offset by diverting cases away from the highly expensive criminal process as it now exists.

This is not to say that abuse of power is not possible in this system. Nor does it exclude the creation of mechanisms to deal with abuse when it arises. Rather, it places both a public trust and a public duty upon state officials to work together positively towards reintegrating the offender with his community and the person he injured. A primary control of abuse of power would lie in creating mutualities of interest among various parts of the system and not solely in negative sanctions. Checks and balances would be also built in through high visibility, public knowledge and public participation at all stages of the process. The public's role would be proactive rather than reactive. This means that the public would participate in concrete tasks presently reserved exclusively for professionals. These tasks would cover the whole field from recommending a law reform to supervising offenders processed through the courts.

The Role of the Public

Lay persons would be involved in every step of the process. At the formal level there would be involvement in the court itself as lay assessors sitting with professionally trained judges (as in the Scandinavian system). Lay persons could also form part of court committees in both the juvenile and adult field, the function of which would be to advise the court of the needs of the community within which it operates. Interested citizens would have the right to discuss problems of a general nature in the community of which crime is but the tip of the iceberg. Courts would then become true learning mechanisms in which community conflicts would be discussed and within which individual cases would de dispensed, first in terms of the merits of the particular case an secondly in terms of the problem the case represents to the community as a whole. It would allow judges to become "arbi-

trators of community conflicts" and would allow the court to play a major educative role.

Citizens would also have direct access to police officers. The police would be encouraged to become integrated into the community, working on a host of social planning problems in collaboration with others. It would mean a decentralization of police functions, the break-up of para-military structures and a restructuring of police priorities in the direction of crime prevention as opposed to law enforcement.

The public would also have a direct role to play in corrections. Parole decisions would be decentralized, with local parole boards attached to each institution and lay persons sitting on these boards on a rotation basis. Probation and parole services would be conducted for the most part by lay persons on a one to one basis as is done in some jurisdictions. The role of the professional would be to seek, train and give support to lay counsellors.

Large prisons would be dismantled and relocated in small units within easy access of the services available in the community. Instead of "special but equal" treatment of offenders in prisons, the majority of offenders would receive their vocational counselling and training in the community by agencies and individuals that provide these services for the public generally. This would go a long way towards treating the offender as a human being instead of stigmatizing and labelling him as a person different from others.

By far the largest role the public can play is in the informal aspects of the social defence system. Here an array of community based systems can be created that will act as information and referral sources in which neighbours with problems would be put in touch with neighbours with resources to assist in handling problems that arise. The information centres should be staffed by members of the local community and their initial task would be to consult and pass on information with respect to resources, needs and problems. Lay mediators could be used to deal with domestic and neighbourhood disputes which form the original base of so much crime, and an effort would be made to keep problems in the community wherever possible, utilizing formal agencies as last resorts in ordinary cases.

These community based organizations must be grass roots in the true sense. They should not be imposed upon a community by a group of individuals using the device to work out their own problems at the expense of both the taxpayer and the members of the community that probably did not invite them in. The values and attitudes of the people working in these centres must be those of the majority of the people in the areas they serve. They must not be seen as agents of authority or representatives of an outside controlling institution. The main pro-

tection from abuse in the system lies in the fact that true grass roots organizations operate within the framework of the communities value system. However, the decision to use the resources of a community based organization by an individual in difficulty must be a voluntary one and it must be one that does not preclude access to any of the formal systems.

Perhaps the best that could be hoped for from grass roots agencies of this kind is that they will promote community responsibility to deal with its own problems before these become so extreme that authoritative action by some official must be taken. They should be seen as working in partnership with the more formal agencies of the state and not in opposition to them. They are able to play this role to the extent that they are perceived by people in difficulty as a non-authoritarian community resource with a capacity to deal with their problems humanly and effectively.

The Role of the Police

The delicate task here will be to create positive roles for the police in society without breaking their tie with the law. While it is widely recognized that the police are not and should not become social workers, they are the major agency operating twenty-four hours a day and are responding to crisis situations of all kinds. The police must be trained to handle family disputes, neighbourhood quarrels, racial conflicts and a host of other problems for which they are inadequately prepared and insufficiently supported. The response in referral roles of the police need additional attention through training, integration with social services, guidelines for the exercise of discretion, experimentation and innovation.

Being a major intake agency to the entire criminal justice system, the decisions made by police officers with respect to discretion not to invoke the criminal process, levels of enforcement, priorities with respect to certain kinds of offences, diversion of social service networks and informal mediation at the community level have important consequences at each subsequent stage of the process. Being part of a larger system, police policy must be integrated with the criminal justice system as a whole and this will require more effective liaison through the sharing of information and joint planning.

In restructuring law enforcement, it is essential to remember that the police officer is one of the few individuals in society with special powers to use force to prevent breaches of the peace and in arresting and detaining suspects. This necessarily imposes limits to their helping the role. While it is true that up to 80% of calls for police assistance

do not involve a breach of the criminal law, police are the coercive arm of the state. They should not be encouraged to take over voluntary social service functions. It appears from the evidence that the reason for public calls for police assistance in non-criminal matters lies not only in the fact of police readiness to respond quickly, but also because the police are seen as an authoritarian agency with the powers to freeze situations before they get out of hand. It appears, therefore, that short term crisis intervention is a legitimate police function. Where there appears to be some confusion at present lies in differences of opinion among police officers and others as to what a police officer should do once a situation has been brought under control and it is determined that no useful purpose would be served by laying criminal charges. It would appear to be both wrong in principle and unworkable as a matter of practice for the police to undertake responsibility for counselling or long term follow-up in these cases. It also seems questionable for police to hire their own social workers as members of the police force. These measures lead to unnecessary confusion in the minds of the public and police officers themselves. A better solution would appear to be one of considering the police officer's role simply in terms of an intake function to either the criminal justice system or to a voluntary social service network. In order to make this work it would be necessary to ensure that voluntary social services can respond adequately to referrals from police officers. This means that each community will have to examine its resource network and supplement it as necessary. Medical, social and counselling services must be available to the police on a twenty-four hour basis. Police themselves will have to be trained to use this network appropriately and this means that curricula for police officers in training must have components dealing with discretion not to invoke the criminal process, the identification of mental or social problems requiring professional help, short term crisis intervention and police community relations. Many police academies at present do not pay any attention to these matters and the result is that 100% of police training at the recruit level deals with 25% of police activity on the street.

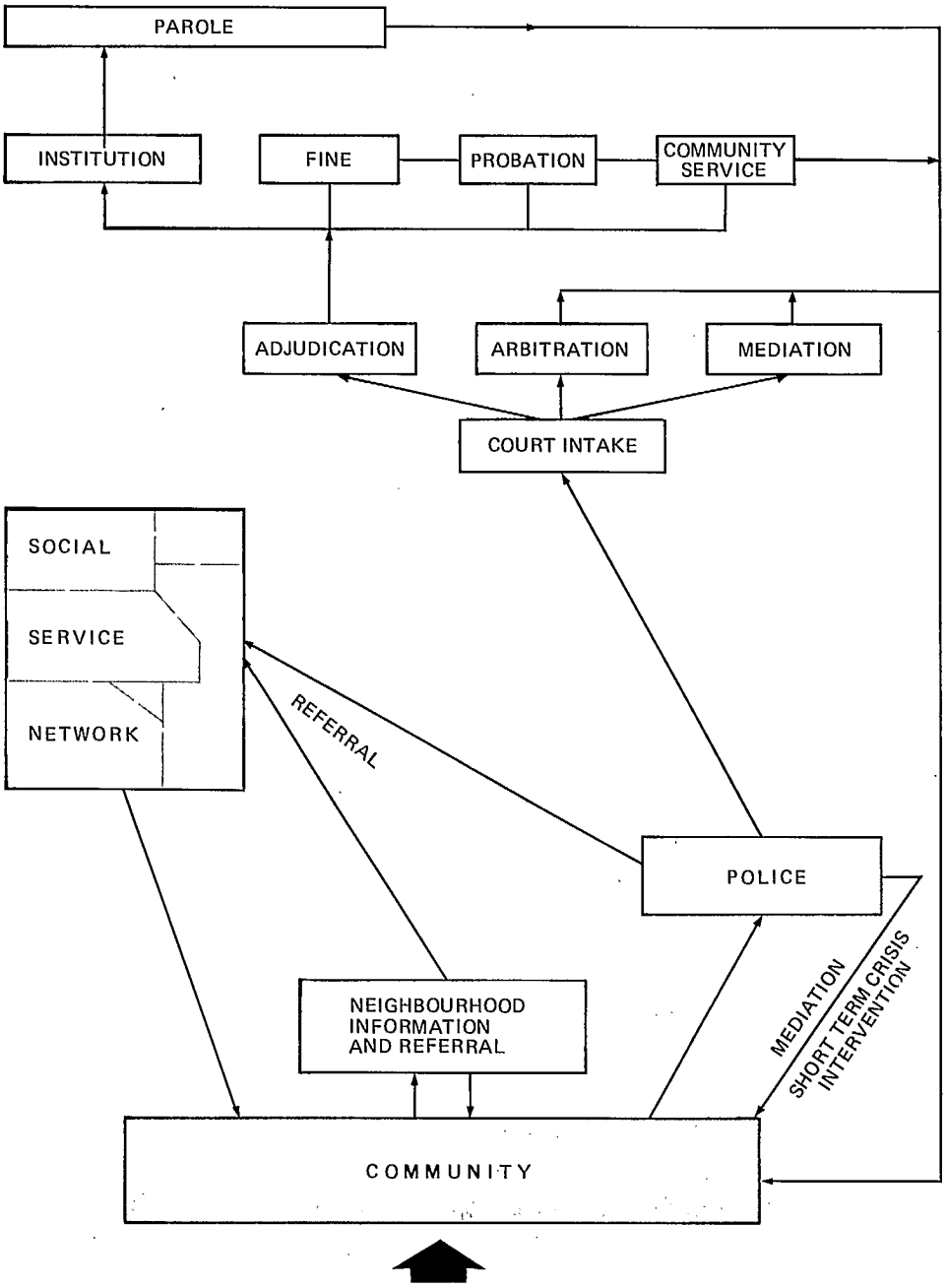
By far the most important change needed is a fundamental structural change in the role of the police in the community. It is important that the police be seen as a social service and be integrated at the planning and organizational level with other social services. This means that in each community officers will be directly involved in general social planning processes in which problems of co-ordination and delivery of services would be discussed with other relevant agencies and individuals concerned. Individual police officers will be encouraged to participate in the life of the community, not only for purposes of

public relations, but more importantly as a technique of crime prevention through interaction between community members and police officers around potential areas of conflict between citizens and the law.

Finally, there is a need to establish a clearing house of information on police innovation. Provincial and federal governments can play important roles in funding experiments, monitoring them and disseminating results. Only in this way will it be possible to take full advantage of novel attempts to find more constructive roles for police officers in a rapidly changing society.

To summarize the tentative working model as discussed in this paper it is schematically presented below.

SCHEMATIC PRESENTATION OF MODEL



the reform of punishment

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Part 1

Introduction

> Our national reluctance to discuss abstract principles did comparatively little harm when there was a certain intuitive unanimity about sound fundamentals; in such circumstances a healthy moral instinct yields better results than an inadequate abstract theory. A man who knows that chicken is wholesome, as Aristotle remarks, is more likely to restore you to health than the man who knows that light meat is easily digested but does not know what kinds of meat are light. At present, however, when instinctive unanimity has disappeared, it becomes imperative to reflect upon abstract principles if we are not to submit to the casual influence of gusts of emotion. You can muddle through only with the aid of sound instincts; without them you make the muddle but you do not get through.[1]

I intend in this essay to review some of the notions currently under debate within the philosophy of punishment and to assess their relevance to selected issues of criminal law reform. Perhaps I should say something right at the outset about the significance of such abstract philosophical speculation for the pragmatic, hard-headed task of reforming Canada's criminal law. The connection is not a self-evident one, to say the least.

If we step back from the details of the various segments of our criminal law and take a bird's eye view of the whole process, a striking fact appears. This entire complicated and cumbersome apparatus is basically designed to do one thing. It channels some individual before a judge, a representative of the state, who can ordain that a painful measure will be deliberately inflicted upon him. Some of the rules of the criminal law tell us the kinds of prohibited conduct for which such punishment may be meted out. Other legal doctrines define the kinds of offenders who may be punished. Still more inform us how much punish-

[1] Hawkins, "Punishment and Moral Responsibility" (1944) 7 Modern Law Review 205.

ment may be meted out, or the procedures through which the target of the process is brought to that ultimate point. But the detailed superstructure of our criminal code does not address itself to that most fundamental of questions *why* do we punish at all? Nowhere has the latter dilemma been better expressed than by Tolstoy:[2]

> He asked a very simple question: Why and by what right do some people lock up, torment, flog and kill others, while they are themselves just like those they torment, flog and kill? And in answer he got deliberations as to whether human beings had free-will or not; whether or not signs of criminality could be detected by measuring the skull, what part heredity played in crime; whether immorality could be inherited; and what madness is, what degeneration is, and what temperament is; how climate, food, ignorance, imitativeness, hypnotism, or passion affect crime; what society is, what its duties are and so on . . . but there was no answer on the chief point: 'By what right do some people punish others?'

Hence the true importance of the often tiresome wrestling of philosophers with the moral justification of punishment. It is directly relevant every time a judge exercises his sentencing discretion, even though his attention is focused only on the particular form and severity of punishment to be meted out. Clearly, though, it is even more vital at a time of systematic reform of a nation's criminal law. Implicit in every proposal for change of that body of law is a tacit assumption about the propriety, and the limitations to such propriety, of this deliberate coercion of the individual by the state.

I do not mean to suggest that philosophical reflection in an armchair will provide answers sufficient of themselves about the details of a criminal code. Clearly there are complex investigations about matters of fact and tactical relationships of means to ends which are equally important to a successful criminal law enterprise. But in the final analysis, it is this branch of philosophy which sets the guidelines for that enquiry, telling us what kinds of steps we are, or are not, entitled to take. No doubt our men of action—legislator, judge, lawyer, prosecutor, policeman, prison administrator, and so on—may be dubious, but that does not affect the inevitability of this truth. If I may slightly paraphrase a famous passage of Lord Maynard Keynes:[3]

> . . . the ideas of [moral] and political philosophers both when they are right and when they are wrong are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct [theorist]. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back.

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[2] Quoted at the beginning of Pincoffs, *The Rationale of Punishment* (1966).

[3] Keynes, *The General Theory of Employment, Interest and Money* (1936) at p. 383.

In this paper I do not plan to review in a dispassionate way the variety of answers which philosophers have offered to this crucial question why are we justified, if we are, in punishing an individual? Undoubtedly it is a useful exercise to draw together in a coherent way the many opinions expressed by others in this ongoing debate. But that is not the kind of project which interests me. Instead I shall take the somewhat riskier step of presenting my own views about how that question should be approached. Nor do I have any illusions about this being a systematic and comprehensive analysis of the area. I have concentrated on some crucial new turns in recent criminal law theory which I do not believe have as yet filtered into the world of the practitioners but do have real implications for several pressing issues of criminal law reform. Perhaps this exposure of the judgments to which I have committed myself will challenge the participants in this revision of Canada's criminal law to reflect on and rethink their own assumptions about these same themes.

The setting for this study can be summed up shortly. As we look back on the history of criminal law theory in the last century, two ideas have emerged as dominant. First is the reign of utilitarianism as the cutting edge of the philosophy of social reform. The critical questions about any social action, law, or institution are what good will it produce, how much, and at what cost? Second, in the criminal law itself, the "good" with which we have become primarily concerned is the rehabilitation of the offender. There is no logically necessary connection between the two concepts: in fact, Bentham, perhaps the most powerful influence in the evolution of utilitarianism, was much more concerned with the general deterrent impact of the criminal law. But after a long gestation period, the natural affinity of the two objectives for each other has asserted itself. They are now the comfortable intellectual furniture not just of reformers and critics, but also of most practitioners in the field. The Ouimet Report confidently stated that "the Committee regards the protection of society not merely as the basic purpose but *as the only justifiable* purpose of the criminal law in contemporary Canada" and "that the rehabilitation of the individual offender offers the best long-term protection for society".[4] The current fate of their adversary, the retributive theory of punishment which had held full sway until the early Nineteenth Century, is nicely conveyed by the fact that Herbert Packer, author of one of the most noteworthy recent works of criminal law scholarship, dismissed it in one sentence: retribution "has no useful place in a theory of justification for punishment because what it

[4] Report of the Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (1969) at pp. 11 and 15.

expresses is nothing more than dogma, unverifiable and on its face implausible"; indeed it appeared to him nothing more than "the merest savagery".[5]

As is so often the irony of history, just as an earlier revolutionary theory becomes predominant and domesticated, the intellectual pendulum begins to swing the other way. The first to feel the effect of this uneasiness was the "rehabilitative ideal". That objective has a natural resonance with utilitarianism for an evident reason. If one's moral impulse is to produce the greatest amount of good or happiness in the world, then the deliberate infliction of pain or evil presents a real stumbling block. There are ways of circumnavigating it, as Bentham showed, but they are indirect and ambiguous. How much better to revise the institutions of the criminal law so that what we do to the individual, while helpful to us, is also beneficial to him. I believe that this is the chief source of the powerful attraction of the treatment of the offender as the master theme of the criminal law process. Experience with the reality of this brave new world has begun to disenchant many observers, for reasons nowhere better expressed than by this biting comment of an early and prophetic critic:[6]

> To be taken without consent from my home and friends; to lose my liberty; to undergo all these assaults on my personality which modern psychotherapy knows how to deliver; to be remade after some pattern of 'normality hatched in a Viennese laboratory' to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I have grown wise enough to cheat them with apparent success—who cares whether this is called Punishment or not? That it includes most of the elements for which any punishment is feared—shame, exile, bondage, and years eaten by the locust—is obvious.

Still, the reign of utilitarianism as the "justifying aim" of the criminal law appeared unchallenged by the flaws which became evident in the face of its junior partner, rehabilitation. Sophisticated theories were developed by various thinkers, including the aforementioned Professor Packer, to present an "integrated rationale" which can deal with the moral soft spots of pure crime control while preserving the basic philosophical principle. What cannot be admitted is that retributive reasons may provide *a,* or even *the,* positive justification for punishment. Yet that "unverifiable and, on its face, implausible dogma" is alive again, for reasons which go right to the heart of our conception of the criminal law. The explanation of this paradigmatic shift in the ways we are (or will be) thinking about criminal punishment, and the implications it has for important topics for law reform, is the main subject of this essay.

[5] Packer, *The Limits of the Criminal Sanction* (1968) at pp. 38-39, 66.
[6] Lewis, "The Humanitarian Theory of Punishment", 6 *Res Judicatae* 224, at p. 227.

Part 2

The Varieties of Punishment

In most contemporary treatments of punishment a standard order of analysis is adopted. The author begins by formulating a precise *logical* definition of what he means by punishment; then he attempts to develop his argument for its moral defensibility. At first blush that would seem a perfectly sensible manner of proceeding. How can one tackle the perennial dilemma of *why* we punish until we first clear the ground about *what* it is we do when we do punish.

In several important studies of punishment of about twenty years ago, that approach was taken a little too far. These tried to deal with some of the key moral claims of the retributive view—in particular the notion that punishment must only be imposed on someone who deserves it for an offence—by arguing that this requirement was already built into the logical definition of the practice. We can only punish for an offence because if we don't we are not really "punishing" at all. But it did not take long to detect the fallacy in this proposal. Punishment is not a natural phenomenon, to be observed and described. It is a social institution made and remade by human beings in line with their principles and to further their objectives. In the real world what we do is largely determined by why we think we ought to be doing this rather than something else. The need to limit punishment only to deserving offenders is problematic, and can be defended only by moral argument, not definitional fiat.[7]

Yet it is still instructive to look at the typical definitions of punishment in philosophical theory; not so much to see what philosophers

[7] See H. L. A. Hart, *Punishment and Responsibility* (1968) at pp. 5 and 6, dealing with the views of Quinton, "On Punishment" (1954) and Benn, "An Approach to the Problem of Punishment" (1958).

make out of them (because they really try to make very little) but rather to understand the tacit assumptions they embody. Perhaps the most widely-accepted definition is that of Professor H. L. A. Hart:[8]

> The standard or central care of 'punishment' is defined in terms of five elements:
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> (i) it must involve pain or other consequences normally considered unpleasant;
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> (ii) it must be for an offence against legal rules;
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> (iii) it must be of an actual or supposed offender for his offences;
>
> (iv) it must be intentionally administered by human beings other than the offender;
>
> (v) it must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

True, Hart does recognize several other possible uses—unofficial, informal, vicarious punishments, or even punishment of the non-offender—describing them as "sub-standard" or "secondary cases". Still we are left with the clear impression that there is a standard case, it can be quickly identified in the real world, and it includes almost all important instances we will find, all but a few aberrations. If he is right in these assumptions, his definition is probably as close as we can come.

I think it is critical to challenge these assumptions right at the outset. The key elements in the definition are legal rule, offence, offender, pain or other unpleasantness, and legal authority. Certainly these would seem to be obvious requirements for our understanding of the term "punishment", but when we look at real life cases these labels conceal more than they reveal. Suppose we consider the broad range of situations where the moral dilemmas of punishment arise. Anyone familiar with the details of Canadian criminal law will realize that there are a bewildering variety of legal doctrines which are said to satisfy these basic constituents. Even more important, these are not just local peculiarities to be noted and then dismissed for purposes of further theoretical analysis. In this Chapter I shall try to show that Canada's criminal law contains wide variations in the answers given to such notions as offender, pain, and so on; these variations fit together in systematic, internally-coherent ways; these differences are as crucial as the basic similarities in the ultimate task of moral justification.

As a preliminary step in sorting out these issues, I shall propose a somewhat more precise terminology for delimiting these several varieties of punishment. The area of social action which raises the moral problem for this branch of philosophy will be referred to as the system of *sanctions*. These include not only full-fledged criminal offences under the Code but as well provincial "quasi-criminal" offences, the "non-

[8] Hart, cited in Fn. 7 above, at pp. 4-5.

criminal" approach of the Juvenile Delinquents Act, and such "civil" techniques as involuntary commitment of the mentally ill. Within that family we can perceive three distinctive practices: only one of these is properly described as "punishment" in the full sense of that term; the other two I will call "penalty" and "correction" respectively.

I should immediately make clear the limited significance of this linguistic exercise. The different terms refer immediately to idealized models which I believe are useful in making sense of the tangled world of criminal law doctrines and processes. Neither the names nor the models which I will sketch are meant to imply that this fluid and ever-shifting reality of the criminal law can be neatly segregated into self-contained compartments. No intellectual tools that I know of are up to this task. Nor do I assume that because there actually exist in our criminal law several distinctive patterns and arrangements, then *ipso facto*, these differences are morally justified. Indeed that is the problem which is the subject of this enquiry. However, it is important to get clear at the outset of the complexity of an on-going criminal law system, to show distinctions imbedded in the criminal law of modern society generally, and then to analyze the way these reflect the presence of several enduring aims in various areas of human life. In many respects the law is like a language and the theorist can ignore only at his peril the complications and nuances which the ordinary man has found it useful to adopt in his practice. As J. L. Austin once said:[9]

> . . . our common stock of words [or laws] embodies all [at least many] distinctions men have found worth drawing, and the connections they have found worth making, in the lifetimes of many generations. These surely are likely to be more numerous, more sound, since they have stood up to the long test of the survival of the fittest and more subtle at least in all ordinary and reasonably practical matters, than any that you or I are likely to think up in an armchair of an afternoon, the most favoured alternative method.

This said, I must remark on further forms of social practice and give them their proper titles as well. These several parts of the criminal law (or different examples of sanctioning systems), are themselves only a segment of a much broader family of social responses to a perennial and crucial problem of social life. We can only live together in an interdependent community if we largely accept and comply with standards of behaviour which are designed to avoid harmful conflicts and produce beneficial co-operation. The clearest examples of this need are rules prohibiting violence, theft, fraud, and so forth. Of course, a society has to have criteria and procedures for deciding which of these rules are worthwhile and how they are

[9] J. L. Austin, "A Plea for Excuses" (1956-57), *Aris. Soc. Proc.* 1.

to be enacted. These present issues which are equally as enduring and probably more important to social life and social theory than the distinctive challenge I am concerned with here. But once we have agreed upon and adopted a set of standards for social life, whatever be their content and mode of enactment, how is a society to ensure that they will be complied with? What will it do in the inevitable situations where the rules are infringed?

That is the heart of the problem to which the philosophy of punishment addresses itself. As I will try to show it will find several viable social practices in the criminal law whose credentials it must inspect. But the criminal law is itself only one sample of the different responses by any community to this same general challenge. In order to understand the complexity of the criminal law, we should first see it in contrast with the alternative social responses which envelop it.

One example is the response of *moral persuasion and blame.* Through this technique we seek to influence offenders, or potential offenders, by attempting to educate them as to why they should fulfill their obligations, and we express our distaste and resentment of their conduct when they do not. This practice is institutionalized in the family and schools which deal with children who are supposed to be at a morally malleable stage. However, it is a universal theme in just about every social context, be it work, play, public life, clubs and so on. The tacit assumption of the process is that the targets of our efforts are rational and responsible actors, or at least potentially so, and can be led to perceive the duties they owe their fellow citizens and will be influenced by moral claims made upon them.

A rather different technique is that of *reward.* Those who fulfill their obligations or co-operate for the common good will in turn receive some individual benefit which they prize. Praise is a response which lies on the borderline between reward and moral persuasion but the experience of man has taught him that a tangible benefit is more effective. The usual selection for the practice is financial and the standard setting for its use is the market-place. The tacit assumption of the technique is that its targets are influenced by the goal of economic gain and that they are rational calculators of the individual costs and benefits of the activities open to them.

A third social technique, some distance removed from the others, is the one for which I will reserve the term *treatment.* It rests on somewhat contradictory assumptions from the other two. Because of some disorder, whether physical, psychological, or behavioral, a person may be unable to meet his commitments even though he wants to. An automobile driver may suffer from a heart condition, alcoholism, or simple lack of skill, any one of which may make him dangerous on

the road. A society can provide the resources, clinical or otherwise, to correct these personal disorders and then permit the individual to avail himself of them. This is the technique of treatment, which we often find combined with either moral persuasion or reward to influence or subsidize that choice. In the final analysis, though, pure treatment is utilized only when the individual is given the freedom to decide whether his objectives in altering his condition coincide, at least partially, with those of society in securing conformity with its objectives.

It should be clear now why each of these practices shares one essential characteristic which excludes the peculiar moral dilemma addressed by the philosophy of punishment. In every case, the community seeks to alter or channel the individual's behaviour through methods which protect his *voluntary* choice about whether, ultimately, he will comply or not. The individual decides how he will respond to moral persuasion and whether the standards of conduct which require his private sacrifice are sound or not. He decides whether the reward offered for a difficult task makes the game worth the candle. He decides whether he will accept the unpleasantness involved in the treatment which he might undergo in a place like an alcoholics' clinic.

The moral problem depicted in my earlier quotation from Tolstoy emerges only when a society decides that it cannot take the risk that the correct individual decisions will be sufficiently forthcoming voluntarily. It decides to resort to *coercion* in order to secure that necessary extra margin of compliance with its standards. The moral ambiguity of coercion has produced the extensive philosophy of punishment which ultimately turns on this one question—by what right does the state force an individual to bend to its will?

This is where the criminal law enters. As I said earlier, we will find three distinctive practices within a typical modern system of criminal law—punishment, penalty, and correction.[10] I will contrast them first in terms of the peculiar mood which pervades each practice, reflecting the aims and structure embodied in each. A system of *punishment* attempts to achieve general compliance with the basic standards of conduct by using coercive measures that express a community's condemnation of individual behaviour which infringes these rules. A system of *penalty* also tries to secure such generalized compliance, but via the threat of some deprivation which will make an offence too costly to the typical rational actor. The system of *correction* shares this same neutral, non-moralistic mood but focuses its attention on the individual who

[10] There are two especially illuminating studies of punishment which originally suggested this triad to me: Morris, "Persons and Punishment" (1968) 50 *The Monist* 475 worked out the distinction between punishment and what I have called correction while Feinberg, "The Expressive Function of Punishment" (1965) 49 *The Monist* 397, elaborated the differences between punishment and penalty.

comes within its grasp and tries to secure his future rehabilitation and conformity. It does so through a coercive regime which treats the individual's pathological condition irrespective of his own views about whether such a step is in line with his interests. It should be clear from this last, as from the others, that when a society chooses to use the criminal law, it faces alternative practices which reflect much the same atmosphere and assumptions of the corresponding non-criminal techniques referred to earlier, but with the crucial addition of this factor of coercion.

One might ask, then, why should not this common factor of coercion dominate the discussion of the philosophy of punishment and require a common form of moral justification (if one can be found)? Why should I try to sketch three different models of the real-life variations in a society's coercive machinery and then suggest that these may each attract its own form of analysis and defence? To see why, we must look closely at the underlying structure of these three models.

Suppose that a person were asked to design a sanctioning system for a society, a comprehensive criminal code. Here are the basic questions he would have to put to himself and answer:

(i) most important, what standards of conduct are sufficiently critical to that society to warrant the support of its organized force?

(ii) next, what specific measures of official force will prove successful in securing the objectives the society has in mind regarding that conduct?

(iii) again, to what persons and in what situations is it to apply these coercive measures?

(iv) finally, what procedures should it adopt to make these individual decisions in the on-going administration of the criminal law?

We must recognize that each of these questions is logically distinct. The legal responses to each could conceivably be fitted or refitted together in a large number of patterns. In real life, though, we would not expect that to be the case, assuming that the various decision-makers had some coherent view of the problems they faced and the aims they wished to pursue.

The enquiry would begin with the kinds of harmful conduct which had created concern and had led to the use of the criminal law. If we can assume that there are distinctive forms of human conduct which normally evoke very different social reactions, these will almost certainly be reflected in the solutions to the other issues in the design of the criminal law. We will expect to find family connections in the legal

doctrines telling us what kind of conduct is an offence, what sentences are to be meted out for it, who is to be convicted, who is to be excused, and what procedures are to be available for making these decisions. Such affinities should produce internally-coherent designs which will differ sharply if, and to the extent that, the community does find very different problems and aims in the underlying areas of human conduct with which the law must deal.

The Range of Prohibited Conduct

In fact, it is quite easy to see the enormous variety in the kinds of behaviour which are subjected to the sanction of the criminal law. Consider the "crimes" of murder, careless driving, and juvenille delinquency. Is there anything these forms of conduct have in common except the failure to comply with the dictates of a legal standard of behaviour? Many theorists have tried to formulate a definition of what we mean when we speak of a "crime". Confronted by this wide range of examples, every proposed substantive criterion ultimately fails to account for some. Eventually we have become satisfied with a purely procedural and essentially question-begging solution. A crime is "an act capable of being followed by criminal proceedings as having a criminal outcome".[11]

Yet no one, even the least informed of laymen, has any trouble accurately identifying many criminal offences. We would all agree that murder is the clearest case, and then would go on to speak of assault, rape, robbery, kidnapping, larceny, fraud, arson, and so forth. There are certain common factors in these examples which come immediately to mind, which help identify what lawyers and judges are wont to call "real" crimes, or crimes which are *mala in se*. What are they?

I should think that the key characteristic is that the prohibited conduct involves the infliction of a serious harm on another and innocent person. Because of this, the conduct evokes the immediate reactions of resentment from the victim and indignation from the onlooker. Given these inevitable attitudes, it is easy to understand why the heart of every developed system of social morality is designed to condemn such behaviour (although we do see variations and a gradual evolution in the definition of the group whose members are entitled to the protection of such standards). Those who are socialized into that prevailing morality are rarely tempted to engage in such behaviour and suffer persistent guilt if they do succumb. In consequence of these factors, such conduct is proscribed by every developed criminal law system

[11] Glanville Williams, "The Definition of Crime" (1955) 8 Current Law Problems 101, at p. 123.

(although, again with variation in the precise legal definition of the fuzzy edges of its application). Indeed, it is hard to imagine how there can be a viable community with an organized government which does not make the *coercive reduction* of these behaviours a primary concern.[12] In sum, then, when we look only at a part of our criminal law, there is a great deal of substance we can say about that segment taken as a whole. Most important, here, is where the law responds through the institution of "punishment".

But there are penal offences, which are processed through the same criminal law institutions, but for which none of that description will hold true. Let us look at an offence at the polar extreme from murder, one such as illegal parking. If the passenger in a car were to say to the driver that the latter's infraction was a serious moral default, the driver would start to wonder about his passenger, not his own conduct. We all know perfectly respectable people who regularly collect parking tickets and equally as regularly tear them up. No one would expect this conduct to attract resentment or engender guilt (on the part of the "scoff-law"). We seem to be in a completely different world from that of murder or robbery. Yet a large proportion of the work of our criminal law institutions is taken up with this general variety of behaviour, for which our lawyers and judges again have descriptive terms—"public welfare" offences, or conduct which is *mala prohibita.*

Illegal parking might seem a rather trivial example, but I think not. It is one offence in a general scheme of highway traffic laws which serve a variety of vital utilitarian objectives, whether it be preventing motor vehicle accidents and injuries, ensuring a smooth flow of traffic, controlling the use of the car and its impact on urban life, and so on.[13] The scheme typifies a major revolution in our attitude to government activities in the last few centuries. As our population has grown and our community has become intricately interdependent, the coercive mechanisms of the state are used to enforce an ever-expanding set of *regulatory* standards. I need not recite a long list of examples, whether drawn from regulation of cars, food, work, the distribution of stocks, or countless other sources. The phenomenon is clear enough. It is the precise technique used by the state which is of interest here.

What the law does is proscribe a form of conduct which it believes creates the *risk* of harm to others, not the immediate *infliction* of that

[12] In his illuminating analysis in *The Concept of Law* (1961) at pp. 189-195, H. L. A. Hart described these as "natural necessities" for a legal system.

[13] There are a great many hasty generalizations in criminal law theory, both philosophical and criminological, which might have profited from an attempt to work out their implications for traffic law; an instructive discussion as to why this is so can be found in Ross, "Traffic Law Violations: A Folk Crime" (1961) 8 Social Problems 231; see also, Ross, "Folk Crimes Revisited" (1973) 11 Criminology 71.

harm. More and more often, the law is extending its reach to behaviour at a point where the risk seems quite faint, and the ultimate harm rather ephemeral. This is the crucial difference from the "real" crimes of murder and the like where grave injuries are visibly suffered by an identifiable victim, and the moral attitudes of resentment and indignation are naturally forthcoming. But there are further, related characteristics of this new category of offences. In particular, they ordinarily require an expert judgment about exactly where the law should intervene after calculating the probable benefits and losses in social welfare. Moreover, because a clear legal line must be drawn, it must often artificially carve out the sphere of illegal behaviour from its immediate environment. The cumulative result is that ordinarily there is no widespread moral condemnation of the conduct which precedes the creation of the offence. The state relies on the authority of the law itself as the primary influence in reducing the level of these *mala prohibita*. It is in this realm of the criminal law that we should expect to find the practice of "penalty" in operation.

I am perfectly well aware that there is no neat dividing line between these two segments of the criminal law whose characteristics I have sketched. When we examine any real-life criminal law system, these two categories of offences shade imperceptibly one into the other. In fact, as I shall try to show later, the failure of our present criminal law to try to mark off the one from the other is a problem for criminal law reform. But the absence of a water-tight division does not tell against the reality of the differences between clear examples—such as murder and careless driving—drawn from either group. Indeed, a model which is based on these differences can help us understand some of the obscurities in the offences which are on the boundary in the middle.*

There is no such identifiable segment of behaviour in which the "correctional" reaction is dominant. Instead this approach was given its original impetus by the need to deal with certain distinctive offenders against the basic criminal law. The unbalanced and delusional killer does not seem a fit target for punitive blame and instead must be dealt with through some doctrinal practice of "criminal insanity". The

* A good example is the crime of manslaughter by an unlawful act. A very common form of regulatory law is the requirement of a licence, whether to drive a car, hunt game, or practice medicine. If a person engages in this conduct without a licence, he will be convicted, fined, hopefully has learned his lesson and no one will think any more of it. Suppose, though, that while hunting without a licence (or out of season), he accidentally kills someone. Now there is an innocent victim of his illegal conduct, and the whole atmosphere of the legal response has changed, notwithstanding that his own behaviour remains precisely the same. Only haltingly has the law of manslaughter begun to sort through some of the issues in the area and to focus on the *dangerousness* of the defendant's behaviour. But the very existence of the distinct offence of manslaughter is a continued testimonial to the impact which the presence of a victim has on the criminal law's evaluation of prohibited conduct.

adolescent who is tempted to shoplifting cannot be adequately dealt with by deterrent penalties. He needs further teaching and training in the habits of law-abidingness. In the well-known phrase: "the emphasis is on the criminal, not the crime", and because of the way we perceive the offender's status and involvement, our reaction to his crime is very different from those sketched above.

Yet there is an underlying logic to the rehabilitative ideal which has helped move the legal system into new spheres of behaviour[14]. While society's original objective in correcting the individual may be to defend others from the risks created by his dangerous condition, it does so through techniques which it hopes will solve the individual's own problems as well. It is an easy, further step to train the same measures on persons in that condition in order to prevent self-inflicted harm. Hence we commit the mentally ill who we feel are a danger to themselves and we extend the helping hand of the juvenile court to the "neglected" child. Now it might well have been a useful prophylactic principle to limit such *coercive* intervention in the life of the individual to cases where this is believed necessary for the social good, but the trend of history has outflanked any such doctrine. The rehabilitative ideal and paternalistic concern are blood brothers, and their common parent is a heightened (and perhaps excessive) sensitivity to the way in which social and psychological factors inhibit the responsibility of the individual for his behaviour. Coincident then with the growing dominance of the correctional view in our criminal law, we find a proliferation of laws designed to protect us all from the harm we can (foolishly) do to ourselves. The most important instance of this trend in the modern criminal law is the array of drug laws and programmes.

The Choice of Penal Instruments

While I have given specific examples of the different forms of prohibited conduct, up to this point I have been vague about the exact character of society's reaction through its different coercive practices. What does it mean in operational terms to speak of the "punitive", "penal", or "correctional" responses of the criminal law? The answer must be sought first in the several penal measures available to the sentencing judge who must decide exactly what kind of "pain or unpleasantness" is to be visited on the convicted offender. Is it true that there are crucial differences in the character of these alternative sentences which correspond in turn to the variations in the types of prohibited conduct at the heart of the distinctive practices within the criminal law?

[14] One of the nicest descriptions of this tendency is Platt, *The Child Savers* (1969).

One of the most important sanctions available to the practice of punishment is *conviction* of the defendant—the public and authoritative certification of his guilt.* We are operating here within the highly-charged atmosphere of an allegation of blameworthy conduct which has caused serious harm to an innocent victim. As a result, when we stigmatize a person as an offender, we inflict not only a damaging, but also one of the most enduring, sanctions which the state can mete out. This fact is often overlooked but we need only call to mind such examples as the lawyer who is convicted of misusing trust funds or the teacher convicted of sexual offences with small children to appreciate its truth. Because this practice both relies on and reinforces the deeply-felt moral standard of the community, the aura which is attached to its condemnation of the offender is a source both of its strength and dangers. When we realize this fact, we can understand the rationale of recent legal reforms which have given our sentencing judges the alternative of avoiding this formal conviction (and so the "criminal record") through such devices as absolute or conditional discharge.

Yet a pure conviction is rarely felt to be a sufficient response to the kind of conduct which we are dealing with here—be it murder, rape, robbery or the like. There are some groups whose members are uncommitted to or alienated from conventional society and for whom the community's condemnation holds little fear. Even for the hitherto respectable and law-abiding offender whose future life is severely disrupted, a public recording of his guilt is unlikely to be seen as sufficient evidence of how seriously society feels about what he has done. The institution of punishment thus supports and supplements its "expressive" character by other penal measures. In particular, it relies on those sanctions which are held to be peculiarly disgraceful or shameful within the community. Obviously these will vary at different times and places but I am confident that in contemporary Canada the most important of these is the jail sentence. The average member of our middle-class feels an abhorrence for even short-term imprisonment—

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* One of the most widely-quoted statements of this view is this comment of Henry Hart: [15]

> What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition. As Professor Gardner wrote not long ago, in a distinct but cognate connection:
>
> > The essence of punishment for moral delinquency lies in the criminal conviction itself. One may lose more money on the stock market than in a courtroom; a prisoner of war camp may well provide a harsher environment than a state prison; death on the field of battle has the same physical characteristics as death by sentence of law. It is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment.

[15] Henry Hart, "The Aims of the Criminal Law" (1958) 23 Law & Contemporary Problems 401 at pp. 404-05.

almost akin to a moral leper colony—which is far out of line with the actual deprivations it entails. The traditional offences in the criminal law, those which are heavily encrusted by moral sentiments, make much greater use of this sentence with the message it conveys than do more recent forms of regulatory offences, though the latter may involve conduct which is, objectively, much more dangerous (e.g., reckless driving compared with pedophilia).

Instead, these regulatory offences, which are the subject of the practice of penalty, typically use the sanction of the fine. The conduct in question occurs primarily in a business setting, the offender usually fits the picture of the rational, calculating individual which forms the underpinning of the theory of general deterrence, and most offences will be motivated by the prospect of monetary gain (or the avoidance of expenditures). Monetary fines are a technique which enables us (at least roughly) to measure and adjust the deterrent influence in the desired direction. The lawmaker can use them to place a sufficient weight on the other side of the scales to encourage the potential offender to resist the temptation to profit by illegal behaviour. And, as I said above, the "public welfare" offence will not deal with conduct which carries a moral aura which would be depreciated in the rest of the community if the law did not respond with an expressive form of sanction such as the jail sentence.

The ambivalence at the root of the practice of "correction" is reflected in the difficulty in selecting its characteristic sanction. Unquestionably the stigma of a conviction and the disgrace of a jail term must be eradicated as far as possible. Fines are held in equally low esteem. Not only are they of little use as a technique in treating the causes of an offender's behaviour, but they also clash with the basic assumption of this practice, that the offender is *not* rationally-motivated and amenable to this kind of economic influence. I would think that the ideal response within the correctional perspective is the sentence of probation within the community. The offender can be brought into a personal relationship with the expert in the proper case work techniques needed to deal with the conditions which have produced his behavioural problems, and try to solve them in the same environment where he must live if the treatment is successful.

Yet correction is not pure treatment primarily because it does not rely on the voluntary choice of the individual to avail himself of those measures which he feels will benefit him. The needs of social defence have produced a *coercive* practive and these inevitably divert the choice of sentence from the ideal. Dangerous offenders must be incapacitated until they are cured and they must often be confined in places where they can be forced to be rehabilitated whether they like it

or not. Defenders of this practice will argue that such detention is not to be mistaken for the harsh and punitive jail sentence. They will try to turn penitentiaries, reformatories, or whatever is the currently popular term into therapeutic communities which they hope will eventually receive the same sympathetic perception as do our hospitals. The typical product of the rehabilitative ideal is not only the invention of a remarkable array of measures such as probation, parole, discharge, half-way houses, and so on; it is also the persistent increase in the incidence and length of confinement in some institution or other, whatever be the names by which we call them.

The Distribution of Penal Sanctions

Intervening between the general prohibitions of harmful conduct and the application of the specific penal measures through which society responds to its occurrence is a very complicated legal apparatus. Quite simply, its purpose is to single out those individuals who are to bear the weight of the criminal sanction. The prohibited harm may occur, such as a homicide, but not everyone connected with it is an "offender" who has committed an "offence". It is the point of that whole battery of legal doctrines grouped under the rubrics *actus reus* and *mens rea* to tell us exactly who is.

Perhaps the most crucial source of the ambiguity in conventional definitions of punishment arises precisely at this point. The notions of "offence" and "offender" do have a meaningful content within that one distinctive practice of the criminal law which I have termed "punishment", strictly speaking. The reason is that these concepts are generated naturally within a practice which is heavily dependent on the notion of *desert*. What we do is single out a person to be morally blamed, publicly stigmatized, and then subjected to shameful penalties. Yet surely this can only be justified if that person has acted in a morally culpable fashion, and so can be said, in a sense, "to have been asking for it". Such judgments of moral blameworthiness require something akin to notions of an offence and an offender. First of all, the person in question must have engaged in culpable conduct in breach of standards which he was obliged to obey (and I should add that this obligation in turn assumes the standards were enacted by proper authorities in order to protect citizens from invasions of their own security and freedom). Secondly, this external misconduct and harm must have been voluntarily chosen by that individual. He must be responsible for his conduct in the sense that it was fair to expect that he should have acted otherwise.

These two assumptions are the respective sources of the legal principles of *actus reus* and *mens rea*. The law may have made some compromises in their application through its detailed legal rules but the

essential thrust of the core of our criminal law, that part encompassed by the practice of "punishment", is clear enough. The coercive intervention of the state is to be limited to situations where an individual has had sufficient freedom of action to incur moral blame. But the institution is not used to condemn moral defects as such, to punish mere evil designs. Only if the individual expresses those wishes in conduct which infringes the network of obligations protecting others in the community from harm are the representatives of the state entitled to punish an "offender".

Unfortunately (at least for the theorist) there are large areas of our criminal law where these two principles are consistently ignored. Such cases can be included within a general definition of punishment only if the terms "offence" or "offender" are given a purely nominal meaning. In other words, we can say that a person is an offender whenever he satisfies the legal doctrines which expose him to the coercive powers of the state, no matter what is the content of these legal doctrines. (For example, we could say that a "neglected" child or one who is "criminally insane" are offenders, because the law authorizes the confinement of such persons in appropriate cases.) Yet to do that is to ignore the rationale for the use of the concepts, the context within which their meaning has been generated.

On the other hand, if we respect the integrity of these key elements in the definition of punishment, then large areas of the criminal law will be excluded from this kind of philosophical appraisal. Some may take the tack of assuming, without argument, that these uses of the criminal law are an unjustified aberration because they do not fully respect such facets of "desert". Others may take the opposite view and hold that, since we are no longer engaged in "punishing an offender", then the moral dilemmas of the criminal law are now outflanked and we may blithely ignore them. But, as I said at the outset, we cannot solve substantive moral problems by definition. Our preconceptions should not blind us to the presence, within the larger family of sanctioning practices, of durable institutions whose logic does not require the same full scope to the principles of *actus reus* and *mens rea* as we find in the central core of "punishment".

Take the practice of penalty first, where that aura of moral blameworthiness and desert is just about totally attenuated. The standards of conduct in question are not felt to be morally obligatory (at least in a strong sense) since they do not involve the clear and direct infliction of harms on innocent victims. The force of the practice is much more neutral, technical, and future-oriented. Sanctions are imposed in order to maintain the credibility of threats which are established to secure future compliance with sophisticated, regulatory

standards of behaviour. Within this setting what kind of legal attitude should we expect to the question of the distribution of these sanctions?

The value of the conduct requirement of the criminal law would seem largely unimpaired. The focus of the law is on certain risky forms of behaviour and it would seem sensible to impose the sanction only if it has taken place [or been attempted but frustrated]. The rationale for the imposition of the sanction in general deterrence [including the offender, but without really concentrating on him]. But the credibility of the objective of general deterrence depends on two things: first, it must be believed that the threatened sanction *will* be imposed *if* the behaviour occurs and is discovered, secondly, it must be believed that the sanction *will not* be implemented *unless* the behaviour does occur. The reason for the latter condition is that we will deprive the choice of compliance with the law, as such, of much of its meaning if we penalize a person who has not even engaged in the prohibited conduct. After all, what is the point of deciding to obey the law to avoid the sanction if we realize that the latter may be applied, unpredictably, in any event? Hence, if we penalize in the absence of the prohibited conduct, we engage not simply in a pointless exercise, but even in a positively detrimental one, by contributing to a deterioration in the influence of that area of law.

The logic of this argument would seem equally applicable to the principle of *mens rea.* Suppose the prohibited conduct, the *actus reus,* has occurred but as the result of a reasonable accident or mistake. Is not the application of the penalty just as pointless and as demoralizing to the unlucky defendant who at the time he acted subjectively believed he was complying with the law and avoiding its sanction? The inference is unassailable only so long as we consider the case from the point of view of single, blameless offenders. When we turn our attention to the problem of potential offenders, there are good reasons for excluding or minimizing the principle of *mens rea.* Within the ambit at least of the institution of "penalty", these reasons have been consistently persuasive to practitioners, despite the almost unanimous condemnation of the theorists.

At this stage I will not go into the details of these reasons nor try to answer the crucial question of whether they do justify the exclusion of *mens rea.* It is sufficient for my present purposes to mention one mechanism by which strict liability can contribute materially to the effective enforcement of regulatory offences. Denial of legal excuses even to the truly blameless offender can enhance the credibility of the deterrent threat in the eyes of other targets. Unlike the objective and visible behaviour and harmful consequences, subjective matters of belief and intention are inherenly difficult to prove or disprove. They

are by no means impossible because we confidently establish them every day, both in the law and in everyday life. But if we allow and extend various forms of excuses for the benefit of the truly blameless, we must necessarily create possible loopholes for those who were actually guilty. The more opportunities there are for fabricating defences which are difficult to disprove, the smaller the number of guilty defendants who will be properly convicted. The more people there are who commit offences but escape the penalties, the lesser is the deterrent influence of the law.

At least, this is the main argument which has in fact made strict liability an attractive doctrine in a wide area of the criminal law. From that same rationale further corollaries may be deducted and then verified in the actual legal doctrines of the system. The only excuses which we really need to exclude are those of accident and mistake, those which are available to the normal actor. The reason is that the tacit assumption of this practice of penalty is that the targets of regulation are rational individuals who can be influenced by general standards of behaviour to which are attached threats of penalties. There are other excuses, ones which I will loosely describe as abnormal, which will rarely occur in this setting and thus will be very difficult to fabricate—insanity, automatism, intoxication, duress, and so on. In the unlikely case where they might validly be claimed, we might anticipate that the law would allow them.

Contrariwise, I should not leave the impression that strict liability, and the erosion of the concept of the offence, are confined to an exceptional group of "public welfare offences". It is true that the residues of strict liability for mistake are disappearing from such traditional offences as bigamy. However, at the same time, the policy has reappeared in an even more drastic way in the guise of the modern doctrine of corporate criminal liability which operates across almost the total spectrum of the criminal law. If in the course of his employment a senior officer commits an offence on behalf of his company—a securities fraud, for example—then the company can be convicted, fined, and made to suffer a consequent loss of business reputation. This battery of penalties follows the occurrence of the offence, no doubt, but is visited on a group of individuals who can be described as offenders only in a vicarious sense—the shareholders, employees, and others who normally share in the earnings of the corporation and must now help pay for this legally-imposed loss. I shall return later to appraise the ultimate value of this and other forms of strict liability. For the moment I want only to press home the realization that this policy is by no means a disreputable or declining facet of the criminal law. Instead, for perfectly sensible reasons, it lies at the heart of the law's attempt

to regulate the conduct of business through the criminal sanction, and it so persists in the face of innumerable demonstrations of its deviation from the pattern of distributing punishment for traditional offences like murder, robbery, and so on.

This impression of the wide diversity in the policies of the criminal law is enhanced when we take a realistic look at the attitude of the practice of "correction" to these same doctrinal requirements of conduct (offence) and culpability (offender). The correctional impulse rests on the notion that an individual's criminal behaviour is caused by certain subjective traits and thus may be explained biologically, psychologically, or sociologically. No matter what type of condition we look to, there is one characteristic they hold in common. Because the individual is not responsible for their existence, he cannot be blamed for, or deterred from, the crime which they produce. Instead, the appropriate task is the use of forms of treatment which will remedy the cause and thus eliminate the dangers of recidivism. The immediate inference from these premises is that those excuses to criminal conduct which certainly must *not* be allowed are those which are clearly symptomatic of personality problems. The prime examples are the excuses of insanity, drunkenness, and automatism. These are precisely the people who should be subjected to coercive rehabilitation to prevent a recurrence and must submit to incapacitation until they are cured. The one thing we cannot safely do is to allow these subjective factors to be an excuse for the conduct which totally insulates the defendant from the clutches of the law.

At the moment this remains the law's basic attitude in the general criminal law. Only rarely is drunkenness a *total* defence to a conviction (and instead usually reduces offences from one category such as murder to another such as manslaughter); while insanity may prevent any conviction, it does so only at the price of indeterminate imprisonment by another name. There are some who would rationalize this situation and totally eliminate a defence like insanity while preserving the everyday excuses like accident and mistake.[16] Others reject this uneasy compromise and propose a more radical reform, the abolition of all subjective excuses. Perhaps even the accidental infractions of apparently normal individuals are produced by deep-seated psychological factors (i.e., a Freudian slip), which create a risk of future accident proneness. Be that as it may, if we look at the criminal law solely from the point of view of correction, such notions as responsibility or culpability have no place. If an individual has engaged in criminal conduct, he should no longer be convicted and condemned; the proper response is detached

[16] Morris & Hawkins, *An Honest Politician's Guide to Crime Control*, (1970), Ch. 7.

and scientific treatment of his problems. By the same token, though, he should have no right to avoid such a disposition simply because he has an excuse. These latter are relevant only insofar as they may throw some light on the defendant's need for, and the proper choice of, compulsory treatment in the future. There is no instrinsic value in the notion of *mens rea* within the rehabilitative ideal.

Unfortunately, this proposal, made most prominently by Barbara Wootton[17] is itself a highly unstable one. Once we have dispensed with *mens rea* within the correctional perspective, there is very little to be said for retaining the *actus reus* or conduct limitation. One immediate difficulty is trying to define many forms of *prohibited* conduct which ordinarily require some reference to the actor's intention.* But this technical difficulty disguises a more basic disequilibrium in this position. It is worth our while to take some time to get clear about this, because the example will tell us something about the way in which the key elements in the different practices hang together logically.

Why do we have the notion of conduct or offence in the first place? As I pointed out, the requirement does make sense within a practice which announces general and obligatory standards of behaviour and gives individuals reasons or incentives to comply with them. Whether we want to condemn or to deter, we only apply the sanction if the individual did act contrary to the rules. But now our orientation has been radically altered. We want to prevent future crime by correcting the individual conditions which create a peculiar risk that crime will occur. From this point of view, I agree with Barbara Wootton that there is no necessary relevance in what the defendant earlier *intended,* but I would insist also that there is no such force in what he earlied *did.* The fact of past criminal conduct is neither a necessary nor a sufficient reason for believing that a person may be in peculiar need of corrective measures to prevent such harmful conduct in the future.

That it is not a *sufficient* reason presents no real problem. A motorist's brakes may suddenly have failed and his car struck and killed a pedestrian. He is a good driver, this is his first accident, and he is

[17] Wootton, *Crime & The Criminal Law* (1963) at pp. 75 ff.

* I refer here not only to those crimes which make explicit reference to intention such as attempt, possession of burglar's tools, the responsibility of parties, etc., but also those involving an implicit reference. For instance, many offences are defined simply in terms of *causing* a harm. Homicide is *any* conduct causing death (and arson, causing bodily harm, and so on are analogous). But what does "causing death" mean? Once we get away from clear cases of direct immediate infliction of violence, the number of possible candidates who are connected to a death becomes legion. The druggist who sells a poison, the taxidriver who carries an assassin, the repairman who rewired a car can all be seen in the background of various deaths. If they deliberately arranged things with a view to achieving someone's death, they commit an offence; if they engaged in precisely the same behaviour without this subjective foresight, they are automatically excluded. The only criterion for deciding which conduct is a *criminal* cause is the presence of the requisite *mens rea.*

no more a danger in the future than any other motorist. The same conclusion can follow even for a serious crime involving an intention. A person has successfully murdered his aunt and inherited her fortune. He presumably has no need to do it again and, in any event, murderers are notoriously low recidivists. If our sole objective is rehabilitation for the future, both the motorist and the nephew should be given absolute discharge, despite their earlier harmful conduct.

Much more troublesome is the realization that past criminal conduct is not a *necessary* condition to a prediction of future dangerousness. It is clear that a person can be judged of some danger even if he did not have full responsibility for his earlier behaviour, for some such excuse as insanity, intoxication, or accident proneness, and compulsory treatment may seem warranted for him. But what is the theory which underlies this prediction and directs our treatment? Is the occurrence of the criminal conduct a necessary symptom of that dangerous and pathological condition which triggers compulsory state intervention (in the absence even of subjective fault)? *A priori* one would think this unlikely.

An analogy may help make the point clear. Medical science may have (I think in fact it has) developed a theory of the underlying causes of heart attacks as well as a systematic programme for altering these conditions and so preventing future coronaries. Within the theory, the relevant factors might include such items as body weight, blood pressure, nervous strain, and so on. Out of this combination, some index will tell a doctor when his patient's condition does present a serious risk of a heart attack and require preventive measures. Now the fact that this patient has already had an attack may well be a significant warning signal. Indeed, investigation of the background to many such actual occurrences presumably was the avenue towards development of the theory. But once we have systematic knowledge of the underlying causes which has been sufficiently validated by medical experience, and once we know how to correct them, surely it would be silly to limit medical intervention to cases where the patient has already had a coronary. If our objective is individualized treatment and prevention for the future, that would be a classic case of "locking the barn door after the horse has been stolen".

It seems to me that exactly the same logic is implicit in the correctional persuasion within the criminal law. The assumption is that we have some theory relating knowledge of the causes of crime to the techniques which are capable of altering them. The theory may point to factors like chromosomes, poverty, intelligence, the urban environment and the like. Presumably out of this complex of factors, there will be an index which tells us when a person presents a particularly

high statistical risk of future criminality. The actual commission of a crime may be a helpful symptom in making that judgment (although not very much if "crime" is defined without any reference to fault, as the earlier proposal suggested). But if we have any confidence in our theory about the underlying factors (which presumably we must have if it is to be the basis of the law's correctional programme), then we should be prepared to identify potential offenders who exhibit these same characteristics and do something about them.

But then we face the intuitive objection that these people have not done anything as of yet and so how can we justify the compulsory infliction of these unpleasant measures? Surely, though, that objection can only be rationally supported on the assumption that the person does not *deserve* to be so treated. The trouble is that this concept in turn requires that the person has *voluntarily* done something and so chosen to expose himself to some penal response from society. Those who advocate the jettisoning of the notion of subjective responsibility from the criminal law, and adopt instead the view that crime is a product of causes which must be corrected, have no vantage point from which to defend the requirement of actual harmful conduct. If we are serious about making the rehabilitative ideal the primary focus of the criminal law, the criteria for selecting its targets should not logically be the residue of doctrines from the discarded practices of punishment or penalty.

In fact, the correctional model has never gained full sway in the criminal law and the legal notions of "conduct" and "culpability" are alive and well. But, as I have described earlier, there are significant realms of deviant behaviour within which this practice is dominant; here we can perceive substantial erosion of the idea that there should be an offence. We commit, through a civil process, those whom we believe are mentally ill and dangerous but who have not as yet done anything illegal. As a practical matter their situation is not significantly different from those who have engaged in criminal behaviour but are acquitted by reason of insanity. Until very recently Canadian law subjected "vagrants" to the compulsion of the criminal law, because we believed their status—wandering abroad without visible means of support—suggested the threat of future wrongdoing. The juvenile court has gradually extended its jurisdiction to encompass all sorts of vaguely-defined "problem children" and its adherents vigorously resist any suggestion that compulsory intervention in the life of the child should require some actual and specific illegal conduct. Systematic "early warning" programmes have been developed and applied (in New York City, for example) which use criminological theory to identify very young potential offenders and subject them to the prescribed treatment.

At this stage I do not mean to evaluate any or all of these policies. I merely want to indicate that what I believe to be the logical implication of the full-blown rehabilitative ideal—the discarding of the notions of offence and offender in any viable sense—is not merely some hypothetical possibility. It is an everyday reality in significant parts of the criminal law or associated processes, and we must understand why.

The Shape of Legal Authority

I shall now turn to the final set of problems which confront the designer of any sanctioning institution. He must develop a set of procedures through which the legal apparatus is administered and certain individuals are authoritatively judged to be guilty and receive the appropriate penal measure. The problems are numerous and technical and I cannot deal with them in any detail here. However, we must ask what will be the likely answers within these several practices to one or two crucial issues.

The characteristic mood with which the practice of "punishment" approaches the problem of authority is one of concern about *due process* for the individual. Perhaps the deepest expression of this attitude is the principle that "a person is presumed innocent until proven guilty beyond all reasonable doubt". In fact, I believe this doctrine is the keystone of the whole system of criminal procedure, at least insofar as it is mobilized to deal with serious or "real" crimes. Nor is its presence at all hard to understand. When we convict an individual of such a crime, and (ordinarily) inflict the particularly shameful and onerous sentence of a jail term, we do him serious and enduring harm, both to his immediate happiness and also to his character in the eyes of the community. When we look at the defendant who may suffer this result, we want to be very sure that he deserves it.

Sometimes this is phrased in such terms as "it is better that ten (or a hundred . . .) guilty men go free than that one innocent person be convicted". But, as has been pointed out, this does not mean that at some favourable ratio of efficiency, the terms of trade should turn in favour of society. The real point is that we never take the deliberate risk of convicting an innocent man. Of course, because of the fallibility of the human condition, perfect certainty is unattainable. If we want to use the criminal sanction we must envisage some statistical incidence of errors. Yet when we approach the task of judging one individual in a concrete case, we do so with the fixed view that if we feel any reason for doubt about his guilt, he must be acquitted (no matter what the balance between social gain and individual costs). In this way, the criminal sanction, no matter what its crudity, does embody the "con-

cept of a human person as an entity with claims that cannot be extinguished, however great the pay-off to society"* [18].

The mood of the typical administration of a "penalty" system is very different. Let us look at traffic offences again, as a characteristic example. The end result of conviction is not a serious moral stigma nor an especially harsh deprivation through imprisonment or the like. The usual level of fines may be considered a typical risk of monetary loss which we often encounter in social or business life. The conduct itself is not viewed as a grave moral default, especially apart from its illegality, and so a much higher incidence of offences occurs. Not only does this pose a burden for efficient administration but it deprives the occasion of the trial of any special interest and influence for the audience. A murder trial may generate the excitement and drama of a "morality play", but one would hardly say this of a trial for impaired driving, for instance. What is the likely cumulative impact of these several factors?

Probably the best way to describe the atmosphere is to say that it is businesslike. Cases must be processed with despatch to avoid too large a back-log. A division of labour, formal or informal, will often be established so that judges and prosecutors can become specialists in handling certain kinds of cases (and juries are much too cumbersome to use). Negotiated guilty pleas in private, followed by speedy disposition in public, replace the adversary trial for most cases. For those that remain the standard of proof gradually approaches the balance of probabilities whether as a *de facto* attitude in the ordinary magistrates' court or as an explicit legal standard prescribed for a special kind of case. Why is there not such an overriding concern that convictions of innocent persons be avoided, no matter how much due process may cost? The reason is that the stakes are nowhere near as high for defendants of any kind, innocent or guilty. Accordingly, the social interest in efficient administration and effective enforcement comes strongly to the fore.

Much the same detached atmosphere pervades the practice of "correction", but the procedural orientation of the system is quite different. The accent now is on a more or less scientific investigation of the causes of the defendant's problems and a search for the best

* I might add that the several elements of due process, besides protecting the innocent individual against the injustice of an erroneous conviction, also contribute to the solemnity of what has been termed the "morality play" through which the guilty are condemned. This ritualistic adherence of the state to the moral principles protecting the individual may serve to reinforce the commitment of the community audience to those same values as expressed in the basic legal standards which the defendant has infringed.

[18] Tribe, "An Ounce of Detention—Preventive Justice in the World of John Mitchell", (1970) 56 Virginia Law Rev. 371 at p. 387.

ways to mend them in the future. For this purpose we will find too constraining the presentation of evidence through the formal adversary process, focused as it is on the precise events which may have occurred before, and operating within rigid rules for excluding doubtful materials. An informal hearing will be preferred, conducted by a wise and trustworthy judge who takes the initiative in securing the needed information from whatever quarter he thinks useful. The same ambiguity about whether we are really trying to help the individual or to protect society surfaces here again, e.g., regarding the burden of proof. If the need for compulsory correction is doubtful should we err on the side of intervention or freedom? The issue is particularly pressing where an individual has been found to have committed a crime, received a sentence of some sort, and now an issue arises about his further disposition. Should the habitual offender be released from his indefinite confinement? Should a prisoner be granted parole? Should the criminally insane be judged no longer "dangerous" and thus fit for life in the community? If there is any one place in the criminal law where we see an explicit legal shift in the burden of proof to the defendant to show why he should be free it is here. But this is merely one striking instance of the persistent incompatibility of the principles of due process with the underlying rationale of the rehabilitative ideal.

Conclusion

What is the point of this lengthy exercise? I have tried to show something of the criminal law reality which is disguised by abstract terms like legal rule, offence, offender, pain, legal authority and the like. In real life, each of these elements of our standard definition of punishment is satisfied in widely varying ways. Even more important, the legal responses to each of these problems tend to group together in clusters which exhibit distinctive patterns. We can construct at least three models of the criminal law which illuminate not only the arrangements of our own system but also those of just about every modern state (or at least those with which I am familiar). Of course these are just idealized types, each one shades into the other, and the tangle of actual legal rules never conforms totally to the pure logic of the model. But the basic point still remains, that the conception of punishment with which most modern theories have begun has ignored these crucial alternatives in the directions in which the sanctioning system of the state can and does operate.

Yet is that conclusion really of much interest to the task of *moral* justification of the application of that coercive force against the indi-

vidual? These distinctive arrangements, no matter how real, are not self-justifying. What is, no matter how widespread and how enduring, is not necessarily what ought to be. I still have to show that recognition of diversity in the basic logical structure of our criminal law is helpful in sharpening our assessment of the moral issues in the historic debate about punishment.

The argument I shall make is that there simply is no single form of moral justification (no matter how morally complicated we may make it) which is applicable right across the board of the criminal law which our considered experience has taught us we must have. Certainly there are several enduring moral themes (retribution, deterrence, rehabilitation), each of which has secured able adherents and can be plausibly defended in persuasive terms. Yet these respective theories seem to pass each other like ships in the night, never really joining issue and coming to grips with the insights and objectives of their opponents. I believe the reason is that each position has been developed around one area of human behaviour and one picture of the way the criminal law should be designed to cope with this area of primary concern. Within that limited sphere, the justifying theory is coherent and apparently valid. The problems arise with the impulse of intellectual imperialism, the desire to establish this as a single position which will unify the total range of the criminal law. The trouble is that life is too complicated and our legitimate objectives too numerous for that to work. Just as there are a variety of forms of punishment, we should expect to find a corresponding variety of theories of punishment.

Part 3

The Justification of Punishment: Competing Theories

A necessary prelude to testing this hypothesis is a much more detailed review of these historic themes. We must try to sort out the precise claims involved in each, understand the reasons why they are advanced, and then appreciate the source of the attraction they have had for so long a time. At first sight the last might seem somewhat difficult. From a distance the debate about punishment, at least until very recently, seemed like a clash of warring ideologies, rather than a reasoned dialogue within a framework of common assumptions. Philosophical chasms, almost impossible to bridge, seemed to open up between the respective positions. A person had to choose the camp in which he felt intellectually the most comfortable and in doing so he would accept a total package of related beliefs, while rejecting just about everything his opponents stood for.

I think that one primary reason for this situation is that entangled in these three different conceptions of the criminal law are two crucial differences of principle about how one should go about the task of moral justification. First of all, within the ambit of the law itself, there is the conflict between *reductionism*[10] and *retributionism*. The one view holds that criminal penalties can be justified if, but only if, they will reduce the level of crime within the community. The other responds that sanctions are justified if, but only if, the defendant has done something for which he merits their infliction. It is clear then that the arguments within the first perspective are focused forward in time, toward the future beneficial consequences of punishment; within the second the arguments look backward, to events which have already occurred, as the source of moral support.

[10] This term I owe to Walker, *Sentencing in a Rational Society* (1969) at p. 3.

Superimposed on this distinction, but not quite matching it, is a more basic conflict within ethical reasoning. On the one hand we find the *utilitarian* perspective, committed to maximizing the sum of good, welfare, or happiness in the world. On the other hand is the *neo-Kantian* (for want of a better term) who locates morality in adherence to principles of right, justice, or fairness. Given both of these enduring dilemmas in legal and moral philosophy we should not be at all surprised at the failure of agreement around the specific institution of punishment.

In recent years the most promising way out of this intellectual muddle has appeared to be a return to the concrete. Let's stop talking about the general rationales for punishment in all their uncompromising force! Much more pointed questions must be asked about the several very different decisions which must be made within any system of punishment, the context within which these questions are posed must be brought out into the open, the underlying values which shape our responses must be critically scrutinized, and so on. The ultimate objective of this exercise, which just about everyone realizes is the only viable solution to our problem, is an *integrated* rationale for the institution of punishment. In my reading of this recent literature I am struck by the character of the concrete reasons which are advanced on behalf of punishment. They are much more numerous than was hitherto realized; they are all (or almost all) very plausible when considered in the abstract; when arranged in some natural ordering they do not fall into sharply distinguishable categories but instead form a gradually-changing spectrum. Pictured in this fashion I find it exceedingly difficult to point to some dividing line and say that the claims on the wrong side of it are, *a priori,* illegitimate. Let's review these arguments in some detail and see why.*

The Reduction of Crime in Society

I shall start with the reasons most commonly advanced in contemporary society, those we can loosely group under the heading "the

* Any system of criminal sanction is necessarily dependent on a set of legal standards which it is supposed to enforce. These standards will vary widely in their content and the policy objectives which they embody. Clearly, then, the ultimate justification of the application of the sanctions in any concrete case is largely a function of the defensibility of the actual legal rule in question. But I believe it is not totally so. The institution of punishment is a special kind of social practice and presents distinctive problems for philosophical appraisal. In order to focus on these latter problems, I must abstract for the moment from the character of these rules in the background. Accordingly, for the bulk fo this discussion I shall assume that the criminal law consists in offences which are basically worthy of acceptance and concentrate on the specific question whether, and to what extent, we are warranted in adopting a system of punishment for their implementation. Only when these questions have been thoroughly canvassed will I return to the issue of justification in the real world, where sanctions are imposed to support a social and legal structure which is a long distance removed from the ideal.

reduction of crime". Indeed, I hardly need to do more than mention these various arguments to establish their force, so accustomed a part of our intellectual universe is the utilitarian view of social policy. But the effort to lay bare the logic of the argument is worth while for what it tells us about the nature of the criminal sanction and the problems it poses.

Stripped of the mystifying language of the law, what do we mean by criminal sanctions? In the name and under the authority of the criminal law, offenders are killed, maimed, beaten, deprived of their liberty and livelihood, mulcted of their property, and so on. The state deliberately sets out to do something unpleasant to an individual against his will. In fact, the irony of criminal punishment is that these are the very same kinds of harm to the individual which the basic rules of the criminal law are supposed to prohibit. Yet that same legal system authorizes the infliction of these harms on certain selected victims, and at a considerable cost to the taxpayer as well.*

It is clear, then, that within the utilitarian perspective these measures are *prima facie* evil. Their immediate effect is to lessen the sum total of satisfaction within society. The only permissible form of justification is the expectation that a greater good for a greater number will be the consequence. The most likely candidate for that role is the reduction of the incidence of crime or, as our judges are wont to put it, the protection of society. Within that perspective there remain sharp disputes about the mechanism through which that aim may be achieved, be it rehabilitation, intimidation, deterrence or others. However heated these intramural battles may become, the starting point remains that of Jeremy Bentham. Punishment is "a capital hazarded in expectation of profit". We make a prudent investment in some harm to the offender so as to secure the optimum return in reducing the total level of such harm in the society.

With these utilitarian assumptions, we can readily appreciate the perennial attractions of the rehabilitative mechanisms for "reductionism". While it is true that the immediate measures may be painful to the offender, perceived as harmful by him, they are designed to effect a change in the personal problems which have led him into crime and conflict with his society. If we may assume that his individual condition is to be pitied, that he will be happier when he is better adjusted to the

* It is true that in recent years, there is a strong trend towards the elimination of death, injury or bodily pain as criminal penalties. Capital and corporal punishment are on the wane. The emphasis now is on deprivation of a good, such as one's freedom through jail or one's property through fines. The object of the process is still to impose some harm on the offender and so the point remains. I should add also that in the enforcement of the criminal sanction outside the sheltered walls of the courtroom, death and bodily injuries are often the legally-authorized results of the activities of such agents of the state as policemen and jail guards.

demands of the community (and I fully realize these are rather large assumptions), then we can believe we are conferring an ultimate benefit on him, as well as defending the interests of other citizens from his dangerous tendencies. Let us pursue the medical analogy again. The immediate experience of surgery and its after-effects is uncomfortable and often very painful but after recuperation the patient is much happier than if nothing helpful had been done at all.

Why then do we compel treatment within the criminal law, but not for other "diseases"? The reason clearly is that the primary danger posed by leaving the situation alone, and so running the risk of recidivism, is to the interests of others in the community who might well be the innocent victims of that crime. They must be given some voice in the decision about whether the "capital investment" in painful social correction is warranted by the "expected profit" from successful rehabilitation. But it still remains true that the offender is an intended prime beneficiary of the measures which the agencies of the criminal law bring to bear on his behavioural problems (whether they be psychotherapy, job training, measures to cure drug addiction, or the like).

This is the argument, in any event, and within its own terms it makes very good sense. I shall return later to some of its latent ambiguities and necessary limitations. For the moment let me say only that it is not, and cannot be, a general justification for the criminal sanction. The reason is that the basic criminological assumptions of the medical model simply do not account for the broad spectrum of crime. I do not mean to say simply that we are not aware as yet of the underlying causes of all crime, a state of ignorance which could in principle be remedied with the march of time. The problem, I believe, goes much deeper than that.

The treatment approach assumes that the causes of crime, which inhere somewhere in the person of the offender or in his social situation and must be remedied, are *pathological.* By this is meant that offenders are *abnormal* in a way which makes them socially *unhealthy.* Consider this one recent comment:[20]

> [Brushes with the law] are dreary, repetitious crises in the dismal, dreary life of one of the miserable ones. They are signals of distress, signals of failure, signals of crises... They are the spasms and struggles and convulsions of a submarginal human being trying to make it in our complex society with inadequate equipment and inadequate preparation.

From this perspective it makes sense to concentrate appropriate correctional techniques on these special deviants and so prevent their future involvement in crime. There are various historical explanations

[20] Menninger, *The Crime of Punishment* (1968) at p. 19.

for this set of assumptions into which I will not delve here. Suffice it to say that the basic notions are no longer viewed with favour by most recent criminology, no matter what the internal differences within that discipline.

It is now appreciated that we are all tempted to commit crimes and most of us do succumb at one time or other. A crime is simply a legal standard, enacted at a particular point of time in a society, which prohibits a certain form of conduct on pain of a sanction. Those among us who have not broken some such rule are the abnormal ones. We may not all have been caught and there may not be that many who have committed those crimes normally considered the most serious in the community. The primary point still remains that criminal behaviour is a normal experience within any society. I would go even further to say that, given the multiplicity and the artificiality of criminal laws, any theory of the causes of crime as such is doomed to failure. Criminal behaviour is normal and everyday behaviour and can only be ultimately analyzed in the same terms as non-criminal behaviour. Nor should it be considered as necessarily evidence of pathology or individual unhealthiness. The facets of the human condition which make crime possible also make human achievement and progress possible. Without the capacity for evil there could be no moral good. But these latter speculations are not necessary here. The main conclusion is that rehabilitation, as the general social response to all crime, simply is not feasible. We cannot remake the human condition through the coercive operation of the criminal law process in individual cases. This process is moved to action only when someone has already been caught and convicted of an offence, and that, to put it mildly, is "locking the barn door" a little too late. Recidivism rates are undoubtedly too high, but they must not obscure the fact that this accounts for only a minor segment of the total crime rate. We cannot afford to concentrate our efforts primarily on the reduction of recidivism.[21]

Hence, the more efficient, reductive tactic within the utilitarian perspective of Bentham *et al* is to influence the normal citizen through the technique of *deterrence*. The state announces that certain undesirable forms of conduct will henceforth be met by the deliberate infliction of some unpleasantness or other on the offender. As a result the relative attractiveness of the socially harmful behaviour will decrease and the temptations to engage in it will be diminished. If we adopt the everyday, commonsense view of the world then, all things being equal, the actual incidence of that conduct will also be reduced.

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[21] See Gould & Namenwirth, "Contrary Objectives: Crime Control and the Rehabilitation of the Criminal" in Douglas (ed.), *Crime and Justice in American Society* (1971) 237 at 256 ff.

Deterrence itself can be looked at from two different perspectives. Considered as *intimidation* it speaks to and influences the individual offender who has been caught and punished. Presumably the threat of pain is no longer an abstract, hypothetical matter to him, it is a very live experience and we can expect a heightened sense of its credibility. (The opposite assumption is also logically feasible. The fact of being punished, and feeling the reactions of others to it, may reduce its later force in the offender's eyes. Which of these two assumptions is more credible in different contexts is a matter for empirical investigation.) To the extent that it does operate, intimidation is like rehabilitation in that its focus is necessarily limited to those few individuals who have been caught and can effectively be dealt with. However, it is much more like *general deterrence* in its basic assumptions, the image of man with which it operates.

This underlying rationale of general deterrence has been with us at least since the dawn of the modern way of looking at social and political life. Men live in inter-dependent communities. This form of life requires that they abstain from conduct harmful to others and contribute their own performance to mutually beneficial tasks. Yet human nature is not programmed to generate these responses as a purely instinctual matter. Still, men are able to formulate and understand general standards of behaviour which clarify the path to a peaceful and prosperous society. The trouble is that compliance with these, once they are announced, is not an automatic result either. It is in everyone's interest that nearly everyone comply with some such set of standards but in concrete situations this may require a substantial sacrifice to one's private interests. There is always a temptation to be a free rider on the sacrifices that others make, especially if one can keep his own default secret. Logically a purely anarchic, laissez-faire attitude is possible and some have even advocated it, in theory at least. As a practical matter, it has always seemed too much of a gamble and states have provided an artificial mechanism to alter this "utility function" of the individual. The most common device is the criminal sanction.

But how does one justify its use, given this conception of the human condition? On the one hand, it must first be shown that the device will be effective, that it will secure a higher level of compliance than simply leaving the individual's behaviour voluntary. This is a matter which is hard to demonstrate empirically because of the extreme difficulty in subjecting the question to a test under scientifically reliable conditions. Of course, there is no need to show that the lack of a sanction will produce no voluntary compliance at all or that the fact of the sanction will produce total obedience. One need simply demon-

strate a sufficient margin of improvement to make the presence of the penalty worth while (and gradually a body of evidence is accumulating to this effect).[22] But man has not awaited scientific proof of the global fact of deterrence before relying on the criminal law. Ordinarily we rest content with a sufficient degree of probability before acting and that seems attainable here by reflection on our own experience with penalties and the effect they have on our motivation. Take parking regulations again. We all know that we behave differently because of the threat of fines (or towing) and we do think of the chances that we will get a ticket. Given the truth of this belief, and the fact that it may usefully be generalized, what is the argument for punishing those who do not obey the law? Because that is the way we maintain the credibility of the deterrent threat for everyone, and so achieve the objective of reducing the level of crime.

But that is not yet a sufficient argument. It must also be shown that the method of criminal sanction is more efficient than other artificial social devices. Let me briefly canvass the alternatives which are usually suggested. One is *treatment,* which I have already discarded as a general alternative for reasons given earlier. A second is informal social suasion or *group pressure.* We know this can be effective in some areas of behaviour and we rely on it to minimize most forms of purely offensive conduct, through such practices as etiquette (where some leakage is not too worrisome). In fact, in small, close-knit communities it can be the primary force behind even the most serious standards of behaviour. But the reason for this is that in a tightly integrated community deviation from group norms can be met with such drastic condemnation, even ostracism, that, no matter how informal, it is indistinguishable from a sanction. Many examples spring to mind, from the small child in a family, the monk in an order, the worker "sent to Coventry" by his fellows, to the adulterer in a Puritan community. In sum, then, group pressure is most effective when it produces a real stigma for an offence against the group's standards, but that is simply another (and possibly very harsh) form of deterrent punishment which presents precisely the same problem of justification.

Much the same analysis is true of a third alternative, the use of the *reward,* which is especially popular among psychologists. Instead of responding negatively to bad behaviour, we should try to encourage good behaviour through "positive reinforcement". Again, there is nothing illogical about this proposal and its relative utility is an empirical matter. A nice testing ground could be the current debate about the value of offering rewards to business enterprise for making socially

[22] The current state of such knowledge is reviewed in Little and Logan, "Sanctions and Deviance", (1973) 7 Law and Society Review 371.

desirable investments, as opposed to penal regulation which has the same policy objective.*

Still, I think we shall find the same deficiency in the theory of pure rewards as we found in regard to pure social pressure. Remember we are talking about the basic standards of social behaviour which, almost by definition, must be complied with by the vast majority of citizens almost all of the time. As well, most of these standards are negative in form ("don't commit homicide") though a few will be positive ("complete a true income tax form"). It just does not make sense, for negative duties, to pay a reward for every occasion of compliance (i.e., every time you *don't* commit murder) and, even if conceivable, it would seem strange for the positive duties (i.e., a reward is paid for every true income tax return). If the system of rewards is to be feasible, it would have to provide for the earning of rewards after defined periods (of a year for example) of good behaviour. An apt illustration is the practice of reducing insurance premiums for motor vehicle drivers who have gone the prescribed period without accidents or traffic violations.

Now let's think about what this practice of rewards would look like. They would have to be very large in amount to overcome the temptation to engage in all of the acts prohibited by the criminal law (a temptation which is accented by the fact that the negative penalties will now be removed from the conduct). As I said before, a substantial majority of citizens in the community would be receiving these sums (assuming it continued to be true that most citizens are not convicted of a crime in any one year). The payment of these rewards would require significant tax and transfer programmes. Only the few, those who had been detected in an offence, would not receive this "good behaviour grant", but they would still have to pay their full share of the taxes which make it possible. Now how would they perceive this occurence—as the simple failure to receive the benefit of a reward? Surely not! Instead it would be felt as a very serious loss of income which they were accustomed to receive every year, one which would also carry the stigma of making him one of the few who were officially denied that bonus. In its import, then, the practice of rewards would develop the impact of deterrent sanctions, posing the

* I find ironic, though not surprising, the usual schizophrenic approach to matters of criminal and economic policy. Those who most decry such rewards to "corporate welfare bums" are the first to disapprove the stringent application of criminal penalties to vandals and muggers. At the same time those who call for extra doses of "law and order" to fight crime on the streets are not at all so enamoured of the fight against crime in the boardroom. Not for them harsh, negative and "self-defeating" measures against pollution, unsafe products or monopolistic practices. Instead we must offer positive encouragement, profitable incentives, if we want to get results.

same theoretical problems for justification and the practical problems of distribution with some semblance of due process.

The Hazy Border Between Reduction and Retribution

The notion of deterrence is both internally coherent and, I believe, empirically valid. The problem with it is one of scope. When we do reflect on our experience and perceive that we are influenced by the threat and fear of a sanction, what kinds of situations do we think of? The ones that come to my mind, in any event, are matters like driving offences, income tax requirements, or corporate regulations. These are the forms of behaviour which are dealt with by what I have called the practice of regulation through *penalty*. What about the kinds of conduct which is at the core of the criminal law, the area encompassed by the practice of *punishment* as such? Is general deterrence the reason we don't commit murders, rapes, robberies, or aggravated assaults? I think not. Rarely does this type of behaviour present itself to our mind as a viable option. If special circumstances arise where we can envisage it, almost surely the reason it would be rejected is that we believe it to be morally wrong and would feel tremendous guilt if we did succumb to that temptation. In this realm the influence of pure threats is very small and the margin attained by deterrence is questionable.

Accordingly, then, we can understand why so many criminologists have rejected the Benthamite view of deterrence with its image of economic man, calculating the gains and losses of complying at least with this part of the law. Since such critics remained ardently utilitarian, and rejected any retributive value to punishment based on the fact of the offence, they naturally turned their focus to the reductive mechanisms of treatment. And if this could best be served by a gradual amelioration in the lot of the offender, and the eventual removal of any unpleasant effect from the application of corrective measures, then in all logic, that had to be the ultimate ideal. Deterrence might be the focus of penal regulation of morally neutral areas of conduct, but it wasn't needed at the heart of the criminal law for the normal, socialized citizen (while treatment was prescribed for the offender who, almost by definition, had to be abnormal because he had not been controlled by these deep moral inhibitions).

There are several answers to this claim that we might forget about the general influence of the criminal sanction, and focus instead on individualized correction. The most important, and the one I shall concentrate on here, is that it ignores the vital connection between law and positive morality. Granted that the immediate reason for self-

restraint from such harmful conduct is the feeling that it is morally wrong, does this mean that our moral attitudes would remain constant if we removed the punitive function of the law? Or isn't it true that the criminal law has an important, though indirect, *general preventive* effect on the incidence of crime because it preserves these established standards of social behaviour? A great many writers have argued for this moral function of criminal law which stands somewhere on the borderland between strict reductionism and pure retributionism.*[23]

How does the criminal law perform this task of helping maintain and transmit the demands of social morality? First, the *enactment* of a criminal law is an authoritative standard of what the organs of the state ordain as moral or immoral, beneficial or harmful, conduct. Second, the *application* of the criminal law in individual cases is a continued reaffirmation of this judgment. It is not simply that society disapproves of this conduct, it actually denounces it. Finally the *effect* of the criminal law is to provide an environment in which alternative (or "deviant") ways of life are reduced, driven underground, and made much less attractive to those who see the treatment meted out to their members. The cumulative result of these three forces is that the criminal law subjects us to continual propaganda, even brainwashing, in favour of the values it embodies.

Now even those who support these values, who believe that killing, robbery, kidnapping and so on really are moral evils, will feel

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* Before entering into the details of this argument I should make two points clear. First, in referring to this "moral" task of criminal punishment, I am referring to the *positive morality* existing at any one time within a society. It is this living sense of what is right and wrong which shapes actual behaviour, not *critical morality* which philosophers believe is rationally justified. Obviously it is not inevitable that the positive morality of a particular society will conform to the moral principles which we believe are required (no more than is the case with the enacted standards of the law). Indeed, I believe that there will always be a gap between real morality and ideal morality. The relevance of this fact to the ultimate justification of punishment will be clarified later.

Secondly, in speaking of an existing social morality, I do not suggest that there is any near-absolute consensus about its dictates within the community in question. That would be a rarity, even an impossibility, in a large urban society as our own. I merely assume that, with respect to those legal rules which have endured for a long time at the centre of a criminal code, a significant proportion of the populace (probably varying for each offence) believes that the conduct in question is morally wrong. For that group the function of the criminal law will be quite different than it will be for those who do not accept the intrinsic worth of the values embodied in the law. The relative sizes and shadings of these two groups, the degree of conflict and consensus in any society, is a matter for empirical investigation.

[23] The leading proponent of this argument is Johannes Andenaes; see especially his "The General Preventive Effects of Punishment" (1966), 114 U. of Penn. Law Rev. 949; also Hawkins, "Punishment and Deterrence" (1969) Wisconsin Law Rev. 550. I shall include specific references to discussions in the literature about these subtler aims of criminal punishment, something which I will not do for clearer objectives such as deterrence or reform.

uneasy with that conclusion. They would like every man to be his own moral philosopher. If he actually refrains from certain conduct because he feels it is morally wrong he should do so only after he has rationally investigated all the alternatives, weighed all the relevant considerations, and then come down in favour of the most persuasive step. Presumably, for those who think that way, if a person is to act because of the non-rational influence of the law, it is preferable that he be deterred by its naked threats than that he be conditioned into accepting its message.

Be that as it may, if we are concerned about the success a society has in securing adherence to the rules of behaviour it believes in, the moral instructions of the criminal law cannot be ignored. Pure coercion can be effective only for a minority and requires the willing compliance of the majority to give it leverage. If not intellectually, then at least emotionally, most of the members of that majority require an authoritative statement of the standards of conduct which are expected of them. With the decline of religion and the disintegration of small communities and groups, the main public source which is left is the state and its primary instrument is the criminal law. The crucial intermediary in this process is the mass media. As one criminologist has said:[24]

> The media make redundant the need for large gatherings of persons to witness punishment; instead individuals can stay at home and still be morally instructed. They do this simply by reading, listening and watching mass media, a substantial part of which consists of reports as to what kinds of persons are being punished, and the reasons for their humiliations. The obvious consequence of such media coverage is that subjects are provoked into reflecting on the rules of society and the fate which awaits transgressors.

In turn these moral lessons furnish the raw materials with which parents and teachers socialize the young in these dominant values at the period of life in which they are the most malleable.

For this reason we can also see the answer to those who say that the "denunciatory" function of the criminal law could as well be performed by pure conviction, without any further sanctions. It is true that if formal convictions were perceived as a real stigma, as a criminal record which caused humiliation, loss of friends and the closing up of job opportunities, then that comment might be valid. But the reason it would is that this conviction would itself be a serious punishment inflicted on the offender and serve perfectly well as a moral reinforcement for the rest of the community. Still, it is reasonable to believe that a major index of the seriousness of social disapproval is the firm-

[24] Box, *Deviance, Reality and Society* (1971) at p. 40; see also Kar Erikson, *Wayward Puritans* (1966), esp. at p. 12.

ness of reaction which that conduct elicits. If a person has not conformed to the law and has injured someone else, while others have made the necessary sacrifices to protect him from injury, a mere announcement of his guilt is not enough to convey the moral lesson. Some deliberate and formal deprivation must follow the conviction. As well, the sense of relative gravity in various offences will be inculcated by the range of severity in the sentences which are imposed.

But this line of argument will quickly produce the response that the true force of retribution is showing itself. These kinds of reasons, it is said, are only sophisticated disguises of the real purposes of the punishment, which is *vengeance*. Without at all conceding that this conception of criminal punishment as moral education is pure mystification, let us face the question directly—what is wrong with the retributive argument for punishment based on retaliation (especially from the vantage point of utilitarian reductionism)?

Historically and psychologically, I would agree that this is the most deeply-imbedded source of our impulse to punish. A person has harmed another by breaking the law, and so the law must see that he in turn is harmed. "An eye for an eye, a tooth for a tooth!" But the utilitarian critic would say this is not a justification. We are not talking about a natural and immediate reaction; instead we are dealing with an independent human decision mediated by a complex legal apparatus. The original harm has already occurred and cannot be undone. The subsequent act of punishment will merely add a second evil to it and so aggravate the total loss of satisfaction which is produced. Accordingly, punishment can never be justified simply *because* the offender has acted illegally, but only *in order to* reduce the level of such crime in the future.

Yet, on further reflection, is that argument really air-tight? Surely the offence, and the harm it caused, has generated a real sense of grievance among the victim and his friends who expected the law would be obeyed. If the offender is known, or is caught, but then allowed to go scot-free, their unhappiness will be aggravated. On the other hand, their "pain" will be eased somewhat if the offender suffers some form of retaliation.

I do not see how one can really deny the factual truth of these psychological judgments which underline this one version of "retribution". Yet many utilitarian opponents argue that these natural attitudes are morally dubious and must be ruled out, *a priori,* as an independent justification for punishment. Now that might be a possible contention within a moral theory based on principles of right conduct, but it cannot be defended within a theory whose ultimate touchstone

is the "greatest happiness of the greatest number". Consider this much more careful argument of Bentham:[25]

> A kind of collateral end, which it [punishment] has a natural tendency to answer, is that of affording a pleasure or satisfaction to the party injured, where there is one, and, in general, to parties whose illwill, whether on a self-regarding account or on account of sympathy, or antipathy has been excited by the offence. This purpose, as far as it can be answered gratis, is a beneficial one. *But no punishment ought to be allotted merely to this purpose, because (setting aside its effects in the way of control) no such pleasure is ever produced by punishment as can be equivalent to the pain.* The punishment, however, which is allotted by the other purposes, ought, as far as it can be done without expense, to be accommodated to this. Satisfaction thus administered to a party injured, in the shape of a dissocial pleasure, may be styled a vindicative satisfaction or compensation. [EMPHASIS ADDED]

It is clear from this passage that Bentham's moral proposal—no punishment solely for retaliation—depends on a judgment of fact—the pain to the offender will always exceed the pleasure offered to his victim and other interested viewers. When we begin analyzing concrete cases, we can readily agree with Bentham that this is generally true, but the universal applicability of that proposition is nowhere near so clearcut as he assumes. And in cases where it is valid, the consistent utilitarian would have to consider punishment justified for that reason alone.*

We can follow this retributive argument even farther and illuminate some of the hidden logic of the criminal law. We are not in fact talking about simple retaliation or revenge, but an institutionalized version of that instinct. In Sir James Stephen's memorable phrase: "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite". Let us perform a thought experiment and suppose we did not have the channel. When people committed crimes, the state did absolutely nothing in response (abstracting for the moment from the other goals of the criminal law). That would not wipe away the natural and potentially destructive feelings of resentment. Inevitably some would look for private vengeance. Others would imitate them,

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[25] As quoted in Cross, *The English Sentencing System* (1971) at p. 99.

* Consider the case of Adolph Eichman as one instructive example. [26] Apprehended long after his crimes, there was no need to prevent any recividism on his part, either through treatment or intimidation. I also find it difficult to believe that punishing him added any appreciable deterrent force to the laws of war or genocide. But the sense of grievance his conduct engendered among millions of Jews (and Gentiles) in the world, and the aggravation which would have resulted if he had been allowed to go totally free, were palpable facts which a utilitarian could not logically deny. Without dwelling on the specific choice of capital punishment, I think it clear that there were several serious penalties which a utilitarian would have to consider justified on this ground alone.

[26] See Hart, *Law, Liberty and Morality* (1963) at pp. 58-60.

the original offenders or their friends would respond, and the conflict would be escalated to even higher levels. Eventually that practice would become widespread, even stable. Nor is that a purely hypothetical projection. I can think of several examples, such as the vigilante in the American West, or the resistance groups and collaborators with enemy occupying forces.

What is instructive about all this is that the means by which private vengeance is achieved (and the sense of grievance eased) is conduct like killing, assault, or destruction of property which is itself as illegal as the original offence. But if the state did nothing about the offence which started the whole exercise then, logically, it will show the same restraint in the face of the victim's retaliation. However, that private reaction is not likely to be nicely calibrated to the actual situation and motivation of the offender, nor to be the occasion for society achieving some of the other objectives of punishment (those described earlier). An officially-sponsored system of revenge may now seem not so pointless after all. True, it involves the deliberate infliction of harm on the criminal but then it also provides him with a civilized form of protection from even greater harm inflicted by the vigilante. Indeed, we are told that the source of the Talmudic maxim "an eye for an eye, a tooth for a tooth" was the desire to eliminate the practice of "two eyes for one eye, ten teeth for one tooth!"[27]

In sum, then, a crucial reason for punishment is that we allow an offender to *expiate* his crime, to pay his debt to society (and, if possible, to his victim). As Mr. Justice Stephen suggested, the criminal law does not blindly respond to the destructive urge for vengeance, it sublimates it into a much more constructive path. Ironically, then, one of the most enduring and certainly one of the most criticized elements in the "retributionist" case for punishment turns out to be not only utilitarian in its ethical underpinning but also reductionist in its strategic impact.

I believe we can take the argument one level deeper in laying bare the fundamental assumptions of a legal system. Punishment of offenders serves as *reassurance* to the law-abiding.[28] It is not simply a means to conditioning our acceptance of the intrinsic moral value of its rules and so adding to their influence. It is not simply a means of satisfying the sense of grievance for injuries received and so reducing the willingness to "take the law into our own hands". More profoundly still it stands as visible evidence of the state's readiness to perform the guarantees it has made to protect those who will obey it. As such it is the key to

[27] Telyweld, "Essay", in *Punishment: For and Against* (1971) 57, at pp. 66-67.
[28] Max Atkinson, "Punishment as Assurance" (1972) 4 Univ. of Tasmania Law Rev. 45; see also Frankel, "Criminal Omission: A Legal Microcosm" (1965) 11 Wayne Law Rev. 367, at p. 385 and p. 392.

public acceptance of the authority of the legal system, for reasons pungently expressed by H. L. A. Hart:[29]

> Sanctions are therefore required not as the normal motive for obedience, but as a guarantee that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall. . . .

Let us examine why this is so. Fruitful co-operation within a society requires some sense of mutual trust. We must be able to rely on others performing up to our normal expectations of how they will and should behave. To take an everyday example, merchants are ready to accept cheques in payment for goods, or even to cash them, because of the expectation that their customers are not forging them (or otherwise using them fraudulently). A serious crime, especially one of violence, disrupts these fragile bonds of trust and mutual assurance when it comes to the attention of the community. A series of such crimes will lead to defensive reactions, and then counter-reactions, which badly impair the quality of life in that community. Fearful citizens buy guns, use watchdogs, and hide themselves behind padlocked doors. Often enough their fears are realized because their adoption of these measures acts as a self-fulfilling prophecy.

The only way this consequence can be avoided is for the criminal law process to be seen as taking vigorous and effective steps in response. The "silent majority" must be assured that something is being done. I frankly confess that there is often very little rationality in all of this. The waves of fear which sweep suburban communities at the word that a child molester is abroad is a typical example. However, in order to head off countless mothers drumming into countless children the notion that they should not talk to, they should not *trust* strange men, the state must apprehend the offender and do something with him. It seems also that it must deal with him in a way which teaches us that he was really different, almost a moral outcast. If it does, we feel much easier about relying on our "normal" neighbours to remain law-abiding.

I suggest, though, that even this aberration can be understood only against the background of some basic truths about our legal system. Interdependent social life requires mutual adherence to laws which impose sacrifices on all of us in the pursuit of some (more or less) common good. The state makes an implicit bargain with those of its citizens who do make the sacrifices and obey the laws that, in return, it will do something about the few who do not. In particular, it will deliberately impose a similar sacrifice on the latter. The object is not simply to deter these offenders, though it is that as well; it is also to

[29] H. L. A. Hart, *The Concept of Law* (1961) at p. 193.

preserve the morale of the law-abiding by showing them that their sacrifices have not been and will not be in vain.

Let us step back for a moment and consider the common strands running through my argument in this section. I began with a familiar criticism of the concept of rational deterrence as a reductionist device. As a matter of common experience, it clearly is not the source of most of the compliance with the criminal law. Because it does require the infliction of very serious pain on the offender, would it not then make sense to discontinue it? Few of us would set out to kill or rob our fellow citizens in that event. I think that whatever surface plausibility this line of reasoning may have stems from the assumption that current social attitudes will remain viable without the visible operation of the criminal law. But the truth is that these attitudes are themselves heavily dependent on the existence of some such punitive practice.

A large number of people believe that conduct which deliberately and seriously harms others is morally wrong; they would not engage in it even to avenge similar wrongdoing committed against themselves; they believe that they can trust others to adhere to the same standards and so refrain from constant defensive measures. Each of these attitudes is generated by, and remains dependent on, a social environment which at its roots is constituted by a legal system. These sentiments exist right now. If the criminal law suddenly disappeared (by which I mean that no deliberate harm was inflicted on known law-breakers), they would continue to function on their own for at least a time. We would not have instant anarchy. I do not predict that, overnight, previously timid, sensitive souls would suddenly become looters, rapists, or killers. But I believe we can envisage the scenario for the gradual deterioration of our moral attitudes. A generation or two hence and they could be gone.

In conclusion, then, a system of social morality, one which requires that we restrain ourselves in the pursuit of our private interest, but at the same time offers us reciprocal protection against similar harmful conduct from our neighbours, could not long survive the demise of the legal system which makes good on that protection. If men were angels, if they never gave in to the temptation to harm others for their own benefit or if the injured party was always ready to turn the other cheek, then that conclusion would not follow. Unfortunately, or perhaps fortunately, the human condition is the way it is, and as long as it so remains, we will need criminal punishment.

The True Meaning of Retributive Justice

The reader should not be left unaware of the character of the position I have just defended. I have suggested that the criminal law

operates in much subtler ways than is involved in the logic of pure deterrence and, as a result, punishment can receive a broader justification than is often realized. Still this justification remains utilitarian at its roots and substantially reductionist in its objectives. True, it relies on and seeks to reinforce the popular view that because the offender committed a crime it is right that he should be punished. But the purpose of punishment is still forward-looking, the maintenance of this moral feeling and its hoped-for effect on the actual behaviour of the majority. All I have purported to show is that crime evokes a *sense of injustice* and that the state must act in ways its supporters *feel* is just in order to preserve their morals and support.

One could accept all that I have said so far and still take a detached clinical view of this popular feeling. One could believe that notions of justice are irrational, prefer that they did not exist, and hope that a very different view of crime and the criminal would develop in the future. Dr. Menninger's view may be representative:[30]

> The very word *justice* irritates scientists. . . . Being against punishment is not a sentimental conviction. It is a logical conclusion drawn from scientific experience.

But if one is a utilitarian, he would, with Holmes, admit the necessity of adjusting the body of law to "the actual feelings and demands of the community, whether right or wrong", and then designing it so that the highest level of welfare was produced, consistent with the materials the law-maker had to start with.

That view does not reflect the retributive justification of punishment in its strict and classical sense. On the contrary, this latter conception of the criminal law holds that there really are principles of justice which underline our *sense* of justice (and often require revision of the latter after reflection). From this vantage point the commission of crimes and the infliction of punishment are subject to moral claims about what is right and wrong, independent of the future good or evil which this conduct may produce. If we want to give a full account of the reasons for punishment, we must grapple with these claims.

In fact, this final perspective is needed to deal with a large gap in the account I have given of the supposed justification for punishment. These arguments all constitute very good reasons why the members of society taken collectively (or at least the most powerful groups among them) may well *want* a system of criminal punishment, may think the latter a very good thing to have. But of course, at the critical moment in the administration of that system, the state does something very painful to one individual. He is not so likely to be enamoured of rehabilitation, intimidation, deterrence, moral educa-

[30] Menninger, *The Crime of Punishment* (1968) at p. 17 and p. 204.

tion, retaliation, or reassurance, and he would probably take his chances without the opportunity for expiation. After all, it is because he is unwilling that we have to use coercion, the common denominator to this whole exercise. The crux then, of the moral dilemma in punishment is the problem of *distribution*. These objectives I have named and described are all steps in the way to producing a pleasant and comfortable life in the community. The means we adopt for the achievement of this end is the infliction of very unpleasant and uncomfortable lives on selected individuals within that community. The early utilitarians did not blink at that fact:[31]

> When a man has been proved to have committed a crime, it is expedient that society should make use of that man for the diminution of crime; he belongs to them for that purpose.

One doubts that Tolstoy would be satisfied with that answer to the question of our right to punish.

There is one facet to this problem which is of practical significance, but can be disposed of, theoretically, very quickly. If we were solely concerned about crime control, the reduction of illegal behaviour in the community, we could conceivably justify very harsh measures to deal with even very petty offences. However, the utilitarian social ethic which is the common presumption of each of these more or less reductionist arguments, is not identifiable with the objective of crime control. The criminal law is only one element in social policy and is just a means to producing greater satisfaction within a society. Yet of its very nature it is a means which embodies a distinct threat to that ultimate goal. Hence its use can only be justified if it can be shown that the end result will be a society with less harm and suffering on the whole. Of critical importance is the utilitarian proposition that the harm and suffering caused by the criminal law process, especially that inflicted on the offender, is to be placed on that balance without discrimination. When this is done, utilitarianism will only justify measures of *economic* reductionism, where the criminal sanction is itself the least harmful of the alternatives for securing a given level of protection, and the harm from criminal conduct avoided at this level is greater than the harm created by the sanctions imposed to achieve it. Whatever I am going to say below about the limitations of pure utilitarianism should not obscure my belief that more desirable reforms have been accomplished in the history of our criminal law by the application of this principle than by any other.[32]

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[31] The Reverend Sydney Smith in the 1830's, as quoted in Radzinowicz and Turner, "A Study in Punishment" (1943) 21 Can. Bar Rev. 91 at p. 92.

[32] Packer's prize-winning book, *The Limits of the Criminal Sanction* (1968), is a sustained argument along those lines.

But while utilitarianism may exclude a criminal law which is generally harsh and repressive, it does not exclude one which is selectively so. Petty habitual offenders can be sentenced to long terms of imprisonment. Those who happen to appear before a court during a crime wave (e.g., shoplifting in a particular city) may receive exceptionally high, exemplary sentences. In fact, it is quite conceivable that the authorities could take the deliberate risk of punishing an innocent person to deal with a dangerous situation.

A FIRST HYPOTHETICAL CASE

> We can easily find real life examples of the first two possibilities I mentioned because it is common to find little concern in our law for the claim of the convicted offender not to receive excessive punishment. The last will not often find public expression, though, because of the undesirability of writing in a general rule permitting punishment of the innocent (though changes in the burden of proof, presumptions, denial of *mens rea* currently produce the risk of this quite often). In any event, there is a standard hypothetical example used in writings about punishment which will illustrate the difficulties of pure utilitarianism.
>
> Suppose in a racially tense area in the southern United States a black has brutally raped a white woman and escaped. The Ku Klux Klan has met and threatened to lynch ten blacks unless the actual offender comes forward, and from their past performance this is a credible threat. The liberal police chief, district attorney, and judge, while fully regretting the necessity for this step, decide to frame a black whom they know to be innocent of the crime and have him sentenced to jail for a period, say, five years, which is not out of line for that offence (and certainly is a lot less than execution). To make the case even more pointed, let us assume the intended scapegoat is unmarried, has no close family, is middle-aged, a drinker, without a regular job or prospects of one, has had small brushes with the law, and, in general, is considered less worth saving than some of the other possible candidates for lynching. Would their actions be morally permissible? Within the utilitarian framework, and assuming (as I see no practical reasons not to assume) that the affair can be kept secret, the answer clearly is yes. If one feels, nonetheless, that that action just has to be morally wrong, then some independent principles must be found to show why.

Each of these is symptomatic of what has been termed the problem of "victimization",[33] something which is permissible in principle for the pure utilitarian. Why? If, as Sydney Smith suggested, we may use the convicted offender for the diminution of crime, why may we not use the innocent but available citizen? The utilitarian is concerned only to maximize the aggregate level of satisfaction within the community. He does include the interests of the offender within his calculus, equally as much as any other citizen. But the actual distribution of this

[33] See Honderick, *The Supposed Justification* (1969) at pp. 48 ff.

total satisfaction among law-breakers or the law-abiding has no independent value for him, except insofar as it contributes to the whole.

Right at the beginning of this essay, I said that the retributive view of punishment was fast reviving within criminal law theory. The principal reason is the increased concern for the problem of fairness in the distribution of punishment. The concept of retribution, in the strict and proper sense of the term, stems from a very different philosophical background than utilitarianism. The extent of the difference can be gathered very quickly from the tenor of its basic argument. someone is punished because he has committed an *offence,* he *deserves* to be punished for it, and thus it is *just* that he should be punished. In each of the examples I have given of "victimization", it may be *useful* to punish someone who does not deserve it at all, or to punish another more severely than he deserves. But morally speaking, such punishment is not permitted, no matter how useful it may be, because it is unjust. As Kant has said:[34]

> Juridical punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another... woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from the due measure of it....

We should also be clear that, within classic retributive theory, criminal responsibility is not just a *necessary* condition for punishment, which *permits* society to impose it for its own utilitarian reasons. While the conclusion is much more controversial and harder to appreciate, the logical implication seemed clear to Kant that an offence is a *sufficient* condition for punishment, which *obligates* society to impose it. In his famous example:[34]

> Even if a civil society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last murderer lying in prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds....

However, the prevailing consensus in contemporary legal philosophy (at least in the English speaking world), is that only the first of these positions can be sustained, and not the second. The retributive argument does place negative restraints on the *distribution* of punishments

[31] Kant, *The Philosophy of Law* (trans. by Hastie; 1887) at pp. 194-98.

in individual cases but cannot be part of the positive *general aims* which supports adoption of the practice itself.[35]

My main concern in this section will be with whether or not that position, which I shall call the standard version, can be maintained. To test it, we shall deal with each of the respective claims in order. But right from the outset we must appreciate that the common theme in the whole argument is a very different value from what has concerned us up to now, namely, the right of each individual to equal treatment from the law and from society at large. This value is expressed in principles of justice which place limits on the pursuit of the aggregate welfare of all the members of that society. I believe it to be true that for the reasons I have developed in this chapter the practice of criminal punishment does contribute to the greater satisfaction of the vast majority of the citizens of a community. However, it does so only by the deliberate imposition of harms (such as jail terms) which (especially with their long-term effects) result in a grossly unequal share of the price of these gains being borne by just a few citizens. For the utilitarian, this consequence would be supportable if the extra satisfaction of the law-abiding exceeds the extra pains of the offenders. For one who believes in the independent worth of justice and equality, that calculation is not sufficient. But is there an alternative solution?

The clue to unravelling the dilemma lies in the recognition that justice does not require total equality but instead permits of inequalities which are of benefit to all. To paraphrase the most important recent analysis of the demands of justice,[36] inequalities are just if they contribute to the well-being of those who are worst off and if the positions to which they are attached are open to all. The only reason we might reject arrangements which are advantageous to everyone, but in so doing necessarily more beneficial to some, is envy, and that is hardly a reason at all.

Assume then that society needs a set of standards which rigidly controls the individual's discretion to use violence and deception in order to protect such interests as bodily safety, enjoyment of property, privacy, and so on. General observance of such standards will secure a much higher level of welfare for every representative group in society. But because of the limited altruism and susceptibility to temptation of mankind, some artificial incentive must be created for compliance with

[35] This distinction is developed by Hart, in his *Punishment and Responsibility* (1968), esp. at pp. 8-13. Essentially it is followed by Packer in his *The Limits of the Criminal Sanction*; see pp. 66-67, for example. I think these are the two most important recent works of criminal law theory in the English language and they have been heavily influential. This crucial notion at the heart of their respective positions thus requires sustained appraisal.

[36] Rawls, *A Theory of Justice* (1971), passim.

these standards. The anarchical alternative might not totally fulfill the Hobbesian vision of "the life of man, solitary, poor, nasty, brutish, and short", but it would come too close for comfort. Criminal sanctions are the rational choice for this reductionist aim if the earlier argument is valid. The consequence of the enforcement of these crucial standards of behaviour is a society with a higher quality of life than one in which they were only preached.

But what of the further requirements of justice? The benefits of that better social life must be made available to everyone. Put in a more pertinent way for our purpose, the opportunity to avoid the harms threatened by the criminal law must be available to everyone. This opportunity is defined in any criminal law by the criteria it uses to select those upon whom to visit the severe and unequal deprivations of the criminal law. Within the retributive conception of the criminal law, the heart of these criteria is the notion of an offence—blameworthy conduct of some kind. What is the significance of this concept for the issue posed by the principles of justice?

The criminal law consists of a series of standards designed to protect the zone of freedom of its citizens. Yet that same code carries the threat of forcible invasion of that protected zone of freedom of those who would ignore these standards. As enacted, these latter harms remain threats. It is in society's interest that the occasions in which they need be applied are minimized. Within that framework, what is the meaning of an offence? One person has invaded the sphere of interest of his neighbour which was supposed to be protected by law. He has deliberately sought to advance his own interests, but only by using another as a means to his end. When he does so he can fairly be said to have forfeited his immunity from criminal punishment.

Why is this so? The essence of the criminal sanction is the coercion of the individual offender as a means of advancing the community end of protection of the freedom and welfare of the general public. The imposition of this inequality is unjust if some individual is singled out fortuitously for that sacrifice. More is needed than proof that his sacrifice will maximize the public interest. Why should this one person suffer and not someone else? Some sufficient reason to justify his personal candidacy for the distribution of that harm is required. But the offender was given the opportunity to avoid that harm, and yet he took the risk in order to obtain an extra advantage at the expense of someone else. Can he complain of an arbitrary denial of his rights when society now decides to use him as the means to the protection of the ends of others? Surely not! By his own choice he has singled himself out as the proper candidate for the distribution of punishment. The analogy must not be pressed too far. He is not literally the author of

his own misfortune. The state must still make the independent judgment that the sanction is needed as a reaction to his crime. But he can be said to have given the state the "moral licence" to come to that conclusion, even at his expense. Ordinarily that reaction will be reasonable, indeed necessary, in order that the credibility of the criminal law be maintained, and the general security and freedom in that society preserved.

When the constituent elements of this argument are satisfied, punishment is just. When it is not satisfied, as in the hypothetical case of the black sacrifice to the lynch mob, then punishment is not just. The defender has not chosen to engage in blameworthy conduct and so has not *decided* to forfeit his immunity; then society is not entitled to use him as a means to secure greater safety and welfare for others. (I shall deal in the next chapter with the clear implications of this argument for the doctrine of *mens rea*.) A further retributive principle, limiting the *quantum* of punishment, follows as a natural corollary from this conception of just *distribution*. Offences can vary radically in their gravity, whether because of the motivation of the offender, the benefits he achieved from his conduct, or the harm he has caused to others. If the point of justice is to limit occasions of punishment to cases where it is not offensive to the values of equality, then the simple lifting of the barriers to some punishment (or unequal treatment) should not thereby open the flood-gates to any punishment no matter how severe, even though this might be beneficial to the aggregate common interest. Just as crimes vary in the degree of injury to the value of equality, so must also punishments, which must be confined within some proportionate range.

EXCURSUS: QUANTIFYING RETRIBUTION IN SENTENCING

This is as good a point as any to deal with one continuing theme in the criticism of the retributive theory. What does it really mean to speak of imposing that amount of sentence which is no more than what the offender deserves? I take it that no current retributionist would want to defend the one thesis which provides an obvious answer —the duplication in punishment of the harm the offender caused in his crime (i.e., a life for a life, an injury for an injury, an eye for an eye, a rape for a ?). Once we leave that ground, though, there seems to be no precise way of calculating the scope of what the criminal does deserve.

It may be replied to the reductionist that he too cannot calculate the precise amount of punishment which will deter, or of treatment which will cure. The answer of a writer such as Nigel Walker is that this reflects merely the practical limits of empirical knowledge. By contrast "the difficulties of retributive accuracy are theoretical, fundamental, and insuperable".[37] In this I would agree with the reductionist. As long as the latter confines himself to the issue of the best means to a single

[37] Walker, *Sentencing in a Rational Society* (1969) at p. 11.

goal such as deterrence, he faces a problem which is scientifically approachable, in principle if not in practice. One could go further and say that conflicts between two intermediate goals (e.g., deterrence and rehabilitation) are themselves theoretically resolvable by reference to a more remote objective (reduction of crime). However, as soon as we admit the presence of two or more competing and independent goals, the situation is changed. Nigel Walker himself suggests the validity of a principle such as *humanitarianism* limiting the pursuit of reductionism by ruling out certain kinds of penalties (perhaps because they are "cruel and unusual"). Others would contend that the protection of individual liberty, as expressed in the principles of *due process,* is equally a restriction on crime control. Now each of these, like the claims of *retributive justice,* is an independent moral value which is supposed to shape and control our judgment of utilitarian efficiency. Because of the fact that each of these involves *moral* claims, it should not be surprising that they do not admit of *scientific* or empirical answers. Hence the first point to get clear is that retribution does not present a unique problem to the sentencing judge, simply because it asks him to think in terms of a moral concept like "desert".

Of course this form of *tu quoque* argument does not provide any positive solution to the problem of how a judge can go about making these value judgments in meting out a real-life sentence. I think we must admit that these concrete value judgments—whether about desert, humanity, or liberty—cannot be deduced from our formal moral principle. They require an appreciation of the nature of the harm caused by the offence, the gains the offender derived from it, and the pain he will suffer from the penalty. Nor will the judgment which results from this amalgam of factors identify any precise unit of punishment which is deserved. Retribution here can suggest to us only *ordinal,* not *cardinal,* justice. We can have a rough idea that one offender is being sentenced to more or less than he deserves by comparison with sentences to other offenders, without being able to fix any absolute amount which should be meted out to each and all. Retributive justice must be satisfied with due proportionality within a system of punishment, and the base-line for that enquiry is the evolving tradition of the community about the absolute severity of punishment which is acceptable to it.

I know that analysis will be as unsatisfying to a critic as it is to me, but let me suggest a close analogy which may make it a little attractive—a society's wage policy. One key factor in wage determination is productive efficiency (which is the analogue to crime reduction). We want to ensure that people are paid the relative wages which will allocate their services to the point from which they can make the maximum contribution to the social welfare. (We might like our citizens to be selfless, to want to work their hardest for the benefit of their neighbours without thought of individual reward, and to see the market wither away. Similarly, we would like to see ourselves as perfectly altruistic and considerate so there was no crime, and the system of punishment could wither away. For the moment, though, we act on the assumption that neither of these wishes is yet fulfilled.) But the single-minded pursuit of pure "productionism" is not considered to be morally tolerable (except perhaps by some unreconstructed, *laissez-faire* economists). That pursuit must be limited by moral claims of distributive justice, which give employees a relatively equal share of the product to satisfy their individual needs, and does

> not sacrifice all to maximizing the gross national product. Hence we adopt various policies of progressive taxation, minimum wage laws, income or social security floors, and so on. It clearly is not possible to deduce any one concrete solution to these issues from a general theory of justice. We have to work out a very rough approximation, based on community perceptions of human need, relative deprivation, and the other factors with which we are familiar here. What we eventually do is fix an artificial level which we can never demonstrate to be just in an absolute or cardinal sense but which we reasonably believe to be ordinally just, preferable to other alternatives. And the fact that the empirical answers are theoretically unsatisfying does not mean that the questions are morally unnecessary and impracticable. I would argue that if the enquiry is valid for our wage (or tax) policy, then it is also so for our sentencing policy.

Within the standard version of criminal law theory, that is as far as the retributive rationale is taken. When someone commits an offence, and so is said to *deserve* punishment, this must be translated to mean only that he has removed the moral roadblock in the way of his being punished. But this does not of itself justify the state taking positive steps down that path which has been opened to it. Unless one has committed an offence he cannot be punished, but the mere fact he has committed the offence does not mean he should be punished. Because punishment of the offender does involve the infliction of pain on the offender, which is *prima facie* evil, some further good must be shown to flow from that positive state action. And the modern critic just cannot appreciate "a mysterious piece of moral alchemy in which the combination of the two evils of moral wickedness and suffering are transmuted into good."[38] Only utilitarian considerations will suffice, presumably the consequential good of the reduction of the future level of crime in society. Accordingly, this more sophisticated theory of punishment integrates the utilitarian and retributive arguments into a coherent whole by having each respond to different fundamental issues —the "general aim" and the "distribution" of punishment respectively.

Undoubtedly this position is an illuminating advance on the earlier state of philosophical analysis; for a long time I was thoroughly persuaded that it was correct. But eventually I grew puzzled by an issue the theory posed, but left unresolved. If we hold that punishment without an offence is unjust because it is not deserved, this must be by virtue of a rationale which shows why punishment which does follow an offence and which is deserved is just. But if to punish someone who does not deserve it is unjust, then why is not the failure to punish someone who has committed an offence equally unjust? To test whether this line between the negative and positive uses of the retributive rationale really does hold, I will analyze another hypothetical case, one

[38] Hart, *Punishment and Responsibility* (1968) at pp. 234-35.

which illustrates the implications of retribution a little more graphically (and, I think, more attractively) than does Kant's case of the last murderer on the dissolving island community.[39]

A SECOND HYPOTHETICAL CASE

Suppose that the defendant, a Mr. Johnson, admitted and has pleaded guilty to an offence involving an aggravated sexual assault of a young 12 year old girl, Jennifer. As a result of the assault, Jennifer has suffered a serious psychological trauma which her doctors believe might become permanent. It would significantly aid in her hoped-for recovery if the affair could be kept as secret as possible, and especially if her friends, teacher, and future associates do not become aware of it. Accordingly, everyone involved in the case—police, prosecutor, judge, psychiatrist, Jennifer's parents, Johnson and his defence counsel —have agreed to an *in camera* hearing for the disposition of this case. But this procedure will not only help Jennifer; it has the side effect of depriving any sentence meted out to Johnson of a general preventive effect. No matter what theory one adopts about deterrence, reassurance, or the like, each of them requires that the affair come to the attention of others in the community. Since knowledge of this case is confined to the smallest number of individuals possible, the concern for general prevention is reduced near the vanishing point.

What about our concern for Johnson and his individual behaviour? After intensive social and psychological investigation, the conclusive opinion is as follows: Johnson is unmarried, middle-aged, wealthy, and has channelled almost all his energies into the growth of his very successful business. Several years previously, though, he had engaged in somewhat similar sexual behaviour, but fortunately no serious harm resulted and he was not detected. Still, frightened by the impulse he had had, Johnson consulted a psychiatrist. After a long examination, the psychiatrist's diagnosis was that Johnson's single-minded concern for his business gradually built up pressures which he could not always contain. He had to realize that there was a serious risk that one night in the future, he would be driven to release these pressures through a similar form of assault, but the results could be much worse. The only safe course, according to the psychiatrist, would be for Johnson to sell his business and thus remove the source of his problem.

But that placed Johnson in a dilemma. At the time, his enterprise was at a critical stage, committed to expansion plans, and heavily dependent on the reputation and involvement of its founder and chief executive. If Johnson was forced to sell then, he would have found it very unprofitable. Hence, cold-bloodedly, he decided to take the risk, to continue working and develop his business to a point where he could sell it for a sufficient fortune that would enable him to live the rest of his life in affluence and ease. For a long time the gamble appeared to have paid off. The company had prospered, and he had negotiated its sale to an American-owned conglomerate, for a very large sum of money. Unfortunately (for Jennifer), after working late one night on some final details of the transaction, Johnson committed this second sexual offence. But the psychiatrist now says that, the sale having been completed, and Johnson having the intention to retire

[39] The origins of this example I owe to my colleague John Hogarth, though I think he does not quite agree with all the implications I would draw from it.

to his luxurious resort home in the Carribean, there is no danger of recidivism. Granted that one can never be certain about these matters, he says he can find no justification for a sentencing measure designed for the purposes of rehabilitating Johnson. From his own, purely correctional point of view, the optimum sentence is an absolute discharge.

Now the point of this elaborate description is two-fold. First of all, I want to insulate a sentencing situation as far as possible from any concern for reductionism of future crime, whether from the point of view of the offender or the general community. Having done that, I want to show the force of the *positive* case for punishment which can be made from the retributive concern alone.[40] Each of the elements necessary to that argument is present here.* Johnson and Jennifer live in a community where the interests of each are to be protected by all citizens complying with key legal standards of behaviour. Johnson has prospered in that community, and only because others have respected his own bodily security and his freedom to accumulate and enjoy his property. Yet he deliberately engaged in a course of conduct which created a grave and unjustifiable risk of the invasion of another person's freedom and safety. From that decision Johnson certainly was a beneficiary; the value of his business increased five-fold in the extra time he took in building it up. But it is the innocent little girl who has paid a good part of the price for his success.

Certainly we would have no problem in selecting Johnson as the appropriate instrument for criminal punishment which would serve the general social interest in reducing crime. He could not argue that he was being *unfairly* harmed for the benefit of others. The trouble is that in this case no such future good will be produced by his punishment. Is there any reason, then, for inflicting it? The answer, I believe, is yes, because otherwise we would leave Johnson with a kind of illegitimate "windfall" profit.[41] By acting illegally he has prospered, but only by taking advantage of a situation where others restrained them-

[40] There are several important items in the recent revival of the retributive theory in the philosophy of punishment. I would mention Murphy, "Three Mistakes about Retributivism" (1971) 31 Analysis 5; Finnis, "The Restoration of Retribution" (1972) 31 Analysis 131, and, most important, Morris, "Persons and Punishment" (1968) 52 The Monist 475.

* I should add that there is some utilitarian (though not really reductionist) good produced by punishing Johnson, namely, the satisfaction or alleviation of the sense of grievance of Jennifer and her family. But it is realistic to assume that the pain to Johnson from being publicly labelled and further penalized will outweigh the pleasure that his victims might receive from punishment. Accordingly, if *net* utilitarian gains are the only general aim which justifies the positive infliction of punishment, then a secret absolute discharge is the only permissible disposition here (and Jennifer's family will just have to bear up under the aggravation this will cause them).

[41] The essence of the theory of retribution is put that way, quite neatly, in Wasserstrom, "H. L. A. Hart and the Doctrines of Mens Rea and Criminal Responsibility" (1967) 35 Univ. of Chicago Law Rev. 92 at 109.

selves, and acted legally where he was concerned. I believe we sense, intuitively, that to leave that situation unremedied—to "sentence" Johnson to an absolute (and secret) discharge—just would not be right. The core of the retributive case for punishment, which illuminates that intuitive judgment, is that we must deprive Johnson somehow of that unjust enrichment.*

This case aptly illustrates what I suggested was the puzzling conclusion implicit in the Hart-Parker position. We all recognize that it is quite injust to let Mr. Johnson go scot-free even though no good *consequences* can be seen in his punishment. One could not really deny this while still condemning the punishment of the black who had committed no offence in my earlier example. The reason is that the same institutional and moral assumptions lurk in the background to each judgment. Each individual is guaranteed a certain area of freedom and social benefits by the law. It is unfair to deprive the black of the rights to which he is entitled in order to secure a net social advantage (saving ten other blacks) in which he will not participate. But by the same

* I shall not try to defend any specific sentence which I think Johnson deserves. In several years of using this problem in my criminal law classes, I have heard many ingenious and attractive suggestions from my students. One thing which is necessary is that Johnson should be publicly convicted and condemned for what he has done: he should not be allowed to parade behind a facade of wealthy, bourgeois respectability. That exposure might well be considered punishment enough (though I doubt it). But as I said earlier a theory of deserved punishment leaves room for wide variation in the quantum of sentence to serve utilitarian objectives.

Still, there is one issue which I must address briefly. Should Johnson be given a jail term—the standard sentence for this kind of crime? One might argue that not only would this be painful to him and expensive to us; it would actually be counterproductive. The prison experience might turn him into a confirmed, "hardened" criminal, and thus trigger further harmful conduct on his part.

I should say, first of all, that I think that expectation is false. Jail sentences which are not excessive in length (e.g., six months to a year) would not likely have that kind of effect on a fully-matured personality such as this defendant's. There has been a great deal of investigation of, and theorization about, the "prisonization" of inmate personalities during their periods of confinement. However, attempts to detect any real impact of this experience on future recidivism have not been notably successful (in recent studies which control for the variables which produce the prison sentences in the first place). But for purposes of argument let us assume that hypothesis to be true. If jailing Johnson could conceivably produce one or two more Jennifers, then the proper conclusion is clear; we must not jail Johnson. The reason is equally clear. The pursuit of a retributive (or a deterrent) objective would be achieved only at the expense of other innocent victims. In such a situation, to try to comply with the abstract principles of retributive justice would produce a concrete injustice.

I would generalize further from this case. Unlike Kant, I do not believe in an obligation on a society to punish offenders for retributive reasons. Unlike Hart and Packer I do think that retributive reasons offer us more than just a moral licence to punish for utilitarian ends. In my view, retribution is one aim, a valuable aim, of the criminal sanction. But it is only one such aim, it must be blended with others into a coherent whole, and these others will sometimes require that we ignore or minimize its force. If I may put it in linguistic terms: Hart suggests that retribution tells us only that we *may* punish; Kant goes much further to say that we *must* punish; I would take it as far, but only as far, as to say we *should* punish.

token it is unfair to allow Johnson to retain the extra and illegitimate advantage he has obtained by deliberately infringing on the rights guaranteed to the little girl, his innocent victim. If one does not accept these claims of justice as a reason for punishing the guilty offender in this latter case, independent of and even over-riding the claims of maximization of total social welfare, then by the same token one cannot appeal to that same kind of principle as a reason for refusing to punish the innocent person where this seems warranted by the social interest in the first case.

I do not mean to deny the sense that there are some differences in the two cases; the question is whether they really do require the contrasting results which Hart and Packer propose. First of all, it is true that if the state punished the innocent black, it would be taking affirmative action to *inflict* an injustice, while, in the second, it merely refuses to *correct* the injustice which Johnson himself has worked. Now the distinction between "misfeasance" and "nonfeasance" may have some legal and even moral relevance, but I do not see it as a persuasive argument for leaving the second injustice uncorrected. However, perhaps it suggests a second and more compelling difference. In my first example, the state inflicts positive harm on an isolated individual, sacrificing him to the interests of the group. In the second case it would merely leave the individual with the fruits of his unfair advantage, and so leaves him better off, and unjustly so, than others who have abided by the law (although this diffused unfairness is focused somewhat in the sense of grievance of the victim and her family). Again I believe it is true that the prevention of a serious injustice to a lone individual is a more important objective than securing a slightly fairer equilibrium of benefits and burdens among the community at large. But again, the fact that one objective is more important does not tell against the validity of this latter aim.

The real source of the popularity of the standard position is to be found in the artificiality I had to introduce into my example—the secret trial. The "general aim" of the enactment of the criminal law, prescribing certain behaviour on pain of a threatened penalty, is clearly utilitarian. We hope that these standards of behaviour will be largely complied with and the level of harmful behaviour reduced. Once the standards have been ignored and an offence committed, then actual punishment has the utilitarian value of maintaining the credibility of the criminal law and so furthering its general aim. One can easily imagine situations where there is no appreciable danger of recidivism and so no need to apply sanctions on that account. Take the nephew who cold-bloodedly murders his dowager aunt and inherits a fortune. He is clearly unlikely to act in like fashion again but to leave him unpunished would seem

totally unjust. But assuming the typical situation of a public trial, punishment is needed for general deterrence. The nephew must receive a stiff sentence for the utilitarian good of protecting rich aunts, and this will have the latent effect of satisfying the demands of retributive justice. But since we are uneasy about the connotations of vengeance in that latter argument, it may seem best simply to ignore it. We have sufficient utilitarian reasons for the positive justification of punishment and need never face the situation in which a total absence of punishment would be morally intolerable. Yet we can still appeal to a theory of retributive justice for its negative virtues, protecting the individual from the logic of deterrence which might imply an unjust distribution or quantum of punishment.

I will not repeat here my earlier argument that this distinction will not work. One cannot be against the unjust punishment of the innocent while being neutral about the just punishment of the guilty. But even that analysis will not account for everything we want to say in favour of punishment, especially those subtler versions of "general prevention" which I reviewed in the second part of this chapter. There I did highlight the utilitarian and reductionist elements in these several justifications of punishment, whether as a morality play, as a means of requiring the offender to pay a price for his default, or as a vehicle for reassuring the majority in their law-abidingness. However, when we examine them closely, each of these apparently utilitarian arguments receives its motive force from the popular sense of injustice which crime evokes. Society must drive home the lesson that "crime does not pay" in order to preserve the public attitude that "crime should not pay". Nor is the latter simply an irrational feeling which administrators of the criminal law must merely tolerate, make adjustments for, until and unless it goes away. Ordinarily to leave a crime unpunished, to permit crime to pay, really is unjust. One should prefer a community feeling that offenders like Johnson, in all fairness, should be punished.

The reason is that there is an extra dimension to the justification of criminal punishment by contrast with the criminal law. The enactment of the law may be defended in basically utilitarian terms. Once it is enacted, most people will comply with the new standard, accept the sacrifices which this entails, and so offer their neighbours the protection it affords. But the offender has ignored the law and made his victim accept the sacrifices of his behaviour. In so doing he gets the benefit not only of the general security of the law but the extra advantage of his illegal action. The criminal has profited while the law-abiding have suffered. A crucial aim of punishment is to restore the rightful balance, to see that at least in the long run those who choose to comply with the law are not disadvantaged by comparison with those who choose to

ignore the law. We should make that an aim of the criminal sanction not simply because it may help produce a more secure and happier society (though we may do so for that reason as well). We do so as well because it may help produce a more just society (and only if the operation of the criminal law is seen to be just in this sense will the necessary voluntary compliance of the silent majority be forthcoming). And that I think is the core of enduring truth in the tangled web of retributionist analyses of punishment.

The Dependence of Retributive on Distributive Justice

At this point in the argument I can no longer ignore the question which I left in parentheses right at the beginning. What is the relationship between the moral justification of the practice of punishment and the actual content of the laws it is used to enforce? (This in turn is one instance of the more celebrated enquiry in jurisprudence about the relation between law and morality.) I do believe it is both necessary and legitimate to consider punishment in the abstract to assess whether it is intrinsically justifiable or whether it has internal flaws which render its use indefensible. Once one has concluded, as I have, that punishment is justifiable in principle within the assumptions I have made, the enquiry could stop right there. Given the human condition as it is, punishment is a "natural necessity" even in an ideal society. The fact that it may be misused in a highly inequitable society is no argument against its theoretical value, no more than would be the case with any human endeavour or institution (such as government or courts).

But most of us would find that conclusion rather unsatisfactory. Punishment is something which is operative only in the real world. It involves the deliberate infliction of actual pain on real people. This apparent evil is worked on behalf of a legal system which is invariably some distance removed from the ideal. Especially in the case of an argument such as mine which has located a primary justification of the practice in its accomplishment of retributive justice, the issue of the distributive justice of these basic social arrangements cannot ultimately be ignored.

I do not believe there is any serious problem in the cases of those crimes involving infringements only on personal bodily security (such as murder, assault, or rape). One can hardly say that the distribution of physical integrity which is protected by the criminal law is unjust. Everyone is given only one life to enjoy (although even within the offence of murder, there can be debate at the periphery about which lives are to count, as the cases of abortion and euthanasia show). But when we turn to property offences, which comprise the majority of

serious crimes and convictions, the situation is very different. I do think that some system of property law is inevitable in any modern society and that a suitably-designed institution of private property is a desirable means of preserving the values of personal autonomy and privacy. However, the actual definition of property and the socio-economic institutions through which it is allocated give some much more than others. In human history up to now, the disparity has always been excessive and unfair and it is this kind of basic distribution which is protected by the criminal law (either directly, by offences of theft or fraud, or in combination through offences like robbery, arson, or kidnapping which also protect personal safety, or indirectly by offences like treason, espionage, or corruption which protect the state which defends that system of property). How then does one justify in the real world the punishment of the person who has just a little property and has stolen from those who have a great deal?

To illustrate the problem, let me sketch one more imaginary case which it might fairly be argued is much more representative of the real world of the criminal law than my earlier one. The defendant is poor and a member of a minority group, such as an Indian. He has become a heavy drinker and is unable to find a regular job. To obtain money to eat or drink, he breaks into the house of a well-to-do family and steals some money. If he is caught and charged with burglary and theft should this defendant, who appears so much a victim himself, be sent to jail? That hardly seems the course which protects the value of equality and serves the principles of justice.

This is the kind of situation which seems to be at the forefront of the minds of those who are understandably squeamish about the infliction of criminal punishment in the real world. But to get some perspective on the significance of the example I should add some further comments. First, most of those who commit criminal offences are not poor, unemployed, or Indian. Secondly, many (if not most) of those who are poor, unemployed, or Indian do not respond to their condition by committing such offences. Finally, when they do, their victims are disproportionately drawn from the same underprivileged ranks as themselves (even indirectly, as if they steal from large corporations who respond by raising their prices in such risky areas of the community). In sum, even in a society whose *laws* produce an unacceptable inequality in distribution of benefits, *crime* is usually not a step towards greater equality and will often be the reverse. But that qualification merely affects the scope of the problem. The core of the objection conveyed by this example is a valid one. In the real world, the enforcement of certain laws against certain people serves only to aggravate an existing injustice and inequality in society. What then should be the conclusion?

When the question is put thus squarely, I think the retributionist must answer that punishment which for that reason is unjust is thereby also unjustified.

And that implication is no argument against retribution; indeed it should be a primary source of the theory's appeal. It is often suggested that the pursuit of retribution will breed moral complacency. If someone is convicted of an offence he deserves to be punished, and that is that! Yet there are too many relevant factors in the background to an offence to permit of such easy judgments about moral (as opposed to legal) deserts: the offender's family history; his needs in the immediate situation; the legitimate opportunities society offers to fulfill these needs. Modern man is ready to suggest that only God can weigh these factors, and to leave justice to Him while humans concentrate on crime prevention. (It is not without irony that so many of those who advocate that division of labour do not believe there is a God.)

I quite agree that, at best, the state and the criminal law are crude instruments in the pursuit of justice. Still, one might question whether this means we should ignore that objective altogether. We can argue as though the reductionist form of justification—what strategies in enforcing the criminal law will achieve the optimum success at acceptable costs?—was the only relevant question. But that will only drive underground the fundamental concern about the just distribution of punishment. How can we be justified in enforcing a somewhat unfair set of socio-legal arrangements? Even worse, by what right do we reform an offender so that he adjusts to a social order he previously found oppressive? One can understand why the administrators of the criminal law process would want to avoid these intractable dilemmas, and to assume they have been resolved elsewhere in the political system. Then these officials can concentrate on technical issues, how to enforce these political decisions efficiently and with a minimum waste of resources and welfare. But while we may understand this inclination, we must not thereby ratify it. Implicit in every exercise of discretion within the criminal law is some view of the justice of inflicting punishment. We will not improve the quality of these views by refusing to reflect upon them.

The point of a retributive theory of justification is to bring that question out into the open and to put it at the forefront of the enquiry. Properly understood it does not entail moral complacency; it should be morally subversive of the existing criminal law system. One can discern two distinct movements in this recent evolution and impact of retributive theory. Let us first consider the hidden impulse of what I have called the standard version of limited or negative retribution. This theory stems from an appreciation of a very simple fact: those who control the criminal sanction wield substantial *power* over the individual. The

rehabilitative ideal is no longer so appealing. We are not as enamoured of the notion of the wise administrator, concerned simply with detached and scientific therapy, who can be trusted to do just what is right and necessary. What he thinks is necessary may have awful consequences for an unfortunate individual. Accordingly, the impulse is to hedge the exercise of this power through strict negative limitations on the application of the criminal sanction. In the final analysis, these coalesce in the proof beyond reasonable doubt, through a system of due process, that an individual has committed an offence for which he is responsible. Only when these conditions are satisfied does he forfeit his immunity from the use society may want to make of him for the enforcement of its criminal law.

With the full-fledged retributive position, the one which is just beginning to emerge (or re-emerge) in recent years, we focus on a different character of the criminal law. It may suffer from other defects besides those of inefficiency, or of erratic, arbitrary interference with individual freedom. Even when it is careful and precise in its operation, it can be used to enforce (very successfully) a system of social arrangements which are grossly unequal and unfair.[42] When a victim of these arrangements strikes out against them, he may have committed a legal offence and thus be legally open to criminal penalties. But he does not morally deserve the infliction of punishment and thus one cannot justify the application of these penalties to him. Yet the reason we know that certain punishments, even for legal crimes, are morally undeserved is because we have some idea of what is necessary for it actually to be deserved. Suppose, then, that in a relatively just society, someone commits a crime and secures an unequal and unfair advantage at the expense of someone else. When we see why punishment is just in such a case, we can also see why its application is justified, without more.

The retributive analysis of punishment is neither self-sufficient nor a means of simplifying the problems of justification. A criminal law must be effective and economic, as well as fair, and the entanglement of these several values just adds further complications to the task. Even worse, the retributionist poses questions to the criminal law which can never be satisfactorily resolved. One does not reform society by reforming the criminal law, but one cannot dispose of the criminal law for that reason without making everyone even worse off, including those at the bottom of the social scale. Once we put the

[42] An interesting analysis of criminological theory from this point of view is Taylor, Walton, and Young, *The New Criminology* (1973); its implications for the philosophical justification of punishment are explored in Murphy, "Marxism and Retribution", (1973) 2 Philosophy and Public Affairs 217.

criminal law into motion, then individual decisions in its adminstration are made by people whom we want to see controlled by some fairly specific standards. Few of us would like police, prosecutors, or judges to assume they should not enforce laws they believe unjust or irrational. Even those who are strongly opposed to some existing laws have a well-founded suspicion that when these officials do disagree with the legislature they may err on the wrong side of justice. These typify the intractable problems we face in the real world which do not fit so tidily into the abstract assumptions of a theoretical scheme. But the fact that the answers are so difficult to find is no reason for not asking the questions. And the first, and ultimately over-riding question, in the justification of punishment—posed either to the judge in sentencing or the legislature in reforming—should not be whether the measure will be effective, but rather will it be just.

Conclusion

The arguments I have advanced in this chapter as justifications for punishment are not novel. Each of them has been with us for a long time. With the exception of the last, I do not think any are really that controversial in current legal philosophy. The one exception—retributive justice as a positive aim of punishment—is an ancient argument, long submerged but now coming out into the open again, and likely to prove very persuasive in the intellectual climate of the next few years. What I have tried to do is present these arguments in a form of dialectic in which we see how each reason follows from its background assumptions, and in turn naturally produces its successor when this background is considered from a slightly different point of view. This is the way I look at the claims made by the historic theories and I can find no *a priori* reason for drawing the line at any particular point. The problem that is left is to understand the real life contexts within which each reason is significant and to establish some set of priorities for adjudicating between them when they conflict.

Part 4

The Logic of our Criminal Sanctions: Institutional Design and Moral Justification

Save for a few ideologues, people who are close to the criminal law recognize the multiplicity of valid considerations in the administration of criminal sanctions. Sometimes these different values will point in the same direction, in which case we will have a cumulative justification (or rejection) of punishment. Sometimes they will conflict, in which case we must decide which is to be given greater weight in the concrete problem before us. All of this is terribly familiar within the modern sentencing process. Accordingly, the problem which I will address in this chapter is whether we can go beyond such essentially *ad hoc* adjustment and discern any underlying natural order in the several objectives of punishment. I believe that we can, and the clue can be found in the corresponding internal variation in the structure of the criminal law process as a whole.

In the opening chapter, when I was describing these structures, I deliberately left vague the nature of the mood which animated each, the glue which seemed to hold the parts of the structure together. Now, having completed the analysis in chapter 3 of the various reasons prescribing punishment, the true force of these moods is apparent. The natural home of retribution is the practice of "punishment", of general deterrence is "penalty", and of rehabilitation is "correction".

At the outset I must be quite clear and careful about the claims I will be making. It is too tempting for the theorist to impose a neat order, fitting his own preconceptions, on a reality which is far too complex to be captured by his categories. All that I suggest is that each of these practices is *primarily* focused around one of these respective goals, not that it is *exclusively* concerned with just that one. Nor is this connection a matter of any kind of logical necessity. A much better way to

describe it is in terms of practical affinity. In those key cases where the different justifications of punishment may conflict in the directions which each offers, it is predictable, understandable, and justifiable that one such objective will predominate in the flow of decisions undertaken within that practice. To put it another way, we should expect to see some natural division of labour within the tangled reality of the criminal law: one which relates the basic forms of criminal conduct, the function we primarily want performed by the criminal sanction with respect to that conduct, and the structure of the institution which we utilize for that purpose.

Retribution and the Practice of "Punishment"

With these preliminaries, let us examine in some detail how the various goals of punishment do line up with our different models of the criminal sanction. As I have reiterated several times, at the core of our criminal law are the 'real' crimes of murder, rape, assault, robbery, and so on for which the practice of 'punishment', in the narrow sense, is primarily designed. Notwithstanding that such cases comprise only a small proportion of the total operation of the criminal law process (by contrast with even one offence such as public intoxication), this central segment shapes our attitudes to the criminal sanction and our reflections on the problems of punishment. And it is here, I suggest, that retributive values are dominant.

Each of these offences exhibits the background assumptions which retribution needs to make sense. A set of legal standards has been enacted prohibiting certain forms of conduct which cause serious harms to others. The aim of the enactment of the criminal law is to reduce the level of such harmful behaviour even though compliance with these standards may demand sacrifices to individual interests. One person has chosen to ignore this law, to pursue his own immediate goals, and so to inflict a harm on an innocent person. He has done this even though he has benefited from the security afforded by the willing compliance of others with that same set of laws. What, if anything, should the state do to that person? What are the natural, human reactions with which the criminal law must make its peace?

The first and most evident problem is the sense of grievance of the victim and the desire for revenge. An officially-sponsored system of retaliation must be created to satisfy these feelings and to protect the offender (or at least some of them) from more damaging informal measures. Indeed we are told that the criminal law, as a state-controlled monopoly of legitimate force, only gradually emerged from its historic

roots in private retaliation organized through kinship groups.[43] But what is the explanation for this trend to state control? I think it is the fact that crime generates significant responses among the larger public as well, even though they feel no sense of particular injury such as that of the victim and his family.

The rules at the core of the criminal law reflect moral standards which are deeply imbedded in our way of life. Indeed, it is difficult to conceive of a human society which does not accept some authoritative restraints on the use of force, the taking of property, or fraud and deception (though, as I said earlier, there clearly is great variation in the definition and ambit of protection afforded by such legal or moral standards). When this kind of offence occurs, it will evoke somewhat conflicting public reactions. On the one hand there will be indignation and resentment towards the person who has dared to flout the basic decencies of community life. Yet, at the same time, the example of the criminal may suggest to us how easily we too could succumb to the same temptation. When it does, crime generates feelings of uneasiness about the fragility of the social bond, about the reasonability of our trust in the self-restraint of our neighbour.

Punishment of the offender is a response to each of these general attitudes; at least the practice of "punishment" in the narrow sense of the term. What are its peculiar characteristics? The criminal trial appears as a morality play, with its robes, its ritual, its priestly terminology. The source of its dramatic interest is the presence in the wings of the prison sentence, the typical means through which the Canadian community now expresses "its hatred, fear, or contempt for the convict". When this process is put into operation, when we convict and sentence an offender to jail, we reinforce these basic standards of morality, drive home again to the waiting public the lesson that "crime does not pay". At the same time we try to repair the wound in the social fabric by reassuring the citizenry that its officials are able to do something about the crime problem, and so their own willingness to abide by the law continues to be a good bet.

Of course, as I emphasized in the previous chapter, these specific functions of punishment are only quasi-retributive. They can be viewed with detachment as simply useful ways of dealing with the natural feelings of the masses[44]. But tying together these attitudes, giving them whatever *moral* force they have, is the fundamental notion of retributive justice. Given the qualifications I sketched earlier, to leave this kind

[43] Bittner and Platt, "The Meaning of Punishment" (1966) 2 Issues in Criminology 82.
[44] An interesting exhibit of that attitude can be found in the Report of the New York Governor's Special Committee on Criminal Offenders, *The Penal System: Treatment as Prevention* (1968), pp. 73 & 74.

of crime totally unpunished would not merely appear unjust, it would actually *be* unjust. Accordingly, the crucial aim of "punishment" is the vindication of the decision to be a law-abiding citizen, with all of the sacrifices which that entails, by depriving the criminal of the unjust advantage he gained from his decision to ignore the law at the expense of his fellows.

I do not mean to suggest that this complex of "retributive" functions is the exclusive concern of this practice of "punishment", but just that they are predominant. There are many individuals in our society for whom these subtler lessons of the criminal sanction are meaningless. They have little, if any, commitment to a respectable life and career in the community and few attachments to individuals who prize its moral code. For these, the reaction to the commission of a crime which goes unpunished is the simple wish to imitate it (and I should add that just about everyone, no matter how respectable on the surface, will have that response at least to some offences in some circumstances). The message that punishment must convey is one of deterrence: the threat to impose a painful sanction really is credible and so should outweigh the temptation to lawbreaking. But the point is that there is no conflict between this aim of protecting society and the positive force of retribution, because the actual punishment which satisfies the claims of the latter will do as well to enhance the deterrent threat of the law. There sometimes is a contradiction in the conclusions of the retributive and the reductive arguments, but this occurs only when the goal of crime control seems to demand measures in excess of what the offender seems to "deserve". If, as I believe, retribution should be considered to be the dominant value here, this will be apparent in its negative, restraining impact on the distribution and quantum of punishment. To that subject I will return shortly.

By contrast, there is a deep and intractable conflict between the retributive and the rehabilitative concerns. Unfortunately, that fact is only too easy to deny. Our judges are sending more offenders to institutions and they are being kept there for longer periods of time, at the same time (and I believe because of) the increasing attractiveness of individualized therapy. The reach of the criminal law and related processes is being extended further and further into new corners of human behaviour with the aim of helping those who would get themselves into trouble. Yet the degree of success in real life is just about nil. No matter how sophisticated and expensive the programme, changes of character and behaviour just do not seem attainable through the vehicle of the criminal sanction. It was not too long ago that the introduction of "treatment" seemed to promise a revolution in our ability to deal with the crime problem. But the application of social

science techniques to appraise these claims has thrown cold water on such romantic hopes. The verdict of several recent reviews of studies evaluating penal measures is that the more careful the research design, the less likely that any positive gains will be found to have occurred.[45]

Nor should any of this have been unsuspected. In a classic essay written fifty years ago, Mead predicted precisely that consequence:[46]

> [T]he two attitudes, that of control of crime by the hostile procedure of the law and that of control through comprehension of social and psychological conditions, cannot be combined. To understand is to forgive and the social procedure seems to deny the very responsibility which the law affirms and on the other hand the pursuit by criminal justice inevitably awakens the hostile attitude in the offender and renders the attitude of mutual comprehension practically impossible.

The central core of the criminal law is "punitive" in precisely the respects I have described. It functions in an atmosphere of heightened moral fervour, fuelled by our attitude to the laws the offender has broken and the harm he has caused. When he is convicted through the solemn ritual of the criminal law and sent to jail, the outcome is an enduring stigma for the "criminal" whose consequences are almost impossible to shake off. When the battery of treatment measures are only then brought to bear on the moral outcast, it should not be surprising that they face insurmountable obstacles.

Nor was any of this invisible to the original advocates of the rehabilitative ideal who had a sophisticated notion of what the latter involved. Mead recognized the need for a fundamental change in social attitudes as a precondition to the success of the new approach, an erasure of the retributive attitude at the heart of the practice of "punishment". Society must feel that desire to "deal with the causes of crime in a fundamental way, and as dispassionately as we are dealing with the causes of disease".[47] Crime must be viewed with detachment, as evidence of a social situation which has broken down and which is now in need of co-operative and scientific reconstruction. As Barbara Wootton, a leading modern adherent of this persuasion has put it, the hope is that:[48]

> the formal distinction between prison and hospital will become blurred and, one may reasonably expect, eventually obliterated altogether. Both will be simply "places of safety" in which offenders receive the treatment which experience suggests is most likely to evoke the desired response.... The elimination of those distinctions, moreover, though

[45] See Hood and Sparks, *Key Issues in Criminology* (1970), Ch. 6; Robison and Smith, "The Effectiveness of Correctional Programs" (1971) 17 *Crime and Delinquency* 67.
[46] Mead, "The Psychology of Punitive Justice" (1918) 23 American Journal of Sociology 577 at p. 592.
[47] Ibid., at p. 594.
[48] Wootton, *Crime and the Criminal Law* (1963) at pp. 79-80; 83.

> unthinkable in a primarily punitive system which must at all times segregate the blameworthy from the blameless, is wholly in keeping with a criminal law which is preventive rather than punitive in intention.

With the factual suppositions underlying these proposals I fully agree. "Punishment" and "correction" may not be logically contradictory; they may even be attainable together in some individual cases; however they are not compatible when pursued in a systematic way through the same social institution. If that is true, one might ask why anyone would be reluctant to discard the moralistic sentiments of retribution and to embrace the rehabilitative ideal wholeheartedly. Again one can agree that the facts of formal condemnation and stigmatization present problems in the current criminal law, even within the retributive rationale. The seriously harmful effects of a criminal record, which endure long past the time the offender can rightfully believe he has paid the full penalty for his offence (and also exact a price from the innocent members of his family) are seen to be morally excessive precisely because the notion of retributive justice suggests there is a range of penalties which is fair. A somewhat more neutral and compassionate view of the situation would be less hypocritical if only as some recognition of the criminal which is in all of us and "there but for the grace of God go I".

But these are simply revisions in what remains fundamentally the same enterprise. The crucial question posed to us is whether the law should be totally neutral, totally detached. And to do justice to that question we must fully appreciate the Hobson's choice which the legal process faces. As Mead posed the dilemma, "it is impossible to hate the sin and love the sinner".

How would we go about erasing the stigma in the message the legal process communicates about a convicted criminal? Do we want it to suggest that the criminal law is not very important, the harm it prohibits is not very serious, and no great sacrifices are demanded of us to avoid it? That can hardly be the appropriate attitude to matters such as murder, kidnapping, robbery, or arson. Whenever these occur, we must continue to expect a heightened reaction from the general public.

But then should the law suggest that the offenders who commit these crimes really are not to blame for the harm they cause; they were driven to their crimes by conditions beyond their control, whether they be unhappy childhoods, poverty or deep emotional strains? Yet there are a great many citizens who are poor, or who had unhappy family lives, or who feel real psychological stress, but who nonetheless manage to restrain themselves in the face of the temptation to engage in such

serious crimes. An assumption of the traditional conception of the criminal law is that individuals in the community are *responsible* for controlling their impulses and not inflicting such harms on their neighbours. I suppose it is this notion of responsibility which such reformers as Mead and Wootton would have us discard in the effort to delete the connotation of blame and punishment in the criminal law. It seems to me, though, that a sense of responsibility to the central standards of the criminal law is absolutely critical to the maintenance of community life. Even if we knew how to treat the causes of crime (which we do not), the application of individualized treatment measures could reach only a tiny fraction of the populace, and then only after they have done something which made them visible to the authorities. The success of the criminal law must ultimately rest on the capacity and the willingness of the vast majority to refrain from crime. Whatever else the criminal law process may do, it must not detract from that.

Suppose, then, we have a society in which the vast majority does feel revulsion about deliberate crimes like murder, assault, or armed robbery. What will be its likely attitude to the person who has committed such a crime? He is charged, solemnly tried, and convicted after due process of law. He has been offered the various excuses which constitute exceptions to our assumptions of responsibility, but can take advantage of none of them. In sum, he is a person who could have complied with the law but chose not to, at serious cost to his victim. The popular reading of the judgment of the court as a moral denunciation of the character of the offender is all but inevitable.

For that reason it is best not to be under any illusion about the feasibility of eliminating the "punitive" attitude to crime and the criminal, given our everyday, commonsense interpretations of human action and obligations. Once we have found it necessary to punish an offender, there is no reason not to try to use this occasion for purposes of rehabilitation, if that is possible. But the main point is that we should recognize the predominance of retribution in the design of the practice and thus not *extend* its operation in a probably fruitless quest for correction. If treatment is to be our major aim in a particular situation, we must channel that offender into a different practice, one with its own distinctive shape whose lines I shall sketch later on in this chapter.

Excursus on Responsibility

I should add some further comments about this notion of responsibility. Both the retributive and the deterrent arguments for punishment do imply a certain conception of crime and the criminal. Both theories make sense only on the assumption that criminals, by and large, are normal individuals, their criminal conduct is the result of choices they make in particular situations, and these decisions are influenced by motives or reasons advanced to them. In a word

criminals, as other citizens, are persons responsible for their actions, for good or evil.

That assumption is profoundly opposed to the dominant strain in modern criminology and the rehabilitative ideal. If we think of what we are doing as treatment, then we must envisage the possibility of a cure. But to talk of a cure, we must assume there is some existing disease. And since we are treating the criminal, his crime must be taken to be a symptom of his individual malady, produced by factors beyond his control. Within the disease model of crime, an offender is not responsible and so he can not be blamed; once *mens rea* is dispensed with, then so must be "punishment"; any failure of society to recognize this is evidence only of its cruelty and vindictiveness.

Obviously in this paper I cannot begin to grapple with either the metaphysical issues of determinism versus free-will or the scientific value of different theories of crime causation. I can only spell out in greater detail the assumptions to which I do hold as the underpinning of this theory of the justification of punishment. But one point must be very clear. It is not good enough to argue that the criminal law should be designed as if criminals were responsible, because that fiction—"noble lie"—is necessary for the current functioning of society. A theory of human nature and action is logically prior to a theory of punishment; if the former won't stand up under analysis, then the latter falls with it.

In any event I do not believe that criminologists have produced reliable evidence of some distinctive trait(s) marking off the population of criminals from that of non-criminals and thus explaining the occurrence of crime. Indeed the thrust of recent criminology, whether theoretical (e.g., work on the artificiality of the distinction between criminal and non-criminal action) and empirical (e.g., self-report studies showing the widespread distribution of actual crime) just is not compatible with the "disease" model. There is a resurgence in contemporary criminology[40] of the classical notion that the commission of a crime is a normal, often a reasonable response, to the situation the offender faces, not a symptom of some underlying pathology (though that perception has not yet penetrated the more popular and pragmatic literature of correctional practice and reform).

Accordingly we need not be uneasy about any supposed unscientific character of this view of punishment. In our ordinary, commonsense understanding of our activities we believe that we do make choices on the basis of the considerations before us, that we can decide between alternatives by selecting which is the more attractive, and in this sense we are responsible for what we do. We rely on this view in appraising our everyday non-criminal behaviour. My assumption is that the decision to commit a crime, equally as much as the decision not to commit a crime, should be perceived in that same way.

Interestingly enough, the contrasting correctional literature makes that same assumption with respect at least to part of its audience. It proposes a different view of the crime problem, argues that other solutions are more desirable in the light of certain value premises, and tries to persuade legislators and others to undertake certain reforms. It is assumed, then, that criminologists and their clients are responsible for the actions they propose or undertake within the

[40] See Matza, *Becoming Deviant* (1969); Phillipson, *Sociological Aspects of Crime and Delinquency* (1971); Box; *Deviance, Reality and Society* (1971), for illustrative recent monographs on that theme.

> criminal law process. The premise of my argument is that criminals are basically the same as criminologists, policemen like those they arrest on the street, prison guards like prison inmates, and even psychiatrists and social workers like those they diagnose. It may be that for special categories of offenders (as of non-offenders) there is demonstrated evidence of certain clinical disorders which can be shown to produce crime in an abnormal and deterministic fashion. But the mere fact of committing a crime must not be taken as evidence, in itself, that the criminal is beyond the pale and without normal responsibility for what he has done.[50]

What are the implications of these theoretical conclusions for practical issues of law reform? I do not propose to develop the case for any particular alteration in the law in systematic detail. An adequate treatment of any one of these would take a separate paper of its own. Still, a philosophical theory of how punishment may be justified in the abstract must imply some concrete suggestions about where and how an institution like the criminal sanction should be used in practice. Accordingly I will indicate some of the directions in which I believe the criminal law should move, and do so in just enough detail to illustrate the real-life significance of this type of reflection.

I have argued that in the central area of the criminal law the infliction of sanctions on the offender has a symbolic character. When a person is sent to prison for rape, he not only suffers the pains of confinement (which are harsh enough) but he carries as well the stigma of formal community denunciation of his conduct. The explanation and the justification for this two-fold character of "punishment" lies in deep-seated notions of what retributive justice requires for someone who sought to gain his own private ends at the expense of the legally-protected interests of his innocent victim. Carefully used, such a sanction is a powerful influence in securing a decent quality of life in an interdependent community. At the same time it has an equal potential for misuse and harm. The public attitudes and reactions which underpin this area of the criminal law can develop an independent and inertial force of their own. Lawmakers can exploit the power implicit in our feelings about crime and criminal convictions and make a parasitic use of the practice in areas of conduct which bear only a faint likeness to its original rationale. Hence the most important direction for reform of our criminal law is to keep that sanction out of areas where it has no business being used and to conserve its resources for situations where there is no viable alternative.

One well-known instance of that concern is the creation and enforcement of "crimes without victims" (of which the drug offences are the most pressing example). The distinctive feature of this kind of

[50] An excellent philosophical treatment of that issue is Flew, *Crime or Disease* (1973).

criminal law is that it attempts to protect a person against the harm he can do to himself, rather than preventing the harm he may do to a nonconsenting victim. Even more, in the case of almost every such offence the harm which society has in mind is to the "character" of the actor. Accordingly, the objective of the law here is, quite simply, moral paternalism.[51]

Now there are a great many things which can be said about such an objective. Some may argue that any attempt by the state to intervene in a person's "self-regarding" behaviour is ruled out in principle, as an illegitimate infringement on individual liberty. Others contend that, as a practical matter, such laws are self-defeating; they actually worsen the problem they set out to solve or, at best, attain their "solutions" at unacceptable costs. I do not propose to canvass either of those issues here. Instead, within the framework of a philosophy of punishment, I should argue that, even assuming the state may legitimately intervene in certain areas of risky, personal behaviour, it is not justified in doing so by *punishing* an individual for his own "good".

Let us consider heroin addiction as an example. This is one area of personal "self-regarding" conduct where even radical critics of the law agree that state intervention has some semblance of justification. One can conclude it should be a crime for a private individual to exploit those who are tempted to this dangerous form of drug career for his own profit. But even if we are justified in punishing the trafficker who will cause serious damage in the long run to those whom we feel cannot now appreciate the risks, I do not see how we can be justified in punishing the user, the very person whom we are trying to protect against his own weaker inclinations. Not only is this a parasitical use of the criminal law, and likely to be counter-productive; it is, quite simply, unjust. I would propose this one *minimal* principle limiting legal intervention in this whole area of victimless offences. If the state wants to control an area of conduct because of the risks it poses for the well-being or character of the participants—be it gambling, drinking, pornography, or drugs—it is justified only in criminalizing the provision of that service or article for a profit. It is not justified in making criminals of the members of that very group whom it is trying to protect against themselves.

But the problem of restricting the ambit of the criminal law is broader than this one well-publicized area of "morals" offences. A pervasive flaw in the operation of the traditional punishment system is that it does not satisfy the claims to retributive justice of either the

[51] I shall confine myself to a cursory treatment of this issue, since I have dealt with the topic in much greater detail in my paper *Law, Morals and Drugs* which will be appearing shortly.

offender or his victim. Throughout this whole discussion of the practice of "punishment", I have spoken of *serious* crimes at the heart of the criminal law. When we think of such crimes as assault, theft, or rape, we picture in our minds the particularly horrendous example of each. But the actual legal definition of such offences casts a much wider net than that: any hostile touching is an assault; a temporary borrowing of a person's property without his consent is theft, no matter how trifling in value or how short in time; rape has a very hazy borderline with seduction and consensual intercourse. I don't deny that there may be good legislative reasons for broad definitions which minimize the availability of loopholes for the careful criminal. Still, me must recognize the costs of that effort.[52]

Most offences dealt with by the criminal courts are situational; they arise out of an involved human relationship between offender and victim; they reflect early dabbling by the offender in crime, not a commitment to a criminal career. But the present law is not really equipped to make a visible distinction between the person who just strays across the legal line and the one who has committed a series of particularly horrid crimes. In both cases a cumbersome bureaucratic machinery takes over, one which congeals the qualities of a complex human event into artificial legal categories, largely freezes the victim out of the process, and does little to satisfy the onlooker that something has been done to restore the community equilibrium which was disturbed. Yet the expressive character of punishment, the label it inflicts on a convicted offender, can have an enduring harmful impact which is far out of line with his only slightly blameworthy conduct. (As well, reactions of the public to that new label can alter at least some offenders' self-images and channel them into criminal careers they might otherwise not have had.) Hence the victim and the public's sense of grievance is not really satisfied but at the same time the formal public adjudication inflicts disproportionate harm on the offender.

In practice a solution to this dilemma is very difficult as I fully recognize. Still we can chart the direction which reform must take. A large number of the actual criminal events under our written criminal code must be channelled elsewhere than into the formal legal process. We need alternatives which allow the immediate participants to see that something is being done in response to an offence which will satisfy them that the criminal is paying for his conduct. Right now the victim loses time and money from having to appear at trial, suffers the abuse of defence counsel when he appears as a witness, and then sees the offender receive some disposition such as probation which he views as

[52] I have benefited from an as yet unpublished paper dealing with this problem area by Professor John Hogarth, *Alternatives to the Adversary Process.*

merely a slap on the wrist. It is no wonder that the public is more and more alienated from the criminal law.

But what neither the victim nor the offender realizes at the time is that the very fact of the conviction and the criminal record will ultimately have a seriously damaging impact on the offender's future prospects. Accordingly, while satisfying the victim, we must also protect the casual offender from the stereotyped label of the "criminal". His particular transgression must be dealt with at as invisible and informal a level as is possible in the community. As my colleague, John Hogarth, has suggested, we must find alternatives to the "adversary process" for a large proportion of the assaults, shop-lifting, damage to property, joy-riding, petty theft, and so on which now occupy the criminal courts. That search is undoubtedly desirable for utilitarian reasons. Even more, it is required by principles of retributive justice.

Finally, though, there is the most important and unyielding restriction on the use of "punishment" which is implicit in my analysis of what it is all about. Whatever other pragmatic restraints we may impose on the practice, it is crucial as a matter of principle that it not be applied to those who are *innocent*. This is the source of the continued vitality of the notions of *mens rea* and due process in the traditional criminal law. For my illustrative purposes I shall concentrate on *mens rea* [53] (which is the key to the legal exclusion of the innocent, while due process requires procedures and presumptions which will produce such factual exoneration).

Translated literally as a "guilty" mind, the legal connotation of *mens rea* is that a person has knowingly and willingly engaged in conduct which is prohibited by the law. In a practical sense legal rules are best understood as defining a series of excuses which are taken to exclude the presence of that blameworthy choice—accident, mistake, automatism, insanity, drunkenness, duress, and so on. These in turn are tied together by the legal principle of *mens rea*. While that principle may be the ultimate legal reality, it is not a self-evident absolute. In turn it depends on and is explained by certain moral values and principles which demand its presence in the practice of "punishment". Some of these are utilitarian (and I shall deal with these later), but the predominant rationale is the theory of retributive justice.

Let us briefly review the argument again. "Punishment" uses state coercion to impose gross deprivations on an offender. He is publicly condemned as a criminal with the long lasting stigma which that involves, and then sentenced to jail, with its added shame and aggravated

[53] A much more detailed exposition of my views can be found in my article, "The Supreme Court of Canada and the Doctrines of *Mens Rea*", (1971) 49 Can. Bar Rev. 280.

hardships. However we may characterize the different reasons for doing this, it is true to say that they are for the benefit of the rest of us (or else why do we need to use coercion). The essence of the criminal sanction is the infliction of a serious and enduring inequality on an offender which serves, to some extent, the interests of the majority.

Prima facie, that appears offensive to justice. Society would seem entitled to this course only if there is something special about the victim which warrants his being singled out for such measures. The one reason which does appear sufficient is that the defendant has himself acted unjustly—in a very distinctive way. While taking advantage of the law-abiding forbearance of others, he has advanced his own ends through conduct which inflicts an unequal deprivation on his victim. He did so in the face of a fair warning from society that, in order to protect against such harm whether to his victim or to himself, it would respond to such conduct with sanctions. Hence he can be deemed to choose the risk of suffering the sanction when he actually did choose to harm the victim for his own advantage. Of course he does not now consent to his future hardship. Still it is not unfair to require him to accept the consequences of his earlier choice, both to deprive him of that earlier unfair advantage he did get and to serve the general aims of society embodied in its criminal law.

The significance of this argument is that punishment is just only if that earlier choice can really be said to have been made. A person who has accidentally harmed another, or mistakenly broken the law, has not actually preferred his own interests to the values embodied in the law, has not decided to run the risk of punishment, and thus has not offered a "moral licence" to those who would inflict it on him. I do not mean to deny that there are good reasons why society would find it *useful* to punish him in any event, in particular to do a more effective job of crime control. All that I assert is that it is not *just* to use the blameless individual as the means to that social end. And within the practice of "punishment", if the action is not just, it cannot be justified.

Full acceptance of that conclusion would require some fairly radical surgery on our existing criminal law (within this area of "real" crimes with which I am here concerned). I am not at all sure that criminal responsibility for inadvertent, albeit gross, negligence (which appears to be the operative standard in even as serious an offence as manslaughter) can be supported. There are still certain offences for which *bona fide* mistakes are no excuse at all (statutory rape; perhaps bigamy) and there is some considerable law to the effect that any mistakes must be reasonable, non-negligent, in order to be valid legal excuses. Further, there is a continuing theme in our criminal law, especially in the area of homicide, that if a person is doing something

illegal and accidentally causes a much more harmful result (e.g., a gun goes off and kills a teller in a bank robbery), he is to be convicted and punished for the commission of the more serious offence. The corollary of retributive justice which limits the quantum of punishment would seem to frown on that consequence.

Most important, though, there are several excuses which are in a totally underdeveloped state in our current law—especially drunkenness, mistake of law, and duress—for reasons of social defence which seem insupportable in principle. A young Indian has his first taste of alcohol at a stag party and becomes totally intoxicated, a quarrel develops, and it ends in his killing the aggressor. The next morning, now sobered up, he is arraigned for manslaughter. A cook in a R.C.A.F. mess takes home to his family some cakes which are to be thrown out, believing that there is nothing wrong with taking property to be so abandoned, and is charged with theft. An inmate in a prison, who is still hopeful for his appeal, is forced to join a prison riot and break up his toilet fixtures, when threatened with a sudden "shiv in the back", and is charged with malicious damage to government property. I do not deny that there are intelligible reasons, connected to the enforceability of the criminal law, why each of these excuses might be rejected and the defendants convicted (as in fact they were).[54] But within the theory I have proposed, only one simple question should have been decisive in each case. Did the defendant exercise a meaningful choice to engage in this illegal and harmful conduct? If he did, he can be blamed for it and said to deserve punishment. If he did not, he was innocent of moral blame and must be acquitted, no matter how useful we may find it to punish him.

I should say one thing further about the implications of this kind of argument. When we fully appreciate the nature of "punishment" as a distinctive sanction, we can understand the need for these several limitations on its use. A consequence of so conserving the practice is that its force will be enhanced in those remaining areas where it is concentrated. One significant factor in the erosion of the criminal law process is the dissipation of its energies in so many marginal and morally dubious endeavours. I share the views of those many critics who have proposed fairly radical retrenchment on the reach of the criminal law. But, as in just about every area of human endeavour, even that kind of reform has its moral ambiguities. As we gradually lop off the fringe cases we must not blink at the reality of what remains. The glare of criminal "punishment" will be concentrated on a much smaller number of accused, the stigma will be aggravated for those whom we believe

[54] See *R.* v. *Fireman* (1971), 4 C.C.C. (2d) 82 (Ont. C.A.); *R.* v. *Pace* (1965), 3 C.C.C. 55 (N.S.C.A.); *R.* v. *Carker* (1967), 2 C.C.C. 190 (S.C. of C.).

must still be judged blameworthy, and the consequences for the criminal outcast will become even more painful. As we use it less the moral dilemma of punishment will be felt stronger than ever.

Deterrence and the Practice of "Penalty"

The appropriate order of priority in these several justifications of the criminal sanction looks very different when we consider the practice of "penalty". Here rehabilitation of the individual offenders is pointless and retributive concerns are greatly attenuated. The deterrent impact of the sanction on the general public's attitude to the law emerges as predominant.

Let us recall the features of this area of human conduct and the kinds of legal standards it embodies which account for that conclusion. A typical example is the situation in *Pierce Fisheries*[55], which is also of interest because there the Supreme Court of Canada firmly established the attitude of Canadian law to one of the key issues within this practice—the legitimacy of strict liability for "public welfare" offences. The offence in that case involved possession of undersized lobsters, 26 lobsters in 50,000 pounds, which were less than 3 3/16" long. How different is that conduct from, say, a brutal assault causing serious bodily injuries!

In the first place there is no immediate harm to an identifiable victim. Instead there is only an immediate prohibition which is an element in a comprehensive set of regulations directed at a fairly remote aim, the conservation of Canadian fishing grounds. Accordingly, the commission of an offence will rarely create any sense of grievance, desire for retaliation, or need for community reassurance, the attitudes which form the emotional backdrop to "punishment" of the violent offender. As well, the standards of behaviour are novel, esoteric, and draw artificial and ever-changing lines between legal and illegal behaviour. These rules will not have an encrusted moral aura behind them. The conduct is considered *mala prohibita*, wrong because it is illegal, rather than *mala in se*, wrong in itself and therefore illegal. In consequence, the application of the sanction is not designed to maintain and reinforce the public attitudes of aversion which inform the traditional crimes. It would seem strange to speak of the trial of Pierce Fisheries as a dramatic morality play, and its conviction just does not carry the same kind of stigma as does fraud, for example. In conclusion, then, the whole battery of quasi-retributive (but utilitarian) arguments for punishment are simply not applicable here.

[55] (1970) 5 C.C.C. 193 (S.C. of C.).

Instead we are impressed by the commonsense notion of deterrence. The major reason why people will not engage in this prohibited conduct is fear of the penalties. (There is little or no pre-existing moral support for the legal standard or sense of guilt about its breach, if only because if was likely dreamed up and enacted just recently, at the behest of some government official.) The penalties must be imposed on offenders who are caught in order to preserve the credibility of the threat for those who might be tempted. The general public must be persuaded that the gains of disobedience are outweighed by the costs.

The image of man and human action which underpins this familar legal model is that of the rational economic actor, one who will see the lesson of penal sanctions and will be influenced by them. To the extent to which that image is valid, the logic of rehabilitation is also irrelevant to the justification of punishment. What is the point in a case like *Pierce Fisheries* of trying to penetrate beneath the surface of a particular offence in order to connect the deep-seated *causes* of criminality. In fact this family of offences has always seemed a conclusive counter-example to those "imperialistic" theories which suggest that *all* crime is the produce of some pathological condition, rooted in the individual's biography, which he finds it impossible to control. The common denominator of crime, as such, is that it is the breach of a legal rule. Simple reflection on our own experience, e.g., in deciding whether to park illegally to save some time and money after considering the likelihood of a ticket, is sufficient to show that at least *some* crime is perfectly normal and rational behaviour. (And it is engaged in all the time by those who would try to "cure" the pathologies of different kinds of offenders.) In the final analysis the balance between normal and abnormal offenders is one of degree and the proper dividing line must be established by empirical investigation, not metaphysical assumption.

For good and sufficient reasons we have assumed that the actors whom we need to influence in this area are rational, they can and must comply with certain standards of behaviour, they will often have good private reasons for ignoring these standards, and so we must provide some public incentive for compliance. The choice comes down to reward or sanction (ordinarily both expressed in monetary terms) and when we opt for the latter, we use the criminal law. I do not deny that there may be occasional persistent offenders with individual problems which could usefully be corrected (e.g., the accident-prone driver), though identifying and effectively treating them is another matter. The point is simply that the typical, normal, self-determining citizen is the actor for whom the institutional response of the criminal law

must be designed. And the predominant value which will shape that response to his offence is the reduction of crime through general deterrence.

Still, I must reiterate that "predominant" does not mean "exclusive". There is also an important element of retributive justice involved here, and one which might be appreciated in cooler tones precisely because the emotional factor of the victim is absent. Recall for a moment the nature of the argument I made for the *positive* force of retribution as an aim of punishment. A system of rules has been established, substantial compliance with which is necessary for a decent community life for all. Yet some are tempted to pursue their own private interests even though this involves a breach of that legal system. Accordingly, while taking the benefits of the self-restraint of others, they do not make the reciprocal sacrifice demanded of them. As a result they obtain an unfair advantage in the distribution of the benefits from life within that legal system. Punishment is necessary to remove that unjust enrichment from the offender and so secure a just equilibrium on behalf of those who were willing to be law abiding. I believe that it is the removal of this extra advantage from offenders, rather than the satisfaction of the sense of grievance of their victims, which is the chief rational support of this retributive justification of punishment.

Now let us look at an example of a "penalty" situation, one where there is little of the emotional force of retribution. A university establishes a system of parking regulations to achieve several beneficial aims—an orderly flow of traffic, a pedestrian-oriented campus, an aesthetic distribution of parking spaces, access for emergency vehicles, and so on. The rules are readily understood and their rationale appreciated and just about everyone complies with them. As a result the benefits of the system become available to everyone who uses the campus. However, compliance requires a walk of some distance from the lot to one's building and this can be unpleasant on a cold, windy, or wet day. A few will always succumb to the temptation to ignore the rules and park their cars in an illegal place near their respective buildings. We can assume that there is no victim as such from this conduct. If everyone did the same thing, the result would be an unsightly, unpleasant, even dangerous chaos; but when just a few do it, there is no actual harm done by their choice of an illegal space. It is clear, though, that the few lawbreakers take advantage of the public goods which are produced by general compliance with the law but get the extra private benefits of close and convenient parking (especially in inclement weather).

In this situation, I would contend that a major and independent aim of fining these few offenders is retributive justice. A penalty must be imposed on the lawbreakers to ensure that they are not unfairly enriched by their decision to break the law and to see that the law-abiding majority is not disadvantaged by its choice to comply with the law. There is nothing intrinsically vindictive or vengeful about that judgment. It does not depend on the emotive connotations of a victim or the flouting of deeply-respected moral values. Given the simple facts of a co-operative enterprise requiring mutual sacrifices, there is an independent argument based on notions of justice for punishing those who refuse to make the sacrifice but yet share in the benefits.

Of course, it is evident that the application of the penalty is also justified by the need to reduce the level of parking violations in the future. If there are examples of offences which go unpunished *and they become known,* then we can anticipate that the example will be imitated; if these also are unpunished, the process will escalate and gradually the system will deteriorate into some form of parking anarchy. As I stated earlier, in the real world the application of sanctions will be doubly justified, by the two aims of reduction and retribution. When we unpack the case for punishment, we can see this latter dimension as well, one which would furnish sufficient reason in itself for penalizing an offender even in those situations (which are readily imaginable) where lack of publicity would exclude any deterrent effect.

Granted this conclusion, I would still suggest that the aim of deterrence should be seen as the predominant justification imbedded in the design of the institution of "penalty". One reason, as we have seen, is that the complex of quasi-retributive moral attitudes is almost totally absent from the vast majority of the family of offences. We can separate only analytically the rational force of redistribution from that of deterrence. Even more important, for certain key issues the major implications of retribution in its negative sense are no longer compelling. I refer here, in particular, to the problem of strict liability in public welfare offences, the issue presented to the Supreme Court in *Pierce Fisheries.*

Ever since the rise of the modern regulatory state, the doctrine of strict liability has been attractive to the practitioners within this area of the criminal law. At the same time it has been condemned, almost uniformly, by a strange alliance of theorists, both the reductionists and the retributionists. The former argue that the application of sanctions to the inadvertent offender is *uneconomic,* because it is not useful in reducing the level of crime. The latter contend that the application of such penalties is *unjust* because the blameless offender does not deserve it. Starting from either direction, the conclusion is the same, that strict

liability is an indefensible element in our law and must go. Yet its use continues and grows, and was cemented into Canadian law just a couple of years ago in *Pierce Fisheries*. After a period of time, one must grow suspicious of a theoretical conclusion which denies legitimacy to a doctrine that has endured for so long a time and become imbedded in so many legal systems. Perhaps one reason is that the theorists have operated with too narrow and univocal a conception of the criminal sanction. One can fully appreciate the compelling rationale for *mens rea* within a practice of "punishment", but it simply does not follow that that conclusion is exportable to the practice of "penalty".

Let us first look at the reductionist argument for *mens rea,* historically the first to fall to critical attack. Punishment is costly and so is *prima facie* evil. It involves the immediate infliction of pain on the offender at some substantial expense to the state. At the same time it produces a general loss of freedom for the public who must now be concerned about incurring criminal liability. But the doctrine of strict liability exacerbates that latter result. Individuals are now deprived of the ability to keep themselves out of the clutches of the law through their own voluntary choices. They can become involved in a situation purely by accident and so become subject to prosecution, conviction, and punishment. Accordingly, a system which is designed to protect people from deprivations inflicted by other private individuals now becomes a vehicle for similar or even worse incursions at the hands of the state.

But, the utilitarian would agree, the use of the criminal sanction in cases of accidental harm just does not have the happy effect of reducing the level of crime. Why punish the purely inadvertent offender? He has not shown himself to be dangerous and so in need of individual correction. Potential offenders who are similarly unaware that they are committing an offence cannot be deterred by the threat of a sanction of which, by definition, they must also be ignorant. In sum, then, punishment in such cases is both unproductive and costly, hence uneconomic, and so unjustified in utilitarian terms.

It is clear now that this argument is fallacious. As H. L. A. Hart has aptly put it, while the *threat* of punishment to this inadvertent offender, or others like him, is pointless, it simply does not follow that his *actual* punishment is unnecessary to the general effectiveness of the law.[56] What does it mean to say that *mens rea* is a requirement for a criminal conviction? The criminal law thereby defines a set of excuses which are made available to everyone who can fit his case within them. But when the law establishes exceptions and qualifications

[56] See Hart, *Punishment and Responsibility* (1968) pp. 41-44.

in its general prohibitions, it necessarily creates loopholes whose existence may lessen the deterrent influence of the law over those who really would be guilty.

This is especially true of a requirement such as a "guilty mind". To decide at a trial some months later what a person *thought* is a much more tenuous matter than establishing the external, objective and verifiable facts of what he *did*. In both cases, the Crown must prove the element in the defendant's legal guilt beyond all reasonable doubt. This is not to say that proof of *mens rea* is impossible; there are a great many convictions in cases where it is required. But prosecutors and police are rightly worried about doctrines which permit defendants to dream up some ingenious excuse and hope their story will have some plausibility for an inexperienced jury. The defendant has nothing to lose and he merely has to be convincing enough to raise a reasonable doubt. An enduring lesson of our criminal law is that nothing reduces the impact of deterrence as much as a decrease in the certainty of conviction of those who are guilty. The inevitable consequences of this effort to protect the innocent is that we thereby do give an extra chance to at least some of the guilty.

Within the reductionist perspective, then, the case against strict liability eventually comes down to balancing the gains in crime control against the costs of punishment of those who have no *mens rea*. That perspective just does not do justice to our considered moral judgment that the innocent must be protected as a matter of principle from such punishment. The unyielding character of this legal principle is founded on notions of justice, not utility. We are not entitled to use an individual in this way as a means to the general good unless he can be said to deserve it; in this context that means that he has voluntarily exposed himself to the risk of such a sanction by his own illegal conduct. But the structure of this retributive argument for *mens rea* in turn is founded on a fundamental value of social morality—the claim of each individual to equal consideration in the distribution of social benefits and burdens. It is that value which is ignored when the serious deprivations of punishment are inflicted on an accidental offender to obtain some extra margin of security for others in society.

Does that argument really have much force in the typical "penalty" situation? Take the battery of traffic offences, for example, where strict liability is the rule (at least of thumb). Suppose a defendant's vision was blocked and he did not see a stop sign, and so accidentally violated that rule. The rule could reasonably conclude that to allow that excuse would unduly lessen the deterrent impact of the law (and impose significant administrative costs at the trial stage). If the unlucky defendant who did have a valid excuse is forced to pay a fine of $10.00

or thereabouts, can he really complain of a great injustice, a gross inequality? True he must pay the fine to maintain the credibility of the rule while the next driver who came along after the sign became visible goes scot-free. But then that other driver (or someone like him) may be stopped at a safety check, find something has gone wrong with his car, and have to pay a charge of $25 to get it fixed. In each case I think it fair to say that the general system of parking regulations is for the benefit of all drivers including these two, there are recurring costs and charges which it is reasonable to assess in these situations if the system is to function well, and there is no unfairness, no excessively unequal treatment, in having these individuals pay such charges.

Our appraisal of that situation is equally applicable to the broad spectrum of public welfare offences typified by the situation in *Pierce Fisheries*. There we have a comprehensive set of regulations imposed on the fishing industry designed, *inter alia,* for the conservation of the fish (e.g., lobsters) which are the foundation of the whole enterprise. Anyone who chooses to engage in that business must accept responsibility for a wide variety of costs and charges. One of these is the possibility of criminal fines for violation of this framework of regulations, even when his possession of undersized lobsters, for example, is purely accidental. The imposition of such fines, in itself, strikes me as no more an *unjust* infringement on the individual than governmental exaction of licence fees for certain kinds of machines or processes. Both are part of the typical costs of doing business which must be incurred for the chance of earning a profit from it.

We should be clear that this reasoning does not establish the case *for* strict liability. It just removes the moral roadblock which potentially bars the way by virtue of our concern for retributive justice. The affirmative decision to extend the reach of the criminal sanction to the inadvertent offender must be made in the light of utilitarian objectives (and I hope it is clear by now that there is no positive retributive value in punishing such an offender). Is strict liability the most effective and economic way of attaining our objectives of crime control without an undue loss in individual freedom? There can be real doubt whether the doctrine really is necessary, especially if we envisage a halfway house which allows the inadvertent offender to go free if he disproves any negligence on his part. That is an empirical question, one which probably admits of different answers in different situations, and there is not much more that can be usefully said about it from the vantage point of criminal law theory.[57]

[57] For the kinds of investigations which must be carried on, see Carson, "Sociological Aspects of Strict Liabilibty" (1970), 33 Modern Law Rev. 396.

Excursus on Market Deterrence and Strict Liability

There is one further line of argument which I am inclined to pursue just a little. It has always struck me as somewhat ironic that tort law reformers parade under the banners of strict liability while those in criminal law advocate the elimination of that doctrine. Underlying the tort law proposal for enterprise liability is an elaborate and well-defined theory of market deterrence which is considered appropriate for the same areas of business behaviour that are the subject of typical "public welfare" offences. Undeniably the objectives of tort and criminal law are quite different and we should not expect any automatic duplication in their respective bases of liability. Still, we can sense much that same market rationale lurking beneath the surface of some of the writings or opinions supporting strict criminal liability. Accordingly, it may be useful to bring the theory out into the open and see whether it may have a place in criminal law as well as in torts.

Much of the accidental harm in our society is produced as an inevitable byproduct of patterns of behaviour and technology within business enterprise. These recurring patterns of conduct are adopted and accepted notwithstanding the statistically predictable incidence of harm, on the grounds that the risks are outweighed by the gains, and the costs of avoiding these residual risks are excessive. The consequence of that reasoning is a divergence between the private costs to an entrepreneur of his activity and the total social costs which it involves. Those accidental injuries which his enterprise produces are not included in the cost column of his private balance sheet.

But why is he not legally responsible for negligence, for not using "reasonable care"? The reason is that the law finds it difficult (and perhaps even unfair) to call one businessman unreasonable or careless if he does meet the customary standard within the industry. But the custom tends to remain static in this respect precisely because there is no incentive for any one entrepreneur to develop a less risky (but more expensive) way of doing business. What the law needs, then, is a vehicle by which individual entrepreneurs are induced to engage in research to develop new safety techniques or to reduce accident costs by lowering production to a more optimum level. Once such improvements are visible and in use, his competitors can be judged negligent for failing to meet that new, existing standard.

One sensible device for achieving this result is a doctrine of strict tort liability which imposes the total social cost of accidental harms on the enterprise. In this way its managers are presented with this new "factor of production" as a necessary expense which must be dealt with in their prices. Two routes then open up. It may now become economically attractive to invest in extra safety devices which, while costly, are still less expensive than the accident bill. Or, if these devices are not economically available, prices must be raised to recoup this new accident cost. Assuming some elasticity of demand for the product or service, sales will drop somewhat and, because accidents are a relatively uniform function of the level of production, so will the number and burden of accidents. Along either route we use the market as a means of "deterring" accidents, not through the enforcement of specific rules of safe conduct (of whose value we are as yet unsure), but simply by charging the entrepreneur with the responsibility for dealing with the problem, and by giving him a direct monetary incentive to reach the optimum result on his own.

That, in any event, is the rationale proposed for tort law. Why should we pursue that objective through criminal law? The chief reason is that tort law is a privately-sponsored legal mechanism. It requires an individual plaintiff who has been injured, and harmed enough that it is worth while for him to sue. In many contexts tort law may well be sufficient, (e.g., automobile accidents, construction safety mishaps, etc.). But many of the situations within which we feel the need to place some regulatory controls are not like that at all. Take the subject of conservation dealt with in *Pierce Fisheries*, where the eventual harm of decreased fishing yield is remote and diffused over a large group. One may tinker with procedural devices such as the class action to facilitate tort litigation but these devices pose problems of their own. The better alternative will usually be a public procedure for enforcement, i.e., the criminal sanction. But we still want the market deterrence benefit of strict liability so that the business is left with the responsibility of finding the best and cheapest mehods of avoiding such a harm as the catching and processing of undersized fish. The penalty should be a monetary fine, the equivalent to a tort damage award, but should be assessed not in terms of the blameworthiness of the offender, but instead in some rough proportion to the social harm which has been caused. In this way, the prospects of the monetary fine will figure in management planning in much the same way as the prospects of tort damage awards, and give the enterprise a real incentive to develop techniques of minimizing both.

Admittedly this rationale will not explain or justify all forms of strict liability within the criminal law. I do think that it makes a persuasive utilitarian case in such areas as pollution control for instance. And it is not an argument (like the problem of proof) which can be finessed by shifting the onus to the defendant to disprove his negligence, as some have suggested for "public welfare" offences. The problem with that tack is that we are not as yet sure what kinds of conduct are unreasonable or negligent and we need a legal device to encourage businessmen to find out for us. Strict criminal liability would be effective for that purpose, at least in some cases. Whether it would be fair is a matter to be appraised in light of the discussion in this section.

I must still deal with some potential objections to the imposition of criminal sanctions on the basis of strict liability. The consequence of a criminal conviction is not simply the imposition of a fine, something analogous to a tort damage award. The analogy is deceptive because it leaves out of the picture such ulterior effects as the loss of drivers' permits, the revocation of liquor licences, and so on. Indeed, these are merely formal indications of the impact that a prosecution may have on a business' reputation or good name. In other words, the consequences of criminal convictions go beyond the surface appearances of the fine and this renders *criminal* liability quite a different thing to justify.

I think that there is a large kernel of truth in that objection and it is instructive to consider why. Our attitudes toward the criminal sanction are formed around the serious and attention-getting cases with which it deals. We naturally perceive the person who has been convicted of such an offence as carrying a stigma, a stain on his character. He has

been formally tried and proved beyond reasonable doubt to have voluntarily done something which was harmful, wrong, and illegal. When new uses are made of the criminal law, as in the case of "public welfare" offences, it is likely that much of this aura will be carried over. That is the difficulty with strict liability. Judges who are close to the situation will realize the lack of blame and take this into account in writing out the sentence. But interested bystanders, hearing of the criminal conviction but not readily able to go behind it, will interpret it as the same kind of judgment of a blameworthy offence which they are used to in the criminal law process. Hence, a moral barrier to the use of strict liability is, quite simply, that it leads the process to *lie* about the defendant, to suggest by his conviction that he was to blame for what he did, when he really was not. (And, as we saw, that misrepresentation can produce quite harmful consequences for the purely technical offender, whether they be formal or informal.)

When we appreciate the rationale of this objection, we can readily see the remedy. Offences for which liability is to be strict should be totally removed from the ordinary criminal law process, encrusted as it is with the connotations of "punishment". Prosecutions should be lodged in a separate administrative tribunal; the law should speak of "violations" not "crimes"; monetary penalties, not jail terms, should be the available sentences; the consequence of conviction should not include any of the disabilities incident to a criminal record. The vice in strict liability is that, for the benefit of the prosecution, a crucial protection for the defendant was removed but too much of the ordinary connotations of the criminal law were left unchanged (and exactly the same analysis can be made of similar infringements on the presumption of innocence). The practice of "punishment" has its own intrinsic limitations, in particular, the requirement of proof of a blameworthy offence beyond all reasonable doubt. If the prosecutor wants to use a criminal sanction whose character is heavily tinged by that practice, then he must accept these limitations. If he feels that a more appropriate vehicle for social control must be designed along the line of our "penalty" model, then he should utilize a distinctive legal institution for that purpose.

Having said that, I would also argue that the second alternative is by no means as desirable as the critics of a "punitive" approach to the criminal law would have us believe. The problem, in a nutshell, is that this system of legal regulation too easily suggests the idea that criminal fines are just normal expenses, a tax on everyday ways of doing business, when the message we really want to convey is that the method in question is wrong and very definitely should not be carried on. Indeed, I believe that in the area of economic regulation we are as a rule much

too close to the penalty model and too far from the practice of punishment. I refer here not to the spread of strict liability for public welfare offences but rather to the growing and unquestioned acceptance of the corporate criminal responsibility throughout large areas even of the traditional criminal law.

Stripped of its technical jargon, the law and practice of corporate criminality comes down to this. A senior executive in a business in the course of his normal activities has engaged in illegal acts—which may be restrictive trade practices, income tax evasion, fraud practised on customers, or the like. Though his motivation ordinarily is to improve the position of the firm (of which he will be one of the beneficiaries), he is clearly responsible in law for the crime and could be prosecuted and sent to jail for it. Instead, the corporation is prosecuted, convicted if the individual is found to be a "directing mind", and then fined. (I realize that in law conviction of the corporation does not exonerate the person responsible; it is just that in practice if the corporation is an available defendant, the executive is not prosecuted.) Of course the corporation is merely a legal concept. The fine (or the loss of business resulting from its damaged good name) is actually borne by shareholders, employees, customers, or even the revenue department who normally participate in the income and expenditures of the business (and the actual distribution in turn depends on the market position of the firm).

How shall we evaluate this picture? Since the fine is borne by those who are not responsible, one might see an injustice in this vicarious or group liability; but each individual share is small enough that I feel we can ignore this (on the argument developed earlier). The individual executive who committed the offence deserves to be punished but nothing happens to him. That injustice is mitigated somewhat by reason of the fact that he was acting on behalf of others, but we must not forget that he gains also if the corporation prospers (especially if this is due to his efforts). More pertinent are the deficiencies in this practice as a method of social control. The failures of criminal regulation of corporate business practices are notorious. I suggest that one important reason is the reluctance of the law to express emphatically the view that the individual corporate executive is responsible to see that his business does not get involved in these practices which are not just technically illegal, but wrong. One does not readily get that notion across by pursuing a legal entity and inflicting a fine on a large group within which an individual's share is nominal. But it is conveyed rather dramatically when the people involved are prosecuted personally, given a criminal record if they are found guilty, and sent to jail as a means of reinforcing the law's condemnation of their conduct. If we are

serious about the damage to the social welfare which is produced by monopolistic activities, consumer frauds, pollution of the environment, and other such business crimes, as I think we should be, we will have to rethink the doctrine of corporate criminal liability.

Indeed, remarks in the same vein may be made about the whole family of offences which generate that same response of the "penalty" model. We should be clear that such conduct is usually wrong, even though there is no immediate victim and it does not violate a fundamental tenet of individual morality (such as does "murder"). The phrase *mala prohibita* must not be read literally. It is true that novel and apparently artificial regulations may not be *felt* to be in breach of the positive morality of the community. However, they can be *understood* to be in breach of the implications of the critical morality of that community. Upon investigation it may be found that concentrations of an activity (e.g., resale price maintenance, production of pollution or impaired driving of automobiles) will eventually create serious damage to the general welfare. The law may justifiably step in to regulate the activity and use sanctions for that purpose.

I believe there is something offensive about inserting that new crime into the full-blown practice of "punishment" immediately. The early offenders who continued in their old ways have violated the law and clearly merit some sanctions. I wonder whether subjecting them to a jail sentence may conflict with the limitations that retributive justice imposes on the quantum of sentence. But after some period of time the continued existence and enforcement of these laws should produce popular appreciation of the purposes of such rules and the real burdens the prohibited conduct does impose on others, and so generate attitudes of moral disapproval of the conduct. Income tax evasion is an instance in which this evolution has largely taken place. When it does happen, we should not be loath to channel prosecutions of new violations into the practice of "punishment" (which as I suggested earlier should be a visibly different institution from the administration of the system of "penalty"). Our purpose now is to maintain, reinforce, and enhance these popular attitudes of distaste and guilt about that kind of behaviour. We do this through the "morality play" of individual trial and conviction and then the peculiarly expressive form of sentence which is a jail term (and I should make clear that I am talking about short term jail sentences, something on the order of sixty or ninety days. For the kinds of people who are in a position to commit these types of offences, it is the experience of jail which is important, not its length, and no draconian system of prison sentences is warranted for our purposes).

While I am generally of the view that the system of criminal punishment is badly over-extended and must be cut back in several key areas,

here I think the opposite is true. That system would prove a useful alternative to the present routine of inflicting nominal, business-as-usual fines on large corporations. But I would reiterate the proposition I stated earlier. When the law chooses to take the much more serious route of "punishment", it must accept the intrinsic moral restraints which that practice entails. Before convicting someone of an offence for which he could go to jail, it must prove beyond reasonable doubt that he voluntarily engaged in that illegal conduct.

The Practice of Correction and the Rehabilitative Ideal

One can see distinguishable clusters of legal rules which are readily categorized as either punishment or penalty systems (e.g., the law of manslaughter contrasted with careless driving). However, with some exceptions, these situations are dealt with by the same criminal law institutions. Even such key legal distinctions as summary versus indictable offences, or trial by jury versus trial in magistrates' court, do not begin to match this underlying functional contrast. I suppose one important reason is that the objectives of retribution and deterrence are largely compatible in their implications and both take a similar view of the problem of penology. I believe that this blurring of the two models—punitive and regulatory—is harmful in certain respects and a sharper division of labour between the two should be instituted. Be that as it may those who are of either the retributive or the deterrent persuasion do share the classical legal outlook on the problems of crime and the criminal (though not always about the ethical standards as to what may be done about either).

The picture is very different when we look at the correctional model. Its history is marked by several important decisions to establish distinct institutions with which to deal with special areas of deviant behaviour. One thinks in this connection of the juvenile court, the commitment of the mentally ill, or the preventive detention of habitual or psychopathic offenders. Currently under consideration are various proposals for compulsory but "civil" techniques for handling drug addicts or alcoholics. The internal differences among each of these are clear but that does not obscure their membership in the same family grouping, one which I have tried to capture in the model of "correction". And what accounts for that family resemblance is, again, a common outlook on the problem of crime and the criminal, call it therapeutic, behavioural, or what have you. The primary objective of those who participate in these various processes is rehabilitation which, at least conceptually, diverges sharply from the aims of retribution or deterrence. The

question, then, is whether and to what extent this goal of rehabilitation justifies the constituent elements of the practice of correction.[58]

The rehabilitative ideal has generated a great deal of rhetoric and extreme views, both pro and con. On the one hand, some incautious proponents proclaim that all offenders are sick, hence we must abolish the crime of punishment, and instead turn our prisons into hospitals. Others, taking these claims literally, respond that a jailor remains a jailor even if he wears a medical jacket, psychiatrists in the service of the state are corrupted by their power, and even that crime is the sign of a healthy, authentic existence. It is society and its criminal justice system which are sick and in need of a cure.

For a long time, the pendulum swung towards the rehabilitative ideal. Carried along on the twin supports of science and humanitarianism, its success seemed assured by the march of history. How much better to understand the offender rather than to blame him, to help him see the error of his ways rather than to punish him. How much more rational to deal with the tangible, manipulable causes of crime, rather than to soar to flights of metaphysical fancy about justice and deserts. Now one senses the pendulum swinging back the other way, propelled I believe by two factors. First of all, it has become clear that those who wield state power in the name of correction can do some very unpleasant things to those within their charge, however humane be their intentions and euphemistic their language. Second, criminology, like all the social sciences (and perhaps more than most), has fallen into some disrepute. When put to the test of experience, scientific theories have not worked that well. When carefully-designed evaluative studies have been made of different treatment programmes, they have proved singularly unsuccessful in achieving their justifying aim—the prevention of recidivism.

It is only too easy for lawyers to feel some sense of *schadenfreude* when the severe critics of the legal approach have also run aground on the facts of life. But that temptation must be resisted. Not one of the traditional objectives stands up too well to the harsh glare of quantitative evaluation. Accordingly, in this philosophical essay, I shall take the goal of rehabilitation at face value. Assuming that treatment will prove to be a realistic possibility at least in certain situations, what are the moral principles which should inform its use?

A necessary prelude to that enquiry is the pruning away of some of the rhetorical underbrush which stands in the way of clear thinking

[58] A good general description and analysis of these different correctional institutions is Kittrie, *The Right to be Different: Deviance and Enforced Therapy* (1971).

about that issue. In the first place, too often the proponents of correction suggest that because they are concerned to help the offender through scientific means, the problems of justice and moral justification are irrelevant:[59]

> The very word *justice* irritates scientists. No surgeon expects to be asked if an operation for cancer is just or not. No doctor will be reproached on the grounds that the dose of penicillin he has prescribed is less or more than *justice* would stipulate. Behavioural scientists regard it as equally absurd to invoke the question of justice in deciding what to do with a woman who cannot resist her propensity to shoplift or with a man who cannot repress an impulse to asault somebody. This sort of behaviour has to be controlled; it has to be discouraged; it has to be *stopped*. This (to the scientist) is a matter of public safety, and amiable coexistence, not of justice. . . .
>
> [EMPHASIS IN ORIGINAL]

It is pretty evident by now why that analogy is defective. The doctor operates only with the consent of his patient. The "behavioural scientist" is given the use of state power to coerce the individual offender precisely because the latter does not want his "help". The congenitally violent criminal may not want a prefrontal lobotomy; the drug user may find detoxification very unpleasant; the juvenile delinquent may prefer not to leave the streets and go to a training school. It may be clear in each of these cases why society *wants* each of these techniques applied but that does not eliminate the problem of *justification*. Why are we entitled to infringe on the individual's interests and wishes in this way to use him as the vehicle for such social goals?

Hence, one can understand the reaction which has set in to this all-too-common correctional view:[60]

> The distinguishing feature of punishment, then, is not a particular motive but its result: the application of force to another person against his or her will.
>
> The essence of punishment is the state's use of compulsion against the offender for the purported benefit of society in general.

and should be regarded

> not as a potential benefit to the subject but invariably as a detriment imposed out of social necessity.

But understanding such a reaction should not lead to uncritical approval. Appreciation of the common factor of coercion in traditional "punishment" and newfangled "correction" should not obscure the

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[59] Menninger, *The Crime of Punishment* (1968) at p. 17.

[60] American Friends Service Committee Report on Crime and Justice in America. *Struggle for Justice* (1971) at pp. 22, 25 and 26.

vital differences in the rationale and the character of each. The application of such coercion to the juvenile delinquent or to the mentally disturbed poses a moral problem but does not necessarily admit of the same moral solution as we would find for "punishment" of the bank president who embezzles funds for instance. There are enough differences in the situations to warrant our approaching each within their respective frames.

The second issue is the use and abuse of the rhetoric of science. It was an article of faith in positivist criminology that there are distinctive *causes* of crime involved in the biography of the criminal. There was nothing unusual in this belief of criminologists. A similar behavioural persuasion was to be found in contemporary sociology, political science, and so on. Perhaps it was distinctive of criminology that it started with the presumption that the fact of a commission of a crime indicated something abnormal, even pathological, about the person of the criminal (and thus needing treatment). It now seems clear that these were articles of *faith*, not matters of scientific knowledge, and probably not even fruitful myths in shaping criminological research. The capacity to commit crimes is a normal and fundamental constituent of the human condition, not some peculiar feature of those unlucky few who committed an offence, were caught, convicted, locked up in prison, and then were subjected to scientific study. (Indeed, if anything, it would seem that it is the ability to comply with social standards, rather than deviate from them for one's own gratification, which seems the problematic and peculiar human factor to be explained.)

Again, though, when we discard the basic image of crime as caused by certain underlying forces propelling us along predetermined paths, we need not reject the search for "causes" in particular areas. Some individuals may be deprived of the typical ability to comply with the criminal law for very special reasons. I do not mean that they are totally incapable of obeying a concrete order from a policeman carrying a nightstick. The criminal law operates through general standards communicated to the public at large and carrying only an abstract threat of a sanction. We can understand why certain individuals may suffer from a substantial impairment in their capacity to comply with that kind of legal rule in the face of an immediate temptation. An example is the heroin addict who is impelled to illegal possession of drugs (and often other crimes as well) because of his overpowering urges. Rejection of the positivist's global conception of the criminal should not rule out the feasibility of scientific investigation and dis-

covery of specific situations such as these. If and when we understand the factors which produce this kind of crime we may also come to understand how to manipulate these factors. But this natural partnership of criminology and correction should proceed at the retail, not the wholesale level.

I do not pretend in this paper to be able to appraise the validity of the claims made with respect to such categories of offenders as the mentally ill, the juvenile, the addict, or the psychopath. Assuming that we do have some knowledge here of both special causes and correctional techniques, the question I will focus on is the moral justification for the operation of "correction". In particular, are there situations in which, while we would not be justified in "punishing" an offender, we would be justified in "correcting" him?

This problem is especially acute for one fundamental reason. The point of scientific criminology is to establish certain causal factors which account for an individual's criminal behaviour. However, if these are the determining causes of his offence, then we cannot hold the person responsible for the harm he has inflicted. Then, if he is not to be blamed for what he could not help doing, it is unjust to punish him, to express our condemnation, and then visit the usual painful treatment of a jail term. The logical conclusion within the punishment model is that the accused must be acquitted and go free.

But that conclusion seems somewhat impractical. This is not the case of an unusual accident or a coincidental mistake. The reason this defendant had no *mens rea* is that he suffers from a condition which sharply impaired his capacity for self-control and expressed itself in harmful, albeit involuntary conduct. But once we have diagnosed this condition as a valid reason for excusing him from blame, we are immediately struck by that same condition's potential danger for the future. Once it is appreciated that this distinctive reason for protecting the defendant from "punishment" is also a good reason for protecting the rest of the society from him, the practice of "correction" is born.

As soon as we discard the doctrine of *mens rea*, the linchpin of the classical conception of penology, that whole structure begins to come apart. The key to that structure, as I have emphasized throughout this paper, is the notion of *choice*. The offender has chosen to engage in a specific illegal act which causes a defined range of deserved penalties. Absent the requirement of *mens rea,* any notion of a sentencing tariff must quickly be dispensed with. The commission of an offence is now merely the symptom of some underlying "disease". Minor offences may produce diagnoses of major, intractable problems while major

offences may, at least in certain cases, disguise only a trivial and easily-corrected ailment. Treatment must respond to the individual offender as a whole, not what he has done.*

A seemingly impregnable constituent of the legal point of view—the notion that the defendant must have *done* something illegal—turns out to rest on theoretical quicksand as well. The doctrine of *actus reus* makes sense in tandem with *mens rea.* We punish an offender for having chosen to do something which is illegal and harmful. But once choice has gone and we are attempting to treat scientifically the underlying behavioural problems of the defendant, then the requirement of actual conduct no longer seems logical. If the defendant's dangerous condition subsists after his first offence is over and done with, then we must assume it obtained beforehand. If the *actus reus* is viewed only as a symptom of that condition, then there may well be other, equally valid, symptoms. If our sole concern is future prevention and we are confident in our ability to deal with present dangerousness, then it seems illogical to act only to prevent the second offence, and not the first.

Finally, along with the growing irrelevance of a specific illegal act, the value of adjudication also becomes dubious. I refer not simply to the incompatibility between the tacit assumptions of the adversary process and the rationale of correction, although that is in point as well. For those who are concerned to rehabilitate a person who seems to have behavioural problems, there will always be something offensive in a system which allows counsel to use his forensic skills to let his client "beat the rap." As well, there is the perennial problem of requiring testimony in open court, before a juvenile or mentally ill defendant, of "touchy" personal information about himself, his family, or his friends. Still, while these may be valid concerns, we might be willing to pay that price to ensure procedural fairness. The deeper problem is institutional. Adjudication is an appropriate, I think even the optimum, vehicle for securing an impartial and intelligent decision about disputed factual events. It is much less satisfying a device when the subject of

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* A representative statement of the implications of this view is this comment of Mr. George Street, Chairman of the National Parole Board of Canada, and a strong adherent of the correctional point of view: [61]

> "The ideal solution to the problem of crime would be that when a person commits an offence, especially a serious one, he should be placed under effective control for as long as necessary, but no longer than necessary. If he cannot be adequately controlled in society, then he should be placed in custody. In either case he should not be given absolute freedom again until it is fairly apparent that he intends to behave, and until then he should remain under strict supervision, in or out of custody."

[61] As quoted in Wolff, "The Relation Between the Court and the National Parole Board", (1969) 19 Univ. of Toronto Law J. 559, at p. 587.

enquiry is a diagnosis of a person's general condition and the prescription of an individually-tailored scheme for his treatment. Those topics require a much more free-wheeling, informal investigation, dominated by the inquisitorial powers of the judge and his experts. The combination of the rehabilitative ideal and the adversary process is at best a marriage of convenience.

This is not simply an abstract dialectic. The working out of these logical implications of the correctional ideal is visible in the several real-life examples of that practice (admittedly in varying mixtures of single-minded purity and compromise). But when we do abstract these elements and construct the correctional model, the crucial problem emerges: what are the limits to correction? The classical structure—with its doctrinal restraints of harmful conduct, voluntary choice, due proportion in sentence, all administered within the adversary process—may be internally coherent but it simply is not in point when we come to deal with the mentally ill, for example. For once we have removed these restraints, do we have anything to put in their place?

For some time there was a mood of trust in the unfettered discretion of the experts. They did not need the artificial limitations of the law, as did judges, prosecutors, police, or prison wardens. If it be assumed that there is an objective body of scientific knowledge shaping the correctional enterprise, we could rely on this internal source of impersonal, detached, and careful treatment of the individual's problems. But the lesson of history has been that any such absolute trust is misplaced. The available knowledge is too soft and spongy and open to personal judgment. The fact that such judgment is expressed in the service of the state, even the therapeutic state, leaves the individual's fate exposed, possibly to corruption and abuse, but more likely to bureaucratic insensitivity. The need is very clear for meaningful controls within the practice of correction, but controls which make a coherent fit with the presupposition of the rehabilitative ideal.*[62]

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[62] The most influential exponent of this view has been Francis Allen: see his *The Borderland of Criminal Justice*, (1964), esp. Ch. 2; also Allen, "Legal Values and Correctional Values" (1968) 18 Univ. of Toronto Law J. 119.

* I think that final qualification is important. Among many writers who have considered this problem, there is a disposition to want to have it both ways. On the one hand the aim of the legal process in question should be rehabilitation. On the other hand they would subject the pursuit of that aim to many, if not all, of the traditional restraints incorporated in an avowedly punitive criminal law. Taken to its final conclusion that would mean a formal trial in which it was proved beyond a reasonable doubt that a person has committed a specific illegal act for which he is liable to some maximum sanction. Once each of these conditions has been established, then the rehabilitative aim should be vigorously pursued. This is a fair description of the programme inspired by legal academics and largely adopted by the United States Supreme Court in the due process revolution in the juvenile court. What I am very sceptical about is the attempt to combine the classical legal frame-

Accordingly, I shall propose several such limiting principles designed to maximize the economy and the fairness of our various correctional practices. I am a little diffident about the exact status of these principles—I am not sure that they are logically deducible from a theory of punishment and I can imagine circumstances in which we might feel justified in bending, if not breaking them. Still, conceived as sensible guidelines for the design of institutions which must operate at large, they would certainly make an improvement in the current morass.

A first and crucial step is the sorting out of the several aims and objectives in this area and the selection of a dominant purpose of "correction". We can fairly say that the immediate goal which informs the efforts of the participants in the actual workings of such a practice is rehabilitation. Yet that statement conceals an important ambiguity in the background. *Why* do we want to rehabilitate an offender? Are we trying to help the individual solve his own problems of social maladjustment or are we trying to protect other citizens from the harmful effects of his condition?

Certainly, it is logically possible for these two further aims to be complementary. We can conceive of situations where we would coerce an individual in the *bona fide* belief that this will advance the latter's own interests in the long run (e.g., a person, distraught about an immediate disaster, may, with justification, be forcibly restrained from

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work of the criminal law with the wholehearted striving for rehabilitation. The intellectual foundation of each just is not compatible at their roots.

Rehabilitation assumes that there is some special personality disorder (however it may be conceived) which has expressed itself in a symptomatic offence. Otherwise, what is there to treat? Suppose the participants in the correctional process believe this to be true, that the offender acted as he did because of some continuing behavioural problem. Then how can they understand the rationale of a complex legal framework, founded on notions of desert and punishment, which is to limit their efforts to deal with that problem? Certainly these restraints can be artificially imposed from above but we have learned that that is a long way from faithful compliance from below.

But let us assume that the legal framework is voluntarily embraced by those participants who are becoming a little uneasy about the assumptions and the tactics of rehabilitation. What is the situation of the accused, then? He has been formally and solemnly convicted of a specific offence, with all due procedural safeguards, and has received no more than the proper sentence for what he did. And when he does, that sanction will be considered deserved, he will suffer the stigma of punishment, and the atmosphere is charged with the very emotions which will likely defeat the aim of rehabilitation from the start.

In the criminal law, as just about everywhere, one does not really succeed in having it both ways in the long run. If we assume that the intellectual assumptions of correction are valid for certain kinds of offenders, then we should not look for restrictions on that process in a quarter whose image of the offender is so profoundly different. Restraints on the use of state power there must be. But we must try to formulate such limitations in a way which can be seen to make sense within the internal logic of the practice we are trying to control.

committing suicide). But we are talking about the design of a practice to be administered by a great many people, applying vague standards in a large number of situations, and using the coercive power of the state. It is a sensible rule, guarding against the ever-present danger of hypocrisy, to establish as the purpose of that practice the aim of social defence, not the individual's welfare.* This is not to deny that there may be valid means of treating individual behavioural problems which could result in a better, happier life for the individual. But in the vast majority of cases (and that is what institutions deal with), we should assume that the individual can perceive that possibility better than some official. If he wants to take advantage of a possible "cure" which is offered primarily for his own good, he should be allowed to do so voluntarily.

As a corollary to that principle I would propose a very different attitude towards rehabilitation within the general criminal law. An individual offender is to be sentenced to the kind and quantum of sanction which he deserves and which will serve the objective of general prevention. The goal of rehabilitation should not be allowed to justify greater deprivations of the individual, though we can use that period of sentence to try to deal with the factors which have led this individual to a life of crime.[63] Further, within that frame, all forms of rehabilitative programmes should be *voluntary*. The state should make every effort to provide them and encourage offenders to use them: it should not force them to do so. While serving the sentence for his past offence, the offender should be enabled to improve his own life chances for the future by job training, psychiatric sessions, group therapy, and so on. He should not be treated any worse than his individual offence warrants if he does not agree that these programmes will help him. Indeed, I think this proposal is justified not only in principle but also in practice. There are few, if any programmes of education, training, or

* We might then be able to talk more candidly about, even to see more clearly, the truth that the actual practice of correction does not await the availability of feasible techniques of rehabilitation. Hence our preventive detention laws—incapacitation of the offender until something can be done about him. As Herbert Packer expressed it: "Incapacitation, then, is the other side of the rehabilitative coin. It may well seem a dark underside." Even in these cases rehabilitation does not recede completely from the picture. If nothing else, the passage of time—whether it produces the maturing of the juvenile offender or the aging of the habitual offender—eliminates much of the dangers these conditions pose. We might even describe a practice which quarantines such people as correctional, in some Pickwickian sense. But it achieves its goal in a way which clearly uses state power to sacrifice the individual's prospects to the public interest in preventing crime. That reality, starkly revealed here, looms large in the background of even the fanciest, most innovative, therapeutic programmes. If we want to place due restraint on the use of legal coercion in treatment, we should bring that dominant justification of social defence out into the open and keep it there at all times.

[63] See Norval Morris, "Impediments to Penal Reform" (1966) 33 Univ. of Chicago Law Rev. 627, at pp. 638 ff.

psychological improvement whose chances for success would not be enhanced by the fact that all the participants are there through their own decision to invest their time and effort in the endeavour.

Suppose it is argued that there are some individuals who would really benefit from some form of treatment but are not likely to make a rational judgment if left with the choice. Personally I am dubious about the extent of that problem, given my earlier comments about the normality of crime. Yet I agree that there are people whose lack of insight and intelligence impairs their capacity to make rational choices. Some at least of juvenile delinquents or the mentally ill would be included in that category, though by no means all of them. I do not see how we can rule out, *a priori,* the exercise of state coercion for paternalistic reasons in such cases, though I am chary about the opening this would create in practice. In my view it is not sufficient evidence of impaired rationality that a person has committed a crime and then refused to avail himself of a treatment programme for his own "good". Some further validated symptoms of his condition should be required. And if they do obtain, that person should be immunized fully from the criminal law, and that as a matter of principle. If a person is considered normal and responsible enough to bear the stigma and pain of "punishment" for what he has done, he must also be judged capable of making his own choices about whether and how to improve (or at least alter) his life for the future.

But what about those individuals who do not meet the latter description and whom we feel must be coerced into treatment for their own good, but one which they are not then capable of seeing? If we exercise state power over an individual and the primary justification advanced is that it is for his welfare, then he must be granted some form of legal "right to treatment". For too long people have been deprived of their freedom in the name of treatment which is nothing more than a pious hope. In this kind of case the individual (or someone acting on his behalf) should be able to go into some judicial forum and obtain an independent review of the value of what society has offered him as the *quid pro quo* for its forcible intervention in his life. If what he is getting does not appear sufficiently valuable, then he should be allowed free of that correctional practice. If searchingly pursued now, I believe that right would produce quite a number of such releases.

These proposals are essentially preliminaries to the main enquiry. Most real-life correctional practices are designed for the defence of society, not the interests of the individual subjects. I believe that the criminally insane, the habitual or psychopathic offender, even the juvenile delinquent, is subjected to state control in Canada basically

because his condition is believed to make him a menace to his neighbours. We want to quarantine him even though no promising treatment can be provided. We may even want to treat him against his will if there are measures that will reduce his danger in the long run but are sufficiently unpleasant in the short run that they are not undertaken voluntarily. What are the principles which should shape and restrain the pursuit of that social aim?

First, we must draw a much sharper demarcation line between the practices of punishment and correction. Too often now the individual gets the worst of both worlds from this confusion of social aims. Take the "criminally insane" as an example of what I mean. The manifest function of the defence of insanity is the laudable goal of exempting the mentally ill from condemnation and punishment because they had no *mens rea*. The latent effect of the use of the doctrine is the automatic committal of the acquitted defendant "at the pleasure of the Lieutenant-Governor", with a consequent stigma which is worse, if anything, than a conviction and criminal record. The significance of this operational effect of the "defence" has not been lost on those prosecutors and judges who have sought to give some defendants the benefit of it against their will.

The source of the problem is the tacit assumption that, simply because a defendant has once engaged in criminal conduct, this means he poses a significant danger for the future. As a general proposition, that simply is not true. A person acquitted by reason of insanity may be a future threat but then again he may not be. Further enquiry is needed with affirmative proof of that essential ingredient before we can confidently order committal.

Why has the law so long dispensed with it? I think the reason is that the retributive overtones of the harmful conduct still remain, notwithstanding that we have legally excused the defendant because of his condition. We are ambivalent about the criminally insane (and also about the intoxicated offender whose excuse remains so underdeveloped in our current law). While we do not feel justified in blaming them, we are loath, emotionally, to exonerate them totally. Accordingly, we subject them to the pains of detention without any showing that that is needed for the future prevention; yet we refuse them the benefit of the restriction inherent in "punishment" (in particular a sentence limited to what is deserved for the past conduct) under cover of the rationalizations of "correction".

That all too pervasive hypocrisy must be ended. Those who have committed the *actus reus* of an offence, but without *mens rea* in any meaningful sense, must be totally excused from blame, acquitted, and

allowed to go free. If the reason for the lack of *mens rea* is mental illness, the criminal law consequences must be exactly the same and there should be no such stigmatizing category of the criminally insane. If such a person really is considered to pose a future danger because of his continuing condition, then the state must proceed through a separate civil process. And the point is that the standards, procedures, and consequences of that process would be designed on the assumption that they are equally applicable to those who have not yet committed an offence.[64] Of course I do not mean to exclude the fact of the earlier criminal occurrence as relevant evidence in that second enquiry. That would be absurd in the light of our experience. What I do mean to exclude is the present situation where the fact of the earlier crime committed by reason of mental illness (and, in practice, intoxication) is legally decisive, which is equally absurd.

Which brings us to a second key question: what exactly is meant by *dangerousness*? That question itself breaks down into two subsidiary issues: what kinds of harms are we attempting to prevent and how proximate must that harm be in order to justify compulsory incapacitation and attempted treatment? About the second there is not much I can usefully say here. The theoretical dilemma is clear enough. How do we devise a set of standards and a procedural structure which will minimize the number of "false positives" (those judged in need of 'correction' who turn out not to be) which I take to be the primary problem in accurate identification. About this I take a conservative position. We must have previously validated prediction tables *before* the state is justified in intervening. But since this topic has been adequately canvassed elsewhere, I shall not pursue it here.

What of the logically prior issue of defining the kind of harm we are concerned to prevent through these compulsory measures of social defence? Our objective should be confined to the prevention of those offences involving serious and irremediable harm to their victims and which cannot be prevented by less serious means. Each of these constituent elements of this principle is important. Most property offences would be excluded if only because the victim can and should be insured against that kind of loss. Offences involving the infliction only of pain or psychological distress—common assault, sexual assault, exhibitionism, and the like—would be excluded because the harm is not serious. Hence the sole focus of this practice would be the prevention of offences which inflict or gravely risk the infliction of death or bodily injury—homicide, assaults with weapons, armed robbery, kidnapping, arson, and rape. Finally we must have exhausted other methods of prevention.

[64] See Fletcher, "Two Kinds of Legal Rules" (1968) 77 Yale Law J. 880, at pp. 920-21.

Take the case of civil commitment of heroin addicts on the grounds that their addition is responsible for a high incidence of crime. This would be unjustified because there is an alternative means of social defence—the provision of maintenance doses of heroin on an ambulatory basis—to minimize crime as a means of supporting this habit. (And if it is argued that the latter alternative would not produce the beneficial result of curing the addiction, my response is that this form of paternalism does not justify "correction".)

It is clear that the adoption of this principle would require radical surgery on the current Canadian law and practice of confinement for correctional purposes.[65] Accordingly, let me reiterate the gist of the proposal. I do not argue that any of these lesser harms should not be made the subject of criminal offences and penalized in the regular manner. The topic here is the drastic step of depriving someone of his liberty when he has not committed a blameworthy offence (or continuing such a deprivation long past the usual scope of punishment of normal offenders). At this point I am not willing to argue that such an infringement on an individual's interests is absolutely indefensible. To follow that logic, after all, poses grave risks of the infringement of the interests of another innocent individual. But the only harms which we should try to guard against by this extraordinary device are those like death or permanent bodily injury. True, we thereby run the risk of repetitive and annoying petty offences even by habitual criminals. But, as Holmes once observed, "Law, like other human contrivances, has to take some chances."

Yet the obvious problem with even the limited use of preventive detention is that when the law refuses to take chances it does so at the expense of the unfortunate individual. It is logically required, from the assumption that we are infringing on the freedom of those who are not to blame for their condition, that the centres of correction should be as comfortable and as concerned for the well-being of the resident as are hospitals or rest homes (and very much unlike jails). It is notoriously true that this is ignored in practice. And in any event, even a comfortable confinement with good food and other amenties inflicts real losses of freedom and enjoyment on the individual. Let me suggest a radically different way of viewing this problem. If we quarantine an individual to defend others from his dangerous condition, then we should pay him compensation for the loss of his liberty. (The difficulties of actual quantification are not insuperable. We already do something like this in cases of false arrest and should do even more in cases of erroneous convictions and imprisonment.)

[65] See Report of the Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (1968), Ch. 13.

Let us first consider this proposal as a matter of principle.[66] What society is really doing here is expropriating for the public good, the individual's interest in freely living his daily life in the normal surroundings of the outside world. If society were to expropriate his property (usually to put it to some more beneficial use, but occasionally to prevent some danger such as flooding, soil subsidence or the like), clearly it would have to pay for it. The principle is that if the public gets the benefit of this deprivation, in fairness it must bear the cost, not the unlucky individual who stood in the state's way. The same principle is equally applicable to the even more valuable right of an individual to his freedom. Nor should we be swayed by rhetoric to the effect that we demean the right to liberty when we put a monetary value on it. What we really do is to give vivid legal recognition to the true meaning of this individual interest even on those occasions when we feel compelled to over-ride it.*

There are further practical benefits from such a compensation scheme. First of all, it operates as a form of market deterrence to minimize the incidence and duration of preventive detention and to encourage the search for alternative means of reducing the danger from the individual. Nor should we delude ourselves in the belief that this is some expensive and extra gratuity to a particular class which we cannot afford now in our economy. The costs of compulsory correction already exist, right now in Canada; they remain disguised, more or less invisible, because we impose them on those hapless individuals who are sacrificed for the good of the community. All I suggest is that these existing losses be quantified and their burden be distributed across the community which is the beneficiary. Perhaps when they are the realization will sink in of how expensive in real terms are our practices of social control. Then the alternatives which now frighten the taxpayer will seem cheaper by comparison.

As well, the creation of a limited form of market economy may be the most fruitful avenue for securing more adequate conditions and treatment for those whom we now warehouse. The inmates will have

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[66] See Frankel, "Preventive Restraints and Just Compensation", (1968) 78 Yale Law J. 229, at pp. 256-67.

* My first visceral reaction in seeing this proposal was that the situations were different because here we were responding to a danger which the individual represented and thus should not have to pay him for the privilege of protecting ourselves from it. On further reflection I do not think that objection holds up. In fact, it reflects the same blurring of "punishment" and "correction" I mentioned earlier. Because his conduct causes serious harm to his victim we react with blame and resentment to the actor, notwithstanding his lack of responsibility in engaging in that conduct. But we cannot have it both ways. If we choose to use the special practice of correction because of this condition he cannot control, then we must strip that practice of any connotation of individual blame. When we do, the logic of compensation stands out clearly.

the money to pay for the amenities which could make their confinement more endurable and also for forms of treatment which might make it shorter. A familiar refrain in the correctional literature is the difficulty of wooing psychiatrists and psychologists away from the lucrative treatment of well-to-do neurotics and adequately staffing the institutions which house those in much greater need of such care. For a long time we have relied on the wisdom and benevolence of our governmental officialdom to solve that problem. Perhaps we might now try the "invisible hand" of the market to weave the public good out of the pursuit of private gain.

On reflection, though, each of these prophylactic principles seems merely to finesse the crucial moral problem of justification. We may sharply restrict the use of correction, we may make it as pleasant as possible, we may even pay the unfortunate detainee for his loss of freedom. Yet we must not deny the painful truth of what we are doing—depriving a person of his capacity to enjoy life as he wills for a lengthy period at a most significant point in his life span. The significance of the claims of justice cannot be rejected here, as in the "penalty" area, by asserting, realistically, that there really is no undue inequality involved. Fines may be a typical and not excessive cost of doing business or engaging in an activity (e.g., driving a car). That kind of sanction is qualitatively different from confinement in a mental hospital, an addiction treatment centre, or a reform school. Even if we did make great progress in erasing the character stain implicit in such committals, we could not remove the gross inequality in the loss of freedom. Once we recognize the unvarnished truth of that fact, how, if at all, can we support it?

Let us look at the key situations where compulsory correction is now practised or seriously proposed in its own right (and not as an appendage to the ordinary criminal law designed, as it is, in its retributive shape). Can we discern any suggestive common denominator? I believe we can. The mentally ill person is deprived of insight into the unconscious factors which produce his behaviour. The juvenile has not yet developed the degree of self-restraint needed to control his impulses. The psychopath lacks a conscience, a moral sense, which motivates him to act with some degree of care for the rights and interests of others who stand in his way. The addict has a powerful physiological urge to secure drugs in the face of just about any obstacle. The common denominator in each of these cases is, quite simply, a greatly diminished capacity to control one's inclinations to harm others through a responsible decision to obey the law.

Let me be careful about the point I am making here. I do not suggest that every one of the members of these vague sociological

categories—juvenile, mentally ill, addict, or psychopath—suffers from that incapacity; clearly there are some who do not. Nor do I suggest that these are the only such categories for which that common theme is true. There are many supporters of the proposal that the law recognize the same powerful constraining force in the alcoholic, the economically and socially disadvantaged, and perhaps other groups as well. Nor do I contend that even the clearest examples of any one of these categories is totally lacking in self-control. If a heroin addict, badly in need of a "fix", sees an armed policeman standing right behind his supplier, he will likely be able to restrain himself even in the face of very severe withdrawal pains. The fact is that the law ordinarily operates through a general standard, accompanied by abstract threats of a sanction, and thus must rely on private acquiescence for most of the influence it has. The point, then, is that eventually a society may conclude that a sufficient proportion of the members of an identifiable group suffer from a substantially impaired capacity to comply with that kind of legal standard. When society becomes confident enough to make that judgment about one or more such categories it then decides, ordinarily, to adopt a different mode of social control, the one I have called "correction".*

Within that common threat we can find a natural, and I believe intellectually satisfying stopping point in the use of pure correction. In fact, this area of the criminal law seems founded on a two-fold reciprocity. On the one side are those persons who have the ability to formulate and pursue their own life-projects but also have the capacity to choose to protect that same liberty in others. On the other are those who, while still having some of the human capacity to adopt their own aims, do suffer from the serious flaw of being unable to decide to respect the rights of their neighbours.

For the first group, those who can choose to adhere to the law, the state must stay its hand until it sees what choice they have made. Only if and when they do decide to break the law may (and I think should) the state intervene to punish them and so protect the rest of society. But that same opportunity need not be offered the second group, those who suffer from a condition over which they have little control and one which propels them to harmful behaviour which they really do

* To avoid any confusion, I should reiterate here a point I have made earlier. I do not necessarily subscribe to the empirical truth of the criminological perceptions and theories which have led to some or all of these legal programmes. The recent critical literature in criminology gives grave reason for doubt, but I am not prepared to resolve that doubt here. A philosophical argument can turn on the hypothetical truth of its basic assumptions and I believe there is sufficient warrant for at least the plausibility of the correctional impulse. The applicability of the philosophical value judgment in the real world will hinge on the empirical verification of its antecedents.

not choose. Because they are not responsible for a crime—because they are not to be blamed—they may not be punished. By the same token their inability to be responsible—to be blamed—deprives them of any right of immunity from "correction". The psychotic, driven by his paranoia, for example, may be a real danger to the liberty of other citizens who have a right to protection from the state. And the fact that his liberty is inherently deficient in this crucial respect implies that he cannot complain of unfairness when the law deprives him of it.

This constitutes no more than a description of that final limiting principle. The attempt to defend it could rest on several foundations. Some place it on a functional basis, suggesting that it is a necessary means to the protection of the general liberty and security of all from the reach of the therapeutic state[67]. Others see it as an implication of a general theory of justice[68]. Those who are not capable of controlling their behaviour, of being able to do justice to other citizens, are not themselves entitled to full justice from the state. In other words, the fundamental assumption of a theory of justice is that it is the fact of human freedom which is the source of the value of equality. We deny equal treatment to the psychopath, for instance, when we confine him indefinitely even though he did not really *choose* to commit his crimes. Again, there is nothing of blame in that state action; indeed, it is the total irrelevance of blame which is the rationale of correction. The point is that those who by reason of some personality disorders are unable to participate in an institution shaped by principles of justice—who are unable to offer others their equal right to freedom—simply do not meet the assumptions which are necessary to claim similar rights for themselves.

Although I believe this latter analysis is correct, it raises intricate philosophical dilemmas which I cannot appropriately deal with here. But there should be no misunderstanding of the direction of that argument. The fact that some people are not fully entitled to just treatment does not mean that the "wraps are totally off" the exercise of state power. After all, we are still talking about human beings and thus are morally obliged to limit our intervention so as to cause no unnecessary suffering. As I have suggested, correction should be used only for persons who are truly dangerous to others, it should involve as little stigma as possible, take place in comfortable and pleasant surroundings, and even be paid for. We must also be wary of the ever-present possibility of false identification. In theory we may have a good idea of the type of personality problem we are talking about but actually locat-

[67] Frankel, cited in fn. 66, at p. 847 ff.

[68] Morris, "Persons and Punishment" (1968) 50 The Monist 475; Murphy, "Moral Death: A Kantian Essay on Psychopathy." (1972) 82 Ethics 284.

ing it in the real world is a very different matter. And the consequence of error may be the subjection of a person who does have his full capacities to preventive detention for much of his life. Finally, the subjects of correction are entitled to even more than careful procedures and compassionate treatment. The condition which deprives them of full competence may be transitory (as in the case of juveniles) or temporary (as in the case of much of the mentally ill). Hence social defence cannot be the be-all and end-all of the organization of the correctional system. This latent potential demands some recognition in a theory of just punishment. As a matter of principle, the practice of correction must be organized in a manner which is as conducive as possible to its subjects attaining the status of fully functioning moral persons. If that requires extra expenses or even extra risks, as it most certainly will, then so be it.

With all these caveats, I believe that the practice of correction is morally defensible. And once we have laid bare the elements of that argument, we can make some sense of a peculiar retributive doctrine, the notion that a person has a *right* to punishment. As Herbert Morris has said:[69]

> Reaction to the claim that there is such a right has been astonishment combined, perhaps, with a touch of contempt for the perversity of the suggestion. A strange right that no one would ever wish to claim! With that flourish the subject is buried and the right disposed of.

But the point of the "right" is a little more apparent now that we appreciate that "punishment" is a practice with its own distinctive features. The state must prove, beyond reasonable doubt and in an adjudicative forum, that a person has engaged in illegal conduct with full responsibility; when that is established, he should be punished but no more than he deserves. The correctional ethos is subversive of each of these restrictions: limitations on sentence, *mens rea, actus reus,* the adversary process, and even proof beyond reasonable doubt. Within a retributive theory, a person may claim to be dealt with only within the practice of "punishment", not the practice of "correction". That is a valuable right, perhaps even an inviolable one, as a recognition of our autonomy, our capacity to choose, whether for good or for evil. Throughout recent history, it has undoubtedly seemed humanitarian to ameliorate the excesses of the criminal law by the adoption of a correctional orientation and many desirable reforms have been achieved (though how much of penal reform is actually owed to a focus on treatment is debatable). But as the logic of the rehabilitative ideal has gradually worked itself pure, there can be few who can be so confident of their good intentions any longer.

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[69] Morris, cited in fn. 68 above, at p. 476.

Part 5

Conclusion

As I stated at the outset, this essay is written from a definite point of view. In it I have tried to rehabilitate a defence of punishment which traditionally is described as retributive. I have not dwelt in anywhere near as much detail on the reductive position but this should imply no denial of the latter's importance. Any essay inevitably has a partial character derived from the special problem it sets out to deal with. In current criminal law theory it does seem to me of pressing importance that we recognize again the enduring core of truth in the retributive tradition. For over a century the focus has been on the reduction of crime, first through deterrence and then through treatment. That attention was warranted historically and produced progressive, civilized advances in our criminal law. But the single-minded pursuit of this goal, as any other, will also produce excessive and unfortunate results. In the realm of punishment the retributive theory is the necessary corrective and in the 1970's we are in a good position to see why.

The retributive case for punishment has had a great many connotations throughout the years, some of them quite unpleasant. To unravel this tangled theory is a complex task. But at its roots that position makes one fundamental claim. Punishment must be defended primarily in terms of the justice in its distribution, not the social utility of its infliction. I will restate the precise outlines of the argument. The specific proposal of "retribution" is that punishment should be distributed to those who deserve it. The conclusion is demanded by principles of fairness; these in turn are founded on the value of equality in the relationship of persons within a society. Accordingly, the retributive argument is a relatively concrete implication within the criminal law of a general theory of justice in social philosophy.

No doubt that kind of argument is not easy to appreciate within the current temper of the modern mind. The question to be emphasized is not "will punishment make the members of society happier?"; rather, it runs "is punishment the right thing to do?" Many fail to understand how an answer to the latter question can ever be a justification at all. They wonder whether the retributionist is doing anything more than recounting his intuitive perception of the fitness of suffering following crime. The utilitarian point of view has become so ingrained a piece of our mental furniture that when someone begins to talk of justifying a social practice, we all assume he means to show the contribution it will make to our future social welfare. Retribution, in the strict sense, does not ask that kind of pragmatic question. Accordingly it is easy to dismiss its answer as "nothing more than dogma, unverifiable and on its face implausible".

Yet how can a position which deserves these epithets have maintained its niche in the historical debate about punishment? An explanation which is surprisingly prevalent in the literature is that the retributive theory is merely an intellectual rationalization of an emotional fixation. Crime arouses the desire for vengeance, fuels our urges to cruelty, and punishment simply gives an institutionalized expression to these attitudes. Instead of argument with the retributive theory, we more often find psychoanalysis of the retributive theorist. What could have happened to them in their childhood that they could say such things now? I wonder how many readers of this essay have been tempted to ask that question.

Such a form of quick dismissal is not tenable. The validity of a position cannot be appraised by reference to the attitudes of those who subscribe to it. Retribution is an element in a complex intellectual view of the social world. Its conclusions may be appealing to those of a certain temperament which we do not find attractive. That psychological fact does not tell against the logic of the argument. Only after we have demonstrated the error of his ways are we entitled to dismiss an opponent because of his emotional biases. And those who would show the incoherencies in the retributive conception of punishment must first appreciate and grapple with the structure of its reasoning.*

* Let me develop this point further by reference to my earlier analogy to the search for economic justice in the distribution of wealth. Right now, this distribution is basically determined by the market place. I think we can assume that the incentives of the market are more conducive than alternative systems to the efficient production of the optimum total of desirable goods. [I reiterate: not perfect, just better.] The question is whether its operations should be deliberately restricted by such policies as minimum wages, progressive taxation, guaranteed income, *et al.*

These policies can be shown to hamper pure "productionism". I have not seen really persuasive demonstrations that they maximize social happiness or welfare (as opposed to reallocating it). But these calculations are beside the point.

When one gets down to intellectual debate, the demolition of retribution does not look so easy any more. For some time utilitarianism as a general social theory has been in full retreat from the critical onslaughts of the alternative Kantian persuasion. At the level of theory, it is clear now that justification simply does not mean pragmatic or utilitarian argument. We cannot reduce all values to the one common denominator (call it happiness, welfare, the *summum bonum* or what have you) and collapse the value of the means by which this is produced into the sum of their end-results. Very recently these deficiencies of "social engineering" or the "policy" approach have begun to penetrate popular views in many spheres at the level of action.[70] We should not be surprised to find that alternative *Weltanschaung* seeping into the criminal law system.

As well, there are tendencies internal to the administration of criminal justice which make retribution increasingly relevant. Within the utilitarian perspective punishment is essentially a bet about the future. We invest the offender's immediate unhappiness in the hope this will produce an acceptable general return in the form of a safe and secure society. Unfortunately as we have become more knowledgeable about crime and our responses to it, that no longer appears such a good gamble. As I read the growing body of research, there seems little reason for optimism about the prospects of deliberately engineering an appreciable drop in the level of crime. Treatment does not seem to work in practice and its theoretical underpinnings in casual theory are increasingly shaky. Draconian measures to achieve "law and order", whether through stiffer judicial sentencing, unleashing the police, or handcuffing the parole board, are no more promising. They might achieve some extra margin of deterrence but only by eroding the authority or the moral acceptability of the criminal law, which accounts

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Such wage and tax policies, designed to redistribute the total wealth, can be justified by independent principles of fairness. These in turn are founded on the basic value of equality in human relationships. There is no need to torture the argument into some proof that the policies are functional in their total effects.

But those who cannot appreciate how an argument can be a justification unless it is couched in pragmatic or utilitarian terms will not accept that. They will dismiss frankly egalitarian proposals as motivated by envy of the rich, or *ressentiment* towards the successful. Again it may well be true that many of the advocates of such policies were fuelled in their cause by some such emotions. But the point is that, even if true, this is irrevelant to their case. The reasons for rejecting the validity of a proposal must be found in some point of incoherence in its underlying argument, which in this case is a theory of justice.

There are few philosophers any more who reject this matter of conceiving of the problem of economic justice. Clearly the specific arguments and conclusions about criminal justice will be very different because of its very different subject-matter. All that I claim here is that this conception of the problem of the proper method of attacking the issues is basically the same.

[70] See, e.g., Tribe, "Policy Science: Analysis or Ideology" (1972) 2 Philosophy & Public Affairs 66.

for much of its preventive influence. What about the growing call to reduce poverty and improve the level of social justice as a means of combatting crimes? Now many such proposals are intrinsically valuable and deserve adoption for their own sake; but we should distrust those who tell us that one happy result of a more equal distribution of our affluence will be a sharp reduction in crime. As we learn more about the true social distribution of crime (as opposed to convictions), its connection with poverty is murky to say the least.

I do not want to draw too one-sided a picture. It is not the case that the criminal law has no impact at all and we could dispense with it without any concern for the consequences. A good analogy is with education.[71] Up to a certain level of operation the systems produce visible results, either in controlling crime or educating children. But starting from that basepoint, we have little validated knowledge of how we might deliberately improve the product, whether by increasing or altering our investment. Marginal gains are always possible but I know of no major breakthroughs now on the horizon.

Meanwhile one can hardly miss seeing what the offender has done to his victim and then what society does to him in response. These inflict tangible harm and produce sharp inequalities in the distribution of welfare in our society. We are rightly sceptical about our ability to bend the future to our will through the criminal sanction but we can be clearsighted about its immediate impact on the relative position of the criminal and the law-abiding. The pressing issues of criminal law reform in Canada are largely of this latter type, the fairness in the distribution of punishment. I believe we can safely navigate these shoals only through some defensible version of retributive justice.

What are the practical policy implications of this suggested rearrangement of our intellectual frame of reference for the criminal law? While I do not propose to recapitulate my earlier analysis of these many issues for reform, I should make explicit one basic theme. The primary direction for reform is towards retrenchment in the scope and application of our criminal law.[72] That law is now over-extended and over-burdened; the criminal sanction has been inserted into ambiguous areas of human conduct (such as drug use); it is applied to some offenders who might better be handled elsewhere than in the dramatic

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[71] Jencks et al, *Inequality: A Reassessment of the Effect of Family and Schooling in America* (1972) draws very pessimistic conclusions about the potential effects of educational reform.

[72] The title of a recent book is very suggestive: Schur, *Radical Non-Intervention: Rethinking the Delinquency Problem*, (1973). This book, which came to my attention just as I finished this essay, is an excellent review of recent criminological research and draws basically the same conclusions as I have done about the very limited margin that now exists for improving crime control through correctional reform.

spotlight of the criminal trial (e.g., the violent family quarrel); the use and length of prison sentences in Canada is much too high; there is a growing readiness to dilute the built-in protections against convictions of the innocent defendant. The issues in each of these situations could be debated in utilitarian terms, weighing the social benefits and costs of the reach of our criminal law, and a policy of sensible retreat might be arrived at on that basis as well. Still I think we should defend those judgments on the clearer and more enduring principles of fairness to the individual.

In its practical conclusion, then, I largely agree with the proponents of a purely negative theory of retribution, one which views the claims of justice as simply a restraint on crime control, not a value to be pursued for its own sake. I shall not repeat here my argument that one cannot hold to the view that particular punishments are undeserved, therefore unjust, and so should not be imposed, except by virtue of a theory which tells you that some punishment is deserved, therefore is just, and so should be imposed. But, as a practical matter, a sufficient measure of just punishment will be warranted on deterrent grounds and the problem is how to cabin the latter impulse within some decent restraints.

Yet there is one positive implication of a full-fledged retributive view which I will mention again in closing. Generally speaking, we now make excessive use of "punishment", especially its operational instrument, the jail sentence. In the area of conventional or "white-collar" crimes we make far too little use of either. If a low income offender steals a woman's purse to get money for liquor, he stands a good chance of going to jail. If an upper-income executive administers a system of consumer fraud, his company will be convicted and pay a fine. A criminal law founded on principles of fairness should not permit such disparities, no matter what their utilitarian rationale. And I dont believe the preferable avenue to equalizing the law's responses is to lighten the penalties for "purse-snatching".

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Nietzsche once said: "Distrust all of those in whom the urge to punish is powerful." He was right; but he was only half right. Be wary also of those who tell us not to punish, but then tell us to do something else instead.