SENTENCING CRIMINALS

Crime in the streets, marijuana in the schools, civil disobedience — these are aspects of what appears to be a breakdown of social control. It is the criminal sanction, the imposition of punishment for the violation of criminal statutes that constitutes society's primary control over behaviour defined as antisocial. But can the criminal sanction do the job effectively? How can we tell what it is good for?

In this paper an attempt will be made to analyse the various points of view regarding the desirable objectives of punishment and the rationale that should sustain the sentencing and correctional system.

The general claim is that ideally the criminal process is designed to motivate people to behave or refrain from behaving in certain specified ways with the ultimate goal—the control and reduction of crime in society. More specifically, the aim of the sentencing process and the meting of punishment is the accomplishment of one or more of the multiple objectives of the criminal sanction, to wit: rehabilitation of the convicted offender into a non-criminal member of society; isolation of the offender from society to prevent criminal conduct during the period of confinement;[1] deterrence of other members of society who might have criminal tendencies similiar to those of the offender (secondary deterrence) and deterrence of the offender himself after release (primary deterrence) ;[2] community condemnation or the reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves;[3] and retribution or the satisfaction of the community's social and emotional desire to punish the offender[4] (community condemnation is distinguishable

1. Many of the most dangerous criminals are simply "warehoused" — see Morris, "Sentencing Convicted Criminals", 27 A.L.J. 186 (1953); also, Gerald Gardiner, "The Purposes of the Criminal Punishment", 21 M.L.R. 117 (1958); Andenaes, "The General Preventive Effects of Punishment", 114 U. of Penn. L.R. 949 (1966); Hall Williams, *The English Penal System In Transition* (Butterworth, London, 1970).
2. See Ball, "The Deterrence Concept in Criminology and Law", 46 J. Crim. L.C. & P.S. 347 (1955).
3. See Hart, "The Aims of the Criminal Law", 23 Law & Contemporary Probs. 401 (1958).
4. The desirability of a collective punitive response to the criminal is often argued on the basis that such expression vindicates the criminal law and in so doing helps to unify society against crime and criminals. In a very real sense it is the retributive response which gives meaning to the label criminal, for it is in this aspect of society's response to the criminal which places him in a lower status than that of lawabiding citizens. Stated another way, if it were possible to remove the retributive response from our reaction to the criminal, would we not abandon the meaning that is conventionally attached to the label "criminal"? Cf. Ewing, *The Morality of Punishment* (London, 1969); Morris Ginsberg, *On Justice in Society* (Penguin Books, 1971).

from retribution in that the former is reprobative and the latter vindicative). At one time or another all these concepts have been advanced to explain some aspect of penal law or to attempt to change it. But generally speaking, the law has failed to take a stand as to what part these theories should play in shaping a meaningful and effective correctional programme. Too often we circle around questions that face the issue of the theory of punishment as we rush on to make changes and to innovate.

However when people talk about criminals and punishment two threads are to be discerned. First of all, it is argued that justice demands that criminals should be punished, and that punishment should be proportionate to the crime. Secondly, it is argued that punishment is necessary in order to deter. These two attitudes seem to crop up time after time in the discussion almost inextricably interwoven with each other.

The idea that a wrongful act should always be followed by some kind of punishment is deeply ingrained in our natures. It is symbolically represented by the Scales of Justice and judges devote much anxious thought to the problem of how much punishment a particular offence justifies in order that justice may be done as between the criminal and the community, and as between one offender and another. The idea of having "paid for" or expiated one's guilt after punishment is strong in all of us.

Most people would feel that justice is a fine ideal, but how to carry it into effect is the question. How much punishment does a particular criminal in fact deserve? Should a thief receive a prison sentence which is proportionate to the amount of money he has stolen, or is stealing bad in principle no matter how small the sum involved? And then what about the circumstances of the criminal? Are all equally blameworthy? At first glance, this may not appear to be a very difficult problem — the courts could always take into account mitigating circumstances. But mitigating circumstances may not always be easily seen and it may sometimes be very difficult indeed to know in particular how much weight to give them. If, for instance, unconscious motives play a major role in a particular case, it will not be easy to prove it.[5]

To carry justice into effect in our criminal law is obviously more easily said than done. What the judges in fact do is to ignore the subtleties and instead enforce the status quo in their sentencing policy. Judges (like everybody else) have their own peculiarities and occasionally exhibit these in their statements from the bench; yet they are not entirely free agents. They are bound by precedent, and so must continually hark back to other cases. An appeal to higher court against sentence is also often possible. Such safeguards undoubtedly reduce the idiosyncratic element in sentencing. They also, however, do more than this — they enforce upon a not unwilling bench a backward-looking attitude.

5. The retributive theory has its limits. Not surprisingly therefore, this has led Nigel Walker to concede that what is demanded is not a system in which sentences are retributively appropriate; but merely "one in which they are consistent and not on occasion unpredictably severe." On this basis he maintains that what is done to offenders can be planned with a view to reducing the frequency of repetitions of their offences so long as the principle is observed that — "The unpleasantness of a penal measure must not exceed the maximum limit that is appropriate to the culpability of the offence." Walker, *Sentencing in a Rational Society* (Penguin Books, 1971, at p. 30).

The idea of justice as practised in the courts is indeed only a very rough and ready approximation to the real thing. Society's devotion to the ideal is very laudable, but its ability to carry it into effect is open to question; conversely, its inability to meet its stated objectives give us no reason to be satisfied with it as the main aim of judicial policy. It may well be that society's ideas about justice are not only misplaced but actually irrelevant. Instead we ought to be asking what action should be taken in order that crime may be reduced. This is the justification for the deterrent punishment of criminals. The essence of the deterrent approach is that we should quite simply "intimidate" people into good behaviour. It is said to operate at two different levels: after-the-fact inhibition of the person being punished (special deterrence — the convicted offender is to be deterred by his punishment from committing further crimes); and inhibition in advance by threat or example (general deterrence — an example is made of the offender to deter the rest of society).

The idea of justice and the deterrent attitude both form part of the average "man-in-the-street's" approach to the problem. He moves, without any sense of incongruity from an approach based on justice to one based on deterrence, in spite of the fact that the two are quite inconsistent with each other. There is no reason to believe, if a utilitarian deterrent policy is adopted, that this will do anything to ensure justice as between one individual and another. If so, it could only be by accident.

Within limits, therefore, how effective is punishment as a deterrent? To pose the question in this way is to fail to recognise how very complex our crime situation is. Criminals are of many different kinds. One type of theif, motivated by nothing more complicated than stupidity, may well be affected by the prospect of severe and fairly certain punishment. The incidence of crimes of this type is likely to be reduced by a firm and efficient system of deterrence. Acts of an impulsive kind, like much assault and unpremediated murder, are unlikely to be materially affected. Nor are eases in which the offence arises from deeply-rooted psychological problems in the offender — and much premeditated murder falls into this class. As extreme examples here, one might take the psychopath and the criminal with an unconscious sense of guilt. The former seems unable to draw any conclusion from his behaviour from the consequences which it brings down upon him; while the latter will be totally unaffected — punishment is not a deterrent at all.

Difficulties notwithstanding, however, advocates of the deterrent position argue that while it is apparent that all persons are not deterred, the deterrent objective which in fact helps to support our entire structure of law enforcement is still desirable. Regardless of the prevailing crime rates, it is assumed that many persons are in fact deterred; were it not for the operation of the deterrent machinery, the crime rates would be still higher. Although extensive data are not available regarding the operation of the deterrent principle we can point to some examples of persons who are or have been deterred — the decision to take special care to travel within the speed limit when we know that an aggressive effort is being made to arrest speeders.

Perhaps when assessing the usefulness of deterrence, it is insufficient to ask: Did the threatened punishment deter or not? It may well be

that it had channelling effects that are not measureable in absolute terms of the threat succeeding or not succeeding. What is more important is to consider the concept of "marginal deterrence." The question, "Do criminal sanctions deter?" although frequently asked is not particularly helpful. We impose criminal sanctions for a variety and diversity of purposes, and many criminal prohibitions would exist even if we were confident of the absence of deterrent efficacy of the sanctions attached to them. The issue is rarely: Does a given sanction deter? It is usually: Would a more severe penalty attached to that criminal prohibition effectively deter? In the capital punishment debate, for instance, the real issue is not whether the death penalty is a deterrent to homicide, but whether it is a more effective deterrent than the alternative sanction of protracted punishment of imprisonment which would be applied. Hence the key question in deterrence is whether variations in the severity of threatened sanctions will affect a given crime rate.

According to Zimring, "[t]here seems to be a tendency for people, ... to think in a straight line about the deterrent effect of sanctions. If penalties have a deterrent effect in one situation, they will have a deterrent effect in all; if some people are deterred by threats, then all will respond; if doubling a penalty produce an extra measure of deterrence, trebling the penalty will do still better."[6]

Such a unitary attitude towards deterrence renders it a myth. But this is not to suggest that deterrence is not functional as a technique of crime control. Belief in deterrence is both natural and in the interest of most law enforcement officials. It is difficult to deny that, as Professor Packer puts it, "people who commit crimes appear to share the prevalent impression that punishment is an unpleasantness that is best avoided."[7] To threaten with punishment is therefore to some extent, a very promising strategy of influencing behaviour. But a threat alone is not sufficient. In order to make the threat of punishment believable, the criminal law must follow through by punishing those offenders it apprehends.

Punishing people in order to deter them (or others) from committing future offences raises some questions about the justice of pain inflicted for deterrent purposes that should be distinguished from issues that relate to the efficacy of deterrent strategies.[8] When concerned with the efficacy of punishment-for-deterrence, we ask the question, "Will it work?"; when concerned with the justice of punishment-for-deterrence,

6. *From Perspectives on Deterrence,* by Franklin Zimring, NIMH Monograph Series, January 1971, Part II, Deterrent Motives and Crime Control Policies, p.11.

7. Packer, *The Limits of the Criminal Sanction*, at p. 149 (Stanford University Press, 1968).

8. There are a variety of tests as to the efficacy of deterrence as a concept of crime prevention. Cohen is of the view that to "justify punishment it is not necessary to prove that it always prevents crime by its deterrent value or quality. It is enough to indicate that there would be more crime if all punishment were abolished", (see Cohen, "Moral Aspects of the Criminal Law", 49 Yale L.J. (1940) at pp. 1015-1016). On the other hand, Chambliss suggests that the efficacy of deterrence should be tested in the light of the kind of criminals to be dealt with and the type of deviance in question. (See Chambliss, "Types of Deviance and the Effectiveness of Legal Sanctions", (1967) Wisc. L.R. 703; also, Hawkins, "Punishment and Deterrence: The Educative, Moralizing and Habituative Effects", (1969) Wisc. L.R. 550).

we ask, "Is it normally acceptable to punish for this reason?". These two issues are not identical. It is easy to imagine, for instance, punishments that would be effective but unjust, such as the random execution of every tenth parking violator.

The basic principles relating to the justice of punishment have been admirably discussed and documented in the literature.[9] Only two aspects need to be referred here. First, it seems clear that under the moral precepts of our criminal law[10] punishment can only be justified if its subject has committed a forbidden act.[11] Objectors to this principle are hard to find; similarly those who deny the injustice of aimless punishment. Society has developed a large and diverse vocabulary of motives for punishment; punishment is justified as a means of expressing society's retributive feelings as a method of inculcating respect for law and order and as a method of isolating high crime risks as a deterrent and as a mechanism for rehabilitation.[12] While commentators may disagree about which purposes are legitimate, and which of the legitimate purposes of punishment should be accorded priority, most would however agree that the gratuitous infliction of suffering cannot be justified. To assert that punishment must have a purpose to be considered just, differs from the strict utilitarian position that punishment must achieve more benefit than the harm it produces in that our formulation allows as legitimate objectives of punishment goals that some utilitarians might reject.[13] And so, having said that aimless punishment is unjust, it

9. See e.g. H.L.A. Hart, *Punishment and Responsibility* (London, 1968); Packer, *supra;* Moberley, *The Ethics of Punishment* (London: Faber, 1968); Ewing, *The Morality of Punishment* (London, 1969).

10. Cohen, *supra*.

11. See generally, Packer, *op. cit.*, Chapter 5, "Culpability and Conducts":
    (1) No one may be subjected to criminal punishment except for conduct.
    (2) Conduct may not be treated as criminal unless it has been so defined by appropriate lawmakers before it has taken place.
    (3) This definitional role is assigned primarily and broadly to the legislature, secondarily and interstitially to the courts, and to no one else.
    (4) In order to make these prescriptions material and not merely formal, the definitions of criminal law conduct must be precisely enough stated to leave comparatively little room for arbitrary application.

    Cpr. Packer's statement with the well-known twofold maxim: *Nullum crimen, sine lege* and *Nulla poena sine lege*. The law alone determines and defines an offence. The law alone decrees the penalty. A penalty cannot be inflicted in a given case if it is not decreed by the law in respect of that case. This so-called legality principle was very well explained in the Advisory Opinion, Permanent Court of International Justice Series A/B No. 65 (Dec. 4, 1935) at pp. 41-46, 50-53, 56.

12. Morris and Zimring, "Deterrence and Corrections", 38 Annals of the American Academy of Political and Social Science, January 1969, p. 137 at p, 138.

13. The strict utilitarian position is as follows: Knowledge that a wrong has been done is not itself a sufficient reason for punishing the wrongdoer. The original wrongful act has caused pain and therein lies the wrongfulness; but you do not necessarily mend matters by punishing. On the contrary, the one thing you do immediately and certainly is to cause more pain. Therefore, unless you can expect some further useful consequence of punishment or show that more good is likely to result from inficiting than withholding punishment you are making matters worse. The good that is thought to result from punishing criminals is the prevention of a greater evil, that is, crime. For an extended discussion of this view, see Ewing, *supra*.

would still be possible to justify punishment that was motivated solely by society's needs to express its disapproval of the punished conduct.

While this observation may hold true when the sole question to be addressed is *whether,* even if the smallest measure of punishment is just, limiting punishment by requiring that it must be imposed for legitimate reasons may have a profound effect on *how much* pain may be justly inflicted for a particular offence. The need for retribution justifies the punishment for offenders, but the amount of punishment justified is limited to the amount necessary to achieve the retributive effect. Any extra punishment is unjustified unless it serves other purposes.[14] Limiting the extent of punishment to those measures which serve legitimate purposes will protect against the overkill of criminal sanctions.

The two conditions for just punishment — the existence of blameworthy conduct and a legitimate purpose for punishment — are necessary but not sufficient conditions for determining that a particular punishment is just and appropriate.[15] Indeed, punishment may serve legitimate objectives and still be too severe. There could exist circumstances that would render harsh punishment shock the conscience.[16] And, punishment for deterrent purposes raises a few special problems, in that it appears to have so little to do with the particular offender; such punishment is not determined as the result of the particular degree of reprehensibility of his conduct as with retribution and it cannot be justified as being designed to benefit the offender, a familiar justification for rehabilitative measures.[17]

Cf. Bittner and Platt — "punishment on the basis of deterrence is inherently unjust. For if an example is made of a person to induce others to avoid criminal actions then he suffers not for what he has done but on account of other people's tendency to do likewise." ("The Meaning of Punishment," 2 Issues In Criminology (1969), at pp.79, 93).

14. Such a rationalisation places the relationship between the culpability of the offender's behaviour and the distress of the proposed penalty on an "equivalence" basis. Whether it can be sensibly regarded in this way depends on the terms of the relationship. The culpability of an offender in his offence, we may briefly say, depends on two things: the harm caused by his action and the extent to which he can be regarded as having acted responsibly. Greater culpability attaches to violent assault than to pilfering, given equally responsible agents. Greater culpability attaches to intentional as against accidental wounding. Given some such understanding of culpability, it is clear that no penalty can be regarded as either equivalent or not equivalent, in any factual sense to a man's culpability in his offence. This is so because the distress of a penalty and the culpability of an offender are not commensurate or commensurable. There are no common units of measurement.

15. See Packer, *op. cit.*, at p. 63-70.

16. An example that comes to mind is the story of Jean Valjean's pursuit and punishment for the theft of a single loaf of bread in Hugo's *Les Miserables*.

17. "Deterrence necessarily leaves the interests of the victim wholly out of account. It injures and degrades him; destroys the reputation without which he cannot get employment; and when the punishment is imprisonment under our system, atrophies his powers of fending for himself in the world. Now this would not materially hurt anyone but himself, if when he had been duly made an example of, he were killed like a vivisected dog. But he is not killed. He is, at the expiration of his sentence flung out of the prison into the streets to earn his living in a labour market where nobody will employ an ex-prisoner . . . . He has no compunction as to Society: why should he have any?" —George Bernard Shaw, *The Crime of Punishment* (1961, repub.), at pp. 32-33.

It is not deterrence as an objective that is a cause for concern but the escalation of sanctions for deterrent purposes. Thus the moral problems raised by punishment for deterrent purposes arise only when we impose punishments for deterrent purposes that are more severe than would otherwise be imposed. And yet, increases in penalty for exclusively deterrent purposes are far from rare. We tend to confuse two separate things under one heading — deterrence which is one thing and severity which is another. The law has attempted to suppress crimes by means of extreme severity. It is conceded that this should be so to an extent — if we want to ensure such curative effects of a threat we have proportionately to make the threat unpleasant, which is another way of saying that we have to be severe. But in this exercise, we lose sight of one important factor, that is, the more severe punishment is, the greater precautions that have to be taken to ensure that an innocent person is not made to undergo that punishment.

Two principles emerge from a consideration of the moral problems of punishing offenders for deterrent purposes. First, the harm suffered by offenders as a result of the extra measure of punishment administered for deterrent purposes or motives must be recognised as a cost, not insubstantial to the community as a whole. If the community should rejoice at the prospect of punishment as an indication of retributive feeling, no joy should come from punishing in excess of that required to fully express collective feelings of outrage. The offender is a citizen and the community's decision-making process exists to protect his welfare as well as that of others. Considering the suffering of offenders as a cost helps to make clear that aimless punishment is an irrational community response.

A second principle to be drawn is that to base extra punishment on a belief in deterrence is morally acceptable so long as it is necessary.

Deterrence, it seems, has within limits [18] its place in punishment although it will basically not solve our crime problem by itself. Perhaps what is important is that knowledge about deterrence can provide us with more rational means of crime control and may well liberate corrections from the heavy burdens of unitary assumptions about deterrence

Cf. Edmund L. Pincoffs, *The Rationale of Legal Punishment* (New York, 1966); H.L.A. Hart, *Prolegomenon to the Principles of Punishment* and *Punishment and the Elimination of Responsibility* rep. in *Punishment and Responsibility* (London, 1968).

18. "The attempt to protect society through creating a general fear of punishment encounters two inherent difficulties. In the first instance, fear cannot be a complete deterrence. The venturesome will always believe that they can escape. The fearless will always be indifferent whether they escape. The crafty will always believe that they can evade, and enough will succeed to encourage others. Secondly, threat of punishment is very apt to become *brutum fulmen* and defeat itself." (Quoted in *Roscoe Pound and Criminal Justice* (ed. by Glueck, 1965), at p. 107).

"Indeed, deterrence has its limits, and inattention to those limits has doubtless helped to discredit it. . . . deterrence is not the only mode of prevention available to us, and any ultimate appraisal of its role in a system of crime prevention must wait upon a comprehensive presentation of other possible modes, and an examination of the extent to which they use techniques and work towards goals inconsistent with those peculiar to deterrence". (Packer, *op. cit.*, at p. 45).

and penal sanctions. The necessary beginning of a sustained exploration of deterrence is the development of sensitivity to the differences in situation and goal which account for the great differences in the effects of threats on human behaviour.

However, the modern concept of correctional treatment seems to provide a wider framework for attack upon the crime problem and one within which deterrence might find its proper role. It implies that we adopt such policies towards the criminal as are likely to change his behaviour, whether these are of a punitive kind, or whether they involve psychiatric treatment or social work.

The treatment approach is not free from flaw either. It must operate within the same ethical limits as are applied to the narrower deterrent approach; not only must the punishments imposed be limited in their severity, but certain kinds of psychological techniques of a "brain-washing"[19] variety are also not to be tolerated. Some recent work by experimental psychologists which suggest that criminals might be treated and trained into good behaviour by a process of mechanical conditioning, in much the same way as Pavlov conditioned his dogs to salivate at the sound of a bell as if it were food, seems to fall short, in this way, of what is due to human beings in the way of decent treatment.

It is increasingly recognised that the prevention and control of crime should be achieved with minimum interference in the liberty of the subject. Courts are obliged to ensure that the sanctions they impose should bear some relationship to the crime and that no penal deterrent or correctional measure involves a greater deprivation than the

> "On examination, the deterrent effects of punishment on the offender himself appear to be less sure than the doctrine assumes. The high degree of recidivism among Canadian offenders is in point. The magistrate experiences day after day the return of familiar names and men who have done their time in prison and are again before him in a new charge. . . . Of prisoners in Canadian penitentiaries, four-fifths have served at least one previous sentence in a penal institution; . . . Many have served repeated terms. . . . This obvious failure of deterrence on the offender himself must be recognised by the law. The constantly repeated fact of recidivism negates much of the legal theory of the effect of punishment in deterrence. Yet the doctrine continues without being seriously challenged on its validity." (Jaffary, *Sentencing of Adults in Canada* (University of Toronto Press, Toronto, 1963), at pp. 17-18).

19. Morris and Howard warn that:

> "from an unfettered desire to "reform" those of whose conduct we disapprove, the post-war developments in techniques of psychological coercion, "brainwashing" induced confessions, and (as yet only to a degree) psychological processes of inducing protracted or permanent change in the individual's personality structure and system of beliefs should be remembered. . . . William Sargent's *Battle for the Mind* has brought those processes to popular attention and their psychological effect in coming to be more clearly appreciated.
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> Those psychological techniques do not stand alone. No prescience is required to predict the possibility of their being allied with surgical and chemical methods of inducing change in human personality in order to enforce conformity within a social group. . . . Already men are being led in many parts of the world to use such methods on their fellow men, but not for subjecting wicked purposes, but rather, and this is the point, for purposes, which they firmly and deeply believe to be humane and benevolent. Unfettered benevolence is not merely a dark vision of an unlikely and distant future: it is already threatening basic values of human dignity and liberty." (*Studies in Criminal Law* (1964), at p. 163 ff).

offence itself warrants. Professor Morris in sketching the dangers of the abuse of human rights from assumptions of power for rehabilitation purposes offered the following guidelines:

> Power over a criminal's life should not be taken in excess of that which would be taken were his reforms not considered as one of our purposes. The maximum of his punishment should never be greater than that which would be justified by the other aims of our criminal law and justice. Under the power ceiling of that sentence, we should utilize our reformative skills to assist him towards social adjustment; but we should never seek to justify an extension of power over him on the ground that we may thus more likely affect his reform.[20]

The greatest danger to making rehabilitation as the primary justification of punishment is that it may be accompanied by attitudes and measures that conflict, sometimes seriously, with the values of individual liberty and volition. The administration of the criminal law presents to any community the most extreme issues of the proper relations of the individual citizen to state power.[21]

In this context, it may be asked: under what circumstances is the state, through its rehabilitative theory, justified in bringing its force to bear on the individual human being? In the realms of rehabilitation, the obligation of containing power within the limits of individual liberty is complicated in that the problem is one of regulating the exercise of power by men of goodwill whose motivations are to help not to injure and whose ambitions are quite different from those of the political adventurer. There is a tendency for such persons to claim immunity from the usual forms of restraint and to insist that their devotion to treatment of convicted offenders provides sufficient protection against unwarranted invasion of individual rights. To this proposition Garofalo asserted that, "The mere deprivation of liberty, however benign the administration of the place of confinement is undeniably punishment."[22] Rephrased, this would mean that measures which subject individuals to the substantial and involuntary deprivation of their liberty contain an inescapable punitive element. This reality is not altered even if the motivation that prompts incarceration is to provide therapy or otherwise contribute to the person's well-being or reform.[23] As such,

20. Morris, "Impediments to Penal Reform", (1966) 33 U. of Chi L.R., at p. 627.

21. These issues, of course, are not confined to the criminal law, but it is in the area of penal regulation that they are most dramatically manifested. The history of the twentieth century abundantly reveals that criminal law is located somewhere near the centre of the political problem. As such, it is no accident that the agencies of criminal justice and law enforcement are those first seized by an emerging totalitarian regime. This development in the case of Germany may be gleaned from Crankshaw, *Gestapo* (1956). In short, a study of criminal justice is fundamentally a study in the exercise of political power. No such study can properly avoid the problem of the abuse of power.

22. Garofalo, *Criminology* (Millar transl. 1914), at pp. 241-242.

23. However benevolent the purpose of reform, however better off we expect its object to be, there is no blinking the fact that what we do to the offender in the name of reform is being done to him by compulsion and for our sake, not for his. Even though rehabilitation may be the most humane goal of punishment, but it is a goal of punishment so long as its invocation depends upon finding that an offence has been committed and so long as its object is to prevent the commission of offences. (Cf. Packer, *op. cit.*, at pp. 53-58).

these measures must be closely scrutinised to insure that power is being applied consistently with those values of the community that justify interference with liberty for only the most clear and compelling reasons.

This necessity to prescribe a limit to rehabilitation as an ideal is underlined by the fact that the values of individual liberty may be imperiled by claims to knowledge and therapeutic techniques that we, in fact, do not possess and by our failure to concede candidly what we do not know. This has led Packer to state that, "One trouble with the rehabilitative ideal is that it makes the criminal law the vehicle for tasks that are far beyond its competence."[24] Perhaps very simply we do not know how to rehabilitate offenders, at least within the limits of the resources that we now have or might reasonably be expected to be devoted to the task. The more we learn about the roots of crime, the more evident it is that they are non-specific. Therefore, to create on an extensive basis or scale the essentials of a society that produced no crime would be to remake society itself. Rehabilitation after the fact, which is all we can realistically propose, suffers from a lack of appropriate means. The measures that we can take in the name of rehabilitation are so dubiously connected with the goal that it is difficult to justify their employment in the first instance. There is indeed very little reason to suppose that there is a general relationship between these measures taken and the prevention of future criminal behaviour. We know little about who are likely to commit crimes and much less about what makes them apt to do so. So long as our ignorance in these matters persists, punishment in the name of rehabilitation is nothing more than mere gratuitous cruelty.

And yet, such errors have supplied the assumptions on which legislators have proceeded. An illustration of these dangers is provided by the sexual psychopath laws for they epitomise admirably some of the worst tendencies of modern practice. Doubts almost as serious can be raised as to a whole range of other measures. The laws providing for "civil commitment" of persons, except for the reduced protections afforded the parties proceeded against, are essentially criminal in nature; they provide for absolutely indeterminate periods of confinement and are illustrative of the danger as discussed heretofore. Indeed, does our knowledge of human behaviour really justify the extension of these measures to provide for the indefinite commitment of persons otherwise afflicted? In practice, the rehabilitative ideal has often led to increased severity of penal measures. This tendency may be seen in the operation of the juvenile court. The juvenile court is authorised to intervene punitively in many situations in which the conduct, were it committed by an adult, would be wholly ignored by the law or would subject the adult to the mildest of sanctions. The tendency of proposals for wholly indeterminate sentences, a clearly identifiable fruit of the rehabilitative ideal, is unmistakably in the direction of lengthened periods of imprisonment.[25] It would appear then that the rehabilitative ideal tends to serve purposes that are essentially incapacitative rather than therapeutic in character.[26]

24. *Ibid.,* at p. 55.

25. Cf. Tappan, "Sentencing under the Model Penal Code", (1958) 23 Law & Contemporary Problems, at pp. 528, 530.

26. Cf. Sellin, The Protective Code: A Swedish Proposal (New York: John Wiley, 1957), at p. 9.

Given the lack of any solid empirical basis for supposing that we know how to reform, given the fact that measures of reform may entail just as severe restrictions on personal liberty as measures employed for deterrent or even retributive ends, the extent to which the foundations of our moral and social order are likely to be threatened by the adoption of a treatment approach is an open question.[27] If the reformative motive remains strong in our treatment policy, then there is here a powerful lever and moral impulse at work, implying that it is the purpose of a penal system to help people to improve themselves. The emphasis is upon the achievement of certain desirable forms of behaviour with the positive assistance of society — indeed, many will feel that this is an advance over the negative approach of retributive justice. This being the case, the values of our society will surely be stressed more powerfully by giving expression to this rehabilitative ideal in our penal system.

Reformatory "punishment" so conceived (and within limits) is a realistic claim of punishment. Granted that a pure rehabilitative theory of punishment not supplemented by other considerations, for instance, justice is inadequate and open to question,[28] yet, it does have a sound basis of principle. At least, the rehabilitative theory challenges lawmakers, judges and correctional authorities alike to analyse the complex of impulses which leads to criminal behaviour. And, it suggests that punishment should be inflicted, if at all, not to satisfy a natural impulse only,[29] but on reasoned plan, in the spirit of the surgeon who inflicts the minimum pain or damage to some part of the human body which he is required to remove to avert some greater mischief. In sum, therefore, that the concept of rehabilitation should play a definite role in the legislative formulation of a sentencing philosophy cannot be denied.

But even a treatment approach may not be comprehensive enough unless we are prepared to extend its meaning. It is used, as a rule, to refer to the treatment of individual offenders, but some part of our crime problem, perhaps numerically the greater part, springs from forces at work in society at large. Probably our treatment efforts may have to be directed not only towards individual offenders but towards communities and maybe towards certain aspects of our society which give rise to conflicts, or leave certain groups within disinherited and resentful.

27. Even novelists have perceived the threat of "reformatory treatment" — Aldous Huxley in *Brave New World;* George Orwell in *1984;* David Karp in *One*, all sketch a conforming, regimented and painfully benevolent world in which the criminal law, usually under another name, is used as an instrument of tyrannical coercion in the guise of reformatory treatment. Cf. Anthony Burgess, *A Clockwork Orange*.

28. Francis Allen suggests that, "No idea is more pervaded with ambiguity than the notion of reform or rehabilitation. [Even] assuming, for example, that we have the techniques to accomplish our ends of rehabilitation, are we striving to produce in the convicted offender something called "adjustment" to his social environment or is our objective something different from or more than this ? By what scale of values do we determine the ends of therapy?" "Legal Values and the Rehabilitative Ideal" in *The Borderland of Criminal Justice* (1964), at p. 26.

29. In defence of the rehabilitative theory Barbara Wootton writes, "The legal process for determining who has in fact committed certain actions would continue as at present; but once the facts had been established the only question to be asked about delinquent persons would be: what is the most hopeful way of preventing such behaviour in future?" (Wootton, *Social Science and Social Pathology*, London: George Allen and Unwin, 1955, at p. 251).

We have, above all, to beware of any treatment approach which sees the reduction of the amount of criminal behaviour as the only objective. To treat or deter "minority" groups within our society so that they no longer break the law, without first being clear that the fault does not lie in the law itself, may merely be to perpetuate a form of "cultural despotism" which the rising crime rates had begun to threaten. This leads us to consider another popular objective of punishment — that of protecting society. This is an element that is present in all phases of punishment. If the offender is imprisoned he is removed from society at least temporarily, and the community is protected. Even if he is subjected to a programme of rehabilitation by probation or otherwise, the ultimate aim is to protect society by making the offender a responsible member of his society, thereby preventing his causing further harm to that society. Sometimes this purpose is so emphasised that it is more clearly recognisable as being a separate end which a sentence is designed to meet.[30]

Indeed, most liberal-minded penologists today claim that the aim of punishment is the protection of society. This point of view may be said to be a by-product of cultural change in general, but it is apparently conditioned to a considerable degree by the growth in recent decades of psychological, psychiatric and sociological knowledge about the offender. Those who subscribe to it are likely to think in terms of the means by which protection is to be achieved — research into the causation of crime in order to make possible the effective removal of criminogenic factors, the rehabilitation or segregation — perhaps even the extermination of offenders after a scientific appraisal of the changes of their reintegration into social life as useful members of the community. The end result — social protection — is often looked upon as an aim, different in kind from revenge or retribution said to be characteristic of punishment in earlier days.

It is impossible to place "protection of society" and "revenge or retribution" into juxtaposition. Every social group, every organised political society, imposes punishment upon those who violate its rules. These rules have developed because the society in question has created or adopted social values by which it sets some store and which it wants to defend against aggression. Such values come to be regarded as essential properties necessary for social survival or stability and any threat against them or any violation of the rules which guard them is looked upon as an injury to be prevented by punishment, the actual infliction of which becomes not merely evidence of the group's insistence on obedience but constitutes a defence reaction on the part of the group against violators. In other words, the protection of society is the aim of all punishment no matter what form it may take.

We may go one step further. The social values which are given the protection of the law, the rules which are enforced by the political

30. For example, in *R.* v. *Barrett* (1S24) 26 O.W.N. 346, the defendant was sentenced to one year's imprisonment for keeping a bawdy house. The court of review reduced the sentence to one month on condition that the defendant leave the community immediately she was released. This latter aspect of the sentence was clearly intended to protect the particular society. Similarly, the preventive detention provisions of the Canadian Criminal Code (ss. 659-667) relating to habitual criminals and sexual psychopaths clearly utilise this principle.

power of the state because they are embodied in the criminal code are those which are deemed desirable by those social groups within the state who have the power to make the law. Jeffrey asks: where does crime exists, if not in the legal codes?[31] Fundamentally then, the aim of all punishment is the protection of those social values which the dominant social group of a state regards as good for "society". Indeed, if there were a "common good" in society to which laws achieved a rough and ready approximation, no problems would arise. One could then assume that offenders are deviant either through moral fault or as a result of some pathological process through which they had been subjected. But if the evidence suggests that such generally acceptable values do not exist, justification of punishment in terms of protection of "society" becomes more difficult.

There is now a substantial body of theory which suggests that criminality is not, in fact, a breach of generally accepted norms, but the evidence of a clash between the value systems and aspirations of different sub-groups within the community. Because one of those groups is dominant and can have its way of life enforced through the law, the others can realise their aims only outside it in the form of delinquency.[32]

This social-conflict theory of delinquency is expressed thus by Vold:

> As political groups line up against one another, they seek the assistance of the organised state to help them defend their "rights" and protect their interests.[33]

On this view much crime is the result of the legislative process. Criminal behaviour is seen as caused, not by peculiarities in the individual offender, but because behaviour which the groups they belong to look upon as being otherwise normal and reasonable is prohibited by a code of law which exists to serve the interests of another socially more powerful group. If this view has any substance, what bearing does it have on the justification for the punishment of offenders in terms of protection of society? In such circumstances, whether there is an absolute standard of behaviour or not may be of importance for our attempt to build the "good of society" but it cannot be used to justify punishing the adherents of an admittedly imperfect way of life because they reject another equally imperfect. When we speak of punishment as protecting society we often refer in this context to the "interests of the community as a whole," but if there is no community as a whole, our endeavours begin to look more like "brain-washing" in the interests of some sectional group.

Even if we can satisfy ourselves about the validity of the social objective of punishment, i.e. the protection of society, our right to interfere in the lives of other members of society can obviously only be

31. Clarence R. Jeffrey, "The Structure of American Criminological Thinking", (1956) 46 Jn. of Cim. L. & Criminology, at p. 670.

32. See generally, Merton, *Social Theory and Social Structure* (Glencoe, Ill. Free Press, 1949).

33. Vold, George B. *Theoretical Criminology* (New York, Oxford University Press, 1958), at p. 208.

justified in that it will be in the "common good" and interest to do so; such a right evaporates if it can be shown that no such "common good" or interest exists (a case already examined) or that, though it does exist, we cannot achieve it. As Mannheim says, "the protection of society self-evident as it is for every law-abiding member of a well-ordered society — if too loudly proclaimed as the ultimate end of punishment — may provoke the lawmaker's retort: Why this particular society?"[34] At best, punishment is a mechanical and dangerous means of protection. It can hardly be made equitable.

Summary

Indeed, no one theory explains the different punitive measures in our criminal law system. Protection, reformation, deterrence, retribution — all these mingle in wild semantic and dialectic confusion in most discussions of the purposes of punishment. It may be that the Freudians are right that our rationalisations for punishment conceal deep needs for vengeance and for the reinforcement of the group superego by the suffering inflicted on the law-breaker; but certainly, within these rationalisations, deterrence and reformation hold primacy of place. Both these are seen as means to the ends of increasing and preserving the welfare of society; to many, they are also seen as conflicting and competing means. Given this, it is hardly surprising that there is inevitable uncertainty and confusion among individual judges in their application of these theories to sentencing problems, with the result of an apparent disparity in sentencing practice.

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34. Mannheim, *Dilemna of Penal Reform* (London: George Allen and Unwin, 1939), at pp. 20-21.

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