A PHILOSOPHY OF A PENAL CODE *

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> Whatever views one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. *Its promise as an instrument of safety is matched only by its power to destroy.* If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual.[1]

The title initially suggested for this discussion paper was "The Underlying Philosophy of a Penal Code." The use of the definitive article "the" would seem to suggest that there is only one penal philosophy or that properly there should be only one. This, however, would not be entirely accurate. For it cannot be gainsaid that legal philosophy, of which penal philosophy forms a part, is reflective of the type of society wherein it operates. Certainly, the philosophy operative in a democratic, individualistic or pluralistic society is much different from that obtaining in a collectivist or socialist society.[2] In one type where man is regarded as the end of and justification for society, law is regarded as a means of providing the legal framework for the solution of the "basic problems of social living."[3] In the other, where society is the end, it is regarded as an "instrument of social control" to further the ends of society itself.

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[1] Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

[2] For a survey of the various theories on the role of law in society, see: LLOYD, THE IDEA OF LAW (1970), particularly, Chapter 9 on "Law and Society".

[3] A popular course offered at the Harvard Law School, entitled Legal Process, gives perceptive insights into how law is made, not only by the Legislature as enacter, the Judiciary as interpreter, and the Executive as executor, but even by private lawyers when the draft contracts in the area of "private ordering". See, the materials used in the course, Hart & Sacks, *The Legal Process: Basic Problems in the Making and Application of Law.* (Handout)

As a matter of fact, it has been aptly said that the definition of crimes in a penal code and the way in which criminal justice is administered, are what make most apparent the differences between a police state and a democracy.[4] The same author puts the matter forcefully, thus: "Crime control is not peripheral to democracy; it is a vital part of it, putting to test basic values and challenging the ingenuity of a free people".

As thus used in the suggested title, "philosophy" seems to have been used to convey the meaning of a general guiding principle to action or a statement of objective. Again, this may be misleading. For as many scholars point out,[5] criminal law, of all the major branches of the law, is the most "notoriously afflicted" by strong disputes as to what it seeks to accomplish. Retribution, removal from society and deterrence of potential criminals, on the one hand, are often at cross-purposes with the objective of reformation and rehabilitation, on the other.

It is in light of the foregoing observations that the author decided to modify the suggested title to its present "A Philosophy of a Penal Code." As here used, the meaning intended to be conveyed by the word "philosophy" is the enterprise of subjecting to critical examination the various views and concepts of criminal law in order to discover whether they are based upon adequate evidence and are worthwhile adhering to.[6] I once asked a reputable physician whether it was safe to simply inhale the pure oxygen directly from the tank without having to pass it through a bottle of water as required by standard practice. Hesitantly, he admitted, to my surprise, that he did not know the answer to my question nor the reason for such practice. Like many, if not most people, practice, whether in medicine, in law, or in some other field, is accepted without much question. And this is particularly true where such practice has been given the respectability of long-standing acceptance.

It is the complacency arising from such unthinking and unquestioning acceptance that is sought to be shaken. This article then is intended to arouse a sharper interest in and provoke discussion about the various issues, matters, and assumptions that are here explored with a view to developing suggestions that hopefully may result in some improvement of our criminal law.

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[4] REMINGTON, CRIMINAL LAW, Chapter 1, "Perspective of Criminal Justice Administration" 3.

[5] FULLER, ANATOMY OF THE LAW 46 (1969).

[6] POPKIN & STROLL, PHILOSOPHY MADE SIMPLE 14 (1956).

Controlling human conduct

Law, religion, and morality converge upon one point of common or shared concern, to wit, the control and channeling of human conduct and behavior away from destructive expression and into desirable ends. These institutions also utilize the same technique to achieve this joint objective, which in modern times was popularized by behavioral scientists[7] as that of "human conditioning" by a system of rewards and punishments.

In religion, the act proscribed is labelled as "sin". Criminal law calls it a crime, an offense, a violation or an infraction. An "immorality" is the term used by the moral code.

Religious sanction is the threat of hell in the afterlife. Social disapproval and the pangs of conscience and remorse are the penalties for the commission of immoralities. Criminal law penalties have evolved and gradually moved away from the early imposition of corporal punishment[8] to the present deprivation or restriction of liberty and the payment of fine.

Religious incentive to the avoidance of sin and the pursuit of a virtuous life is the reward of "heaven". The religious view holds that the world is governed by a just God who rewards the good and punishes the wicked. More importantly, toward tracing the origins of criminal law, the religious view would take away from the offended party the right to wreak vengeance against the sinner. For God, through Moses, warned his people; "To (ME) belongeth vengeance and recompense."[9]

As the State evolved and governments became stronger, the wasteful, interminable, and internecine strife arising from uncontrolled feuds and vendettas seeking to avenge a personal wrong, had to be firmly dealt with.[10] As in religion, the solution was for

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[7] Ivan Petrovich Pavlov, Russian Physiologist, is the first of the behavioral scientists that comes to mind with his famous experiment of inducing, through associative conditioning, a dog to salivate upon hearing a bell ring.

More recently, a controversial book by Harvard Professor of Psychology, B. F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971) advocates a "technology of behavior as a systematic and scientific program to alter the nature of Man."

[8] In only one State, Delaware, has corporal punishment survived. DEL. CODE ANN., Tit. 11, Sec. 3908 (1953) provides: "The punishment of whipping shall be inflicted publicly by strokes on the bare back well laid on."

Although the movement has generally been away from corporal punishment, the upsurge in crime has given rise to some clamor for a return to physical punishment. Thus, BULLETIN TODAY, issue of April 9, 1978, reports that "public caning for illicit intercourse" is being seriously considered "as a deterrent to sexual offenses" in Malaysia's Kedah state on the Thai border.

[9] THE HOLY BIBLE, The Fifth Book of Moses, called *Deuteronomy* Chapter 32, verse 35, (King James Version, American Bible Society) 211-212.

[10] See in this connection, Chapter 1, "Is Law Necessary?", *op. cit.*, note 1; see also, *op. cit.*, note 5, at p. 47.

the State to pre-empt man's natural instinct for revenge. The State took over the right to impose punishment for what has theretofore been regarded as private injury and accordingly prohibited resort to violent self-help by private individuals. The "consent of the governed" to this pre-emption by the State of the individual's natural right to punish the one who has done him wrong, may be inferred from his acquiescence, without protest, to this arrangement.[11] It may be argued therefore, that such consent is withdrawn when the victim, disagreeing with the State's treatment of the offender, takes the law into his own hands. A kind of "official monopoly of sanctions" thus ensued which marked, in the view of an eminent legal philosopher, a transition from the pre-legal to the legal system of modern times.[12]

A widely quoted remark made by Sir James Fitzjames Stephen is that "the criminal law bears to the instinct of revenge the same relation that the institution of marriage bears to the sexual instinct. Both regularize and control a deep impulse of human nature that if not given legitimate expression is bound to find disruptive outlets."[13]

Unlike religion, however, which offers a heavenly reward for a virtuous life, it is impracticable if not impossible for any legal system to offer a material reward for each legal compliance. Such reward can only be given indirectly. Punishment of the criminal is a reward to the law abiding. Stated otherwise, punishment is but the obverse side of reward. As aptly observed by Professor Fuller, "in many contexts, punishment and reward will appear as opposite sides of the same coin."[14]

To illustrate this point; a motorist who stops on a red traffic light feels naturally outraged and indignant at a driver who brazenly disregards this symbol of law and order to cross the intersection. If the offender, however, is arrested for this traffic infraction, the law abiding motorist feels elated. In the scales of justice, this constitutes the balancing reward for compliance with the rule that has entailed some sacrifice of personal convenience.

Legal guides to conduct

In any game, say, basketball, there are rules that prohibit the commission of "fouls", as well as rules that govern how a player may make a "score" that will be officially counted. By analogy, the

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11 KADISH & PAULSEN, CRIMINAL LAW AND ITS PROCESSES 28-29 (1969).
12 H. L. A. HART, THE CONCEPT OF LAW 91 (1961).
13 Quoted in FULLER, *op. cit.*, note 5, p. 47.
14 *Ibid.*, p. 51.

latter is the subject of civil law. This field provides the framework or facility for creating binding legal relations. In order to "score" legally, for example, the formal requirements relating to the execution of wills, such as three attesting witnesses, notarization and other requisites,[15] must be complied with before the will of a decedent may pass his estate to his testamentary heirs.[16] On the other hand, "pushing" and "elbowing", among others, are basketball "fouls" that are appropriately penalized. Again, by analogy, this is the proper subject of criminal law, some main objectives of which are "to proscribe conduct which unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests", as well as to "define the act or omission and the accompanying mental state which constitute each offense."[17]

It has been aptly observed that, "of all branches of law, the criminal law is most obviously and directly concerned with shaping and controlling human conduct."[18] As in the rules of any game, legal rules, including the penal law, operate most effectively if they are widely disseminated to the people whose conduct they are expected to regulate, are further clear and unambiguous, and operate prospectively. In the words of the New York Penal Code, a general purpose of criminal codes is "to give fair warning of the nature of the conduct proscribed and of the sentences authorized upon conviction."[19]

The legal fiction that "ignorance of the law excuses no one" in part rests on the theory of representative democracy that the elected representatives of the people to the legislature must report to their principal all statutes by them enacted. Since this theoretical base is markedly absent in a martial law situation where the legislature does not function, an interesting question that may arise is whether such ignorance of the law, could be considered a valid defense to its violation during martial law. Whatever the answer, the indisputable fact remains that the people can make their conduct conform more readily to rules they actually know and not merely presumed to have knowledge of.

In practical operation, any legal system must depend on voluntary self-application of its rules. This must necessarily be so because there are not enough law enforcement personnel[20] to compel

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[15] CIVIL CODE, art. 805 *et seq.*

[16] RULES OF COURT, Rule 75, sec. 1.

[17] N.Y. (State) Penal Law, Part One, Title A, Section 1.05 (5) effective 1 September, 1967.

[18] FULLER, THE MORALITY OF LAW 59 (Rev. Ed., 1971).

[19] *Op. cit.*, note 16, art. 1.05 (2).

[20] The ratio prescribed by Section 25, Rules and Regulations Governing the Integrated National Police, Vol. I, promulgated pursuant to Sec. 12, P.D.

obedience to every law. And even if there were, such a massive deployment of police officers would be offensive and intolerable in a free society.

Laws cannot serve as guides to lawful conduct unless they operate prospectively, i.e., upon acts still to be performed. It is upon this principle that *ex post facto* laws and bills of attainder are constitutionally prohibited.[21] To guide conduct that had already been performed is an absurd proposition. To punish such conduct which was lawful when done is a "brutal absurdity."[22]

Punishment is a negative form of guiding conduct. It teaches only after a violation has been committed. A penal code, however, can and should offer a more positive direction to guide action than by mere indirection. One significant area in which this may be done is in the proper use of "deadly physical force" in various situations. For example, may a police officer use deadly physical force to prevent the escape of a fleeing suspect regardless of the nature or gravity of the offense for which the arrest is sought to be made? Or, may a private individual resist with the use of physical force an unlawful arrest being made by a police officer? Is there a general duty to retract in order to avoid the necessity of employing deadly physical force upon another? These are matters explicitly provided for with clear guidelines by the New York Penal Code,[23] which could well be adopted in the proposed revision of our own penal code.

Laws that are not couched in clear and generally understandable language do a disservice to this function of providing guides to lawful conduct. And statutes, particularly penal laws, that violate this requirement of clarity, have been struck down for being "unconstitutionally vague." As so well stated by Justice Douglas in a leading case:[24]

> The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. *Words which are vague and fluid may be as much of a trap for the innocent as the ancient laws of Caligula.* We cannot

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No. 765, is one policeman for every 750 people in towns or cities having a population of less than 100,000 inhabitants. In reality, at least in one town studied, "police urban population ratio stands at 1 is to slightly more than 1,000 of the greater poblacion area. Police presence is not even felt by and much less is police protection extended to the more than 50% residents of the rural sector..." See, Tadiar, *The Quality of Justice Administered by the Criminal Justice System of a Provincial Capital Town*, a research paper submitted to the UP Law Center.

[21] CONST., Art. IV, sec. 12.

[22] *Op. cit.*, note 18.

[23] Arts. 35.15, 35.20, 35.27, & 35.30.

[24] U.S. v. Cardiff, 344 U.S. 174, 73 S.Ct. 189, 97 L.Ed. 200 (1952).

(find defendant guilty as) *that would be making an act criminal without fair and effective notice.*

A serious objection based on this ground may validly be made against Guevarra's proposed Code of Crimes. To cite one example. Article 105 provides that a person may be declared *"socially dangerous* when he shows a certain *morbid predisposition* that favors the inclination to commit a crime." Unlike the "normal crime" as, for example, a wilful killing (homicide or murder), there is no objective act or omission which justifies the forcible intervention by the State in the life of the defendant. There is no statutory definition of the phrase "morbid predisposition". How such predisposition manifests itself or may be perceived-whether by act, conduct, behavior, facial expression, or manual gesture — is not made known to the decision maker. There are no guidelines at all-much less clear ones-in the making of the decision to make an arrest or to commit the "socially dangerous person."

Ultimately, the legal decision would then have to rest, in the foregoing situation, upon the diagnosis of a physician. Aside from the problem posed by the paucity[25] of psychiatrists, psycho-analists, and even psychologists in this country, behavioral science has not yet sufficiently developed to the degree that its practitioners are agreed upon reliable indicators of criminal predisposition.

A significant lesson could be learned from an analogous experience in the field of juvenile delinquency. A psychiatric list was drawn up of personal characteristics and behavior patterns of children which may be regarded as indicators of pre-delinquency and the need for professional help. The list included such innocuous acts as day-dreaming, nail-biting, thumb-sucking, hitching rides, showing off, silliness and teasing. The inconsistency of standards and the absolute unreliablity of such indicators, were clearly shown by the fact that the list includes both bashfulness and boisterousness, both bullying and crying, both over-activity and under-activity, and both defiance and timidity.[26] A clear case of being "damned if you do and damned if you don't". The poor child has absolutely no chance whatsoever! Whatever signs he shows, he could still be adjudged a juvenile predelinquent. In much the same way, because of vagueness and imprecision of definition, a per-

[25] Ratio of physician to population is one is to 3,000. For a discussion of this problem, see Tadiar, *Legitimating Change: The Expanded Role of the Filipino Professional Paramedical In The Delivery of Family Planning Services*, 51 PHIL. L.J. 428 (1976).

[26] SCHUR, OUR CRIMINAL SOCIETY: THE SOCIAL AND LEGAL SOURCES OF CRIME IN AMERICA. See particularly, Chapter 2 on "Questionable Crime Theories."

fectly harmless person faces the real danger of being committed as "socially dangerous".

While it is true that the Guevarra Code of Crimes[27] has not been enacted into law and, therefore, the danger above pointed out may possibly never happen, it should serve as a warning against enacting such dangerous laws. In addition, the observation is applicable with equal validity to laws already in force. For example, "incorrigibility", "failure to behave properly", or "inadvisability of continued stay" in the training institution,[28] as grounds for revoking the suspension of sentence on a minor offender, have been in our lawbooks since January 1, 1932 when the Revised Penal Code became effective. These terms have never been defined with precision. Still, they have been carried over to the Child and Youth Welfare Code, as amended,[29] without any attempt to cure the defect. As matters stand, therefore, such vague and imprecise grounds could conceivably be utilized by incompetent custodial or training officers to hide their own inadequacy and incapability to rehabilitate or instill discipline in their wards.

The same law further prescribes substantial penalties of fine and/or imprisonment upon parents, guardians or other persons "who, knowingly or willfully:

(1) aids, causes, abets or connives with the commission by a child of *a delinquency,* or

(2) does any act producing, promoting, or contributing to a child's being or becoming a *juvenile delinquent.*"[30]

What act or omission is considered "a delinquency", or who is a "juvenile delinquent" has glaringly been omitted. It is not known, from a reading of said law, whether it is necessary, in order for the parent or guardian to be charged or convicted under the above provision, that the child or ward be previously adjudicated to have committed the delinquent act or be judicially or at least, officially, declared a "juvenile delinquent". The possibility is real enough that a parent or guardian could be convicted and penalized for a delinquent act or the "status"[31] of delinquency for which honest disagreement may exist in view of such lacunae. In this case, the legal

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[27] THE PHIL. CODE OF CRIMES, U.P. Law Center Division of Research and Law Reform, 1977.

[28] REV. PENAL CODE, Art. 80.

[29] Pres. Decree No. 603 (1974), as amended by Pres. Decree Nos. 1179 (1977) & 1210 (1977).

[30] Article 204, *ibid.*, entitled "Liability of Parents, Guardians, or any Person in the Commission of *Delinquent Acts* by their Children or Wards."

[31] In Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed. 2d 758 (1962), the United States Supreme Court struck down a statute that penalized the "status or condition" of being a narcotics addict.

conclusion of delinquency must be left to the unguided subjective determination of each judge or decision maker. There will then be as many definitions as there are moral differences among them. The consistency of decisions that give rise to reliable prediction which, Justice Holmes called the life of the law,[32] will under these circumstances vanish. The Rule of Law by which arbitrariness in decision making is sought to be minimized, curbed or even eliminated will be tragically destroyed.

THE BASIC AIM OF CRIMINAL LAW

It is not unusual that in the legal scholar's preoccupation with the theoretical objectives of the penal law, the practical aim is often lost sight of. It is well therefore to continually bear foremost in mind that the primordial aim of criminal law is the prevention and control of crime so that men may live and feel secure "in the free enjoyment and development of their capacities for happiness".[33] It is a basic right of men in a free society "to be secure in their persons, houses, papers and effects"[34] not only against unreasonable searches and seizures of governmental authority but also against the ever real menace and threat of crime. As restated recently, it is the purpose of criminal law "To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interest of public protection."[35] As thus clarified, the penologic objectives are no more than instruments or the means for the attainment of societal safety and security.

Penologic Objectives

Let us now examine each of the different penologic objectives and try to see how some of them may be at cross purposes with the others, thereby often leading to a frustration of the attainment of the basic aim of criminal law.

Retributive Punishment

Easily the most widely known of all penologic objectives is that of retributive punishment. It is a universal postulate that revenge is a deep-seated human instinct. The desire to lash out and

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[32] Holmes, *The Path of the Law*, 10 HARV. L. REV. 457-478 (1897).

[33] SHARSWOOD, PROFESSIONAL ETHICS 22 (5th Ed.), quoted in Pound, "Administration of Punitive Justice", PROCEEDINGS OF THE AMERICAN POLITICAL ASSOCIATION, 4th Annual Meeting, December, 1907.

[34] CONST., Article IV:3.

[35] N.Y. PENAL LAW, Article 1:05 (5).

strike back at those who have hurt us, is a feeling that spontaneously arises. Further, religion has instilled even into the depths of the sub-conscious, the belief that punishment is the natural consequence of wrongdoing.

In the interest of public safety and order, however, violent expression of such instinct must be curbed. The religious tenet of divine retribution holding that it is God's prerogative to exact vengeance, provides such a rein. Further, the thought that the wronged person has the legal right to seek the assistance of the government in his object of punishing the wrong-doer, likewise curbs his destructive impulse to inflict the punishment himself. When the State thus took over and away from the offended party what he considers to be his natural right to punish the offender, he naturally assumed and continues to expect that the penalty to be imposed will have the character of a punishment. When the aggrieved victim feels that the justice he seeks is not forthcoming, either from divine retribution or from the formal judicial process, cases are certainly not unknown where he has turned for assistance to his relatives and friends. Even more drastically, such assistance has been sought from the underworld and subversive elements in the country.[36]

Just as it is instinctual to seek revenge, there seems likewise a common sense measure of what constitutes an appropriate punishment for the offense committed. This sense of "penalty-appropriateness" seems to alter with the forward march of civilization. Thus, in biblical times, public stoning to death of a son for what certainly seems now to be a minor offense of disobedience to parental commands,[37] was accepted without much protest. Today, however, it would be ludicrous to even suggest that the death penalty be imposed for theft no matter how large the amount of money that was taken.

This victim sense of penalty appropriateness, if violated, may result in the perpetration of what may be called "revenge-crimes". Thus, it is not uncommon, particularly in the violence-prone populace of, say, the Ilocos provinces, for victims and their families to waylay and beat up convicted offenders who have been released on parole too soon. In their perception, the parolee has not received a sufficient or commensurate punishment. If this observation is true of parolees, the question may well be asked whether such "revenge

[36] It is said that "death squads" notoriously known as the "monkees" and the "beetles" dispensed swift and brutal extra-judicial justice in Central Luzon during the height of Communist unrest in the 1960's.

[37] Various punishments for disobedience is detailed in the Bible. See 1 *Kings*, Chapter 13, verse 26.

crimes" may not likewise prove even more prevalent against probationers who have not been incarcerated at all.

This real life situation was fictionalized in the bestseller "The Godfather"[38] when the undertaker, whose daughter was molested by teen-agers, sought the assistance of the Mafioso to beat up the convicted youthful offenders who were placed on probation. May this not also result in an attenuated moral sense of the necessary connection between "crime and punishment"[39] that will result in an upsurge of crime?

The Probation Law[40] became effective only at the beginning of this year 1978 and therefore has been in force for only a few months. Only time will tell whether our people's instinct for revenge has sufficiently been curbed, or their sense of penalty appropriateness been sufficiently modified, to the point that they no longer will take the law into their own hands against a probationer. Our people must be made to realize that the restrictive conditions under which a probationer must live a supervised life, are a sufficient punishment for the crime committed by the particular offender. Failure to make this realization will mean a rejection by the people of the laudable concept of probation and that we are not ready for its benefits.

As thus above discussed, the punishment theory of criminal law is justified as taking the place of divine retribution and acting in place of the crime victims thereby "putting under public control the vengeance they might otherwise seek outside the forms of law".[41] The other justification "attributes to the criminal law the task of keeping alive a sense of guilt". Professor Fuller explains this function so well, thus:

> There is a fairly respectable view, especially espoused by certain psychoanalysts, that the public trial and condemnation of the criminal serves the symbolic function of reinforcing the public sense that there are certain acts that are fundamentally wrong, that must not be done. This view is perhaps most persuasive precisely in those cases where the crime in question does not stir instincts of personal revenge, for the reason that the harm done is to a general, rather than to an individual, interest. Here we may mention particular "white collar crimes" such as embezzlement, the sale of influence, and bribery. Under certain social conditions a gen-

[38] PUZO, THE GODFATHER (1969), see, the opening chapter of Book I.

[39] See an early classic on this subject, first published in Russia in 1866 — FYODOR DOSTOEVSKY, CRIME AND PUNISHMENT (1966).

[40] Pres. Decree No. 968, enacted 24 July 1976.

[41] *Op. cit.*, note 5, p. 50.

eral deterioration in the moral sense may occur which make these crimes seem almost innocent.

There are many situations in society where a man—a public official, say, or a corporate executive—must choose among competitors for the same advantage. The corporate purchasing agent, for example, must decide whether to place a profitable supply contract with Acme Manufacturing or Exatronics, Inc.; the public official must choose one among many contenders for appointment to office. In such situations—pervasive in a complex society—there is a natural tendency toward the development of a certain sense of reciprocity between those who seek advantages and those who control access to them. This reciprocity may start on a comparatively innocent level as a mere exchange of social amenities. But it has a strong tendency to creep toward more tangible forms of expression. What starts as an exchange of reciprocal esteem may gradually become an explicit trade of material advantages; what began as an expression of gratitude for past favours may shift its position in time by anticipating favours to come. When this anticipation reaches the explicitness of a bargain we are, of course, confronted with unambiguous bribery.

The usual pleas of the bribe-giver or taker is that he only followed the example he saw everywhere about him, that he only did directly and candidly what others were doing indirectly and hypocritically. In such a moral atmosphere, it may be argued, men need to have their sense of guilt restored; they must be brought to see that certain things are fundamentally wrong and that it makes no difference how much company the criminal has in his wrongdoing. For this purpose "a ritual act of expiation" may not be an inappropriate measure.[42]

Preventive or Restrictive Theory

Closely akin to the punishment theory is that of prevention or restriction. By confining the convicted offender in a penal institution or restricting his liberty to a penal farm or colony, he is physically removed from society and thereby prevented from committing any further offense during the period of his sentence.

The strategy of crime prevention is dictated by the theory of crime causation that is subscribed to. There are various such criminogenic theories but, in the main, they could be classified into two general types—the sociological school and the psychological.

The sociological approach holds that crime and delinquency are forms of behavior that are shaped by continuous social interaction and the subtle learning processes.[43] The criminal has a social outlook that is formed by the social and economic class to which he

[42] *Ibid.*

[43] For an excellent discussion of the social approach to the crime problem, see, Chapter 2, "Major Sociological Perspectives", *op cit.*, note 26.

belongs, the frustration of his rising expectations, delinquent gangs, subculture[44] and other environmental factors. Those adhering to this view, upon the assumption that poverty, urban congestion, and illiteracy, among others, are contributive if not causative factors of crime, have initiated well-known programs, such as, "war against poverty", "operation headstart", urban renewal, education reform, and similar other programs. How much crime have actually been prevented by this approach may be well-nigh impossible to empirically validate but its significant contributions to human dignity and uplift are strong enough reasons to continue such worthy endeavors.

The psychological approach[45] to the etiology of delinquency and crime is that the offender or juvenile is an emotionally disturbed or mentally sick person. People suffering from a disease are not to be punished but should be given expert curative treatment to relieve them from their malady. This view would concentrate on the basic instincts of hostility, aggression, and sexuality as they are affected by family and personality variables. The criminal act or conduct is seen merely as symptomatic of the underlying psychic disturbance. Efforts should therefore be directed at treating the disease that is causing the symptom. And this is where grave danger to civil liberties may arise. For proponents of this view are not content to wait until after the commission of a crime as the appropriate moment when they should intervene in the life of a person. Since the commission of a crime is merely one of the many indicators of a propensity to crime, it is argued that an earlier intervention is justified in order precisely to prevent the suspect from committing the crime he may likely do.

There are at least two flaws to this well-meaning intention. One, which was earlier pointed out, is that behavioral science has not developed to the degree that all its practitioners are agreed upon what constitutes a reliable index to crime-prone conduct. The second is that such a theory of prevention is based on the presently far from perfect art of predicting man's behavior in the unknown and distant future.

Predicting Crime and Preventive Detention

The relation between efforts to predict the commission of crimes and consequent confinement has not always been recognized, much less analyzed in legal reasoning. Thus, Justice Jackson characterized

[44] A collection of perspective articles on the "Development of Delinquent Behavior" may be found in JUVENILE DELINQUENCY. A BOOK OF READINGS 65-223, (Giallombardo ed., 1966).

[45] *Op. cit.*, note 26. See, also, COHEN, DEVIANCE AND CONTROL 41 (1966).

the concept of "imprisonment to protect society from predicted but unconsummated offenses" as being "so unprecedented".[46]

This characterization notwithstanding, such a connection seems to be the implicit assumption or basis for several provisions of the penal code. For example, the "additional penalty" authorized to be imposed upon habitual delinquents[47] is not truly a punitive penalty. The offender has already "paid" and been punished for the crimes that he had committed. In reality, the additional confinement is in the nature of a preventive detention to avert the commission of a predicted offense. As well articulated in one case:[48]

> ...the balance of a term of (imprisonment) beyond that part which is purely punitive is not imposed by way of punishment of the offender at all; it is imposed for the protection of the public against the depredations of the man *who has demonstrated by his record* that he cannot be trusted with his liberty without losing it. Whether he cannot help committing crime or does not want to stop committing crime, the public needs protection.

Although not so articulated, the reference in said case to "demonstration by record" is in fact a prediction upon that basis that the convict will continue to commit offenses in the future, either voluntarily or because "he cannot help himself." Similarly, the habitual delinquent's third conviction of the enumerated offenses of physical injuries, robo, hurto, estafa or falsification is taken as an indication that he has acquired a criminal "habit" and, therefore, it is safe to predict that he will continue his "habit of crime" or "habitual delinquency". The protection of society from such criminal propensity is accordingly the basis or, justification for the "additional penalty" by way of preventive detention.

Vagrancy laws[49] illustrate even more clearly the connection between crime prediction and preventive detention. A person who is "loitering about", or "who neglects to apply himself to some lawful calling" or "who habitually associate with prostitutes", cannot by any stretch of the imagination be said to have committed a crime for which he should be punished. And yet the law authorizes his imprisonment for up to 30 days, extendible "in case of recidivism" for up to 2 years and 4 months.[50] The conclusion is inescapable that the conduct engaged in by the defendant is taken by the law as an indicator for a prediction that he is likely or is about to commit an

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[46] Williamson v. U.S., 184 F. 2d 280 (1950).
[47] REV. PENAL CODE, Art. 62(5).
[48] R. v. Higginbotham, 3 All. E. R. 617 (1961).
[49] REV. PENAL CODE, Art. 202, (1), (2) (3) and (4).
[50] *Prision correccional*, medium period, last paragraph, *ibid.*

offense, to avert which a preventive detention is justified in the interest of public protection. As a matter of fact, this author has personal knowledge of an instance where the vagrancy provision was frankly admitted to have been utilized for preventive detention purposes. During one election, the police picked up 2 strangers suspected of an attempt to "liquidate" a mayoral candidate. There being no evidence to substantiate such suspicion, the two men were charged for vagrancy. Confidentially informed of the suspected plot, the judge meted out a sentence of imprisonment for a period that thwarted the possibility of its commission during the election.

During the last World War, America practiced a form of preventive detention by the confinement in wartime concentration camps of vast numbers of *"Nisei"* or first generation Americans of Japanese descent.[51] The justification was based upon a prediction that *Niseis*, from a consideration of racial and socio-economic factors, were likely to commit acts of disloyalty such as espionage and sabotage. It is a sad commentary, however, that the accuracy of the predictive method utilized for that purpose, was not more carefully scrutinized. For the deplorable result was a vast over-reaching of citizens whose loyalty was thereafter unquestionably demonstrated.

Even with recognition of the connection between crime prediction and preventive detention, however, there was nonetheless no attempt to correlate the duration of confinement with the gravity or seriousness of the predicted crime sought to be prevented thereby. As a matter of fact, the nature of the predicted harmful act itself is hardly articulated. Thus, what kind of crime is sought to be prevented by the confinement of the habitual delinquent or the vagrant, is not at all clear.

Further, the prediction must not be only on the commission of *some* crime in the indefinite future but must relate to a prediction of commission of a *particular* crime or class of crimes within a definite time frame during which preventive detention is authorized. A prediction of death at a future time is actually no prediction at all, for death must inevitably come for all men. Such a time limitation of prediction is required if preventive detention is not to become offensively indefinite or last for a lifetime.

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[51] For an instructive history of the evacuation of Japanese residents and American citizens of Japanese Ancestry from the Pacific coastal regions of the United States, following the Japanese attack on Pearl Harbor, see, Hirabayashi v. U.S., 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943); *Ex parte Endo*, 323 U.S. 283, 65 S.Ct. 208, 89 L.Ed. 243 (1946).

Difficulty of accurate prediction

It is a postulate that each human being is a unique creature that is incapable of exact replication.[52] The personality of each individual is the distinctive result of a complex interaction between his heredity and environment. His behavior or conduct is likewise the product of an interplay between such unique personality and an ever-changing stimulus to which he responds.

In general, two methods may be utilized to predict man's future conduct, namely, the "clinical or case-study" method and the "statistical or actuarial"[53] mode. The first requires not only a thorough knowledge of an individual's personality but also an accurate knowledge of stimuli that he will respond to. The prediction is based on predictor data that are gathered from the subject's own past behavior. Assuming that the predictor has the requisite knowledge of a person's predictable response to a particular stimulus, the prediction of an unknown future stimuli in this rapidly changing modern world, is not possible to be made accurately. On the other hand, assuming a constant stimulus, a man's response to it is far from uniform, for he, too, is ever changing. This is easily illustrated by one's response to reading the same book or viewing the same movie at different times. Variations in levels of appreciation and perception are commonly experienced.

The clinical method is based on a one-to-one ratio of predictor and subject. Plainly, because of constraints imposed by large-scale processing and the scarcity of qualified predictors, this is not practicable to be done in a criminal code.

The statistical predictive method is based upon predictor data gathered from the behavior of men belonging to a class to which the subject is assigned. Here, a social character profile is drawn whereby persons having certain listed characteristics are predicted as being more likely to commit the crime sought to be prevented than those without such traits. This method finds practical application in attempts to prevent hi-jacking or customs smuggling.

For either method, the difficulty of accurate prediction is an almost insurmountable one. For man does not live in a controlled

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[52] The uniqueness of each individual is derived from the fact that genetically he is the product of a certain combination of chromosomes coming from the sex cells (sperms and ova) of his father and mother. That combination can rarely, if ever, be duplicated. A reported recent scientific development called "cloning", however, may call for a re-examination and possible mofication of this concept.

[53] An instructive analysis on the merits and demerits of the case-study method and the actuarial method in predicting conduct is the subject of an article by Paul XE. Meehl, *Clinical versus Statistical Prediction.* A Theoretical Analysis and a Review of the Evidence. (University of Minnesota Press).

environment as that in artificially created laboratory conditions. Furthermore, prediction is made even more difficult when the act predicted is of an uncommon variety such as wilful killing or suicide. Its accuracy is further lessened some more when the act or offense is predicted to take place within a limited time frame.

Compounding said difficulties is the fact that an accurate measurement of the extent of failure or reliability of predictions resulting in preventive detentions, cannot be made. Since institutionalizing or confining the subject effectively prevents or denies to him the opportunity of doing what he was predicted to do, there is no way of finding out whether he would in fact have done the act he was predicted to commit. The conclusion seems inescapable that such predictions are not more than a reasonably informed or educated guess that is not much more accurate than a random selection. Such conclusion gets stronger with the growing compilation of tragic cases of mistaken diagnoses and erroneous confinement[54] such as that of a harmless eccentric who is hospitalized for most of his life.

The District of Columbia's Preventive Detention Act

A severely criticized legislative attempt to implement a predictive-preventive scheme was made in the District of Columbia in 1970.[55] This was in part a reaction to the Bail Reform Act[56] of 1966 which saw an increase in the number of pre-trial release of arrested persons, giving rise to some hysteria about a corresponding increase in crimes committed by them during this period. The assumption is that careful consideration of some ten enumerated factors[57] would point out from among defendants which ones among them will likely recidivate and commit the "bail crime" that is sought to be prevented. Upon such identification, a judicial officer may deny them the right to bail and order their preventive detention for up to sixty days.[58]

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[54] A collection of cases for damages arising from false imprisonment, false arrest, and unlawful commitment upon mistaken, erroneous, or negligent medical diagnosis and treatment, may be found in KATZ, GOLDSTEIN & DERSHOWITZ, PSYCHOANALYSIS, PSYCHIATRY AND LAW (1967).

[55] Public Law No. 91-358, 84 Stat. 433 (July 29, 1970), particularly see the provisions relating to preventive detention.

In 1950, the U.S. Congress enacted "The Emergency Detention Act of 1950" as part of the International Security Act, following the invasion of South Korea by communist forces. The statute authorizes the arrest and detention, during the period of a declared emergency, or individuals *likely* to engage in acts of espionage or sabotage.

[56] 18 U.S.C., Sections 3146-52, 80 Stat. 214 (1966).

[57] D.C. Code Ann., Sects. 23-132(b).

[58] *Ibid.*, Sects. 23-1322(b).

A project financed and sponsored by the Law Review Research Program of the American Bar Foundation was subsequently undertaken to make an empirical analysis of said preventive detention act.[59] Among others, an effort was made to test the "ability of the Act's criteria to predict dangerousness." The standard for evaluation is that

> ...a perfect preventive detention system would identify and incarcerate *only* those few defendants who would commit serious crimes if released. At the other extreme, a system whose predictive capacity was so low that it required the detention of many defendants, most of them innocent, to thwart the few serious offenses could hardly be considered successful.

The conclusion of the study regarding the reliability of the indicators used is 30% accuracy, i.e., "for every three actual recidivists detained, seven (innocent) persons who would not have been convicted of an offense, would also have been jailed." If the prediction were limited in time to the sixty day period within which the feared crime is predicted to be committed, the 30% accuracy figure falls drastically to about 5%. This means the incarceration of 19 innocent person for every single one who will turn out guilty of the predicted crime. Such a heavy cost is certainly intolerable to a society whose proud tenet of criminal justice is "better 10 guilty men go free than one innocent man be punished."

Constitutional Defects of Preventive Detention

In a Foreword to the empirical study[60] eloquently entitled "Preventive Detention — A Step Backward for Criminal Justice", U.S. Senator Sam J. Ervin, Jr., of North Carolina convincingly points out the constitutional defects of the preventive detention law as follows:

1. It violates the constitutional right to bail in non-capital offenses;
2. It imprisons for unproved, anticipated crime, rather than actual criminal conduct;
3. The offense of "dangerousness" is unconstitutionally vague;
4. It violates the presumption of innocence;
5. It convicts on the basis of "substantial probability" rather than beyond reasonable doubt.

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[59] *Preventive Detention: An Empirical Analysis*, Law Review Research Series, 6 HARV. CIVIL RIGHTS — CIVIL LIBERTIES L. REV. (1971).

[60] *Ibid.*

There are several other constitutional infirmities that are pointed out but which need not be detailed here. On the issue, however, of reasonable classification under the equal protection clause, it is important to note the conclusion of Senator Ervin that

> . . . a bill which tries to classify arrestees for the purpose of detention, (on the basis of a prediction that) at its most ideal achieves little more accuracy than random selection, is purely arbitrary and violates due process.

Let us now turn to the other two objectives of criminal law—rehabilitation and deterrence.

Rehabilitative, Reformative Theory

In its extreme form, the preventive object of criminal law would want to see "the elimination of crime . . . by the extirpation of the physically, mentally and morally unfit; or by their complete segregation in a socially aseptic environment."[61] The reformative theory, however, seeks to modify and even to reverse this brutal object. Through various sentencing alternatives and procedures, such as suspension of sentence,[62] probation,[63] the application of the Indeterminate Sentence Law,[64] and subsequent parole,[65] the rehabilitative aim is "to uplift and redeem valuable human material and prevent unnecessary and excessive deprivation of liberty and economic usefulness."[66]

The retributive and deterrent objects of penology have their concentrated focus mainly upon the crime itself. Their concern is to predetermine the proper relation between the gravity of an offense and the corresponding penalty in order on the one hand, to satisfy the victim's desire for revenge and his sense of penalty appropriateness, and on the other hand, to deter others from committing similar offenses. This, in the main, is the position of the Classical or Juristic School of crime analysis.[67]

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[61] Ernest Hooton, *The American Criminal* (1939), and an earlier work, *Crime and the Man* (1931), both cited in SCHUR, *op. cit.*, note 26.

In People v. de la Cruz, 76 Phil. 169 (1946), Justice Perfecto voice strong sentiments favoring the preventive object so that "the race of robbers, bandits, gangsters and other malefactors of the same brand, should be *ostracized perpetually from human society* until the shame shall have disappeared completely from memory." (underscoring supplied.)

[62] Article 80, REVISED PENAL CODE was for a long time, the only sentencing alternative of Philippine courts. For a discussion of procedural differences with U.S., see, Tadiar, *The Administration of Criminal Justice in the Philippines: Some Aspects for a Comparative Study with that of United States*, 47 PHIL. L.J. (1972).

[63] Pres. Decree No. 968, July 24, 1976.

[64] Act No. 4103 (1964), as amended by Act No. 4225 (1933).

[65] The Indeterminate Sentence Law is administered by the Board of Pardons and Parole headed by the Secretary of Justice.

[66] People v. Ducosin, 59 Phil. 109 (1933).

[67] The classical and neoclassical interpreters of crime, such as Beccaria, Bentham, and Romilly, sought legal and administrative reform of criminal justice.

A shift in focus and emphasis—from the crime as an objective act or conduct to the subjective person of the criminal—is sought to be made by the "Positivist School" founded by Dr. Cesare Lombroso, often referred to as the "father of modern criminology."[68] The shift in focus would also seek an accompanying shift in penologic object—from retributive punishment to reformative aim. Punishment is to be justified solely by its reformative effect upon the criminal. Individualization of penalty to suit the particular character of an offender, rather than a prefixed and mechanical relation between crime and penalty, is the instrument by which this rehabilitative object is sought to be attained.

The early development of the reformative movement took the form of merely attempting to ameliorate and better the deplorably inhuman conditions under which prison inmates lived as well as to shorten the period of their incarceration. There can of course be no doubt that much of the progress that are now taken for granted in this area, are directly attributable to the dedication and zeal of those committed to the rehabilitative ideal. The teaching of a gainful trade which the convict could put to use for his life after release, medical and even psychiatric treatment in prison to help the inmate cope with his physical and emotional/mental problems, are now standard aids in any prison with a sizable population. Although there are some reported cases where, because life in prison has been made so pleasant by such efforts, inmates strongly desire ironically to remain behind bars, or, after release, deliberately recidivate in order to return to prison, nevertheless, such rehabilitative efforts do not frontally frustrate other penologic objects.

Where the rehabilitative ideal clashes with the retributive and deterrent objects is where it seeks to completely eradicate the concept of punishment and substitute it with the idea of preventing crime through treatment.[69] Considering that revenge is a deep-rooted instinct of man, serious doubts persist that this may not be possible without drastically altering human nature itself.

The logic of the positivist position is understandably simple enough. Why wait for the commission of a crime when it could be prevented by committing the person suspected of dangerous propensities and, by treatment, cure him of his criminal tendencies?

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[68] For an excellent discussion on the subject, see VOLD, THEORETICAL CRIMINOLOGY (1958).

[69] I am indebted for much of my discussion on the conflicting purposes of criminal law to the deeply perspective and "superbly lucid" elucidation by Prof. Lon Fuller, *op. cit.*, note 5.

This thinking finds exemplification in the enactment of the so-called "sexual psycopath" laws by various States in the United States, including the District of Columbia.[70] Under such statutes, a person, although not insane, may be committed to an institution "because he is *likely* to inflict injury on the objects of his desire."

In one case that happened in Montana,[71] a defendant was tried and convicted of the crime of "Attempt to commit a lewd and lascivious act upon a child", and sentenced to fifty years in prison. The proved facts were innocuous enough—defendant, while intoxicated, tried to befriend a ten-year-old-girl and her two younger brothers by trying to shake their hands while they were seated inside their parked car. These perfectly innocent acts, however, took on a drastically different color with the testimony of a psychiatrist introduced by the prosecution ostensibly to prove defendant's intent. The doctor testified to his opinion that defendant was a "sexual deviate" who "represented a threat to society because of his inability to control his impulses." The process thus became converted from what properly should be an "act-oriented" adjudicative criminal trial to a "person-oriented" commitment proceeding for the mentally ill. Fortunately for the defendant, Montana did not have a sexual psychopath law and his conviction was reversed by the appellate court.

The danger of wrongful commitment of persons alleged to be insane is real enough in the present state of the law,[72] under which undefined standards of "public welfare" or the "welfare of the insane person" justifies a commitment order by the court. Adequate and effective procedural safeguards[73] must be formulated and instituted to minimize if not prevent abuse.

Difficulty if not impossibility of eradicating crime

While the ideal of crime prevention is one that cannot be assailed, the route to its attainment is beset with obstacles and fraught with danger to personal civil liberties. When one thinks of crime, what immediately comes to mind are those that coincides with our own moral sense of what is wrong—muder, rape, other crimes of physical violence and stealing. It is well to recall, however, that such crimes constitute only a small portion of the acts punishable under

[70] D.C. Code Ann. (1961), section 22-3503 (1).
[71] State v. Green, 388 P. 2d 362 (1964).
[72] RULES OF COURT, Rule 101.
[73] The D.C. Code Section 21-301 — 333 (1939), establishing a Commission on Mental Health and providing for assistance of counsel in the commitment process, is getting increasingly severe criticism which led to congression hearings designed to improve the process.

the penal code,[74] without even considering those made punishable by special laws. The diverse acts that are made punishable range from the most innocuous omission to plant a tree[75] or to vote in an election,[76] to the most heinous parricide or incest. It certainly would be ludicrous, were it not pathetic and even tragic, to turn over a respectable member of the community, possibly himself a physician, to a psychiatrist for treatment and cure of his "criminal tendencies" not to participate in a political election or habitually failing to plant a tree.

There is another view of crime[77] that is worth bearing in mind which would suggest the impossibility of its eradication from society. In direct contrast to the psychological view that regards the criminal act as a manifestation of a psychopathology, this view regards it as the expression of "his natural unbridled instinctual drives."[78] Crime is merely a penalized deviance from man-made societal rules. Conformity to rules is the result of a successful socializing process exerted by such institutions as the family, the church, the school, the police and similar others. The tendency to crime, or deviance from rules, is therefore the natural while conformity is the artificial. So long as laws are enacted that do not merely reflect current morality but seek to generate and impose a morality that is not yet accepted, in fact, so long as rules exist at all, so long will deviance, hence, crime, continue to exist.

As earlier discussed in the section on preventive theory, a successful crime preventive program is dependent upon a reliable method of predicting future criminal conduct and upon an effective treatment of the impulses and instincts that impel towards a life of crime. As also pointed out, there is at this stage of development no such reliable predictive method. Likewise, short of castration or performing the brain operation called lobotomy, the shocking effect of which turned the hero of the popular movie "One Flew Over the Cuckoo's Nest" into a human vegetable, there is no effective and less costly "cure" for a man's sexual and agressive instincts, assuming that their eradication is considered desirable. This is problematical since

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[74] Crimes against persons, property and chastity, are only three of the fourteen titles under which various criminal acts are classified in the Revised Penal Code.

[75] Pres. Decree No. 953 (1976), sec. 5, imposes a penalty of 2 "years" for failure to plant.

Pres. Decree No. 1153 (1977) expands the scope of the tree planting duty of citizens.

[76] Pres. Decree No. 1296 (1977), Art. 16, sec. 178, par. (ee) a penalty of 1 year in prison is imposed for failure to vote "without justifiable excuse".

[77] This view is discussed in COHEN, DEVIANCE AND CONTROL (1966).

[78] ALEXANDER & STAUB, THE CRIMINAL, THE JUDGE AND THE PUBLIC: A PSYCHOLOGICAL ANALYSIS 34-32 (1931), cited in COHEN, *ibid.*

> ... aggression is not a trait that eventuates only in wanton rape and plunder. It can be quite handy in a corporation. Some generals have been aggressive. Some aggressive people have become noted explorers. Some have gone into medicine and law. Some have specialized in psychiatry. Some have entered teaching, as any student and any faculty member could attest. Aggresison can find many happy uses.[79]

If, as the positivists would have it, the curative treatment of criminals were to hold sway as the primordial, if not the only proper object of criminal law, there will be serious danger that the concept of due process as a constitutional protection of the individual against the arbitrary exercise of governmental power, would be rendered meaningless. This must be so because, under this ideal, there would no longer be any need for a court adjudication that the defendant had committed a volitional criminal act, as a prerequisite condition for the imposition of penalties or treatment sanctions. Medical opinion giving a highly subjective interpretation of otherwise innocuous and possibly meaningless behavior and conduct as "revealing" a criminal predisposition, would be sufficient justification for a forcible intervention in private lives. It would thus be meaningless to give notice of hearing to a defendant for the purpose of determining the validity of medical interpretation as to the meaning, say, of enuresis (bedwetting) or some childhood prank that he has probably forgotten. Such an exercise is meaningless as each medical opinion would be based on subjective interpretation peculiar to each doctor and there is no fixed criteria for a judge to utilize in selecting which view is to prevail.

One last cautionary observation before leaving the subject of rehabilitation. Under the retributive object, an effective yardstick to measure the appropriateness of the penalty imposed for the offense, is to "Let the punishment fit the crime." In early Anglo-Saxon times, "the impulses of the injured person were the proper measure of the vengeance he was entitled to exact, and the probable rise and fall of his passions were taken as a guide for fixing the scale of punishment."[80] The present standard for the measure is the harm or injury done both to the victim and to societal interests in relation to the object of the penalty, which is "to teach a lesson" both to the offender not to repeat the offense, and to those similarly minded not to imitate the bad example. In disturbing contrast, the rehabilitative object utilizes no such measure that con-

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[79] Hakeem, *A Critique of the Psychiatric Approach to the Prevention of Juvenile Delinquency*, 5 SOCIAL PROBLEMS 194-206 (Winter, 1957).

[80] TSAO, RATIONAL APPROACH TO CRIME AND PUNISHMENT 52 (1955).

tains an effective outer limit to the intervention by the state in the lives of private individuals. Since the reformist does not see the forcible confinement of "patients" (who are the "sick" criminals) as a punishment but as a curative treatment done for their own good, an offender can be confined for as long as the psychiatrist believes that he has not been sufficiently cured of his dangerous tendencies. Convicted of simple theft,[81] the offender may be sentenced to a few months behind bars. If, however, the same act were diagnosed as kleptomania,[82] the same offender, under the rehabilitative object, stand a good chance of spending the rest of his life confined in a hospital trying to be cured of his so-called "compulsive habit."

Let us now turn to the remaining object of criminal law, that of

Deterrence

The aim of penal law could not be stated in more plain language than the word "deterrence", and, that is, to deter, restrain and inhibit the commission of crimes through fear of punishment. The general object is to deter *all* crimes. Again however, it is well to recall the widely divergent acts that are made punishable as crimes. With an increasingly complex and industrialized society, more regulatory offenses are being enacted that were not even thought about a few years back. Even with a shotgun blast approach, it will thus be seen that deterrence for all offenses is impossible to be attained. The more sensible and practical approach therefore is to raise the question of whether specific penalties do deter the particular offenses to which they are applied. This narrowly focused subject, in relation to the move for the abolition of the death penalty in many countries around the world, has long been intensively studied and debated by criminologists, sociologists and legal scholars.[83] This is aside from the moral and often emotionally charged issue of whether it is right at all for the state to deliberately take the life of its citizens.

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[81] Article 309, REVISED PENAL CODE provides for a schedule of graduated penalties depending on the value of the thing stolen. An absolute maximum penalty of twenty years, however, is set as the outer limit no matter how large the amount stolen.

[82] Respected scientists have noted that "Kleptomania, by and large, turns out to be nothing more than a social label hung on 'nice people' who steal and withheld from 'bad people' who are simply 'crooks' ". See, SCHUR, *op. cit.*, note 26.

[83] For a brief survey of the studies made on the subject, see Chiricos & Waldo, *Punishment and Crime: An Examination of Some Empirical Evidence*, 18 SOCIAL PROBLEMS 200-215 (1970).

Importance of concept

For those of us who have undergone the wartime experience of living under a ruthless enemy occupation, there exists no doubt that fear of punishment does deter. More recently, our martial law experience, particularly during its inception and early phase, proved beyond question that the principle of deterrence actually works. Martial rule was proclaimed to restore order out of then prevalent chaotic conditions of escalating violence, crime, anarchy and rebellion. Even the opposition had to concede that "public order had been restored and the crime rate had dropped dramatically"[84] upon the imposition of martial law. It cannot be disputed that much of this success in achieving an avowed aim of martial law was accomplished through the principle of deterrence.

Deterrence as a major arm of crime control has been characterized as "the chief reliance of law for protecting society."[85] As Dean Pound much earlier observed so perceptively:

> As to the deterrence theory of penal treatment, while it cannot carry the whole load, there is more to it than many today are willing to admit. There is a potentially lawless side to the normal man. All men need the restraint of the force of legal order... (for) law is not made simply to hold down the bad man. The bad side of the good man needs law also.[86]

Types of Deterrence

The target people sought to be affected by the deterrent influence of penalties provides the basis for a classification of deterrence — first, restraint of all potential offenders in the general population; and second, deterrence of the individual convict/parolee/probationer/released inmate from repeating his criminal act. To differentiate one from the other, Tittle[87] suggests that the former be termed "general deterrence" and the latter be called "specific deterrence".

General deterrence has also been named "exemplarity". It seeks to accomplish its object solely through terror and the supposed consequent desire to avoid the punishment of which persons are terrified. In specific deterrence, however, effectiveness is the joint product

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[84] "A Message of Hope to Filipinos Who Care, containing an analysis of three years of Martial Law, an evaluation of the New Society, a projection of the future, and a proposed alternative," published on October 1, 1975 by a Board of Editors chaired by former Senator Jovito R. Salonga.

[85] Pound, Roscoe, "Introduction" to TSAO, RATIONAL APPROACH TO CRIME AND PUNISHMENT 52 (1955).

[86] *Ibid.*

[87] A suggestion cited in Chiricos, *op. cit.*, note 83.

of the punishment already suffered, including whatever rehabilitative treatment may have been given, and the fear of punishment for whatever new crime he may intend to commit together with the additional punishment imposed for recidivism or habitual delinquency.

The standard for empirically measuring the effectiveness of deterrence must also vary with each type sought to be tested. Thus, recidivism rate would provide the measure for specific deterrence, while crime rate is the measure for gauging the effectivity of general deterrence. Further refining the latter, *total* crime rate will test deterrence of penalties for *all* crimes, while *particular* crime rate will examine such effectiveness for specifiic penalties.

Assumptions:

a) *Free will*

The most basic assumption implied from the concept of deterrence is that man is a rational being with freedom of will to calculate the pains and pleasures of a contemplated course of conduct and to make a rational decision on the basis of such calculation. This is essentially the view of the classical school of criminology which postulates that "all persons, but the insane, are themselves free agents; that they all have the faculty to differentiate right from wrong; that if they commit any wrong act, they must have voluntarily and deliberately chosen the evil course; and that since they have free will to decide one way or the other, they are morally responsible for their acts."[88]

Where freedom of will is effectively impaired, deterrence effectiveness will be unavailing. Thus, it is plain that a person suffering from some mental disease that substantially affects his mental or emotional processes and impairs his behavior controls, cannot be significantly deterred. Similarly impossible to deter are persons who commit crimes in the heat of overwhelming passion when they are temporarily deprived of all reason and capacity to make a rational choice of conduct. In practical operation, however, difficulties of accurately proving such mental state have mediated for a decision to deny them the benefit of exemption from criminal liability. Even assuming such passion, it is reasoned that free will was not entirely overborne or completely impaired but merely weakened. There is thus a corresponding diminished responsibility for which the impassable penalty must be mitigated.[89]

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[88] TSAO, *op. cit.*, note 80, p. 69.

[89] Article 13(5), REVISED PENAL CODE, provides as mitigating circumstance "that of having acted upon an impulse so powerful as *naturally* to have produced passion or obfuscation."

It is interesting to note in this connection that the theory of "brainwashing" as effectively erasing the basic assumption of free will, is the basis for most defenses interposed in wartime offenses. While "brainwashing" is usually associated with techniques employed by the enemy to secure treasonous collaboration of war prisoners, its counterpart technique of indoctrination and military discipline is also utilized for a defense in court martial proceedings for wartime atrocities. This is exemplified in the trial of Lt. William Calley for the massacre of Vietnamese civilian women and children in My Lai. His defense centered around the argument that strict military discipline imposing unquestioning obedience had effectively impaired his free will and capacity to question the "rightness" of the orders issued by his superior officers. A similar defense was interposed by millionaire heiress Patricia Hearst when she claimed to have been brainwashed by her Symbionese Army captors into joining their movement and eventually participating in a bank robbery.

b) *Awareness of criminal sanctions*

In order to be able to calculate the pains and pleasures of the contemplated criminal act, the potential offender must be aware not only of the prescribed penalty but of a reasonable certainty of its imposition upon him should he be caught. For truly, "a law can have no deterrent effect upon a potential criminal if he is unaware of it."[90] This observation is particularly apt in regulatory crimes or offenses which are not *mala in se*. For these *mala prohibita* offenses, since the law proscribing the acts are not reflective of the current collective morality, it is not unreasonable to expect that the violator is unaware that his conduct is prohibited by law, much less penalized. A homecoming seaman, for example, may thus be unaware of his legal obligation to convert the foreign currency he received as his lawful wage, into Philippine pesos within seventy-two hours of his arrival.[91]

The problem of awareness of criminal sanctions is more pressing in the case of general deterrence than in specific deterrence. In the former, the actual effect of say a year in prison upon unspecific members of the general populace can be no more than a subject of speculation. Thus it is that it is not uncommon to hear a potential offender to remark that he is willing to "sit it out" in prison for an intended offense, not fully realizing the actual life in

[90] Bedau, *Deterrence and the Death Penalty: A Reconsideration*, 61 J. CRIMINAL LAW & CRIMINOLOGY AND POLICE SCIENCE 539-548 (1970).

[91] Central Bank Circular No. 364, 26 February 1973.

prison. In the area of specific deterrence, however, the offender who is sought to be deterred has already experienced actual punishment and may be deemed to be truly aware of all that it entails.

Sanction awareness is sought to be impressed upon the general public through widespread publicity. Such, plainly, is the motive behind public execution of convicts by hanging or firing squad in the public square.[92] The same motive exists in the wartime execution of spies, saboteurs and traitors. The more publicity attending the imposition of punishment, the more forcefully the point is driven home to more people that painful consequences await the commission of evil deeds.

The need for publicity is even more pressing in cases of acts which but for the law would not otherwise be considered a crime. The dividing line between lawful and illegal acts must, for the guidance of the people, be made bright and clear. Contradicting this need for publicity, however, is that death sentences, if carried out at all, is presently accomplished in secrecy witnessed only by a few officials. Further, the rarity of actual imposition of death sentences has greatly detracted from its deterrent credibility, so much so that studies on the subject have concluded that it should only be called "normative deterrence" rather than actual deterrence.

c) *Fear and avoidance of punishment*

It is a further assumption of deterrent theory that the potential offender fears punishment and consequentially desires to avoid it. It is not always plain to see that fear leads to avoidance. Studies in psychological behavior have discovered that there are individuals who, although fearing punishment, nevertheless desire to be punished as a means of expiating a subconscious sense of guilt,[93] for some imagined sin. A person desiring martyrdom may fear the death penalty but would be but little deterred by the threat of its imposition upon acts or conduct he is convinced to be morally right. Thus, it is that revolutionaries and political oppositionists are hardly deterred. Witness student demonstrations or the very recent "noise demonstrations" during the just concluded election for the Interim Batasang Pambansa, despite announced intended arrests. For all these persons, punishment, no matter how much feared or severe, will certainly not deter.

Where no fear exists among those in whom terror is sought to be instilled, deterrence would not work. To the fearless who are

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[92] During the almost six years of Martial Law, the only public execution of a convict was that of a sentenced drug "pusher" who was executed by firing squad.

[93] BERG, FEAR, PUNISHMENT, ANXIETY AND THE WOLFENDEN REPORT (1959).

indifferent to punishment, deterrence would have no effect. As Pound aptly noted:[94]

> . . . fear can never be a complete deterrent. The venturesome will always believe they can escape. The crafty will always believe they can evade, and enough will succeed to encourage others.

Implicit in the foregoing discussion is the assumption that the penalty imposed for the act sought to be deterred, is feared and wanted to be avoided because it is productive of pain and suffering. To make the punishment so shameful and as painful as is humanly possible to bear, is therefore only to be logically consistent with and faithful to the object of enhancing fear and promoting the desire to avoid punishment. The more brutal the punishment, the more effective the deterrent principle becomes. But to an enlightened society, efficiency and effectivity are not the only considerations in judging the quality of criminal justice. Other societal values relating to the dignity and worth of each man, decency, fairness and propriety must be given their proper consideration. Although there is indeed a basic contradiction between the penal philosophy of deterrence based on punishment and that of rehabilitation, whatever may have been lost by way of deterrence through the humanization of prison living, cannot be much lamented.

In a bygone age, the concept of pain was limited only to physical suffering. A tour of museums and even, ironically, public entertainment parks, such as the famous Tiger Balm Gardens in Hongkong and Singapore, depict in lurid detail the instruments of torture, as branding irons, nail pincers, tongue pullers, the rack, the pillory and stock, designed to aggravate pain and suffering. At the present time the concept of pain has been expanded from the realm of the merely physical to the mental and psychological fields. Uniformly now, punishment consists of depriving the offender of something which presumably he considers of value, *e.g.*, property, through imposition of fines, forfeiture and confiscations,[95] cancellation of licenses,[96] and similar others; liberty, through the penalties of incarceration of varying duration proportionate to the perceived gravity or seriousness of the offense committed; and, for acts sufficiently productive of extreme moral outrage and social condemnation, deprivation of life itself. The older concept of shame and mortification or humiliation, currently termed "stigma" of loss of sta-

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[94] Pound, *op. cit.*, note 85.

[95] Article 25, REVISED PENAL CODE, classifies, "Forfeiture or confiscation of instruments and proceeds of offense" as an "accessory" penalty.

[96] The LAND TRANSPORTATION AND TRAFFIC CODE (Rep. Act No. 4136, as amended) provides in Section 27 for the suspension or revocation of a motor vehicle driver's license.

tus[97] or degradation such as rank demotion or public stripping of insignias and epaulets in the military service, have been suggested to be included again, in one form or another, in the operational definition of punishment for its deterrent value.

The difficulty with the notion of punishment is that no one type fits all persons who should be punished. For what is punishment to one person may not be so regarded by others. Some criminals are sensitive to pain, others to humiliation, others to confinement, and still others to nothing more than a stern word of warning. Studies on juvenile delinquency have shown that, far from considering as punishment or as stigma the formal process from arrest to adjudication and disposition of the juvenile court system, the youthful offender often considers the processing as prestige-giving.[98] Even the institutionalization of the delinquent is not regarded by some as punishment but as enhancing the reputation and leadership identity of the offender. On the other hand, middle class adults generally regard even just the "very process of being arrested—or even receiving a ticket-and going through a proceeding that leads to conviction" as a serious stigma that people want to avoid if possible."[99]

From the foregoing discussion, it becomes clear that a crucial question to raise in deterrence studies is: What type of punishment will most effectively deter what kind of people from what crime?

Factors affecting deterrent efficacy

An early (1843) statement on deterrence by Jeremy Bentham that man avoids criminal behavior if that behavior elicits swift, severe and certain punishment,[100] still provides the three bases for measuring the efficacy of deterrence, namely, celerity, severity and certainty of punishment. The deterrent product of these three variables is the result of the collaborative or conflicting efforts of the three component elements of the criminal justice system—the legislature, the courts, together with the prosecutor and defense counsel, and the law enforcement agencies.[101] The severity of penalty prescribed by statute for a given offense reflects the popular outrage against the act itself, their perception of seriousness, and

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[97] The penalties of disqualification and suspension in Articles 30 to 33, REVISED PENAL CODE, effects such a loss of status as well as property rights.

[98] Werthman, "The Functions of Social Definitions in the Development of Delinquent Careers", Appendix J of TASK FORCE REPORT, JUVENILE DELINQUENCY 155 (1967).

[99] Rubin, *Illusions of Treatments*, 16 CRIME DELINQUENCY 79-92 (1970). 1970) No. 1, 79-92.

[100] Cited in Chiricos, *op. cit.*, note 83.

[101] The term "Criminal Justice System" is suggested by REMINGTON, CRIMINAL LAW, in Chapter 1, "Perspectives of Criminal Justice Administration."

sense of being threatened in security, that the people's representatives articulated when they enacted the law. The actual severity of the penalty imposed, however, is determined long after enactment of the statute prescribing it, by the courts applying its provisions to particular offenders who have been duly convicted. The exact duration of incarceration, however, is finally determined by the Board of Pardons and Parole which decides who will be released and when. The legislature, in passing the law, and the judge, in imposing the sentence, may have been motivated by considerations of retributive punishment but rehabilitative treatment may be the underlying reason for pardon or parole.

Preponderant evidence accumulated by sociological studies[102] point to certainty and celerity of punishment as being much more efficacious than severity as deterrent variables. The law, however, continues to disregard such significant finding and, as a simplistic solution to the complex problem of crime control, continues to increase the severity of penalties for crimes the public feels threatened with.

Certainty and speed of punishment must in the first instance depend on police efficiency in the detection of crime and identification of the offender. It is well to recall that many regard even the temporary detention for investigative questioning as sufficiently bothersome as to be productive of significant deterrent effect. A good "dressing down" of an erring motorist immediately after a traffic violation probably deters much more than the fine he may be required to pay at a much later time. Such speed also serves to deprive the offender of the enjoyment of the fruits of his crime, even merely the personal convenience of the offending motorist of arriving at his destination early enough. As sociological findings indicate, such intervening enjoyment between the crime commission and penalty imposition significantly attenuates the deterrent effect of punishment.

While the constitutional right to speedy trial[103] is meant to benefit the defendant, it is thus seen as serving at the same time deterrent interest as well. More meaningful both in terms of benefitting individual defendants as well as improving crime control, therefore, is to exert efforts of law reform at narrowing the presently wide gap between arrest of an offender and imposition of sentence. Our wartime experience of living under a ruthless and brutal enemy occupation, should serve to remind us of the intolera-

[102] Gibbs, *Crime, Punishment and Deterrence*, 48 SOUTHWESTERN SOCIAL SCIENCE QUARTERLY 515-530 (March, 1968).

[103] Article IV (16), Philippine Constitution.

bility of living under constant terror. More, it should serve as warning of the dangers that is posed by a system that places its sole or even chief reliance upon deterrence for crime (and political) control. There are at least two dangers that come to mind. Since punishment is meted out primarily for its deterrent effect upon others, the concept of penalty-appropriateness, of just "dessert", of receiving what is coming to him, would be lost. Such limits would give way to the unlimited speculation of what is surmissed to be the deterrent effect upon the rest of the population. Secondly, the constitutional presumption of innocence[104] and requirement of proof of guilt beyond reasonable doubt,[105] would be rendered meaningless. Present procedural safeguards against unreliability of evidence[106] need not be complied with since even adjudication of guilt is not necessary or required for an imposition of a deterrent penalty. A random selection of who will be publicly executed or punished would serve the same purpose of exemplarity as the punishment of an accurately adjudicated guilty offender. That is the principle behind the wartime execution of ten innocent Filipinos for every Japanese soldier killed by guerillas. This would be a reversal of the proud democratic tenet that "better ten guilty men go unpunished than for one innocent person suffer unjustly."

"The problem of criminalization"[107]

"Criminalization" is the term now used to describe the legislative process of choosing what acts are to be prohibited, making legal definitions for them and determining what punishment shall be prescribed for their violation. The choices to be made in this process should be guided by their relation to the accomplishment of the object sought to be attained. As earlier discussed, the ultimate aim of criminal law is to protect society and provide the public with security to life, liberty and property. Any conduct that threatens this security is a fair subject for criminalization. The "easy cases" that come to mind are assaults,[108] kidnapping, and robbery, as conduct posing direct threats respectively to life, liberty, and property. The "hard cases" that pose a difficult problem of criminalization

[104] Article IV (19), *ibid.*

[105] RULES OF COURT.

[106] Inadmissibility of hearsay testimony (R. 132.30), similar acts (R.130.48) bad moral character of the accused (R.130.46) among others, are designed to exclude prejudicial evidence and promote reliability and trustworthiness.

[107] This is the first problem treated by KADISH & PAULSEN, CRIMINAL LAW AND ITS PROCESSES 3 (1969).

[108] I prefer the term "assault" for being more descriptive of the outlawed conduct, as against "physical injuries" which actually bears no relation to it, but merely describe the resultant harm.

comes after passing the area of such direct confrontation between the right sought to be protected and the threatening conduct.

Is it proper to criminalize violations of private morality? The controversial Wolfenden Report[109] directly confronts this question on the issue of de-criminalization of homosexuality committed in private by consenting adults. It concluded that "law is not concerned with private morals or with ethical sanctions... (but) with the outward conduct of citizens in so far as that conduct injuriously affects the rights of other citizens", and therefore recommended repeal of criminal penalties for such conduct. Notwithstanding the powerful argument of Lord Justice Devlin for "The Enforcement of Morals"[110] on the ground that "the loosening of moral bonds is often the first stage of (societal) disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions", the English Parliament agreed with the Wolfenden Report and repealed the penalties in 1967.

Is it proper to impose criminal penalties upon conduct that many would regard as merely offensive to sensibilities or otherwise thought undesirable? The answer will depend upon whether proscription would promote or facilitate attainment of the proper aims of penal law.

Are criminal sanctions appropriate for negligent driving?, in light of findings that negligence cannot effectively be deterred, is another question that may well be asked.

Or take the case of the tree-planting decree. Classic criminal law formulation is in the nature of a prohibition of an act, starting from the early Biblical Ten Commandments "Thou shalt not". Paradoxically, however, the decree would prohibit an omission. The implied premise of the decree is the evil arising from the wanton destruction of trees and forests as natural watersheds against floods. The rational solution to the problem would seem to be the legal regulation of tree-cutting with appropriate punishment for violations. The decree, however, opts for tree-planting as a solution, with penalties for omission. As formulated, the impression cannot be escaped that punishment is unjustifiably meted out for past conduct resulting in forest destruction that the offender was in no way responsible for. Further, the decree would make potential criminals of all

[109] BERG, *op. cit.*, note 93. The citation is officially entitled "Home Office Scottish Home Department Report of the Committee on Homosexual Offenses and Prostitution".

[110] MACCABAIAN LECTURE IN JURISPRUDENCE OF THE BRITISH ACADEMY (1959).

persons, even the most respectable and law-abiding, who is above ten years of age. Possibly because of this, the decree has so far been largely unenforced in so far as prosecutions for its criminal violation is concerned. The hidden costs to this situation is perceptively noted thus:

> But law enforcement pays a price for using the criminal law in this way. First, the moral message communicated by the law is contradicted by the total absence of enforcement; for while the public sees the conduct condemned in words, it also sees in the dramatic absence of prosecutions that it is not condemned in deed. Moral adjudications vulnerable to a charge of hypocrisy are self-defeating no less in law than elsewhere. Second, the spectacle of nullification of the legislature's solemn commands is an unhealthy influence on law enforcement generally. It tends to breed a cynicism and an indifference to the criminal-law processes which augment tendencies toward disrespect for those who make and enforce the law, a disrespect which is already widely in evidence. In addition: 'Dead letter laws, far from promoting a sense of security, which is the main function of the penal law, actually impair that security by holding the threat of prosecution over the heads of people whom we have no intention to punish.'
>
> Finally, these laws invite discriminatory enforcement against persons selected for prosecution on grounds unrelated to the evil against which these laws are purportedly addressed, whether those grounds be 'the prodding of some reform group, a newspaper-generated hysteria over some local sex crime, a vice drive which is put on by the local authorities to distract attention from defects in their administration of the city government.[111]

The foregoing discussion makes out a strong case for a critical re-examination of the uses (and abuses) to which criminal law has been put. It is apt therefore to recall the quotation with which we started out this paper, that the "promise (of the penal law) as an instrument of safety is matched only by its power to destroy." Therefore, it must be "as rational and just as law can be (for) nowhere in the entire legal field is more at stake for the community or for the individual."

CONCLUSION

The foregoing survey of what the criminal law seeks to accomplish, should serve to show that the subject of crime prevention and control is not as simple as at first blush it would seem to appear. The discussion also points out the dangers that arise when a legal system places too heavy a reliance on any single one of the penologic object. Retributive punishment concentrates its focus too

[111] Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157 (1967), cited in KADISH & PAULSEN, *op. cit.*, note 107.

strongly on the victim's desire for revenge and becomes its brutal instrument. On the other extreme, the rehabilitative ideal is so concerned with the offender's interest that it would supplant the conceptconcept of punishment to which the roots of criminal law could be traced. In between, the objects of prevention and deterrence are so intensely bent towards protecting the public interest that such effort may result in a vast overreaching of otherwise harmless eccentrics and innocent persons.

The Greek philosopher Aristotle formulated his famous doctrine of the "Golden Mean" as an answer to a vexing dilemma. By this, the advice is given to follow a course of conduct in accordance with the "virtues of moderation". Thus, "courage is the mean between cowardice and rashness; liberality between prodigality and frugality; pride, between vanity and humility".[112] Where the actual pointer must rest, however, varies for each man and must be determined from actual experience.

As with human life itself, the question of where to strike the balance among often-conflicting purposes of the law, is likewise the constant classic problem that is pervasive in the life of the law. Thus, an ever-recurring problem is the accommodation of the conflicting interests of individual liberty and official authority. The problem cannot be resolved at the abstract level of the "law on the books" but at the point of application of the "living law" or the "law in action".

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[112] POPKIN & STROLL, *op. cit.*, note 6, at p. 21.