

The Morality of Deterrence

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I. THE PROBLEM

Deterrence, both general and special, is one of the traditionally accepted aims of the criminal law. This article will consider only general deterrence: the deterrent effect of the threat of punishment. This concept will be used in its broad sense, including the so-called moral or educative effects of criminal law,¹ thus corresponding to the continental term "general prevention."

Legislators as well as criminal courts often base their decisions on considerations of general deterrence. But punishment on this ground has been attacked time and again in the literature as unjust. Bittner and Platt, for example, contend that "punishment on the basis of deterrence is inherently unjust. For if an example is made of a person to induce others to avoid criminal actions then he suffers not for what he has done but on account of other people's tendency to do likewise."² This criticism, frequently raised, seems to rest on Kant's moral principle that man should always be treated as an end in himself, not only as a means for some other end.³

Ethical questions cannot be conclusively resolved by analysis and

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¹ See Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966); Hawkins, *Punishment and Deterrence: The Educative, Moralizing, and Habitual Effects*, 1969 WIS. L. REV. 550.

² Bittner & Platt, *The Meaning of Punishment*, 2 ISSUES IN CRIMINOLOGY 79, 93 (1966).

³ Kant, *Metaphysische Anfangsgründe der Rechtslehre*, zweiter Teil, erster Abschnitt, DAS STAATSRECHT ALLGEMEINE ANMERKUNG E. (1797). The question has been thoroughly discussed in German literature since World War II as a reaction to the extreme application of general deterrence under the Nazi regime. See Bruns, *Die "Generalpraevention" als Zweck und Zumessungsgrund der Strafe?*, FESTSCHRIFT FÜR HELLMUT VON WEBER ZUM 70. GEBURTSTAG (1963). Several authors have expressed the opinion that the acceptance of general prevention as an aim of punishment violates article 1 of the new German Constitution, which declares the dignity of man inviolable. Some also adduce the European Convention of Human Rights in support of their position. The German courts, however, have not accepted these views. See 1968 DEUTSCHE JURISTENZEITUNG 388; Judgment of May 6, 1954, 6 Entscheidungen des Bundesgerichtshofs in Strafsachen [BGHSt.] 125; Judgment of Aug. 4, 1965, 20 BGHSt. 264.

argument. In the last resort we have to take a stand based on personal sentiment, or, in more lofty terms, personal values. There is no possibility of empirical verification of these values. All we can do is discuss the implications and consistency of our principles.

The Kantian principle has a persuasive ring, but can hardly be treated as a binding rule without closer scrutiny. As with other abstract principles it lends itself to different interpretations, and it is difficult to evaluate the validity of the principle without examining its practical applications. Realistically, societies often treat people in ways designed to promote the good of society at the expense of the individual concerned. Military conscription may be the prime example of this phenomenon which also finds expression in quarantine regulations, confinement of dangerous mentally ill patients, and detention of enemy citizens in wartime. Thus, the Kantian principle, in practical application, is of doubtful value. Moreover, even if we accept the principle, it hardly leads to a general conclusion that punishment based on deterrence is contrary to the demands of justice.

The theory of general deterrence has, however, often been stated in terms which make it a rewarding target of attack on ethical grounds.⁴ Reverend Sydney Smith's statement of the theory in the 1830's provides a good example:

When a man has been proved to have committed a crime, it is expedient that society should make use of that man for

⁴ It should be noted in passing that the other traditional justifications for punishment are also subject to attack. Retribution as a goal of criminal justice is generally condemned by modern authors. And reform and rehabilitation, long the goals of reformers, have been increasingly criticized in recent years. Experience has shown how even the best of intentions can lead to oppressive results. Thus, efforts at reform and rehabilitation, according to critics, should not exceed the limits established by the other purposes of punishment. Norval Morris, for instance, states as a leading principle of criminal policy: "Power over a criminal's life should not be taken in excess of that which would be taken were his reform not considered as one of our purposes. The maximum of his punishment should never be greater than that which would be justified by the other aims of our criminal justice." Morris, *Impediments to Penal Reform*, 33 U. CHI. L. REV. 627, 638 (1966) (emphasis in original). Restraint of dangerous offenders seems to be the only traditional justification of punishment still meeting with general approval, and this justification applies to only a small segment of offenders.

Generally the controversy over punishment reflects differences of opinion with regard to the justification of an institution considered indispensable. But there are also voices which question the institution of punishment itself. Bittner and Platt state that "while the punitive approach has, to all appearances, no future, psychologically oriented treatment is in ascendance." Bittner & Platt, *supra* note 2, at 98-99. Their explanation for this shift is that the execution of punishment has become less and less compatible with prevailing moral sentiment. "Thus, it appears that in the long run it could not possibly matter whether punishment works or not, for it has been going out of use, not gracefully, but inexorably." *Id.*

the diminution of crime; he belongs to them for that purpose. Our primary duty, in such a case, is to treat the culprit that many other persons may be rendered better, or prevented from being worse, by dread of the same treatment; and, making this the principal object, to combine with it as much as possible the improvement of the individual.⁵

This statement considers only the application of punishment in the individual case and does not relate punishment to the general rule of law. For a closer analysis of this relationship it may be useful to distinguish between general preventive considerations as a basis for *legislation* and as a basis for *sentencing*.⁶

II. CONSIDERATIONS OF GENERAL PREVENTION IN LAWMAKING

The legislature's prescriptions, for example, of life imprisonment for murder, thirty days imprisonment for tax evasion or drunken driving, or a heavy fine for speeding, are general provisions directed toward everyone. They attempt to motivate every potential violator to conform. Infliction of punishment for one of these violations is a consequence of the legal provision; it does not require special justification in each case. Punishment is essential to the law's effectiveness; without its application the law would be an empty letter. Thus, if it is ethically justifiable to issue penal laws in order to regulate human conduct, it cannot be ethically unjust to apply the law in the individual case. It cannot be said that the offender "suffers not for what he has done but on account of other people's tendency to do likewise."⁷ He suffers for what he has done in the measure prescribed by the legislature. As H. L. A. Hart has put it, the primary operation of criminal punishment consists of announcing certain standards of behavior and attaching penalties for deviation, and then leaving individuals to choose. This, he asserts, is a method of social control which maximizes individual freedom within the framework of the law.⁸

The connection between the criminal provision and its application was stated forcefully by Feuerbach.⁹ The aim of the penal law, he

⁵ As quoted by Radzinowicz and Turner in *A Study on Punishment: Introductory Essay*, 21 CAN. B. REV. 91, 92 (1943).

⁶ We shall leave aside the problem of whether general prevention does play or ought to play a role in the execution of sentences and in decisions about release on parole.

⁷ Bittner & Platt, *supra* note 2, at 93.

⁸ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 23 (1968).

⁹ FEUERBACH, REVISION DER GRUNDSATZE UND GRUNDBEGRIFFE DES POSITIVEN PEINLICHEN RECHTS, erster Teil, at 48-58 (1799).

says, is deterrence. The aim of the application of punishment is to fulfill the command of the law so that it does not contradict itself. Feuerbach discussed and accepted Kant's principle; he argued that this principle does not conflict with the application of punishment as a consequence of the law.

Acceptance of this proposition does not mean that legislation based on the principles of deterrence is exempt from criticism. The basis for the criticism, however, must derive from a different source. Such criticism could be based on a deterministic view of human life. If every act is the product of heredity and environment, the choice between conforming to the law and breaking it is somewhat illusory. To say that a person *could* have acted differently is merely to state in another way that *if* he had possessed a different personality, or *if* the external situation had been different, the action, too, would have been different. The person makes a choice, to be sure, but with this given personality in this given situation, the choice could only be what it was. The Swedish law professor Vilhelm Lundstedt, one of the best known proponents of general prevention, considered punishment a necessary means to inculcate moral standards in the populace; but recognizing the force of the deterministic position, he characterized the convicted offender as "a kind of martyr to the maintenance of the social order."¹⁰

I do not intend to discuss the free will problem, which easily leads to a tangle of metaphysics and semantics.¹¹ Suffice it to say that in practical life we all tend to differentiate between those who can and those who cannot control their actions and that it is a generally accepted proposition that every normal person has to face the moral and legal responsibility for his voluntary acts. On the other hand, many thoughtful men feel a certain ambivalence, a lurking doubt, towards the concepts of guilt and responsibility. The tendency of the modern, enlightened mind to look for the individual and social causes of the criminal act makes moral indignation evaporate and may even turn it into compassion and pity. At the very least there is a feeling that many of the persons who break the law and consequently are subjected to prosecution and punishment were poorly equipped to resist the temptation. Without moral indignation, punishment is inflicted only reluctantly. For this reason, Bitterner and Platt are right when they assert that the execution of pun-

10 As quoted in 31 SVENSK JURISTIDNING 373 (1946).

11 A detailed analysis of the problem is given in H. OFSTAD, AN INQUIRY INTO THE FREEDOM OF DECISION (1961). For a brief discussion see Andenaes, *Determinism and Criminal Law*, 47 J. CRIM. L.C. & P.S. 406 (1956).

ishment has become less and less compatible with prevailing moral sentiment¹²—prevailing, that is, among the well-educated and liberal-minded. As a Norwegian Supreme Court judge once said: “Our grandparents punished, and they did it with a clear conscience. We punish too, but we do it with a bad conscience.” Although the institution of punishment is necessary, it is a sad necessity.

As long as legislation is restricted to achieving deterrence through economic sanctions, few people will find any moral objection. The same holds true for the threat of losing one’s driver’s license as a deterrent to traffic offenses. The morality of deterrence can be reasonably discussed only in relation to penalties which inflict a serious suffering, humiliation, or degradation on the offender.

The question has been most thoroughly explored in the context of the death penalty imposed for murder. Some defend the death penalty on retributive grounds irrespective of its deterrent value. Others accept it on utilitarian grounds, because they believe that the supreme penalty has a substantial deterrent effect. Of the opponents, many take the position that they will oppose capital punishment as long as it is not proven to have a more substantial deterrent effect than other forms of punishment. Others take the more absolute moral position asserting that the death penalty is unjustifiable regardless of its effect. For example, in 1902, a member of the Norwegian parliament stated during the debates on the new Penal Code: “Even if it were so that capital punishment were necessary to deter people, I cannot accept it. I cannot accept it because it runs counter to the moral principles a society ought to be built upon.”¹³

In our society there would be widespread agreement that the death penalty ought not be imposed for minor offenses, and the same feeling is expressed toward long prison terms which are considered too harsh for the offense for which they are imposed. A threat of punishment which would be considered justifiable for the hijacking of an airliner would be considered excessive for car theft or shoplifting. In 1969 a twenty-year-old Virginia student without a previous criminal record was sentenced to 25 years in prison (with five years suspended for good behavior) for the possession of marijuana.¹⁴ In Virginia the minimum penalty for possession of more than 25 grains (about half a teaspoonful) of marijuana is twenty years, the same minimum penalty as for first degree murder. This is a clear exam-

¹² Bittner & Platt, *supra* note 2.

¹³ 1902 ODELSTINGSFORHANDLINGER 438.

¹⁴ LIFE, Nov. 10, 1969, at 24.

ple of a punishment which is excessive in relation to the nature of the crime.

Thus, the decisive point does not seem to be whether the law is based on considerations of deterrence, but rather whether it can be accepted as a *reasonable means to a legitimate end*. The German courts have declared that the constitutional principle of the dignity of man requires (1) that only culpable offenders be punished, and (2) that the punishment be in just proportion to the gravity of the offense and the culpability of the offender.¹⁵ The first restriction rules out strict liability and vicarious liability in criminal law. I shall not discuss these problems but will deal only with the second proposition.

Punishment in relation to the gravity of the offense and the culpability of the offender provides an elastic formula. Opinions as to the gravity of the offense and the culpability of the offender may differ, but the formula seems to express the essence of the common sense of justice. The formula is valid also with regard to penalties imposed on the basis of considerations other than general deterrence. The Norwegian Penal Code has a provision which prescribes a minimum penalty of two years imprisonment for aggravated larceny, provided the defendant has had at least three previous convictions for that crime. The motivation behind this provision was a desire to insure a more efficient treatment of professional thieves. However, from time to time cases have arisen where the two-year minimum has been applied to petty thieves who happen to have committed a burglary to obtain small quantities of food. Such cases have provoked strong criticism because of the lack of proportion between crime and punishment. The legislature responded to this criticism with a 1967 amendment to the Penal Code providing that the court can disregard the minimum sentence if special circumstances are present.

Where the probability of detection of criminal behavior is low, legislatures are sometimes inclined to compensate by increasing the severity of penalties. In the history of criminal law this has been a recurrent theme. The brutality of penal law in former times is more easily understood when one considers the weakness of state organization and the absence of an organized police force.¹⁶ No doubt a moderate level of penal sanctions combined with widespread and

¹⁵ 1968 DEUTSCHE JURISTENZEITUNG 388.

¹⁶ See E. SCHMIDT, *EINFUEHRUNG IN DIE GESCHICHTE DER DEUTSCHEN STRAFRECHTSPEFLEGE* 63-64, 93-94 (2d ed. 1951); I RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW* (1948); E. ANNERS, *HUMANITET OCH RATIONALISM* 14-15 (1965).

effective enforcement is more acceptable to the moral sentiment than harsh penalties with only sporadic enforcement. Compensating for weak enforcement with harsh penalties may also lead to severe treatment of one type of offense in relation to another offense which, although more reprehensible, is more easily detected. Such discrepancies may be justifiable from a utilitarian point of view, but they are objectionable from a retributive point of view, and if the discrepancies are glaring they might violate the widely accepted principle of reasonable proportion between crime and punishment.

III. CONSIDERATIONS OF GENERAL PREVENTION IN SENTENCING

The preceding discussion has been concerned solely with situations where a sentence based on considerations of deterrence is prescribed by the legislature, as when a penal provision prescribes a fixed sentence (for example, imprisonment for life for murder) or a minimum penalty binding on the courts (as in the original version of the Norwegian aggravated larceny law). However, this is seldom the prevailing pattern in modern legislation. Typically the law gives the judge broad discretion to make the sentence fit the offense and the offender. The relationship between the threat of sanction and the application of punishment thus becomes more complex. The role of the court is not only to carry out the prescriptions of the law but also to exercise its own judgment. The law could, of course, require that the judge in sentencing consider only the rehabilitation of the individual offender. In such a system a murderer might receive a suspended sentence or probation if the judge determines that there is no danger of recidivism, and, in contrast, the petty but incorrigible thief might be imprisoned for life. But most criminal codes leave the task of weighing the different purposes of punishment, including general prevention, to the judge. For example, the Norwegian Penal Code states in section 52 that the court may suspend the punishment "unless the concern for general law-abidance or for restraining the convict from further offenses requires execution of the punishment." The "concern for general law-abidance" is meant to cover the general preventive aspects of punishment.

In practice, it seems that judges in all countries give weight to general preventive considerations as long as the penalty remains reasonably proportionate to the crime. For a meaningful discussion of the moral aspect of the consideration of general prevention in sentencing, it is necessary to distinguish between different situations. The court, in meting out the penalty, may consider the potential deterrent effect of *each particular sentence*. Or the court may con-

sider the foreseeable effects of *this level of punishment for this type of offense*. Both types of considerations may be applied in the same case, and it is not easy to draw a clear line between them. Nevertheless, the distinction is important for analysis.

If the sentencing judge wishes to attach weight to the general preventive effect of a particular sentence, he should consider the publicity which the decision will receive and the possible reactions of those people who will hear or read about the decision. If a case has for some reason attracted great publicity, a severe sentence could be expected to have great deterrent effect. If, on the other hand, the publicity is minimal and the sentence probably will be known only to the defendant himself and the officials involved with the case, the judge could let the offender off with a light sentence without sacrificing any general preventive effects. In a system of this kind it is a fair generalization that the offender is used as a means for the public good, and most people would find the system unjust because it would violate the principle of equality before the law. It may, to be sure, often be difficult to determine what equality means, or, in other words, what differences between two similar cases justify a different treatment, but few would disagree that differences in the amount of publicity ought to be irrelevant. For this reason, the system might also be self-defeating since a system of criminal justice which is exposed as capricious and unjust will be unable to act as an educative force. I shall not go so far as to assert that it is unjust under all circumstances to attach weight in sentencing to the deterrent effects of the particular sentence, but at least we are in an area which demands extreme caution.

The situation is different when general prevention is taken into consideration in determining the general level of penalties for different types of offenses. This seems to me both legitimate and necessary. If the Penal Code gives the court freedom to determine the sentence (for example, within the limits of one year and twenty years of imprisonment), this means that the legislature has abstained from developing a fixed and detailed system of penalties. The threat of the law has a certain indefiniteness, and the task of specifying the exact extent of the threat falls to the courts. In countries with efficient judicial review of sentencing, the supreme court establishes guidelines for the lower courts. In systems where sentencing is viewed as the exclusive, or almost exclusive, province of the trial court, the discrepancies between these courts will necessarily be greater. But in relation to the legislative enactment the task is, in principle, the same. The sentencing is simply a continuation of the evaluations

begun by the legislature; and it would be arbitrary and contrary to the public interest to exclude motivations of general prevention.

What of the Kantian principle in this case? When the structure of penalties is fixed by the legislature it could not reasonably be said that the individual offender serves as a means to deter others. I tend to see it the same way when the level of penalties is fixed by the courts. But whether one agrees with these propositions is of little consequence for the moral judgment.

I shall illustrate the use of general preventive considerations in sentencing by some cases from the Norwegian Supreme Court, chosen somewhat randomly. The Court has power to alter sanctions on law-breakers, on appeal by the prosecutor or the defendant, and it states its reasons for doing so.

(1) *1947 Norsk Retstidende 368*. A Norwegian guard in a German camp in Norway for Yugoslavian prisoners had, at the instigation of a superior, brutally killed a prisoner. The trial court sentenced the defendant to death, and the Supreme Court upheld the sentence. Justice Skau for the majority declared: "Public international law has strict rules for the treatment of prisoners of war and accepts the highest penalties for serious crimes against them. Prisoners of war, civil as well as military, are in an especially vulnerable position and have no other defense than that which a strong legal protection can give. But a strong legal protection in this relationship supposes not only strict rules of law but also strict enforcement." Chief Justice Stang added: "As conditions have been under this war and may become under a new one it is necessary that guards and supervisors in prisons and concentration camps [learn] that to maltreat or kill a prisoner is a crime which will be severely punished. For general preventive reasons it is therefore necessary to apply the ultimate penalty of the law."

(2) *1947 Norsk Retstidende 271*. This case concerned the question of drunken driving. The law has a fixed limit of blood alcohol content (0.05 per cent) and for general preventive reasons the courts have established a practice of not suspending sentences in such cases in the absence of extraordinary circumstances. Sometimes the trial court, consisting of one judge and two lay assessors, suspends the prison sentence out of pity for the defendant. In this case the lay assessors outvoted the judge and suspended a 21-day prison sentence. They argued that this case was an isolated instance of drunken driving by an otherwise law-abiding citizen. On appeal by the prosecution the Supreme Court imposed a 30-day prison sentence without suspension. The Court emphasized the great danger

represented by drunken drivers and the increasing number of such drivers.

(3) *1947 Norsk Retstidende 269*. The defendant, a thirty-year-old man with no previous record, had been drunk in a public place and struck a policeman. In the trial court the lay assessors, outvoting the judge, suspended a 30-day sentence. On appeal by the prosecution the Supreme Court reversed. Judge Gaarder spoke for the court: "I find the appeal justified and, in accord with the previous practice of this court in similar cases, the penalty should be reinstated. Considerations of general prevention speak against suspending the penalty in this type of case."

(4) *1953 Norsk Retstidende 1312*. The defendant was the captain of a Bristol trawler that had been fishing illegally in Norwegian territorial waters. The trial court imposed the harshest sentence ever meted out for this offense. The captain's appeal was unsuccessful. Judge Thrap, speaking for the majority, stated that the purpose of the law forbidding trawling was to protect the vital interests of the coastal population. Illegal fishing by Norwegian and foreign trawlers caused the coastal population considerable loss and inconvenience. The trawling not only adversely affected local fishing interests, but also endangered their fishing tackle. Judge Thrap pointed out that the law had time and again been made more rigorous, and he quoted official statements regarding the need for stringent sanctions. In conclusion he stated: "Because of the strong, general preventive considerations in this field, I take as my starting point that fines and confiscations shall be in amounts which, in each individual case, are adequate for efficient enforcement of the law." Experience had shown that the previous penalties had been insufficient. Under these circumstances, the Supreme Court saw no reason to reduce the sentence imposed by the trial court. One judge dissented. He agreed that it was justifiable to introduce stricter penalties, but was unwilling to go as far as the majority because he felt that the resulting sanction would vary too much from previous practice.

As these cases show, the Court is concerned not with the effect of the individual sentence, but rather with the effect of varying penalties for different types of offenders. It seems difficult to find valid objections to a judge taking deterrence into consideration in the same manner as a legislator does. However, we may sometimes question the beliefs of the courts with regard to the effects of a certain sentencing policy. For example, is it realistic to assume that the war crime sentences imposed in Norway after World War II will have

any deterrent effect in a future wartime situation? There may also be differences in value judgments. With regard to the drunken driving cases we may ask: How many prison sentences are we willing to accept in order to save one life or save one person from crippling injury? Similar questions confront the legislature.

Considerations of general prevention are frequently mentioned by a court in deciding whether to suspend a sentence. While principles of general deterrence seem to weigh against suspension, special circumstances of the specific case may warrant suspension of sentence. For example, in the drunken driving cases the court may be motivated to suspend the sentence because of the bad health of the offender;¹⁷ the suicidal tendencies of the offender's wife;¹⁸ or by the lapse of time since the act was committed.¹⁹

Questions may arise as to which circumstances can properly be considered in determining the extent of the penalties. The next two cases serve as examples.

(5) *1962 Norsk Retstidende 517*. The defendant, a nineteen-year-old man, followed an elderly woman and snatched her bag containing 750 kroner (about \$100). He had no previous convictions and the trial court imposed a ninety-day suspended sentence. On appeal by the prosecution, the Supreme Court reduced the sentence to forty-five days but denied suspension. Speaking for the Court, Judge Bendiksbj stated: "The prosecution has produced evidence that recently there has been a great increase in 'bag-snatching.' Since September 25, 1961, there have been eighteen cases in Oslo. The victims, according to a list which was produced in the case, are generally elderly women; the victim in this case was eighty years old. Crimes of this kind are difficult for the police to solve; in only four of the eighteen cases has the offender been found. There is obviously a strong need to support effectively the work of the police who are trying to protect citizens who are especially exposed to this kind of attack and who have little capacity to defend themselves. When the culprit is caught, the sanction ought to be severe. I therefore find that considerations of general deterrence weigh heavily in favor of denying suspension in this type of crime."

(6) *1969 Norsk Retstidende 1048*. On several occasions, the defendant, an eighteen-year-old boy, had purchased moderate quantities of hashish, sometimes with friends as partners. The trial court stated that he had actively taken part in creating a milieu of nar-

¹⁷ 1968 NORSK RETSTIDENDE 737.

¹⁸ *Id.* at 705.

¹⁹ *Id.* at 707.

cotics in his home town. The court imposed a sixty-day prison sentence, the last thirty-five of which were suspended. On appeal the defendant sought to have the entire sentence suspended, arguing that he was now engaged in vocational training and had broken with the narcotics milieu. Speaking for the majority, Judge Boelviken conceded that it was unnecessary to require the defendant to serve the sentence in order to prevent him from further criminal activity. However, referring to general preventive considerations and the Court's previous practice in such cases, she held that the defendant's crime was sufficiently serious to require him to serve at least part of his sentence. Judge Hiorthoy, dissenting, believed that since the defendant bought and imported hashish only for personal use, rather than being a professional narcotics importer, principles of general deterrence should not be decisive. He felt that considerations of general deterrence should give way when imprisonment would have greatly adverse effects on the defendant. After discussing the particular circumstances of the defendant, he added that he did not feel bound by the previous rigorous practice of the Court in narcotics cases: "Conditions have changed, and the recommendation of the prosecution as well as the sentence of the court below shows that a different and milder course of sentencing is now followed in cases in which the defendant made only personal use of the narcotics. Such a policy expresses a view, which I share, that the general deterrent effects of punishment are questionable in relation to personal use of marijuana [hashish], and that this ought to be taken into consideration when determining whether a sentence should be suspended."

The other three judges agreed with Judge Boelviken, adding that it would be contrary to previous practice of the Court to suspend the entire sentence, and that conditions had not changed so as to justify changing that practice.

The bag-snatching case presents the question whether it is ethically defensible to increase the penalty because of changes in the crime rate or in other social conditions. I agree with the court's affirmative answer to this question. Just as the legislature considers social conditions in legislating against certain conduct, the court should have the power to adjust sentencing policy to the changing needs of society. Such adjustment may lead to less severe sentences for some crimes and to harsher sentences in others. This was the argument of the dissenting judge in the hashish case. Infanticide is an example of a crime for which there has been mitigation of former harsh sentencing practices. Since this crime no longer represents a frequent problem in the Scandinavian countries, penal sanctions for it have

become much more lenient, and in the few cases which have recently been heard, the sentence has almost always been suspended.

Perhaps one exception, illustrated by a German case from the Nazi era,²⁰ should be made regarding the factors which the court should consider when determining a penalty. The defendant was convicted of violating a law which prohibited sexual intercourse between people of Jewish and "Aryan" nationality. The Supreme Court considered it proper to take notice that the number of such violations had greatly increased *after the commission of the act of the defendant*. While the character of the charge makes this decision especially repugnant, it seems that in any case subsequent developments should be excluded as an aggravating factor in sentencing. However, this problem will rarely arise.²¹

In Norway, the question has recently arisen as to whether it is unjust to establish two levels of sentences: one for Norwegians and a different one for foreigners. Norway is a small, peaceful country with a modest crime rate. Compared to those of other nations, punishments are mild, with few prison sentences of more than two or three years. Recently there have been several cases in which foreign, professional criminals have taken advantage of Norway's relatively lax law enforcement to engage in armed robbery, check forgery and narcotics smuggling. Thus, the Norwegian legal system must deal with professional criminals who are accustomed to much more severe penalties in countries in which they have previously operated. It is against national interests to make Norway a tempting base for international narcotics dealers or other professional criminals drawn there by the mild criminal penalties. On the other hand, there is no wish to change the present penalties imposed on Norwegian citizens. Nevertheless, such a dual system seems objectionable, especially when a Norwegian and a foreign national are involved in the same crime.

Sentencing practices vary from one country to another; for example, sentencing in the Scandinavian countries differs in many respects from that in the United States. With the exception of penalties for drunken driving, sentencing in the Scandinavian countries is much more uniform and more lenient. It is therefore dangerous to generalize. A study of sentencing practice in Norway leads to the conclusion that when general deterrence considerations are part of the grounds of a judgment, the general penalty level, not the effect of the particular

²⁰ 1937 JURISTISCHE WOCHENSCHRIFT 3083.

²¹ In the Norwegian bag-snatching case cited above, it is not clear from the judgment whether the Court made any distinction according to whether the change in the crime rate had taken place before or after the commission of the crime.

sentence, is determinative. However, this is not necessarily the case in other countries.

Nigel Walker's exposition on "exemplary sentences," for example, seemingly reveals a willingness of English courts to adjust a sentence to the needs of deterrence felt in the particular case. "A judge who believes that more severe sentences will influence potential offenders, but who cannot ensure that his colleagues will adopt his policy, will sometimes impose sentences which are markedly more severe than the norm for the express purpose of increasing their deterrent effect."²² Exemplary sentences, Walker explains, are usually imposed to deal with a specific offense which has suddenly become more frequent or which has attracted much publicity, especially if the instances of the offense are limited to a certain locality.

A famous example of this system at work is the use of harsh sentences to suppress attacks on blacks in the Notting Hill district of London in 1958.²³ Nine boys, six only seventeen years old and all but one with no police record, were sentenced to four years imprisonment. This imposition of exemplary sentences was upheld by the Court of Criminal Appeal. Other trials followed, in which offenders received lighter sentences; and the race riots waned after the exemplary sentences. But it is extremely difficult to ascertain the role of the exemplary sentences in ending the turmoil.

Walker supports using criminal penalties as a deterrent but argues against the occasional exemplary sentence, not for ethical reasons but because he questions the effectiveness of the exemplary sentence. However, there may be fields where the exemplary sentence works effectively; white collar crime may be such a field. A high official of the Antitrust Division of the United States Justice Department stated some years ago:

No one in direct contact with the living reality of business conduct in the United States is unaware of the effect the imprisonment of seven high officials in the electrical Machinery Industry in 1960 had on the conspiratorial price fixing in many areas of our economy; similar sentences in a few cases each decade would almost completely cleanse our economy of the cancer of collusive price fixing and the mere prospect of such sentences is itself the strongest available deterrent to such activities.²⁴

²² N. WALKER, SENTENCING IN A RATIONAL SOCIETY 68-69 (1969).

²³ *Id.* at 69-70; WOOTTON, CRIME AND THE CRIMINAL LAW 100-1 (1963); Andenaes, *supra* note 1, at 953, 982.

²⁴ Spivack, as quoted in D. GRESSEY & D. WARD, DELINQUENCY, CRIME, AND SOCIAL PROCESS 210 (1969).

Even assuming that unusually heavy penalties of the Notting Hill type have the desired effect, such penalties may be objectionable from an ethical standpoint because they are arbitrary, imposing unequal treatment on one actor but not on another who may be equally blameworthy. But it will not always be easy to tell whether an exemplary sentence is being imposed. As mentioned above, the distinction between the two points at which considerations of general prevention can enter the sentencing process (in calculating the effects of a certain *level of penalties* or of a *particular sentence*) is not a sharp one. A judge in deciding the right level of penalties for a specific crime at a specific time and place comes close to considering the effects of the particular sentence. And it may happen that the judge, in pronouncing a sentence harsher than previous practice would dictate, does not himself know whether he is changing to a new level of penalties or only temporarily parting from the standard sentence to impose an exemplary sentence.

Sometimes it may seem fictitious to talk about determining a level of sentencing, because the case under consideration is more or less unique. The *Quisling* case may serve as an example. The Norwegian Supreme Court sentenced Quisling to death for treason, apparently motivated by a belief that it was necessary to apply the supreme penalty for reasons of general prevention.²⁵ If it is granted that the death penalty is permissible, the decision is not objectionable. There is no disproportion between crime and punishment and no breach of the principle of equality before the law.

IV. PROOF OF DETERRENT EFFECT

The result of our discussion so far can be summed up in this statement: Punishment on the basis of general prevention is ethically defensible, both in legislation and sentencing, if the penalty is in reasonable proportion to the gravity of the offense and does not violate the principle of equality before the law. However, the question may be raised from another angle. It is often asserted that there is no scientific proof for the general preventive effects of punishment, and it may be argued that it is morally unjustifiable to inflict punishment on the basis of a belief which is not corroborated by scientific evidence. The burden of proof, it is sometimes said, is on those who would invoke punishment. Others may answer that the burden of proof is on those who would experiment at the risk of society by removing or weakening the protection which the criminal law now provides.

²⁵ 1945 NORSK RETSTIDENDE 109 (quoted in Andenaes, *supra* note 1, at 953).

Two points should be made. First, our lack of knowledge of general prevention may be exaggerated. In some areas of criminal law we have experiences which come as close to scientific proof as could be expected in human affairs. In many other areas it seems reasonably safe to evaluate the general preventive effects of punishment on a common sense basis. Modern psychology has shown that the pleasure-pain principle is not as universally valid as is assumed, for instance, in Bentham's penal philosophy. Nevertheless, it is still a fundamental fact of social life that the risk of unpleasant consequences is a very strong motivational factor for most people in most situations.

Second, even in questions of social and economic policy we rarely are able to base our decisions on anything which comes close to strict scientific proof. Generally we must act on the basis of our best judgment. In this respect, the problems of penal policy are the same as problems of education, housing, foreign trade policy, and so on. The development of social science gradually provides a better factual foundation for decisions of social policy, but there is a long way to go. Besides, research always lags behind the rapid change of social conditions.

However, it is undeniable that punishment—the intentional infliction of suffering—is a special category among social policies. It contrasts sharply with the social welfare measures which characterize our modern state. This calls for caution and moderation in its application. I do not think the legal concept of “burden of proof” is very useful in this context. The balance that should be struck between defense of society and humaneness towards the offender can hardly be expressed in a simple formula. The solution of the conflict will depend on individual attitudes. Some people identify more with the values threatened by criminal behavior; others identify more with the lawbreaker. But certainly punishment should not be imposed precipitously. History provides a multitude of examples of shocking cruelty based on ideas of deterrence, often in combination with ideas of just retribution.

One conclusion ought to be beyond controversy. As long as society feels obliged to use punishment for general preventive reasons, it is important for researchers to attempt to evaluate the accuracy of the assumptions that lawmakers, courts and law enforcement agencies make about general prevention. This is a badly neglected field of research. It may be necessary and ethically justifiable to base policy decisions on common sense reasoning, often amounting to sheer guesswork, as long as no other alternative exists. But it is morally indefensible to continue to punish other human beings without making real efforts to replace speculation with scientific facts.