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CRIME AND DELINQUENCY ISSUES:

A Monograph Series

Perspectives on

Deterrence

by

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University of Chicago

**National Institute of Mental Health
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Foreword

The prevention of crime and delinquency covers a wide range of activities. Usually prevention suggests such activities as: eliminating social conditions closely associated with crime and delinquency, providing mental health and related services to children in danger of becoming delinquent, and reducing the situations in which crimes are most likely to be committed.

Deterrence, perhaps because it is viewed as a process limited to the criminal law and its administration, is not often viewed as a prevention activity. Yet deterrence is inextricably involved in legislative, judicial, and administrative decisions that consider sanctions or threats of sanction against deviant behavior. And as such, it touches the lives of people in everyday life, beyond those who become directly involved in the criminal justice system.

Though deterrence is a broad concept, distinctions are drawn among special, general, and marginal deterrence. Special deterrence refers to the threat of further punishment of one who has already been convicted and punished for a crime. General deterrence aims to prevent the population at large (including the criminals in it) from committing criminal acts. In considering deterrence, a practical issue that usually appears is: would a more severe penalty attached to a criminal law more effectively deter criminal behavior than a less severe one? Marginal deterrence concerns itself with this issue. It refers to increasing the effectiveness of deterrence through variations in the conditions of legal threats. Marginal deterrence issues may arise in relation to both general and special deterrence.

Historically, there has been considerable argument about the effectiveness of deterrence. Witness the debate over whether capital punishment makes a unique contribution to the deterrence of homicide, or whether lesser punishments would prove less effective as deterrents to drug abuse, "white collar" crime, shoplifting, parking violations, and a host of other deviant behaviors.

The current growing incidence of crime and delinquency and the mounting public concern about it makes the careful examination of deterrence both timely and important. It appears essential that the concept, process, and actual results of deterrence be subjected to sound conceptual and scientific assessment. Such

theory building, research, and the planned use of knowledge must come about if societal efforts at preventing and reducing criminal acts are to be based on testable and empirical models, rather than simply on belief systems.

This volume, drawing on a broad and interdisciplinary range of literature, reviews the concept of deterrence in detail, and considers its application to various forms of deviant behavior. Professor Zimring's effort represents in my judgment an important contribution to the analysis of the concept of deterrence. It also points to specific analyses of some basic assumptions underlying our criminal justice system, and suggests the development of more effective legislative and social policy directions.

In order to provide the author complete freedom to express his views, no substantive changes have been made by NIMH. The views expressed, therefore, are those of the author.

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Contents

	<i>Page</i>
Foreword	iii
Acknowledgments	vi
Introduction	vii
Part I. Definitions	1
Part II. Deterrent Motives and Crime Control Policies ..	9
Section 1. Foundations for Official Belief	10
Section 2. Some Ethical Issues in Deterrence	20
Section 3. Determining Costs in Crime Prevention ..	25
Part III. The Deterrent Effect—A Survey of Issues	32
Section 1. General Deterrence	32
A. Differences Among Men	34
B. Types of Threatened Behavior	49
C. Threat as Communication	56
D. Applicability and Credibility	65
E. Variations in Threatened Consequences	73
F. Variations in Severity of Consequences	83
G. The Moral Quality of Threatened Behavior: Conscientious Objection and Deterrence ..	92
H. Moderating Individual Propensities Through Group Pressure	96
Section 2. Special Deterrence	97
Concluding Reflections	108

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Anyone who chooses to write about deterrence owes a substantial intellectual debt to Johannes Andenaes of the University of Oslo, the most distinguished of the modern scholars writing about deterrence. During 1968 Professor Andenaes spent five months in Chicago as teacher and critic of those of us involved in the deterrence project. He also read and criticized an early draft of this monograph. It is difficult for me to determine how many of his insights pass in this volume without proper acknowledgment.

Maurice Zimring of Hilo, Hawaii, is responsible for the English translation of this effort.

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Introduction

The disciplines of law and criminology have a long speaking acquaintance with the theory that threat of punishment acts as a deterrent to crime. The broad outlines of the deterrence argument have been articulated and embellished over the course of two centuries, as deterrent motives have assumed a greater importance in justifying regimes of punishment policy. In recent years deterrence has received an increasing amount of attention from scholars in many fields, and the emphasis has shifted from the question of deterrence as a general theory to its discussion as a complex of issues about human behavior in a number of different situations. A number of thoughtful articles begin by phrasing the traditional question "Does punishment deter crime?" but quickly make it clear that the answer to this general question is less important than the significant differences in situation that condition the likelihood and extent of deterrence in crime control.

As the focus of discussion about deterrence has shifted from the general to the specific, the need for empirical research has received increasing emphasis in the literature, and the volume of statistical studies of crime control policies has also increased. Research work in social psychology and other fields relevant to deterrence has also mushroomed in the period since World War II. The net effect of increasing attention and study, however, is something less than a knowledge explosion. Empirical study of crime control policy holds great promise, but we are in the prehistory of such studies. The behavioral models discussed in deterrence are more suggestive than definitive; there are many unanswered questions about the relevance and reliability of much of the interesting psychological experimentation; on most questions, what is known leaves uncomfortably ample room for speculation. And as knowledge increases by small degrees, the movement appears to be more away from than toward a general theory of sanctions. But if the boomlet in deterrence study has produced only modest increments in our understanding, it is nonetheless an important step forward in an area of great importance.

This volume is an attempt to draw together some of the empirical and analytical discussions of deterrence in criminology, law, and various social sciences, and in doing so, to impose a conceptual organization on issues in deterrence. The following

pages consider three different but related aspects of deterrence in crime control. Part I offers a few definitions basic to the discussion of issues in deterrence, in an effort to avoid one of the most basic of communication gaps—a difference of language usage between speaker and audience. Part II is concerned with deterrence as a motive for official action in crime control. Part III is a survey of issues relating to the effectiveness of threats as a mechanism for inducing compliance to law. The survey of contributions relevant to deterrence is hopelessly incomplete. It would be difficult to find an area of social science research without possible bearing on our understanding of deterrence, and thus literature of significance in our inquiry expands quickly out of reach. The conceptual organization in Part III is most charitably viewed as tentative, and much of the analysis is speculation. It is published in this form in the hope that it will provoke further research and analysis, thereby contributing in small part to the momentum toward a better understanding of the potential and limits of criminal law as a mechanism of social control.

Part I. Definitions

It is essential, if analysis is even in part to replace emotion in discussions of deterrence, to read some precision into the definitions of a few central terms.

A sign in the park reads

WALKING ON THE GRASS IS PROHIBITED
\$100 FINE
VIOLATORS WILL BE PROSECUTED

Smith and Jones pass the sign while taking a lunch-hour stroll on the park sidewalk. The sign announces a legal *threat*: the attempt of the *threatening agency* (here presumably the city authorities) to decrease the amount of *threatened behavior* (walking on the grass) by announcing that the agency will impose unpleasant consequences on those individuals who commit the threatened act. The sign conveys a *legal threat* because it is based on a rule of law issued by an agency of governmental authority. Like most legal threats, this message is issued to citizens in general rather than specially communicated to particular individuals. In this situation the *threatened consequences* are a fine and prosecution. Smith and Jones are part of the *audience* of the threat. The agency probably considers them part of the threatened audience whether or not they actually read the sign, because they are two of the people the threat was aimed at influencing. However, if our interest is confined to how such announcements affect human behavior, membership in the threatened audience should be restricted to those individuals who are aware of a threat's existence.

The threat communicated to Smith and Jones may or may not affect their behavior. They may stay off the grass because neither had intended to walk there in any event. One or both may walk on the grass in spite of the threat. If the sign produces any change in the behavior of Smith and Jones, such as inducing them to keep off the grass, tempting them to walk on the grass in defiance of the order, or persuading them to walk in some other park during their lunch hour, the threat will have had a *channeling effect* on the behavior of one or more members of its audience, for the channeling effect of a threat is the total quality of behavioral change in a threatened audience attributable to the existence of a threat. The term *deterrence* is used more re-

strictively, applying only when threats succeed in achieving their objective by reducing the number of times the threatened behavior takes place. The *deterrent effect* of a particular threat is the total number of the threatened behaviors it prevents.

There are a number of situations where threats may influence behavior in the direction desired by the threatening agency, but the result will be less than fully law-abiding conduct. The potential bank robber may respond to the threatened penalty for bank robbery by switching to burglary, heeding one threat only to disregard another. The presence of a police patrol may reduce the burglary rate in Manhattan at the expense of the Bronx. Or intensive law enforcement may persuade the mugger to reduce the level of his activities from five to three crimes a week. In each of these cases, the mechanism of deterrence is observable, but the result of the threat is not law-abiding behavior on the part of the individual threatened. Yet in all of these cases, a deterrent effect as defined above will exist, at least on the Island of Manhattan. A more troublesome case is that where the posting of a 65-mile-per-hour speed limit causes a driver to reduce the speed from 90 to 70 m.p.h. In this case, which can be called *partial deterrence*, no law violation will have been prevented by operation of the legal threat, but the speed reduction is still an important contribution toward the goal of the legal threat.

If one is interested in comparing the rates of behavior that would result in the case of a particular threat against the rates of behavior that could be expected if the threat were removed, the total deterrent effect of the threat is relevant. If, on the other hand, one seeks to compare the effectiveness of one type of threat against that of a different threat (say, the threat of Y years in prison against the threat of Y plus 10 years in prison), the deterrent effect of the larger penalty is not the central issue; rather, the comparison should seek to establish whether the larger penalty functions as a *marginal deterrent*, reducing the rate of threatened behavior below that experienced under the lesser penalty.

A further distinction concerns the difference between the special and general effects of threats. *Special effects*¹ are the reactions that a threat produces among those who have been previously punished and who, for that reason, may react differently to threats than the rest of the population. The *general effect* of a threat is the response it produces among persons who have not been punished. For this group the threat, and the example of the punishment of others, must influence behavior independent of any personal experience with the threatened consequences.

¹ See Andenaes, *The General Preventive Effects of Punishment*, 114 U. Pa. L. Rev. 949, at 951 (1966).

The Deterrent Process

The definitions offered above describe deterrence only as a result—the number of offenses prevented—without providing any insight into how legal threats might achieve such results. Commentators have suggested a number of different psychological processes by which the threat of punishment might result in deterrence. The mechanism most often referred to is *direct* or *simple* deterrence, but a number of more subtle ways in which threat and punishment might reduce the number of offenses have also been suggested.

The theory of simple deterrence is that threats can reduce crime by causing a change of heart, induced by the unpleasantness of the specific consequences threatened. Many individuals who are tempted by a particular form of threatened behavior will, according to this construct, refrain from committing the offense because the pleasure they might obtain is more than offset by the risk of great unpleasantness communicated by a legal threat. In the simple model of deterrence, the reaction is a very specific one—comparing *this* crime with *this* penalty for one particular moment²—and the results of this episode of weighing the pros and cons of lawbreaking do not alter the individual's personality, or sense of right and wrong, or general propensity to obey the law. If the individual is to be kept law-abiding, the process of simple deterrence must confront him at every turn—making each form of forbidden conduct a risk not worth taking.

In some early writing, the image of the potential criminal reacting to punishment threats was that of a dispassionate customer peering at a price list in search of bargains, perfectly informed and completely rational.³ But modern writers have recognized the plausibility of the notion that people might refrain from crime specifically to avoid unpleasantness, while discarding the image of the super-rational potential criminal that used to accompany the theory.⁴ Others, convinced that the notion of simple deterrence is unalterably bound up with the image of man as the "lightning calculator of pain and pleasure," have rejected the notion of simple deterrence completely.⁵

In some cases of simple deterrence, the emotional effect of the threat on the threatened audience may be minimal—the man

² The most famous exposition of the theory of simple deterrence is found in the works of Bentham. See *Principles of Penal Law*, Pt. II, Bk. I, Ch. VI, *Measure of Punishment*. I Works, 399 (1843), and *Principles of Morals and Legislation*, Ch. XVI of the Proportion between Punishment and Offenses, I Works, 86 (1843). [Citations quoted from Hawkins and Zimring, *Deterrence and Survey Research*, Working Paper, Center for Studies in Criminal Justice at the University of Chicago (1968).]

³ *Ibid.*

⁴ See, e.g., Andenaes, *General Prevention: Illusion or Reality?* 43 J. Crim. L., C., & P.S. 176 (1952); Morris, *Impediments to Penal Reform*, 33 U. Chi. L. Rev. 627 (1966).

⁵ See, e.g., Barnes and Teeters, *New Horizons in Criminology*, at 338.

dissuaded from parking his car in a tow-away zone may suffer only the mildest regret that the threat of unpleasantness has made this convenience impractical. In other cases, simple deterrence will be achieved because the threat of consequences produces substantial amounts of anxiety or fear in potential deviants. Thus, depending on the nature of the threatened behavior and the threatened consequences, simple deterrence may be associated with different levels of emotional arousal. Within even the simple model of deterrence, then, a number of different processes may be at work, producing different kinds of emotional effect that may condition different types of threat response.

Beyond the notion of simple deterrence, a number of less direct mechanisms through which the threat of punishment induces compliance have been suggested, and these more subtle processes may well be more important than simple deterrence in reinforcing patterns of law-abiding behavior. The search for these more subtle effects involves a wide horizon. As Professor Packer puts it,

Our hypotheses about the operation of general deterrence should be broadened to include also the effect of punishment—and indeed, of all the institutions of criminal justice—on the totality of conscious and unconscious motivations that govern the behavior of men in society.⁶

With the scope of inquiry thus broadened, the threat and example of punishment may play a role in reducing crime as an aid to moral education, as a habit-building mechanism, as a method of achieving respect for the law, and as a rationale for obedience.

Threat and Punishment as a Teacher of Right and Wrong

Simple deterrence is not the primary explanation of widespread patterns of conformity to most of our criminal laws. As Professor Toby has said, “. . . the socialization process keeps most people law abiding, not the police.”⁷ But the threat and example of punishment may play an important role in the teaching of right and wrong, and thus in crime prevention, in the larger sense of socialization. The association of forbidden behavior with bad consequences may lead individuals to view the behavior itself as bad. Thus, knowledge that people who steal are treated badly would lead to the association of wrongfulness with stealing, and ultimately to the conclusion that stealing is wrong.⁸

⁶ Packer, *The Limits of the Criminal Sanction*, at 42.

⁷ Toby, *Is Punishment Necessary?* 55 J. Crim. L., C., & P.S. 332, at 334 (1964).

⁸ Any discussion of the moralizing effects of punishment among American lawyers owes much to the work of Professor Andenaes, *supra* notes 1 and 4. The present comments are also based on Andenaes, *Some Further Reflections on General Prevention*, Working Paper, Center for Studies in Criminal Justice (1962).

Along a somewhat different tack, the threat and example of punishment by a legal system will communicate to the individual that the legal system views the threatened behavior as wrong, and this information will also affect the moral attitudes of the individual. The internal dialogue would go: "The institutions I respect view this behavior as wrong, therefore I should consider this behavior wrong."

Finally, threat and punishment may aid moral education by serving as an attention-getting mechanism. The threat of punishment for stealing forces the individual to think about the moral quality of the act of stealing. Such reflections may lead to the conclusion that stealing is wrong because it causes other people to suffer and undermines the security of a system of private property. In this last process, which Professor Andenaes calls "punishment as an eye-opener,"⁹ the threat of punishment provides only the occasion for reflection rather than any substantial moral ammunition.

Threat and Punishment as Habit-Builders

On his first few trips downtown, the threat of punishment may cause Smith to refrain from speeding on his way to work. After a while, however, more than the simple deterrent effect may be at work, for Smith may have developed the habit of driving at a certain speed, and this habit provides additional insulation against future law violation. And just as the habit of obeying the law in particular situations may emerge over a period of time, the threat of punishment may produce a number of separate habits of compliance which in turn result in a more generalized habit of obeying the law.¹⁰

Threat and Punishment as Mechanisms for Building Respect for Law

If the solemn commands of a legal system were not reinforced with the threat of punishment, many individuals would see no basis for concluding that the legal system really meant what it said. More important, even those who would continue to obey legal commands would be demoralized by watching other people break the law and escape unpunished. The threat of punishment is evidence that the legal system is serious in its attempt to prohibit criminal behavior: it is the "convincer." The punishment

⁹ Andenaes, *Some Further Reflections on General Prevention*, *supra* note 8. For comments on the effect of increasing the severity of consequences threatened on the "eye-opening" effects of punishment, see sub-section III C, *infra*.

¹⁰ "Every one of us is confronted daily by situations in which criminal behavior is a possible alternative. Sometimes the presentation is sufficiently vivid that we think about it and reject the criminal alternative. More frequently and more significantly, we automatically and without conscious cognition follow a pattern of learned behavior that excludes the criminal alternative without our even thinking about it." Packer, *supra* note 6, at 43.

of wrongdoers is necessary to continue that respect, because the unpunished criminal is a direct challenge to the authority behind the law.¹¹ How great would be our dissatisfaction if the villain in the Western movie could escape his just deserts after a career of evil!

Threat of Punishment as a Rationale for Conformity

Temptation to break the law is often a disturbing experience. Even a man completely convinced that stealing is wrong may occasionally need help in fending off the temptation to break his own moral code. A person in this position desires additional reasons for not stealing as a defense against pressures within him that are morally distressing, and the threat of punishment can provide that additional reason when it is needed.

These, then, are some of the less direct ways in which the threat of punishment may have subtle but significant effects on the rate and quality of law-breaking in society. They are hypotheses, rather than established effects on conduct.¹² Little is known about whether, when, and how much these mechanisms affect conduct. If the threat of punishment plays a role in the development of morality and respect for law, it is certainly far from the only force at work in that phase of the socialization process. And since the threat of punishment and other socialization processes are so closely interrelated, it is difficult to isolate the effects of punishment for empirical study.

The Deterrent Process and Policy Research

There are many different facets to the study of the effects of threats on human behavior, and many different ways in which they might be studied. The proper focus for deterrence research depends on the specific question about penal policy that is of central importance.

Drunk driving may be punished at present with fines and expressions of social disapproval which are marginal at best. A legislator, examining this policy, will have a rather specific frame of reference when asking questions about the effect of threat and punishment. With the present penalty as a starting point, he will cast his eye part of the way up and part of the way down the scale of possible agency responses to drunk driving, and he will wish to know what kinds of effects particular changes

¹¹ See Andenaes, *supra* note 1, at 950.

¹² Some psychologists hold, for instance, that the threat of mild sanctions will prove more conducive to moral learning about the threatened behavior than the threat of severe sanctions, because threat of severe sanctions produces avoidance of the threatened behavior without internal conflict, and such conflict is the occasion for much of moral learning. See, e.g., Turner and Wright, *Effects of Severity of Threat and Perceived Availability on the Attractiveness of Objects*, 2 J. Personality and Social Psychology, at 128-132 (1965).

will have on the drunk-driving rate. He will probably not be interested in the effects of leaving drunk driving unpunished because there are reasons, other than deterrence, for its punishment. He will not wish to know about all the consequences of the imposition of drastic sanctions, because there are reasons, other than deterrence, which render drastic sanctions for this crime undesirable and impractical.

Again, when our legislator enters the capital punishment controversy, his interests are frighteningly specific. He wishes to know what differential effects can be expected when we substitute one drastic sanction, life imprisonment, for an even more drastic sanction, the death penalty. To start a dialogue with our legislator by outlining the effects that threat and punishment might have could be misleading, because many of the issues relating to the effects of threats have no relationship to questions pertaining to the shift from one drastic sanction to another. For example, it is difficult to suppose that a move between two such drastic sanctions would substantially affect the moralizing functions of the example of punishment. That kind of issue seems to bear with much more importance on questions relating to whether behavior is to be punished or unpunished, and to situations where rather drastic jumps up and down the spectrum of agency responses are contemplated. Shall we send traffic offenders, now subject to light fines, to prison?

Thus, while threat and punishment may operate in ways that can be loosely categorized as deterrent at many levels, different types of penal-policy questions call for different operational definitions of the deterrent effect that evaluative research seeks to investigate. If the issue is whether the punishment for a specific major crime should be reduced or increased by a moderate amount, the question for research should be whether the higher penalty is a marginal deterrent, and by how much. The range of options presented by the problem bears no apparent relation to the educative or moralizing effects of the institution of punishment. When the treatment of whole categories of behavior as criminal is called into question, the deterrence issue that must concern us involves the full panoply of methods by which threat and punishment might affect the rate of behavior, and the scope of analysis must be broadened, as Professor Packer said in just such a pursuit, to the

totality of conscious and unconscious motivations that govern the behavior of men in society.¹³

We cannot be satisfied with the analysis of only those mech-

¹³ Packer, *supra* note 6, at 42.

anisms of simple deterrence when our policy decisions may affect much more, but it would be equally indefensible to agonize over the effects of punishment as a mechanism to induce respect for law when considering whether meat should be added to prison lunches.

Part II. Deterrent Motives and Crime Control Policies

Legislators, judges, police, prosecutors, and prison officials are in the crime business, and all would agree that lately business has been much too good.¹ Because these individuals operate so close to the problem of crime in America, they are held—and many hold themselves—*responsible* for trends in the crime rate. When crime rates rise, this sense of responsibility impels that something must be done to stem the tide. Since he is both powerful and responsible, it is difficult for the official to feel or announce that the problem is either insoluble or that the solution lies outside his sphere of influence. Even if the official can persuade himself that effective solution is beyond his control, he cannot persuade his constituency, and because the official must personally do something about crime, he finds little comfort in calling for an end to slums, drastic improvement in public education, or any other millennial measures. Thus, the law enforcement official and society at large find themselves in complete agreement that actions taken by officials are intimately related to fluctuations in the rate of crime.²

But the law enforcement official soon finds that he has a very limited range of crime control options. He can do very little to make the life of the disadvantaged more enjoyable. He can make crime physically more difficult in only a limited number of situations—urging citizens to lock their cars, fostering the use of automatic locks on bank vaults, raising the height of fire alarm boxes to secure them from the whims of five-year-old children, doubling and trebling the number of police on the street to hamper the mugger, the purse thief, and the random attacker. But many prevention strategies are expensive, and the administrator is the first to feel the brunt of this type of expense: to double the police force, we must more than double our budget for police. If we require some of our more influential citizens to

¹ See, e.g., both the tone and statistics in the *Uniform Crime Reports—1969*, compiled and published by the Federal Bureau of Investigation.

² There is, to be sure, much official ambivalence about the relationship between law enforcement efforts and crime rates. In discussing the nature of homicide, police authorities are quick to point out that there is little by way of direct intervention that police can do to reduce the rate of violent killings. ". . . [C]riminal homicide is, to a major extent, a social problem beyond police prevention," *Uniform Crime Reports—1967*, at 8. At the same time, police and many other officials have asserted a direct relationship between rising crime rates and constitutional restraints on police procedures imposed by the United States Supreme Court in recent years. And four of the eleven factors listed by the FBI as "conditions which will affect the amount and type of crime that occurs from place to place" concern police, prosecution, and court policies. See *Uniform Crime Reports—1967*, at vi.

take expensive precautions, they will object; if we do not require precautions, many will not heed warnings. Beyond this, many of the most serious of crimes—homicide, aggravated assault, rape, indoor robbery, larceny, and crimes against trust—are committed where police cannot prevent them.

A belief in the efficacy of general and special deterrence is, therefore, attractive—because it supplies crime control measures where substitutes are unavailable and does so without great apparent cost to influential members of society. It is thus not surprising that deterrence through threat and punishment is among the most valued official weapons in the war against crime. And while most of the discussion of deterrence in criminal law revolves around the effects of particular strategies in particular situations, there is much that can be said about the function of deterrence as a *motive* in crime control that is of general application. This segment deals with three aspects of deterrence as a motive of official action: (1) the foundations of official belief in the efficacy of deterrence, (2) some ethical problems associated with the use of punishment for deterrent purposes, and (3) the proper model of costs and crime preventive results that should serve the official in making decisions about whether extra punishment for deterrent purposes is desirable.

Section 1. Foundations for Official Belief

There exists in this country no official dogma that could be considered a general theory of sanctions. Implicit in many provisions of our penal codes is the assumption that higher penalties will reduce the rate of particular types of crime. A few laws—so-called habitual-criminal statutes³ and the Federal law ordaining extra penalties for gun crime⁴ will serve as examples—go as far as assuming that stiffer penalties can make inroads on crime in general. But the source of those beliefs about deterrence that influences our penal policy is not to be found in law itself, but in the shared attitudes of our lawmakers. When issues arise, the attitudes of those with legislative, judicial, and administrative power determine the direction of policy. Thus, the nature of the official's attitude toward deterrence and any explanation of its origins are subjects of independent interest to the student of penal policy.

It is foolish to try to pin one attitude about deterrence on the thousands of officials responsible for the administration of our criminal law. Yet different groups of officials appear to share attitudes about deterrence to the extent that generalization does not seem unfair. When confronted with a crime problem, leg-

³ See Morris, *The Habitual Criminal*.

⁴ 18 U.S.C. 924 (c) (1968).

islaters often agree that the best hope of control lies in "getting tough" with criminals by increasing penalties.⁵ Police subscribe to the notion of "getting tough," but are apt to put more emphasis on what is termed "strict law enforcement,"⁶ a concept that accords the major role to policing. There are significant exceptions to both of these patterns. Many legislators, but far from a majority, now doubt the efficacy of the death penalty as a marginal deterrent, when compared with the threat of protracted imprisonment. Many police express less than total faith in the ability of "strict law enforcement" alone to make a positive contribution in the control of prostitution.

But the exceptions are few, and people more often seem to think in a straight line about the deterrent effect of sanctions: If penalties have a deterrent effect in one situation, they will have a deterrent effect in all; if some people are deterred by threats, then all will respond; if doubling a penalty produces an extra measure of deterrence, trebling the penalty will do still better. Carried to what may be an unfair extreme, this style of thinking imagines a world in which armed robbery is similar to illegal parking, burglars think like district attorneys, and the threat of punishment produces an orderly process of elimination which diminishes the crime rate as the penalty scale increases by degrees from small fines to capital punishment, with each step upward as effective as its predecessor. Other officials, mostly those engaged in prison administration, the discouraging end of deterrence, will take a different but equally unitary view: Since human behavior is unpredictable and crime is determined by other causes, deterrence is a myth.

It is a cheap point, to be made without any semblance of self-congratulation, that deterrence is far too complicated an area to accord with either of these polar views. The purpose of proposing these caricatures of official attitudes is to explore what might account for such patterns of thought. Like deterrence itself, the explanation of these attitudes is multifaceted.

Belief in deterrence is both natural and in the interest of most law enforcement officials. It is difficult to deny that, as Professor Packer puts it, "People who commit crimes appear to share the prevalent impression that punishment is an unpleasantness that is best avoided."⁷ To threaten with punishment is

⁵ *Crime and Penalties in California*, a publication of the California Assembly Office of Research, discusses two episodes of increased-penalty responses to rising rates of marihuana use and assaults on police during the 1961 term of the California legislature, at 10-13. Other frequent candidates for "get tough" legislation in the United States include dangerous drug use and sale, gun robbery, and organized criminal activity.

⁶ The difference in emphasis between "getting tough" and strict law enforcement appears to be that the former emphasizes the severity of sanctions while the latter emphasizes risk of apprehension.

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

therefore a very promising strategy of influencing behavior. And deterrence, as noted above, is a strategy that shows promise of working in areas of behavior where the official has no other technique of crime reduction at hand.

But belief in deterrence and the assumption of a monolithic theory of deterrent efficacy are two different matters. The principal signpost of those who hold monolithic attitudes about deterrence—whether affirming or denying the effectiveness of legal threats—is that they allow themselves only one idea about the nature of deterrence. And once the complex of issues about deterrence is transformed into a yes-or-no question, the results are predictable. If the sum of people's thinking is to decide whether they are "fer it" or "agin it," the "fers" will achieve a substantial majority as a matter of common sense. But when a complex series of different issues is bent into the form of a yes-or-no question, the margin of error obtained from answering that question correctly approaches fifty percent.

The tendency of officials to have only one idea about deterrence may be seen as a symptom, rather than a cause, or unitary attitudes about deterrence. The task becomes that of explaining why this "single idea" phenomenon persists. One factor is no less basic than human nature; we all would prefer to have simple rather than complicated explanations for the questions that perplex us. Complicated explanations evolve from the pressure that experience exerts on our simple initial constructs, a process that takes the classic structure of trial and error. Since there is so little evaluative research in the area of deterrence, however, the pressure toward rethinking unitary positions is not great.

Thus, the fact that there is so little known about the effects of sanction policies means that there are fewer inconsistent results to sensitize officials to the differences in situation which may, in turn, condition differences in threat effectiveness. Moreover, what few data are available can be comfortably fitted into the official's initial opinion—it can either be accepted at face value or rejected as inconclusive. But the absence of reliable research in deterrence does not mean that officials are without any basis for their opinions. They fall back on personal and administrative experience to test their views of deterrent effectiveness.

The official's personal experience is likely to give strong support to an enthusiastic embrace of deterrence. Having worked hard to achieve the regard of his fellows, he is more sensitive than most to the threat of social stigma. He likes to regard himself as a rational man, and will be anxious to give himself credit for responding to threats where any other course of conduct would be irrational. The official is also a law-abiding man and attributes

some of his obedience to the threat of sanctions. He remembers slowing down when passing a police car on the highway, and considering the likelihood of audit when filling out his income tax report. He is less likely to recall deviations.

A more important source of information is the official's administrative experience with crime-control policies. In his official capacity, the legislator "tries out" deterrent threats; the results of these trials are integrated into his attitudes about deterrence. In the absence of controlled research, the apparent results of ongoing crime-control policy are the most important data available about deterrence, and these results have a profound effect on official attitudes. Unhappily, as we shall see, the unquestioning acceptance of the results of experience with crime-control policy is not a sufficient substitute for careful evaluative research.

The World's Three Worst Experiments

Experience is a valuable teacher, but she occasionally codes her messages in ways we fail to understand. In order to emphasize some of the common pitfalls that officials encounter in trying to read the significance of the results of crime-control policies, it is best to start with three classic cases of common errors made in inferring more from statistics than the statistics will support.

Aunt Jane's Cold Remedy

One common inferential error takes its name from the famous (though apocryphal) ad:

Take Aunt Jane's Cold Remedy and Your Cold Will Go Away Within Two Weeks!

All of Aunt Jane's customers will probably be quite satisfied with the medicine, because every time they take it, their cold disappears within the period advertised. The medicine is, of course, a mixture of whiskey, sugar and water, with no known effect on the common cold. The cold goes away within two weeks because most colds go away within two weeks, whether treated or not—it is the nature of the animal to get well. But if Aunt Jane's customers are faithful, they will have no way of knowing it wasn't the remedy. And if they have an emotional investment in believing in the cure, they may staunchly resist the suggestion that the remedy is useless—even when their colds go away without being treated with the medicine. These untreated recoveries will be explained away as milder colds.

Law enforcement officials treat crime, not colds, but they are prone to encounter the same problem. When life is proceeding normally, no great pressure is put on the legislator to increase penalties or on the police official to double or triple patrols.

Pressure for strong new countermeasures comes when the crime rate suddenly spurts. Often the scenario then follows this course: 1. spurt in crime rate; 2. countermeasure; 3. return of crime rate to more normal historical level.

Did the countermeasure reduce crime? If so, by how much? The headlines read, POLICE DOGS REDUCE GHETTO CRIME BY 65%, or COMPUTER REDUCES FALSE ALARMS BY 35%, and enforcement officials are reluctant to avoid credit for the change. But if we remember that an unusual spurt in the crime rate was responsible for the countermeasure, another possible explanation of the reduction exists: The crime rate simply returned to its usual level, which would also have been the case whether or not the computer or police dogs or new patrols had been introduced. A well-documented example of law enforcement techniques taking credit for reductions that were partly the result of other factors was Connecticut's famous "crackdown" on speeders in the mid-1950's. After the crackdown began, Connecticut's rate of traffic fatalities decreased dramatically, propelling the Governor of that State into the national limelight. Investigators⁸ later found that the death rate in Connecticut just before the crackdown was unusually high and that fatality rates in States adjoining Connecticut, which had not instituted a speed crackdown, had also declined, though not as much as in Connecticut. Thus, a large part of the saving attributed to the program probably had nothing to do with it.

How many situations are like the Connecticut speed crackdown? And how can observers discriminate between spurious and genuine preventive effects? In Chicago, the fire department used to send a fireman out to talk to the students of any school that had been responsible for a large number of false alarms. The rate of false alarms from the treated schools usually decreased after the talk. However, when a randomly selected group of schools with recent false alarm problems was left *untreated*, the false alarm record of these schools also decreased.⁹

In New York City, the rate of taxicab robberies climbed sharply in 1966. The police department authorized policemen to take after-hours jobs driving taxis, and the robbery rate fell, although it remained higher than it had been prior to 1966.¹⁰

⁸ Campbell and Ross, *The Connecticut Crackdown and Speeding*, III Law & Society Review 33 (August 1968).

⁹ Interim Report, *The Chicago False Fire Alarm Project*, Center for Studies in Criminal Justice at the University of Chicago Law School (unpublished, 1967).

¹⁰ The countermeasure was introduced in mid-1967. Cab robberies for the period August through December for the years 1964-1967 were as follows:

1964	1965	1966	1967
241	245	585	846

[Cited from letter from Gordon F. Dale, Technical Services Bureau, New York Police Department, March 1968.]

Proof positive of deterrence? A final case history comes from Great Britain, where traffic fatalities fell sharply after the Road Safety Act of 1967 introduced a new definition of drunk driving and new means of enforcement.¹¹

In the Chicago study, it was possible to catch Aunt Jane's Remedy at work because the untreated group of schools served as a control, providing a number of schools where the peak rate was given the chance to diminish without treatment. In Connecticut, observers were able to test the claims made for the speed crackdown by comparing the Connecticut rates with those of other States, a strategy less clear-cut than use of a randomly selected control group but helpful nonetheless. In New York, available figures could only show that the rate of taxi robberies after the "cops in cabs" experience was lower than just before, but still higher than it had been in previous years; since it was impossible to tell what the rate would have been if the program had not been introduced, it is not possible to determine how much of the reduction can be attributed to natural causes and how much can be credited to the program. But knowledge that the program had been introduced in a peak period should at least make observers sensitive to the distinct possibility that a good part of the decrease might have been unrelated to the new program.

In some situations, detailed study of historical trends in the crime rate, or comparisons with untreated areas, will show that the decrease was not solely attributable to Aunt Jane. If the New York cab robbery rate had fallen to levels lower than those usually experienced in the past, there would be a strong basis for concluding that the program (or some other change) was responsible for extra deterrence. In Connecticut, after a careful study had shown that much of the rate reduction probably had nothing to do with the speed crackdown, there was still left a part of the reduction that could not be attributed to forces at work in States without the crackdown. The program probably had some effect after all.¹²

In Great Britain, government studies demonstrated clear-cut results. The drop in fatalities was sharp and came immediately after the law was introduced. Night accident fatalities (more closely related to drunk driving) fell more dramatically than day accident fatalities. And statistics on miles driven in Great Britain showed that there was no reason to expect a natural decrease in accidents due to less driving.¹³

¹¹ See Andenaes, *Some Further Reflections on General Prevention*, Center for Studies in Criminal Justice at the University of Chicago Law School (Working Paper, 1968).

¹² Campbell and Ross, *supra* note 8, at 52. The authors are unable to eliminate regression as an explanation but note the sustained nature of the decrease.

¹³ Press release, Great Britain Ministry of Transport, February 8, at 11, 1968.

By now it should be apparent, however, that if officials desire to maintain a unitary faith in deterrent countermeasures, it will be easy for them to do so. Because new programs are normally tried during periods when the rate of the particular crime is high, the official can take credit for any decreases in rate that follow the introduction of the new measures. If the crime rate stays high, who can say that it would not have climbed higher were it not for the new program? In fact the rise in crime shows conclusively that we need more of the new countermeasure!¹⁴

Subjecting our crime prevention strategies to evaluative research will prove less comforting but, in the long run, more valuable. On some occasions, close analysis will show that the crime rate could have been expected to decrease even if no new treatment had been administered; in other situations, a steady rise in crime over a long period of time that can be attributed to factors such as an increase in the population at risk will indicate that, in the absence of a new treatment, the crime rate would probably have continued to increase.¹⁵ In some, but not all cases, evaluative research may be able to provide rough estimates of how much the rate would have increased or decreased in the absence of treatment and thus give us a baseline for testing the value of new treatments.

Providing a baseline, so that reliable determinations can be made about the degree of crime reduction attributable to particular countermeasures, is an absolute necessity in any but the most wasteful of crime-control policies. Without such a baseline, it may be assumed that some strategies reduce crime when in fact they do not. Then, too, the preventive effects of other programs may be underestimated because we fail to account for expected increases in crime. Even when countermeasures have some effect on crime, overestimating that effect by neglecting the possibility of natural decrease may provoke the use of programs that are not worth their cost—and, worse still, postpone the development of new and more effective strategies.¹⁶

Tiger Prevention

Another barrier to the revision of crime-control strategies is the official belief in a number of "tiger prevention" programs. Tiger prevention takes its name from the story of the gentleman who was running about the streets of mid-Manhattan, snapping

¹⁴ According to the California Assembly Office of Research study, *supra* 5, "In the City of Los Angeles, the rate of attacks on police went from 2.5 per 100 in 1952 to 8.4 in 1961, to 15.8 in 1966. . . . In 1961 the first special penalties for attacks on the police were enacted by the Legislature and such penalties were further increased in . . . 1963 and 1965."

¹⁵ Thus, it is not possible to conclude, as was done in *Crime and Penalties in California*, *supra* note 5, at 11, that increased penalties for assaults on a police officer were of no deterrent effectiveness merely because the rate of such crimes continued to increase after penalties for that offense increased.

¹⁶ See Part II, Section 3, *infra*, for an elaboration of this theme.

his fingers and moaning loudly, when he was intercepted by a police officer. Their conversation follows:

P.O.: What are you doing?

Gtln.: Keeping tigers away.

P.O.: Why, that's crazy. There isn't a wild tiger within five thousand miles of New York City!

Gtln.: Well then, I must have a pretty effective technique!

Other factors, of course, account for the absence of tigers in New York City, but as long as our gentlemen friend continues to snap his fingers he won't know that. And if the method of prevention were any less ridiculous, it would be difficult for observers to conclude for certain that his countermeasure, which is, after all, designed to prevent tigers, is not the reason why the number of wild tigers is low.

In crime control, the tiger-prevention problem is subtle and difficult to resolve. Officials who administer very high penalties acquire the firm conviction that only those penalties stand between them and huge increases in the crime rate. Having assumed that the penalty is the only reason for the absence of a crime wave, the official has "proved" that high penalties deter crime more effectively than less severe penalties. But the proof is the same as that offered by the tiger prevention specialist, except in one respect: because penalties may well influence crime rates, it cannot be assumed, as in the tiger example, that the countermeasure bears no relation to the rate of crime. Being unable to assume that there is no relation between penalty level and crime rate, our only method of determining whether and how much the two are related is to vary the penalty. But since that would involve risk-taking, the status quo and the "proof" of deterrence built into it persist. The tiger-prevention argument is not refutable when posed as a barrier to experimental decreases in punishment; it is, however, patently absurd to present high penalties combined with low crime rates as proof of deterrence.

Studies of different areas with different penalties and studies focusing on the same jurisdiction before and after a change in punishment level takes place show rather clearly that level-of-punishment is not the major reason why crime rates vary.¹⁷ In particular areas, such as capital punishment as a marginal deterrent to homicide, the studies go farther and suggest no discernible relationship between the presence of the death penalty and homicide rates.¹⁸

Although imperfect, these studies are certainly the best method

¹⁷ See Rusche and Kirchheimer, *Punishment and Social Structure* (1939).

¹⁸ See the studies collected in Bedau, *The Death Penalty in America* (1964).

available of testing whether more severe sanctions have extra deterrent force in particular situations. But even when conducting comparative and retrospective studies, the tiger-prevention fallacy may crop up in a more sophisticated form. Consider a study that shows that homicide is both the most severely punished and least often committed crime in a particular jurisdiction.¹⁹ Proof of deterrence? Or tiger-prevention? It is quite possible that the rate of homicide would remain low even if the penalty for homicide were less severe, because of the strong social feelings against homicide. Indeed, one reason why the penalty for homicide is so high is because citizens view this crime as so terrible. Both the low rate and the high penalty may be effects of the same cause: strong social feelings against homicide. Thus, showing that crimes which are punished more severely are committed less often may only be one way of showing how accurately a penalty scale reflects general feelings about the seriousness of crimes.

This problem can spill over into some forms of comparative research. Assume we find out that homicide is punished more severely in Maine than in Georgia, and that the homicide rate is much lower in Maine than in Georgia.²⁰ Does the higher penalty cause the lower rate? It may be that the higher penalty shows that people in Maine have stronger social feelings about homicide and these feelings, rather than the extra penalty, could explain the difference in homicide rate. In order to test the effect of penalties alone, areas that are similar to each other in all respects except penalties should be sought out and compared. This would be a strategy far more cumbersome than assuming that harsh criminal sanctions are keeping the tigers away but, again, far more rewarding.

The Warden's Survey Research

A final example of drawing faulty inferences in deterrence is the proof offered by an imaginary prison warden that deterrence is a myth. He has interviewed a thousand men on death row, he says, and none of them had been deterred by the threat of penalties from committing their crimes. The warden's survey is unpersuasive for two reasons: first, it is not clear that his prisoners would tell him if they *had* been deterred by penalties at some time in their lives, since it would not be in their present interests; but, more important, the warden's sample of people to ask about deterrence is hopelessly biased. The warden has started with a group of men who have not been deterred or they

¹⁹ Tittle, *Crime Rates and Legal Sanctions*, 16 *Social Problems* 409 (1969).

²⁰ *Ibid.*, at 416.

would not be on death row. If the law has had a deterrent effect, it has done so by influencing the behavior of people everywhere else.

The warden's survey problem occasionally crops up in sophisticated efforts at deterrence research. A study conducted for the President's Commission on Law Enforcement and the Administration of Justice²¹ asked incarcerated offenders whether increased penalties or increased policing would decrease crime. A majority thought not.²² This was a modified form of the warden's survey because (a) it involved a group of people who might have some personal interest in keeping penalties from increasing, whether or not they reduce crime, and (b) it was a case of talking about deterrence with a group of people who were there because they had not responded to the threat of punishment for crime.²³

Another subtle form of the warden's survey problem is found in Professor Chambliss' treatment of the problem of deterrence and drug abuse.²⁴ Basing his conclusion on statistics which show that a high proportion of treated drug addicts resume their habits after treatment, Chambliss concludes,

The evidence, then, suggests that drug addiction, like murder, is relatively unaffected by the threat or the imposition of punishment.²⁵

As Professor Andenaes points out, the data support Chambliss' conclusion that the threat and imposition of punishment do not deter those who are already drug addicts from further drug use; however, the drug laws could still affect drug addiction rates by deterring people from getting involved with drugs.²⁶ And it cannot be concluded that all potential drug addicts are unaffected by the criminal sanctions simply because those who become addicts were unaffected, for those who did in fact become addicts in spite of the law are a selected group of deterrence failures. All of the law's successes, if there are any, will be found in the non-drug-using segment of the population.

²¹ Goodman, Miller, and DeForrest, *A Study of the Deterrence Value of Crime Prevention Measures as Perceived by Criminal Offenders* (1966). Unpublished paper submitted by the Bureau of Social Science Research, Inc., to the Institute for Defense Analysis.

²² See *Ibid.*, at 47. The study is considered in detail in Hawkins and Zimring, *Deterrence and Survey Research* (1968), Working Paper, Center for Studies in Criminal Justice at the University of Chicago Law School.

²³ Putting aside the serious issue of whether the prisoners responded candidly and were in a position to make accurate judgments about deterrence, the study can be justified as an attempt to determine whether those who have not responded to present sanctions would be deterred by higher sanctions. From that standpoint, convicted prisoners are a perfect sample for testing marginal deterrence, even though they are a poor sample for testing the deterrent effect of present sanctions.

²⁴ Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 Wis. L. Rev. 703.

²⁵ *Ibid.*, at 708.

²⁶ Andenaes, *Some Further Reflections on General Prevention* (1968), at 5, Working Paper, Center for Studies in Criminal Justice at the University of Chicago Law School.

Our tiger preventer and our warden have made contradictory assumptions about the relationship between those criminals in jail and our potential crime problem. The tiger-prevention advocate assumes that large numbers of law-abiding citizens are held in check by the threat of penalties, indeed, that only severe penalties can perform this job. The warden seems to assume that when he interviews prisoners, he is talking to the totality of the potential crime problem, or at least to a representative sample. Because these assumptions are unsupported, both the "proof" and "disproof" of deterrence must fail.

But the fact that these patterns of thinking fail to prove or disprove deterrence does not mean they are unimportant. Officials will continue to act on sincere convictions, whether or not these convictions are well founded. Thus, a significant step toward more research in deterrence, and ultimately toward a more rational crime-control policy, would be to make officials more sensitive to new insights and more vulnerable to understanding the complexities that undermine monolithic attitudes about deterrence. For this reason, the careful study of "cold remedies," "tiger prevention," and other such habits of thought are an important part of a program for progress in crime-control policy.

Section 2. Some Ethical Issues in Deterrence

In order to make the threat of punishment believable, the criminal law must follow through by punishing those offenders it apprehends. Punishing people in order to deter them (or others) from committing future offenses raises some questions about the *justice* of pain inflicted for deterrent purposes that should be distinguished from issues that relate only to the *efficacy* of deterrent strategies. When concerned with the efficacy of punishment-for-deterrence, we ask the question, "Will it work?"; when concerned with the justice of punishment-for-deterrence, we ask, "Is it morally acceptable to punish for this reason?" These two issues are not identical. It is easy to imagine punishments that would be effective but unjust, such as the random execution of every tenth parking violator.

Two basic principles relating to the justice of punishment need detain us only briefly here, since they have been admirably discussed in the literature.²⁷ First, it seems clear under the moral precepts of our criminal law that punishment can only be justified if its subject has committed a forbidden act. Conscientious objectors to this principle are hard to find. Some anti-utilitarian writers have tried to hold extreme utilitarian philosophers responsible for implying that punishment without offense would be jus-

²⁷ See, e.g., Hart, *Punishment and Responsibility*; Packer, *The Limits of the Criminal Sanction*; Moberly, *The Ethics of Punishment*.

tified within their system, because it is possible that more good may come from the act of punishment (deterrence of others) than harm suffered (pain to the individual).²⁸ Yet those who raise this point do so by way of showing the limits of exclusively utilitarian thinking. Nobody affirms the justice of punishing the innocent.

In a similar vein, it is hard to find writers who would deny the injustice of aimless punishment. We have developed a large and diverse vocabulary of motives for punishment: punishment is justified as a means of expressing society's retributive feelings, as a method of isolating high crime risks, as a deterrent, as a mechanism for rehabilitation.²⁹ Commentators disagree about which purposes are legitimate, and which of the legitimate purposes of punishment should be accorded priority. But most would agree that the gratuitous infliction of suffering, even on those rightly classified as blameworthy, cannot be justified. To say that punishment must have a purpose to be considered just, differs from the strict utilitarian position that punishment must achieve more benefit than the harm it produces, in that our formulation allows, as legitimate objectives of punishment, goals that some utilitarians might reject. And so, having said that aimless punishment is unjust, it would still be possible to justify punishment that was motivated solely by society's need to express its disapproval of the punished conduct. The objection might be made that if pure retribution is a sufficient justification for punishment, then the limiting principle that punishment must have a purpose is acceptable to writers of different persuasions precisely because it is empty baggage. Since, as a first principle, we have limited punishment to the blameworthy, only those who can justly be punished for retributive reasons are left in the discussion. Since retribution is a legitimate aim of punishment, saying that all punishment must have a purpose imposes no further restrictions.

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

²⁸ Even Bentham and Hobbs recognize, however, that the existence of an offense is a necessary condition for punishment. See Moberly, *supra* note 27, at 63.

²⁹ Morris and Zimring, *Deterrence and Corrections*, 38 *Annals of the American Academy of Political and Social Science* 137, January 1969, at 138.

purposes will protect against the overkill of criminal sanctions.

The two conditions for just punishment discussed above—the existence of blameworthy conduct and a legitimate purpose for punishment—are necessary but not sufficient conditions for determining that a particular punishment is just.³⁰ Punishment may serve legitimate objectives and still be too severe. Individuals who have committed criminal acts may have done so under circumstances that would make harsh punishment shock the conscience.³¹ And punishment for deterrent purposes raises a few special problems, in that it appears to have so little to do with the particular offender: such punishment is not determined as the result of the particular degree of reprehensibility of his conduct, as with retribution, and it cannot be justified as being designed to benefit the offender, a familiar justification for rehabilitative measures.³² Indeed, because it stems from other considerations, such deterrent punishment may generate conflict with the law's rehabilitative and retributive precepts.

The special problems raised by punishment for deterrence seldom concern administering harsh penalties because of deterrent motives to people who would otherwise go unpunished; except for regulatory offenses, deterrent motives condition the degree of punishment far more often than they represent the single justification for punishing crime.

In most cases involving serious crime, we have no difficulty classifying those who commit them as blameworthy. A street robbery is objectively dangerous behavior, and the offender's intentions are seldom in doubt. When we catch him, the quality of his conduct makes it clear that he is eligible for punishment. But having decided that punishment is justified, the question remains: how much punishment is just? Beyond deciding that the robber's punishment is appropriate, legislators have prescribed a range of from one to ten years in prison, a judge has sentenced our offender to five years, and the parole board has refused to let him out after serving three. The particular penalty for robbery in this situation exists, as we have noted, for many purposes: to physically isolate robbers and thereby prevent some crime, to assist in the rehabilitation of the robber, to express society's retribu-

³⁰ See Packer, *supra* note 7, at 63-70.

³¹ The story of Jean Valjean's pursuit and punishment for the theft of a single loaf of bread in Hugo's *Les Misérables* was written around this theme.

³² "[Deterrence] is peculiar in that it ignores the personal quality of the offender," Tempie, *The Ethics of Penal Action*, First Clarke Hall Lecture, 1934. See also, G. B. Shaw, *The Crime of Imprisonment*, Philosophical Library, 1946, at 32-33: "[Deterrence] necessarily leaves the interest of the victim wholly out of account. It injures and degrades him; destroys the reputation without which he cannot get employment; and when the punishment is imprisonment under our system, atrophies his powers of fending for himself in the world He is, at the expiration of his sentence, flung out of the prison into the street. . . . [with] no compunction as to society; why should he have any?"

tive feelings toward robbers, and to add potency to the threat of the law, in order to promote the deterrence of apprehended robbers and others who might become robbers. If we assume that robbery would be punished by a two-year, rather than a five-year, prison sentence were it not for deterrent motives, we encounter a complex of issues about the justice of punishing for deterrent purposes. Our robber will argue that he is, in fact, being punished twice: two years of prison for the offense of robbery, three years of prison for the service of mankind. The legislator might reply that once an individual is determined to be blameworthy, the term of punishment is *just* as long as it is set as a result of proper balancing of legitimate punishment objectives, and deterrence is certainly one legitimate objective of punishment.³³ The prisoner might then argue that, while deterrence is a laudable goal of public policy, the second sentence he is serving, if it is designed to deter him from future robbery, seems unjust because it is not at all clear that he would commit robbery again in any event.³⁴ On the other hand, if his extra sentence is motivated by the desire to prevent others from entering the path of crime, he feels unfairly put upon. Why should his grief pay for their moral education?³⁵

Such a dialogue is only possible because it has been assumed that an extra measure of punishment was assessed for deterrent purposes only. It is not deterrence as an objective that is cause for concern but the escalation of sanctions for deterrent purposes. Thus, the moral problems raised by punishment for deterrent purposes arise only when we impose a punishment for deterrent purposes that is more severe than would otherwise be imposed. And yet, increases in penalty for exclusively deterrent purposes are far from rare, if the reasons given for legislative and judicial change in policy are taken at face value.

The robber's complaint can be understood most forcibly in those cases where the punishment is harsh and the disparity between the punishment that would be set in the absence of deterrent motives and the increases for the sake of deterrence is most extreme. Sending offenders to prison for parking violations, much as it might reduce overtime parking, excites our sense of injustice be-

³³ "When a man has been proven to have committed a crime, it is expedient that society should make use of that man for the diminution of crime; he belongs to them for that purpose." The Reverend Sydney Smith, as quoted by Radzinowicz and Turner, 21 *Canadian Bar Review* 92 (1943). (Citation from Andenaes, *Some Further Reflections on General Prevention*, Working Paper, Center for Studies in Criminal Justice at the University of Chicago Law School, at 57).

³⁴ A similar complaint could be registered by those confined in preconviction preventive detention and those held in restraint by civil processes because of "dangerousness to others." The relationship between ethical problems associated with the rationale of constraint and the need for evaluate research appears to be similar in these areas. See *infra*, at Section 3, for a brief discussion of the "research imperative."

³⁵ Not unexpectedly, prisoners place little value on the deterrent potential of increased sanctions. See Goodman et al., *supra* note 21.

cause the total penalty seems so grossly disproportionate to the wrongfulness of the conduct. The same sense of gross disproportion has overcome many critics of drastically escalated penalties for the possession of marihuana. These huge differences are likely to be perceived in connection with behavior that is not considered a serious threat to the community. In these cases, the community's sense of "just deserts" creates a limit beyond which punishment seems unfair. The notion that the punishment should fit the crime, and not grossly exceed it, is one natural limit on the imposition of sanctions for deterrent purposes.

Where criminal conduct has been more serious, the community is less likely to have any sympathy for the offender; and the gap between deterrent increases and punishment levels which might be set in the absence of a desire for marginal deterrence will be smaller, if only because the base penalty is larger. It nevertheless remains true that we are taxing the offender in order to influence the behavior of others. If this is the only way in which we can reduce the crime rate, the practice seems inevitable, and can be more easily justified than if alternative methods of crime control are available.³⁶ If alternative methods of crime reduction do exist, we are in the even less enviable position of explaining to the robber that his extra punishment is our method of saving other scarce resources.

Two principles emerge from a consideration of the moral problems of punishing offenders for deterrent purposes. First, the harm suffered by offenders as a result of the extra measure of punishment administered for deterrent motives must be recognized as a cost, not insubstantial, to the community as a whole. If the community should rejoice at the prospect of punishment as an indication of retributive feeling, no joy should come from punishment in excess of that required to fully express collective feelings of outrage. The offender is a citizen, and the community's decision making process exists to protect his welfare as well as that of others.³⁷ Considering the suffering of offenders as a cost helps to make clear that aimless punishment is an irrational community response. More important, if the offender's suffering is not taken into account as a cost, the usual result of comparing the cost of extra offender suffering and alternative crime reduction methods will be to opt for the extra suffering. The situation is reminiscent of the stranger who had just been advised that the best method of increasing his horse's efficiency was to violently castrate the

³⁶ Cf. Andenaes, *supra* note 33, at 60: "But in the ordinary run of things, where general preventive considerations are taken into account in determining the general level of penalties, the question seems to me to be primarily not one of the principle, but one of degree. How much human suffering are we willing to accept as the price for a reasonable protection of life, property and other interests?"

³⁷ See Temple, *supra* note 32.

animal with two bricks. When the stranger asked, "Doesn't that hurt?," his mentor responded, "Not if you don't get your thumbs in the way."

Of course, the important question is, "Whom does one count when determining if the action hurts?" When the community asserts its right to punish offenders at higher levels for exclusively deterrent purposes, it must protect them against unjustified punishment by fully considering the offender's interest in freedom from excessive punishment.

A second principle to be drawn from an otherwise unresolved dialogue is that administrators have a moral duty to the punished offenders to do research on the deterrent effect their policies pursue. When the law-enforcement official imposes extra punishment for deterrent purposes, he holds the lives of the least lovable segment of our society in trust. To base extra punishment on a *belief* in deterrence is morally acceptable only as long as it is necessary. When facilities exist for the evaluation of sanction policies, a failure to test our policies while continuing to penalize offenders in the name of deterrent beliefs becomes morally obnoxious.

But if our administrators have an obligation to test their methods, it is an easy obligation to ignore. Offenders are the least powerful of pressure groups, and the official is subject to very real temptations to avoid research—in addition to the cost of evaluation, any honest effort to test a program is a threat to its continued existence and a potential shadow on the prior judgment of its administrators. Criminal law administration thus represents an almost ideal mixture for evaluative inaction: powerless subjects, economic excuses for resistance to research, and an administrative incentive to avoid the test of long-held beliefs.

When the genuine obstacles to effective research are added to this already potent brew, the absence of research is as easy to explain as it is difficult to justify.

Section 3. Determining Costs in Crime Prevention

To the official, cost is an important matter. To talk of the effects that particular programs might have, without addressing the issue of cost, tells the administrator only half of what he must know before he has a rational basis for acting. Estimates of a program's cost are essential in deciding whether particular programs will create sufficient returns to justify the commitment of resources necessary to bring them into existence. Cost estimates are also necessary to help the official choose between alternative crime prevention strategies. In their simplest form, these statements are self-evident: it would certainly be worth one million dollars to cut Chicago's larceny rate in half, but not one billion; it would be

folly to spend one million dollars on a program if the same results could be achieved by a different method for \$500,000. But typical cost problems in crime control are far more complex.

Many different types of cost are incurred by law enforcement systems. The commitment of resources to publicity campaigns and to the administration of criminal justice in courts involves monetary costs and the use of personnel that could be deployed in other phases of crime prevention. The nonmonetary costs of publicity campaigns include the environment of fear or tension that such campaigns might produce and the possibility of a gradually diminishing willingness on the part of the public to pay attention to official pronouncements. The nonmonetary costs of a low commitment of resources to courts include delay, injustice, and the appearance of unfairness to those who come before the bar of justice.

* By far the most expensive aspects of law enforcement are police and punishment. An extra police officer assigned to a particular task will cost anywhere from ten to twenty-five thousand dollars per year. And giving the policeman this job means that one less policeman will be available for other duty. The nonmonetary costs of extra policing include effects of a "police environment" on community atmosphere and on attitudes of individuals subjected to increased police contacts. The monetary costs of imprisonment to the prison administration are substantial: from \$620 to \$2600 per prisoner per year in California, depending on conditions and methods of accounting.³⁸ Nonmonetary costs could include extra crime caused by the aggressions or inability to pursue gainful employment that might be side effects of protracted imprisonment. And, as discussed earlier, when extra punishment is administered for exclusively deterrent purposes, the harm suffered by the offender must also be considered as a cost by the official.

A rational crime-control policy takes account of all program costs in determining whether programs are worth the resources necessary to administer them and in choosing between alternative methods of achieving crime prevention. But since all costs are not of the same type, difficult problems of comparison are inevitable. How much money is it worth to prevent ten rapes? How many fewer housebreakings justify keeping ten men in jail for two extra years? How many robberies equal one burglary? It is far easier to outline the types of cost that should be considered in evaluating alternative methods of crime control than to proclaim with any confidence the priorities to be accorded to different types of cost.

³⁸ Lamson and Crowther, Memorandum, Assembly Office of Research, California Assembly, 1969 (unpublished). Supplementary data on costs were obtained from Mr. Lamson.

But if the successful establishment of priorities in choosing among different types of costs proves elusive, a number of more modest points can be made about the role of cost considerations in deterrence. Perhaps the most important point is the most basic: the study of costs in crime prevention is necessary for policy research purposes as well as accounting purposes. In fact, focusing on issues of cost might provide a useful starting point for building a simple model of the questions that evaluative research should answer if it is to provide policy guides in crime control.

An example of recent policy change might illustrate this last point. In California, between 1963 and 1968, the average time served by the prisoner released from the California Adult Authority increased from 30 to 36 months.³⁹ Whether this change was the result of a change in conscious policy on the part of the Adult Authority or sentencing judges, or an unplanned occurrence, it represents an objective shift in punishment policy that should be considered on its merits. Are the longer prison sentences worthwhile? In order to provide a satisfactory answer to that question, research must seek to establish: (1) the types and amount of program costs; (2) the *nature* of the program's effect on crime; (3) the *extent* of program effects; and (4) the cost and relative effectiveness of alternative methods of achieving the same objectives.

Program Costs

As noted above, imprisonment generates a number of different types of cost: monetary and nonmonetary, direct (such as dollars expended by the State) and indirect (diminished ability of longer-term ex-prisoners to adjust when released), costs absorbed by the State and those absorbed by the inmates. Cost study begins with the enumeration of those costs easiest to quantify and determine—the direct monetary costs absorbed by the State. In California, the cost of maintaining one extra prisoner for one year is \$620 when there is surplus space available. The average Adult Authority prisoner population is 30,000.⁴⁰ The monetary cost of the extra time served amounts to about \$9,000,000 over the period of 36 months (one-half man-year \times 30,000 prisoners \times \$620).⁴¹ These figures already exist or would be extremely easy to compile in most jurisdictions in the United States, but they usually command the attention of budgetary authorities for housekeeping purposes while failing to play an important role in basic decisions about crime-control policy.

³⁹ Personal communication from Robin Lamson, November 6, 1969. See also, Lamson and Crowther, *supra* note 38.

⁴⁰ See Lamson and Crowther, *supra* note 38.

⁴¹ *Ibid.*

The statistics presented have already quantified a second type of cost produced by the extra punishment: the additional confinement absorbed by the present prison population, an average of six months for 30,000 men. Other types of possible cost, such as the effect of overcrowding and decreased ability on the part of ex-prisoners to adjust to outside life, cannot be estimated. And there is no way of adding up the costs to the State and costs absorbed by the prisoners into a single index number.

But even this incomplete picture of program costs provides a useful point of departure. The utility of committing resources to crime-control research should be judged against the total cost of crime-control programs, and it is clear that the stakes are high. Because the stakes are so high, the need for evaluation extends not only to decisions about instituting new crime-control programs or committing more resources to police or corrections, but also to existing patterns of resource allocation and existing strategies of control. So little is known about present programs that it would not be inaccurate to call most present crime-control policies expensive experiments that all too often do not permit adequate evaluation. A necessary first step in evaluation is to determine, as fully as we can, exactly how much our present policies cost.

*The Nature of the Program's Effect on Crime—
the "Whether or Not" Question*

Thus far the analysis has only considered the liabilities incurred as a result of the change in sentence length. The motivation for longer sentences is the hope that they will reduce crime, and a necessary step in evaluation is determining whether the strategy is achieving its goal. The extra prison sentences could be reducing crime in at least three ways: (a) incapacitation of offenders for the extra six months could reduce the crime rate because the offenders would have committed crimes during those months if they had been released, (b) the longer prison sentence could reduce crime by persuading those prisoners serving the longer sentence that future efforts at crime are not worth the risk of penalties (marginal special deterrence), and (c) the longer prison sentences could deter from crime some potential criminals on the outside who would not have been deterred by the shorter sentences being administered in 1963 (marginal general deterrence). The longer sentences may have been motivated solely by a desire for a greater degree of marginal general deterrence; like most crime control strategies, however, they may affect the crime rate in a number of different ways. And any rational analysis of the results of the program must seek to

account for all of the different mechanisms that may have an effect on crime.

The different types of effect must be studied in different ways. In order to test hypotheses about the reduction of crime among the convicts serving extra sentences, the records of these convicts after release should be compared to those of other similar convicts who served shorter sentences. The test for marginal general deterrence would focus on the crime rate of the rest of the population. If an investigation revealed that no reduction in crime was being achieved by the shift in policy, the evaluation would be completed; if investigation revealed that the extra imprisonment was responsible for some decrease in criminal activity, evaluation of the program would just be starting.

The Extent of Program Effects—the "How Much" Question

The emphasis in Question No. 1 on the cost of a particular crime-control measure makes evident the point that, to properly evaluate increased sentences, it is not sufficient to determine *whether* the program decreases crime. It is also necessary to ask *how much* of an effect is attributable to the new policy before judgments can be made about the desirability of its continuation. At this point the official has traveled a considerable distance from the question of whether punishment deters crime, for in the case of California prison sentences he is asking about marginal changes in punishment rather than the difference between the threat of punishment and none, and he is interested in the quantity of an effect rather than its quality. It is at this point that the official and the theoretician may often part company, because the same set of findings may have strikingly different implications for researchers and policy planners. For example, in the Chicago False Fire Alarm Project, it appeared that eight-hour-a-day surveillance by teams of two firemen could reduce an individual school's false alarm rate if the surveillance resulted in apprehending a child pulling an alarm. However, after each of sixteen schools had been exposed to two man-weeks of surveillance it turned out that apprehensions occurred at only four schools, and the effect of the apprehension on the false alarm rate was slight and transient, amounting to an expenditure of several hundred dollars for each false alarm prevented. Thus, while the test may have provided valuable information, and while surveillance makes sense in a limited number of circumstances, the fire department would not be seriously tempted to continue the program of regular school surveillance past the experimental period.

Another example to illustrate the same principle comes from Professor Beutel's investigation of the administration of crimi-

nal laws dealing with the writing of bad checks in Nebraska.⁴² His basic findings were that, in spite of an unusually severe penalty structure, Nebraska experienced about the same rate of bad-check writing as a similar State with less stringent policies,⁴³ and those areas of the State that punished particular types of bad checks more stringently than others did not have a lower rate of bad checks.⁴⁴ Since the study involved comparing areas that might have experienced different rates of bad-check writing in the absence of the difference in punishment policy, it would be difficult to prove that the stringent Nebraska policy had no deterrent effect at all. However, since the cost of the Nebraska bad-check policy was so great,⁴⁵ the small measure of deterrence that might have been missed was of no practical importance.

The Availability of Alternative Means

Even programs with crime-prevention results worth their cost should be subordinated to alternative programs that can achieve better results at the same cost, or similar results at lesser cost. The dollar spent in the prison system in pursuit of crime reduction is more usefully thought of as part of a budget for crime reduction rather than simply or exclusively as part of a prison-system budget. Money spent on prison sentences to reduce crime could also be spent on other changes within the prison system (such as better job training) aimed at reducing crime. The same funds could be spent through other agencies to achieve crime reduction—for example, through more intensive policing—and perhaps with greater success. Rational resource allocation in crime control, as the President's Commission on Law Enforcement and Administration of Justice pointed out,⁴⁶ cuts across departmental lines to seek the least cost means to achieve the goals sought in common by the different levels of the criminal justice system. We hear this chestnut of wisdom often, yet repetition will be necessary until we act as if the principle is understood.

Cost Models and Research Strategy

The evaluation model presented above is a shopping list that includes questions that present research techniques often are not equipped to answer. But the perspective gained by structuring a model of crime-control research procedure can prove help-

⁴² Beutel, *Experimental Jurisprudence*.

⁴³ *Ibid.*, at 355.

⁴⁴ See *Ibid.*, at 351.

⁴⁵ According to Professor Beutel, the administration of bad-check laws in Nebraska costs more than making all such checks good. See *Ibid.*, at 406-07.

⁴⁶ President's Commission on Crime and the Administration of Justice, *The Challenge of Crime in a Free Society* (1967), at 1.

ful even if the information necessary to answer significant questions is often unavailable. It is difficult, even *in abstracto*, to design research that could determine with any confidence the extent to which the increase in California sentences has influenced the crime rate through marginal general deterrence. But even when the extent of crime prevention cannot be precisely estimated, cost studies can start official discussions about how much of an impact on crime would be sufficient to justify particular programs, and this can simplify and help shape the design of research to suit official needs. As in Nebraska, once the cost of a program is recognized, the researcher can stop looking for needles in the haystack and confine his search to the existence of possible skyscrapers.

Finally, a checklist of the questions that comprehensive policy research must answer can be valuable for what it tells us we do not know. Once missing links between particular research findings and our rather simple evaluative model are established, those areas where findings cannot be translated into policy mandates can be more clearly isolated.

Part III. The Deterrent Effect—A Survey of Issues

When discussing deterrence as a motive of crime-control policies, the proper focus of inquiry is on the attitudes and behavior of officials; when discussing the likelihood and magnitude of a deterrent effect, emphasis shifts to characteristics and reactions of potential criminals. Part II dealt with the view of threats subscribed to by officials. This section deals with the responses of threatened audiences, the major portion of the analysis being concerned with the *general* effects of threats: behavior that can be expected from people even if they are not caught and punished. Much of this discussion of general effects will be relevant as well to special deterrence, but the combination of actual punishment and further threat raises some special issues that are separately discussed in a brief concluding section.

Section 1. General Deterrence

The legal threat is both a distinctive class of phenomena, within which all members share certain similar characteristics, and a composite grouping which includes communications that differ greatly in content and effectiveness. Exploring the concept of general deterrence thus becomes a two-pronged search: 1. for generalizations that apply to all threat situations, and 2. for explanations of the differences observable in the effectiveness of various legal threats.

Since threat responses are distributed over a spectrum that ranges from total lack of effect to almost full compliance, it appears at the outset that the differences between legal threats are more important than their similarities. But if present knowledge about threats in general is not sufficient to shed much light on the utility of particular legal threats, the initial consideration of a few generalizations about threats can still provide a framework for considering more important patterns of difference.

One common element of all threats (whose defining characteristic is the announcement that unpleasant consequences will be attached to particular behavior) is that they give their audience a new reason for avoiding the threatened behavior. The power of unpleasant consequences as a reason for avoiding behavior will vary, of course, but the existence of an additional barrier to commission of the threatened behavior is constant. Whether there are any other effects produced by all threats is debatable, but

investigators have reported that with the creation of the new barrier, two further changes in outlook on the part of a threatened audience may be expected.

Constraint

According to Kurt Lewin, "Threat of punishment always and necessarily gives rise to the structure of a constraint situation."¹ Even though the threat of consequences does not physically impair the ability of audience members to engage in threatened behavior, the prospect of punishment creates an emotional barrier that makes the threatened individual feel less free, with respect to the threatened behavior, than he would feel with no threat outstanding.

"Forbidden Fruit Is Always Sweeter"

According to some observers, existence of the threat as a barrier to committing a particular act causes members of a threatened audience to revise attitudes toward the desirability of the threatened behavior. People who felt that the threatened behavior was desirable in the absence of the threat will consider the behavior more desirable, even if they are persuaded by the prospect of consequences to heed the threat. To those who originally were neutral about the desirability of a threatened behavior, it will acquire some positive value, apart from the unpleasantness of threatened consequences.²

It is probably unsafe to assume that an atmosphere of constraint and the "forbidden fruit" effect are inevitable products of threats. How a threat can produce feelings of constraint among those who were never tempted to engage in the threatened behavior is difficult to understand, unless the fact of the threat causes a significant reevaluation of the behavior. And where members of an audience have considered behavior to be highly undesirable in the absence of threat, it is not clear that the addition of a threat will make much difference in the way they view the behavior. Then, too, intervening variables would overwhelm any attempt to validate this prediction in many circumstances.

Even if constraint and reevaluation of the threatened behavior could be added to the creation of a new reason for avoiding it, the general model of the psychological dimensions of threats could not lead to predictions about behavior because the feel-

¹ Lewin, Reward and punishment, in *A Dynamic Theory of Personality—Selected Papers of Kurt Lewin* (1951), at 129.

² See Brehm, *A Theory of Psychological Reactance*. "[W]hen a person believes himself free to engage in a given behavior, he will experience psychological reactance if that freedom is eliminated or threatened with elimination." There is some basis for thinking that while threatening behavior may initially lead to a higher valuation of that behavior, persons who refrain from the threatened behavior because of the threat will afterward think of the behavior as less desirable. See Brehm and Cohen *Exploration in Cognitive Dissonance*, at 40-41.

ings toward the threatened behavior produced by threats lead in opposite directions, leaving the behavior more dangerous at the same time that it is more attractive, and no general statement can be made about which pull will be stronger.

At the same time, the "forbidden fruit" effect may exist in a wide variety of situations where members of an audience were not previously disinclined toward the behavior threatened, and the above psychological model of threat-effects can provide information about the emotional climate in which threats operate, even though it cannot predict the outcome of threats. For those who are tempted to commit threatened acts, threats produce reasons for avoiding them—reasons that compete with the attractiveness of the behavior, and with any new attraction that is added by threat. Where a legal threat is relevant to predicting behavior, it will produce conflicts. How such conflicts are resolved is a function of the differences between threats, but the existence of conflict is a common theme.

Still, the critical work in any discussion of the effectiveness of threats is the search for those variations in circumstance that account for the great differences noted in the results of threats. Toward this end, the following sections discuss (a) differences among men, (b) types of threatened behavior, (c) threat as communication, (d) applicability and credibility, (e) variations in threatened consequences, (f) variations in severity of consequences, (g) the moral quality of threatened behavior, and (h) the effects of group pressures.

A. Differences Among Men

One natural place to search for the explanation of different patterns of response to threats is within the great range of differences in psychology, sentiment, and status that set men apart from each other in a large and complex social order. Explanations of differential deterability that are based on differences among men—unlike hypotheses about differences in deterrence caused by variation in the nature of the threatened behavior—seek to establish general patterns of threat sensitivity that follow a particular person from one situation to another. Where it is known that Mr. Smith's relative immunity to the threat of sanctions while filling out his income tax is attributable to a personality characteristic, it is likely that the same characteristic will operate when he is exposed to the temptation to steal, or to speed. If differences among men were the only explanation of differential deterability, society could be neatly divided into deterable and nondeterable segments. But since differences among men can only be a part of the complex of

factors conditioning the effectiveness of threats in different situations, general patterns of threat responsiveness based on personal differences will predict responses with only partial effectiveness. Knowing that Smith is relatively unconcerned about the threat of punishment for tax cheating, and that this lack of concern is related to a general tendency, will not tell us that he is more likely than not to be undeterred by the threat of punishment if confronted with the opportunity to commit armed robbery. Such information will, however, mean that Smith is more likely than others without this characteristic to be unimpressed with the threat of punishment for robbery. But the chances of deterrence in the second situation may still be overwhelmingly high.

Differences in Personality Type

A great number of different personality types co-exist in the same social order. Various schools of thought in the psychic sciences use different schemes of classification to describe variations in personality type. Most of the personality differences that have been mentioned in connection with the effect of sanctions are based on simple distinctions not related to systematic explanations of human personality.

The Future vs. the Present

One such relatively simple distinction is between those individuals for whom the future is an important part of present thinking and those who are less "future-oriented." The future-oriented individual will be happy to forgo a large gain today in order to enjoy a larger one next week. The person without a significant sense of the importance of next week will accept a lesser but immediate reward.¹ In the case of threat response, it is the converse of this effect that is significant: since the unpleasantness threatened will always come after the commission of the threatened act, and is often quite distant in both time and probability from the temptation to act,² the future-oriented person will pay greater heed to the possibility of unpleasantness communicated by a threat, while the less future-oriented person will be more willing to place a heavy mortgage on events removed in time and space. Observation has established that deviant subcultures place less emphasis on future events than representative members of the middle class, a finding that lends credence to the view that these groups are generally less

¹ See Mischel, *Preference for Delayed Reinforcement: An Experimental Study of a Cultural Observation*, *J. Abn. Soc. Psych.*, 56 (1958).

² "Punishment is psychologically farther off than satisfaction of . . . desire (so that) a certain intellectual maturity is a necessary condition of the effectiveness of threatened punishment." Lewin, *Reward and Punishment*, in *A Dynamic Theory of Personality—Selected Papers of Kurt Lewin* (1951), at 163.

deterable, and could support the assumption that this feature of personality accounts, in part, for the higher rates of criminal behavior among some subcultures.³

The problem with attributing higher crime rates to lesser deterability and lesser deterability to the lack of emphasis on the future among some subcultures is that of separating *cause* from *consequence*. The relative lack of emphasis on the future may simply be a reflection of the fact that people in some positions have less to look forward to than people in others. If a tendency to discount the future is the result of environmental conditions, then these environmental conditions and not any separate trait of personality are responsible for a different view of threats among members of the culture of poverty. Moreover, even if it is plausible to assume that a short-term world view contributes to lessened degrees of threat responsiveness, it is difficult to jump from that finding to the further conclusion that such a difference is responsible for much of the increased rate of crime observed among such groups. Too many variables—each a plausible explanation for higher rates of crime in its own right—intervene to spoil the respectability of such an assumption. And we are left with the unavoidable possibility that a discounting of the future is the result of a number of other psychic and physical conditions that account for the diminished effectiveness of threats.

"Optimists" vs. "Pessimists"

Unless members of a threatened audience choose to ignore threats "with a policeman at their elbow," reacting to a threat may involve weighing the chances of being apprehended and punished. To a large extent, people weighing the chances of being apprehended and punished will be influenced by the objective probability of being discovered. But most potential law-breakers will not have complete information about the risk of apprehension, so that subjective judgments will play an important role in the individual's estimate of his chances of escaping without apprehension and punishment. Moreover, psychological research has established that even when it is possible for a person to know the objective probabilities of achieving a particular goal, a person's estimate of his own chances of success will often differ from objective probabilities.⁴ It is thus plausible to suppose that people who more often underestimate the chances of being apprehended if they engage in threatened behavior will be less responsive to threats than persons who are more likely to overestimate the probability of the

³ Mischel, *supra* note 1, and see Lewis, *La Vida*, xlii-iii.

⁴ See Cohen, *Chance, Skill and Luck*, Pelican Books (1960).

threatened consequences occurring. The worrier will tend to overestimate the objective probability of being caught, if he is not completely informed about the probability of apprehension, while the optimist will tend to underestimate apprehension chances. Even if both the worrier and the optimist know what the chances are, in general, of being caught, the worrier will tend to feel that his personal chances of successful evasion are no better than anybody else's, and may be worse, while the optimist will feel that his personal chances of successfully escaping threatened consequences are much better than the general average. As a result, the optimist will prove to be a far more difficult person to deter.

In one recent study addressed to the optimist vs. pessimist theory, Daniel Claster asked a sample of delinquent boys and a sample of nondelinquent boys to estimate (a) *the general chances* of being apprehended and punished, and (b) *their personal chances* of being apprehended and punished, in relation to a variety of offenses.⁵ The two samples gave similar answers about the general chances of being apprehended and convicted, and about their personal chances of being convicted of offenses if apprehended, but the delinquent boys perceived their personal chances of arrest if they committed crimes to be significantly lower than the personal chances estimated by nondelinquents. These results might be evidence of the delinquents possessing, as Dr. Claster describes it, a "magical immunity mechanism"⁶ that serves to neutralize fear of punishment, and makes this group less susceptible to deterrence. It is curious, however, that the same mechanism does not appear in answers about chances of conviction after arrest.⁷ Moreover, it is possible that the delinquents' estimates of personal apprehension chances were accurate, and based on personal experience not possessed by the nondelinquent boys. So, available data fall short of establishing that personality traits associated with differential estimates of risk play a significant role in selecting those members of society who fail to be deterred by the threat of punishment.

Even if studies showed that criminals were more optimistic than the facts warranted and less worrisome than law-abiding citizens, there still remains the problem, alluded to earlier, of separating cause from consequence. Dr. Claster spoke of the optimism expressed by delinquents as being an "immunity mechanism" that "protected" delinquents from fear. Does this mechanism exist before the boy embarks on a delinquent career, or is

⁵ Claster, *Comparison of Risk Perception between Delinquents and Non-Delinquents*, 58 J. Crim. L. C. & P. S. 80 (1967).

⁶ *Ibid.*, at 85.

⁷ *Ibid.*

it a result of ignoring threats, i.e., a point of view that develops after deterrence has failed, and can therefore hardly explain the initial failure?

Finally, it should be noted that the "optimist" who acquires that title because he tends to underestimate risks of apprehension is not necessarily a person with a generally rosy view of the world around him. If the hypothesis holds true that persons without a strong sense of a personal future doubt that the future is promising, then the most threat-resistant personality of all would be a man who tends to underestimate risks, yet holds a generally pessimistic view of his chances for future success.

Planning vs. Impulse

Threats seek to create a strong association between threatened behavior and threatened consequences in the mind of the potential deviant, but such an association may require that members of a threatened audience devote time and thought to the meaning of their acts. In this sense, the process of deterrence by threat may be one of accretion.⁸ The person who acts on impulse is less likely to spend time thinking of consequences, and if the association between act and consequence cannot be fully realized in the span of time consumed by an impulse decision, such actions will be insulated from the accretive impact of punishment threats. If decisions to act are the product of a longer period of gestation, thoughts of unpleasant consequences to follow will have more time to chip away at temptations to deviate. Where impulsive actions are characteristic of an individual's personality, he will, according to this theory, be generally less susceptible to threats than the person whose actions are usually preceded by planning.

The distinction between impulsive and premeditative personality styles differs in theory from that between future-oriented and present-oriented personalities because the emphasis of the former is on the amount of time available for reflection, rather than on the relative value of present and future gratification. In practice, however, impulsive conduct and a lack of future orientation may most often occur together. Here the problem of Cause vs. Consequence recurs again, for an impulsive life-style may be the result, as well as part of the cause, of paying little heed to the threat of punishment.

⁸ The possibility that threat communication and influence may result from cumulative impact over time was noted in another connection, by Barmack and Payne, when observing that the delay between an experimental countermeasure and significant results may have been due to the fact "that the spread of *information* about the countermeasure is an accretive process which necessitates repeated announcements . . ." (my italics). Barmack and Payne, *The Lackland Accident Countermeasure Experiment*, 40 Highway Research Board Proceedings, 513 (1961).

Conflict vs. Harmony

Some speculations about personality differences that may affect threat-responsiveness grow out of more ambitious theories of human behavior. Forty years ago Alexander and Staub theorized that deterrence functions differently in the different personality types posited by the Freudian system.⁹ According to these writers, anyone suffering from organic brain damage is totally beyond the reach of sanction threats, for he is often unable to understand and act in relation to threats.¹⁰ Three other offender types (the neurotic criminal, the normal criminal, and the acute offender) are discussed in greater detail. The neurotic criminal, to Alexander and Staub, is a persistent offender with psychological conflicts that are the basis of his criminal acts. With this type of offender, crime is a symptom of personality disorder, consisting of impulsive acts far removed from ego controls, and presumably far removed from susceptibility to punishment threats.¹¹ The normal criminal they regard as a psychologically normal individual with a persistent history of criminal behavior that probably results from early identification with criminal prototypes. Criminal behavior is quite consistent with the normal criminal's ego structure, and thus does not lead to inner conflict. The acute offender is described as a psychologically normal individual without any long history of crime who is driven to an isolated criminal act by a crisis situation.

Of these classes, Alexander and Staub consider the normal criminal most susceptible to deterrence: "We admit that . . . fear of painful consequences . . . may prevent [normal criminals from] committing anti-social acts, or may at least reduce the number of the latter."¹²

The authors make no specific reference to deterrence and the acute offender, but presumably the relative effectiveness of threats would be hampered by the fact that so many other barriers to criminal activity that normally operate will have been overpowered by the force of circumstances before the acute offender is confronted by the possibility of crime. Alexander and Staub appear to doubt the effectiveness of penalty threats on neurotic criminals because inner conflict, which militates against rationality of responses, is the cause of this type of criminality, and the degree of ego involvement in crime is low.

These observations, it should be recalled, are based on different personality types among criminals, rather than among the gener-

⁹ Alexander and Staub, *The Criminal, the Judge, and the Public*, rev. ed., Free Press of Glencoe (1956).

¹⁰ *Ibid.*, at 82.

¹¹ *Ibid.*, at 42-46.

¹² *Ibid.*, at 210.

al population.¹³ Thus, this theory does not hold that neurotics are less deterrable than other personality types—indeed, they could be more deterrable as a class—but only that those individuals who commit crime as the result of neurotic conflicts are seldom deterred by threat of punishment.

Of further interest would be estimates of how many criminals fall into each of the personality types outlined by Alexander and Staub, and what types of crime different personality types commit. Such estimates would be helpful, both as a necessary step toward testing the hypothesis that inner conflict precludes deterrence and as a method of gauging the potential importance of this type of insight on penal policy.

Crime, Deterrence, and Personality Characteristics

There are a number of other personality dimensions that observers have suggested may be related to the propensity of individuals to commit crime: it seems reasonable to suppose that aggressive personalities will be more likely than passive personalities to act out impulses of all kinds, including criminal impulses; individualistic personalities may be more likely than group-centered personalities to deviate from group norms; and the suggestion has been made that certain musculature-related psychological types are more prone to crime than others.

All of these predictions, if correct, will mean that a greater proportion of the crime-prone personality types will commit threatened acts more often than those individuals displaying different personality traits, although the rate of deviance among the crime-prone may still be quite small. But the higher rate of noncompliance noted in such groups is not necessarily tied to different patterns of threat response. It may simply be that pressures toward deviancy, or barriers (other than deterrence) to deviancy are distributed unevenly among personality types. Isolating facets of personality that are associated with high involvement in criminal activity will tell us much about the type of people on whom the operation of threat and punishment is of the most critical importance to a legal system. But if crime-related personality traits are not accompanied by psychic mechanisms that affect threat responses, the crime-prone individual may still be just as susceptible to threats as anybody else. For example, a disproportionate number of aggressive personality types will commit aggravated assault each year. But the threat of punishment may be equally effective on aggressive and passive personality types, as illustrated by table 1.

¹³ For an elaboration of the difficulties encountered in generalizing from a sample of imprisoned criminals to other groups, see the discussion of *The Warden's Survey*, *supra* Section II A.

Table 1

Hypothetical Percentage Distribution of Aggressive and Passive Personality Types by History of Criminal Conduct and Effect of Threats.

	Passive	Aggressive
Would not have committed assault in any event	97	70
Would have committed assault, but were deterred by threat of consequences	2	20
Committed assault in spite of threat of consequences	1	10
Total	<u>100%</u>	<u>100%</u>

Knowing only the proportion of known offenders that are aggressive-personality types, it would be tempting to conclude that threats have less of an effect on the behavior of aggressive personalities than on passive personalities. When the percentage of persons of each type that would have committed the crime but were deterred is also known, we find that threats were equally effective among both groups, deterring two out of three potential assaulters. And the deterrent effect among aggressives resulted in ten times as much crime prevention as among passives.

If a particular personality trait were associated with deterability, it would give us something like table 2.

Table 2

Hypothetical Percentage Distribution of Future-Oriented Personality Types by History of Criminal Conduct and Effect of Threats.

	Future-Oriented	Non future-Oriented
Would not have committed assault in any event	80	80
Would have committed assault, but were deterred by threat of consequences	17	14
Committed assault in spite of threat of consequences	3	6
Total	<u>100%</u>	<u>100%</u>

In this case, a difference in threat responsiveness appears to explain the difference in crime rate. But the hypothetical tables raise rather clearly some of the problems encountered in trying

to relate personality traits to deterability, and deterability to differences in crime rates. In the first place, personality traits do not come one to a customer—a particular individual will have several different traits that should be accounted for in trying to relate his behavior to elements of his personality. And people who differ in one personality trait may differ in others as well. Thus, if a greater proportion of aggressive persons than passive persons were lacking a significant sense of the future, table 1 would have appeared to show that aggressive persons were less deterable than passive types, even though aggressiveness per se did not affect deterability.¹⁴

A second problem is pointed up by the fact that the tables presented above are hypothetical. There is, unfortunately, no direct method of determining what proportion of a population, let alone what proportion of a particular group within a population with a particular personality type, "would have committed assault, but were deterred by threat of consequences." For this reason, the tables serve as an *illustration* of the difference between crime-related and more specifically deterrence-related personality traits, rather than a *method of researching* the influence of character traits.

But a more basic objection may exist to the entire discussion of the relationship between personality traits and deterrence. It may be argued that even if personality differences do influence deterability, such an influence is not relevant to legal policy because a threat is usually issued generally, and its audience will be composed of a mix of personality types, so that "tailoring" threats to particular personality types would be impossible.

In considering this objection, two points can be made in favor of research into the relationship between personality and deterrence. First, there are reasons for supposing that any knowledge that can be gained about the relationship between threat-response and personality-type can be useful, even if all categories of crime are committed by a mixture of different personality types. If the deterrent threat issued to the community-at-large can be altered to exert greater influence over a particular personality type without impairing its effectiveness among others, this will strengthen the effectiveness of the threat. If threats to the community-at-large are not altered, the way in which threats are communicated to particular groups and individuals can be changed. Moreover, even if the general deterrent threat of the law cannot be specially designed for particular types of offenders, the form of special-deterrent threats probably can be tailored to individual personality differences.

¹⁴ See Zeisel, *Say It With Figures*, 5th ed., at 132-46.

A second answer to the objection that personality differences are not relevant to penal policy is that, while crime as a general category may reflect participation by the whole spectrum of personality types, some specific crimes may be committed much more often by particular personality types, and with respect to those crimes, the relationship between personality type and threat-responsiveness may be valuable. While larceny may be said to be the province of no single personality type, except perhaps the "larcenous personality," can the same be said for public exhibitionism or even violent assault? Even supposing that no remedies exist for the immunity to threats associated with particular personality types, if a certain personality type dominates the crime statistics and population of potential offenders in one or two specific offenses, it would appear useful to know that the deterrent threat is not achieving its objective.

Yet it cannot be denied that our present knowledge about differences in human personality has less to offer in terms of penal policy than we would hope. Data about the relationship between deterrence and personality differences is tentative, and even if more becomes known, such further knowledge will probably prove far more useful in the design of correctional procedures than in the realm of general deterrence.

Differences in Attitude

A second area where individual differences may lead to different patterns of threat-response is found in those patterns of differences in attitude that are prominent features of plural societies. This analysis uses the term "attitude" to describe normative feelings about different features of a person's environment; therefore, attitudes and personality characteristics are not mutually exclusive classifications. In some cases it might be proper to view an attitude as a personality trait in its own right; in others, an attitude will be the product of a particular personality trait; in many cases, differences in attitude between men are simply the product of differences in experience.

This section discusses differences in socialization and in specific attitudes toward authority that may help to explain why some men are deterred by threats and others are not.

Socialization

Within the same society, the life experience and therefore the learning processes of individuals may vary greatly. Some men will grow to adulthood with strong loyalties to the social system, as well as to the smaller family, clan, institutional and community groups in which they live most of their lives. Others develop

strong loyalties to the smaller groups, but are less committed to the larger social entity. Some may grow to reject both the ideology of their particular living groups and that of the larger social system. The intensity of personal commitment to the goals of a society is a significant predictor of law-abiding behavior for one reason that has nothing to do with simple deterrence: the strongly socialized individual will obey commands out of a desire to do right, quite independent of the specific consequences of wrongdoing. Of less importance, but still significant, a strongly socialized individual may be more likely to comply with threats because he is more sensitive to the negative aspects of threatened consequences than his less patriotic neighbor. Social disapproval, which is an important part of most threatened consequences, will seem to the strongly socialized individual an experience well worth avoiding, whereas less socialized men might be less impressed. Because the desire to obey commands in order to do the right thing and a greater sensitivity to consequences involving community disapproval will occur together, it is extremely difficult to estimate how much of an observed difference between strongly and weakly socialized individuals is attributable to the greater sensitivity of the former to the negative aspects of threatened consequences. Perhaps the crucial test of such an effect would come in an area covered by a legal threat where the chances of apprehension were known to be nil. Under such circumstances, the desire to be law-abiding for its own sake would presumably still be operative, while a greater sensitivity to the negative aspects of threatened consequences would not.

While no criminal behaviors exist in our society for which the chances of apprehension are absolutely nil, it might be suggested that areas of behavior where the chances of apprehension are extremely low would serve as adequate substitutes. It could also be argued, though, that since it is part of human nature to avoid low risks of very high costs, those who fear the law's sanctions most will be influenced by that fear even where the probability of risk is statistically minimal. Thus, sensitivity to sanctions may influence rates of compliance even in such areas as the requirement (once difficult to enforce) that interest and dividends be reported on individual income tax forms.¹⁵

In the absence of conclusive data, a plausible thesis is that where a threatened behavior is considered to be a serious breach of society's moral code, the major explanation for the higher rate of compliant behavior is the strongly socialized citizen's sense of right and wrong, rather than his special sensitivity to the negative aspects of threatened consequences. Where a threat-

¹⁵ See Schwartz and Orleans, on legal sanctions, 34 *Chi. L. Rev.* 274 (1967).

ened behavior is considered a less drastic breach of the moral code, a special sensitivity to the negative aspects of threatened consequences may play a noteworthy part in explaining the difference in behavior between these two groups. How much of a role such considerations play, either in absolute terms or relative to the socialized individual's stronger drives toward doing right, cannot be presently estimated.

Attitudes toward Authority: The "Authoritarian Personality"

Some people identify with authority more intensely than others, and thus find it easier to obey orders just for the sake of obeying orders. It is plausible to suppose that this type of person will be more likely to refrain from committing a particular behavior because it is threatened than a person whose specific attitudes toward authority are either more ambivalent or more flexible. The person who obeys orders for their own sake will do so whether or not he considers the threatened behavior as seriously wrong (in the absence of the threat) and largely independent of his chances of being apprehended. While people with less respect for authority may see an element of challenge in a threat and be tempted to try to "get away with something," the authoritarian personality will comply with the threat, and will be more likely to change his opinion of the rightness or wrongness of the behavior threatened solely because it is threatened.

These predictions are based on studies of the attitude characteristics of the authoritarian personality begun during the mid-1940s.¹⁶ While some overlap exists between the theory that strong socialization produces greater compliance with commands and these predictions about the behavior of the authoritarian personality, important differences can also be noted. The authoritarian personality is not necessarily more strongly socialized than the less authoritarian personality. He is more likely to express racial and religious prejudice than the nonauthoritarian, even though these prejudices are not officially condoned.¹⁷ The authoritarian is no more likely to hold strong moral views about the rightness or wrongness of conduct than the nonauthoritarian, and his opinion, if not firmly held, is easier to change.¹⁸ Finally, the authoritarian might respond with obedience, not only to legal commands, but to orders from those in most high-status positions. Such a tendency could lead to cooperation, for example, with occupying powers or other high-status individuals in positions of

¹⁶ Adorno, Frankel-Brunswick, Levinson, and Sanford, *The Authoritarian Personality* (1950).

¹⁷ See *Ibid.*

¹⁸ Crutchfield, *Conformity and Character*, 10 *Amer. Psychologist* 191 (1955).

power whose authority does not stem from the social value system native to the authoritarian.

The experimental evidence linking the "authoritarian personality" to possible differences in response to threats is circumstantial because the study of authoritarian attitude patterns has been limited to finding differences of attitude among different groups, and relating one type of attitude response with other attitudes or with attitude change. Because attitude surveys elicit only verbal responses, it is important to distinguish between such expressions of sentiment and tendencies to act. Available evidence on the authoritarian personality relates to sentiment, while any conclusion about differential deterability must describe a tendency to act.

Attitude toward Authority: The "Anti-Authoritarian Personality"

Of special importance to the student of criminal sanctions is the possible existence of a small segment of the population that rebels against the whole concept of obeying orders. Rather than being characterized as authoritarian or nonauthoritarian, this class is properly thought of as anti-authoritarian. A person with this sort of attitude toward authority views each new threat as an invitation to defiance. The psychological prediction that threats create an atmosphere of restraint and make the threatened behavior initially more attractive than it would be in the absence of the threat applies to this group with special force. Unless this class is substantially affected by a wish to avoid unpleasant consequences, the net effect of a threat would be to make the threatened behavior more attractive to the anti-authoritarian. For this group, then, the chances of apprehension and the extent of unpleasantness threatened are of particular importance in determining threat response, because there are very few other barriers to committing the threatened acts. To some extent, the attractiveness of a behavior to an anti-authoritarian may increase as the consequences of apprehension are escalated, because the greater penalty is evidence of a greater degree of dare attached to the legal threat. But, with all forms of consequence except some expressions of social disapproval, the anti-authoritarian personality probably will show no special appetite for unpleasantness. For this reason, it is likely that the probability of apprehension and the magnitude of unpleasantness threatened will serve as behavioral controls, either by keeping anti-authoritarian sentiments from expressing themselves in conduct or by governing what types of conduct (presumably those threatened less severely or with less credibility) will be chosen for expressing antisocial drives.

The "anti-authoritarian personality" serves as an example of

the special role that relatively small groups may have in criminal studies. In normal times, the anti-authoritarian personality would not be of great interest to the psychologist trying to explain the outcome of presidential elections because this group is so small. But recurrent and serious criminality is the product of a relatively small segment of the community. And if small subgroups are disproportionately represented in the ranks of criminals and potential criminals, they may account for a major share of crime.¹⁹ If the socialization process keeps most people law abiding, the effectiveness of simple deterrent threats must be judged in terms of that part of the population which remains potentially criminal after socialization has done its work. In many cases, this residue may consist of small groups who differ substantially from the rest of the population in many respects.

Status

Perhaps the most dramatic relationship one finds in studying the characteristics of people arrested and imprisoned is that which exists between social status and crime. Known criminals in our society have less education, lower social standing, less opportunity to become socially mobile, and less money than non-offenders. As a corollary, all that is known about crime in our society suggests that the well placed and well off commit fewer and less serious offenses. While various forms of bias built into the reporting of crime and the enforcement of criminal laws may account for some of the difference noted between classes, it would be fanciful to argue that all of this difference can be attributed to bias. A more plausible explanation of most of the difference in criminality noted between economic and social classes is that crime is relatively more attractive to persons who have little to gain through legitimate patterns of conduct, and relatively less attractive to the man who has legitimate means available to satisfy most of his desires. The wealthy feel the temptation to commit crime less often because they have more of what they want, and because experience has taught them that legitimate means are open to them for obtaining their objectives. The poor have achieved fewer of their wants, and the prospects for future achievement through legitimate channels seem remote. Under such circumstances, criminal means to achieve some of the things all men desire will seem rational to the poor far more often than to the wealthy, and the temptation to rebel will be felt more intensely by those with less to show for adherence to the predominant system of values.

¹⁹ See Zimring and Hawkins, *Deterrence and Marginal Groups*, 5 J. Research in Crime and Delinq. 100 (1968).

If differences in perceived opportunity through legitimate means were the complete explanation for the relationship between crime and social and economic status, there would be no basis for concluding that low-status groups are any less amenable to the influence of threat and punishment than those of higher standing. As noted above in the discussion of crime and personality traits, finding that one group is tempted by criminal alternatives more often than another does not show that such a group is less sensitive to threats. There are, however, reasons for believing that some relationship does exist between social standing and the effectiveness of threats. First, it seems likely that those who attain high status will possess many of the personality characteristics that may be associated with maximum threat influence, such as a sense of the significance of the future and strong loyalties to a social system that has been responsible for much of their success. By the same token, lower-status groups will contain a disproportionate number of less consistently socialized and more present-oriented people. If this theory holds true, an association between deterability and social status will exist, but can be attributed to factors other than the difference in status.

A second possibility is that personal success makes an individual more susceptible to the influence of threats because success determines the amount of investment in society an individual puts at risk when engaging in a threatened behavior. The greater the investment at risk, the more likely it is that he will obey commands. In this sense it could be said that the man who has everything also has everything to lose, as well as little to gain, from the commission of forbidden acts. The other side of the coin is equally important:

Deterrence does not threaten those whose lot in life is already miserable beyond the point of hope.²⁰

It follows that one of the most important ideas about those factors that condition differences among men in relation to threat and punishment is that those with a greater stake in life continuing as it has been will have more to fear from the legal threat of unpleasantness and social disapproval. But this observation cannot be made into a complete repudiation of the possibility of deterrence among low-status groups, because bad conditions can always get worse. Even the poorest and least free of men in our society have life itself and some measure of personal freedom at stake when considering the prospect of criminal acts. Very few men have ever indicated a preference for prison over the worst of our slums, and the prospect of social stigma would not be wel-

²⁰ Packer, *The Limits of the Criminal Sanction*, at 45.

comed by most of those with the lowest stake in maintaining the status quo.

Further, it cannot be said that threat responsiveness and investment in the status quo rise and fall together in any sort of calibrated, arithmetic formula, particularly since a person's opinion of the worth of his present life opportunities, rather than status as an objective fact, is the significant factor in predicting response to threats. Those with extremely high positions in life may have motives for obeying the law stronger than any other group. But there is no reason to suppose that a lower middle-class person would consider his investment in the social system as any less worth protecting than that of a wealthier neighbor. The "investment" theory of deterrence is stated most powerfully when it is put forward as a contrast between the great mass of people with much to lose if apprehended for law violation and those who feel they have so little that fear of loss is of less importance.

B. Types of Threatened Behavior

It has often been observed that the threat of consequences appears to operate more effectively in controlling some types of criminal conduct than others. While evidence on the number of potential criminals of any kind who are deterred by threats is sparse, there is reason to feel that the jealous husband bent on homicide is less likely to be deterred by legal threat than the housewife considering pilferage as a method of reducing her grocery bill, or the bank clerk who views embezzlement as a method of securing funds to invest in a beefsteak mine.¹ Variations in the content of legal threats may also have greater or lesser impact, depending on the crime: the rate of illegal parking is believed to be more sensitive to changes in the credibility and severity of threats than the rate of incest.

That deterrent threats function differently with respect to various types of threatened behaviors should come as no surprise, since crime is a separate and unitary class of behavior only in the legal sense. In all other respects, classes of criminal activity differ from each other as importantly as any kind of criminal behavior can be said to differ from lawful conduct. Of particular significance in seeking to explain why legal threats function with varying degrees of effectiveness are differences in:

1. the kinds of people drawn to different types of criminal activity;

¹ See, e.g., Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 *Wis. L. Rev.* 703, at 704-12.

2. the pre-barriers, other than legal threats, that may condition the rate of a particular crime;
3. the motivational situation typically associated with a particular crime;
4. the environment usually surrounding decisions to commit a particular crime.

Differences among Potential Criminals

The type of person most likely to be a bank robber will differ significantly from the potential bank embezzler if only because the opportunities and skills necessary for the commission of these crimes call for different sorts of people.² The potential embezzler is apt to be of higher status, more socialized, and more respectful of authority than the potential robber, and the class of potential embezzlers may have different characteristic personality traits.³ If social and personality differences influence susceptibility to the influence of threats, differences in the type of potential criminal are one possible source of the variance in threat effectiveness noted by type of crime.

Differences in Pre-Barriers, Other Than Threats

There are a number of reasons, other than the threat of legal consequences, to refrain from homicide, including personal abhorrence of killing and powerful social values that consider such behavior reprehensible. Apart from the legal consequences, there are very few reasons to refrain from parking in a prohibited zone when there is something to be gained from this course of action. This point may be illustrated by a hypothetical table comparing the behavior of persons tempted to commit homicide with those tempted to park illegally.

Table 1

Hypothetical Distribution of 1000 Persons Tempted To Commit Homicide and Illegal Parking.

	Homicide	Parking
Restrained from offense as result of other barriers	990	50
Would have committed offense, but were deterred by legal threat	5	800
Committed offense	5	150
Total	1000	1000

² Personality differences that might affect threat responses are discussed in subsection A, *supra*.

³ See, e.g., Zimring and Hawkins, *Deterrence and Marginal Groups*, 5 J. of Research in Crime and Delinq. 100 (1968) for a discussion of possible differences in the composition of criminals and potential criminals among various crimes.

In table 1, the complex of legal and social controls was more successful in restraining potential killers than in preventing illegal parking: a total of five persons committed homicide, compared with 150 parking violators. But the legal threat deterred only half of the potential homicides that were not prevented by other considerations, while deterring more than 80 percent of potential parking violators who would have committed that offense in the absence of threat. In the case of illegal parking, it is important to note that there is nothing unusual about the 950 people who were not restrained from considering this course of conduct as the result of factors other than deterrence—there are very few social forces operating to make people fear or abhor such minor deviations from social norms. On the other hand, the small minority of people who continue to consider homicide in spite of the powerful social and personal feelings about killing are a special group, either powerfully motivated toward homicide or insensitive to social values, or both. And the characteristics that set this group apart from most others will ordinarily make them less responsive to the threat of consequences. Thus, while it may be true that “the effectiveness of deterrence varies in inverse proportion to the moral seriousness of the crime,”⁴ the increased effectiveness of deterrence noted in relation to minor offenses may be due to the impact of threats on persons for whom a deterrent threat is not necessary to prevent more serious criminality.

Differences in Motivation Associated with Particular Crimes

For the individual who does not need a deterrent, the threat of consequences can be received and digested without tension or conflict, but processes other than threat will be responsible for conformity to legal commands. The notion of deterrence suggests that threats play a dynamic role in the behavior of some people, establishing barriers to conduct that do not exist without the threat and changing tendencies to violate the law into patterns of conformity. The motivational conflict produced by threats is the competition between the reasons for avoiding threatened behavior provided by the threat and the motives for engaging in that behavior which lead to the need for external controls. Discussing the credibility and severity of a threat helps to predict threat response by providing information about only one side of such a conflict: the drives to avoid criminal alternatives that emanate from a particular threat. It is equally important to know what kind of drives, and of what intensity, are responsible for pressures toward deviation, for the balance between what is lost if crimes are committed and what will be lost if they are not com-

⁴ Morris, *The Habitual Criminal* (1951) at 13.

mitted will vary with the importance of the drives toward particular criminal acts. Thus, the same type of threat operating on the same person may provide sufficient influence to deter behavior that is weakly motivated but will fail to deter behavior that is strongly motivated.

The strength of a person's motivation toward a particular crime would appear to be a function of the importance of the drive he seeks to satisfy by criminal means and the availability of alternative means for satisfying the same drive. The strength of the drive that motivates criminal behavior has an obvious effect on amenability to deterrence: the man who steals because he is hungry or addicted to drugs is less likely to be deterred than the woman who shoplifts as a result of whim, or the parking violator who is trying to save money or time. For certain people in certain situations, the drive toward committing a crime may be so strong that no threat will stop them.

When other means exist to satisfy the drives that lead to crime, the prospect for deterrence is brighter than when acceptable substitutes do not exist: the man who can either steal or work to eat is surely more responsive to legal threats than the man for whom stealing is the only way to eat.

Different types of crime may be associated with different levels of motivation, and this could account for some of the variation in the success of legal threats. Possessing and taking illegal drugs is, for the addicted person, the only available means of fulfilling strong drives. To the extent that drug-taking is preponderantly the behavior of addicts, it would seem likely that the threat of consequences will have less effect on the rate of this crime than on others.⁵ For the drug addict, shoplifting may be one of many means of obtaining money to support his habit; for other shoplifters the crime may be the result of a weakly motivated desire for more of the better things of life. The legal threat can operate with greater force on the weakly motivated shoplifter and result in keeping many members of this group law-abiding. If the drug addict has unthreatened alternative means to obtain money, the threat aimed at shoplifting may deter him from shoplifting even though he continues to violate the law by taking drugs. If his only alternatives for obtaining drug money are all illegal, the credibility and severity of a threat directed at shoplifting may motivate the addict to use other illegal means of obtaining money. To the extent that a large number of potential shoplifters are either weakly motivated toward the drives for which they might steal or have alternative means of drive-satisfaction available, the threat of consequences

⁵ Chambliss, *supra* note 1, at 707-08.

will be more likely to have a significant influence on the rate of this crime.

The Emotional Climate of Crime

It seems reasonable to suppose that the context in which decisions to commit or refrain from crime are made will have some bearing on the relative importance of threats in the decisional process. Decisions that are made very quickly, as a reaction to a sudden impulse, may be less susceptible to the influence of threats than decisions that are made over longer periods of time. Decisions about criminal conduct that are made when a person is in a condition of great emotional arousal may be less amenable to threats than decisions that occur when the potential criminal is less aroused, because very high degrees of emotional arousal may eclipse thoughts of future consequences by riveting all of the potential criminal's attention on his present predicament. The threat of consequences would appear to be of lessened effectiveness when decisions about criminal conduct are made under the influence of drugs or alcohol.

If particular types of crime are associated with different types of decisional environments, differences in the emotional context of crime could help to explain why some threats are more effective than others. The presumed effect of alcohol becomes important if alcohol is associated with a particular type of crime, such as homicide, more often than with others. To the same effect, finding that the degree of motivation influences the effectiveness of threats becomes important if it is determined that some crimes (such as homicide and certain deviate sex offenses) are usually associated with high degrees of motivation, while others (such as illegal parking or shoplifting) are weakly motivated in most cases. The relationship between personal motives or the context of crime and a specific type of crime will never be a complete one: there are, to be sure, sober potential killers and strongly motivated shoplifters. Often the association of particular motivations or emotional states with crime will prove more helpful in distinguishing between the different types of offender represented in the same offense group than in distinguishing between types of offenses. For example, the distinction between the amateur and professional shoplifter may be as important in predicting threat response as any distinction between shoplifters as a group and pickpockets.⁶ But if a particular level of motivation is more often associated with one crime than another, the relationship between motivation and crime need not be complete to explain differences in the impact of legal threats.

⁶ See Cameron, *The Booster and the Snitch* (1966).

The above typology of factors that might be associated with difference in the efficacy of threats in different areas of crime control appears to be consistent with predictions made by others about deterrent effectiveness in different types of crime. Professor Morris' prediction that deterrence is inversely related to the moral seriousness of the threatened behavior is explicable on the basis that minor crimes are more weakly motivated, are associated with lessened degrees of emotional arousal, are committed by broader cross sections of the general population, and are characterized by fewer prebarriers other than legal threats. The observation that crimes committed for material gain are more susceptible to deterrence than crimes of passion, such as homicide and assault, can be viewed as consistent with the analysis above (though, of course, not validated) because crimes of passion are associated with higher levels of emotional arousal, and it is more likely that there are substitute methods of obtaining money (either lawfully or unlawfully) than substitute means for achieving the ends sought in aggressive crimes. It may also be the case that many potential property criminals are not powerfully motivated.

The above analysis is largely consistent with the theory that *instrumental* crime is more susceptible to deterrence than *expressive* crime (where the crime itself is what the criminal seeks).⁷ An example of an instrumental crime would be stealing from a department store in order to obtain money to buy drugs; an expressive act would be the consuming of drugs. As suggested above, this prediction would hold true in many cases because it is more likely that substitutes exist for instrumental behavior (where other means may exist for the attainment of an end which is external to the criminal act) than for expressive behavior (where the act itself is what the potential criminal wants). However, the distinction between instrumental and expressive crime would not seem to be as clear where no substitute exists for a specific criminal means of obtaining an end. A pregnant woman seeking an abortion is trying to commit an instrumental act, but this is her only means of avoiding childbirth. The emphasis on substitution in the present analysis would suggest that this behavior would be difficult to deter, while the distinction between instrumental and expressive conduct would tend in the opposite direction. With respect to a doctor who is tempted to perform abortions, both the emphasis on available substitutes and the distinction between instrumental and expressive behavior would suggest that deterrence is more likely.

Suggesting that deterrence is more difficult in some situations

⁷ Chambliss, *supra* note 1, at 712-17.

than in others is not the equivalent of asserting that deterrence does not function at all for particular offenses. Even under unfavorable conditions, the threat of consequences may influence many people most of the time. For the same reason, saying that deterrence is more difficult with respect to some offenses does not mean that changes in the credibility or severity of threats will not result in marginal deterrence in these cases. But it does appear that marginal deterrent effects of changes in the conditions of a legal threat will be greatest when the conditions for deterrence are most favorable. Increasing the perceived credibility of the threat regarding homicide and illegal parking may thus reduce the proportion of potential offenders of both kinds who become actual offenders. But similar changes in the content of the two threats will achieve a more substantial increase in deterrence among weakly rather than strongly motivated persons, in situations where the degree of emotional arousal associated with decisions about crime is low rather than high and where the threat is the only major barrier to crime, rather than one of many social and moral reasons to avoid a particular type of activity.

Because the classification of offense types in accordance with the likelihood of deterrence cannot produce positive statements about the presence or absence of a deterrent effect, this type of prediction cannot be directly translated into policy. Even if marginal increments in the credibility of threats aimed at illegal parking will reduce that rate more substantially than a similar investment in enforcement of the law against homicide, the social importance of preventing homicide may dictate that resources would be more wisely invested in deterring homicide. And simply because legal threats operate with less effect on some types of potential criminals does not mean that other forms of social control will achieve better results. For this reason, Professor Chambliss appears to be swimming in rather deep water when he suggests,

A truly rational system of justice is one that will maximize its effectiveness by imposing criminal sanctions where these act as an effective deterrent, and at the same time develop alternatives to punishment where it is found to be ineffective. The implication of this foregoing analysis would be that the legal system will have little effect in reducing the frequency of such things as excessive drinking, drug use, most murders, most sex offenses and aggravated assault. For these behaviors, alternative mechanisms of social control must be instituted.⁸

⁸ *Ibid.*, at 714.

Unfortunately, even if predictions about the conditions that militate for or against deterrence in particular types of offenses are completely accurate (and there is little present basis for this conclusion), such predictions can only provide statements about the relative likelihood of deterrence, and these will be insufficient foundations for priorities in penal policy. Much more specific empirical research is necessary to determine whether particular countermeasures achieve a degree of deterrence sufficient to justify their costs.

C. Threat as Communication

If a threat is to achieve a generally deterrent effect, it must alter conduct as the result of communication to members of a threatened audience. In this sense, the deterrent threat is best viewed as a form of advertising, and such a perspective highlights the significance of differences in the way that threats are communicated. In simple terms, this significance in the relationship between threat-communication and threat-response has the following basis:

1. If threats are to have any effect on members of an audience, information about the threat must be communicated to that audience.
2. The way in which threats are communicated may also affect the willingness of people to comply with their terms.

Public Knowledge as a Threshold Requirement

Different types of information are necessary conditions to different categories of crime prevention.

1. Unless members of an audience know that a behavior is prohibited, they will not refrain from the behavior because it is forbidden.
2. Unless it is known that the legal system will punish those apprehended for committing a threatened act, the existence of threatened consequences cannot have a generally deterrent effect on the rate of that behavior.
3. Unless differences in the level of consequences threatened are known by members of a threatened audience, a marginal deterrent effect cannot be attributed to raising penalties.

Research is just beginning into the extent of public knowledge of the existence and terms of legal threats. Accordingly, very little is known about the extent of such knowledge or the sources through which people obtain what information they have. It is reasonable to suppose that most people understand the general boundary in society between criminal and noncriminal behavior; however, many people do not know that some forms

of behavior which are not viewed as major infractions of the community's moral code are unlawful, and even greater numbers of people appear to be unaware of certain changes in the scope of the criminal law.

An example of widespread ignorance of a criminal law that has been on the books for many years was found in a survey of public knowledge of crime and penalties in Nebraska, where writing checks with insufficient funds on deposit to cover them constitutes a misdemeanor.¹ In a public opinion poll, 41 percent of adult males in Nebraska declared that this behavior would not be criminal if arrangements to pay the obligation were eventually made.² Another public opinion poll, taken after England had abolished prohibitions against attempted suicide, showed that 76 percent of those polled were unaware that a change had taken place.³ Both of these cases may be considered exceptional—in Nebraska because the law was rarely enforced, and in England because of the exotic and morally charged nature of the subject.

It is highly unlikely that public ignorance of the existence of legal prohibitions is widespread with respect to most areas of serious criminality. What is much more likely is that people are not informed about the specific penalties provided. Surveys in California⁴ and Nebraska⁵ have established the fact that the public knows little about the legislatively proscribed minimum and maximum penalties for a variety of crimes. In California, only inmates of adult correctional facilities were likely to give the correct answer more than a quarter of the time to a number of multiple-choice possibilities. Public knowledge of changes in the minimum and maximum punishments provided by law was also found to be quite low.⁶

Findings of this type do not indicate that deterrence is not possible among those who do not know the specific penalty provided for violations of criminal law; as long as it is widely known that behavior is punished, this information alone can lead to significant amounts of deterrence. In fact, it has been suggested that a threat which produces uncertainty about what penalties are imposed for violation may be a more effective deterrent than complete knowledge about sanctions.⁷ However, if

¹ See Nebraska Revised Statutes § 28-1213, 1943.

² Poll conducted in 1968-69 by the Center for Studies in Criminal Justice at the University of Chicago, in collaboration with Professors Harvey Perlmán and Allan Booth of the University of Nebraska.

³ See Walker and Argyle, *Does the Law Affect Moral Judgments?* 4 Brit. J. Crim. 570 (1964); see also Walker, *Morality and the Criminal Law*, 11 Howard Journal 214 (1964).

⁴ Psychiatry Research Associates, *Public Knowledge of Criminal Penalties: A Research Report* (1968).

⁵ Poll conducted in 1968-69 by the Center for Studies in Criminal Justice, see *supra* note 2.

⁶ *Public Knowledge of Criminal Penalties*, *supra* note 4.

⁷ Morris, *The Habitual Criminal*, at 12.

people are insensitive to shifts in the level of punishment threatened for particular acts, increasing punishment levels will not increase the general deterrent effectiveness of threats.

But finding that most people do not know specific provisions in the penal code is not conclusive evidence that higher penalties do not produce marginal general deterrence, for two reasons:

1. higher penalties might affect perceptions without producing correct answers;
2. even if only 10 percent of a population knows the specific penalty for a crime, that 10 percent of the general public could be the overwhelming majority of those for whom the threat of a particular level of punishment is necessary.

In order to determine whether higher penalties might lead those who cannot correctly estimate the penalty for an offense to think it is higher than they would if the penalty were reduced, comparison must be made between areas where the penalties differ widely, to see if public estimates of the severity of punishment also differ. And in order to determine whether potential criminals are more likely to know specific penalty levels than the average citizen, high-risk groups must be asked about penalty levels, and the results of this type of poll should be compared with answers given by the general public.

To date, no comparison of public penalty estimates in high and low penalty areas has been made, but preliminary studies have investigated whether high-risk groups are better informed than the general public. In California it was found that Adult Authority prison inmates, the highest-risk group of all, showed a high level of knowledge about maximum and minimum penalties for most types of serious crime.⁸ In addition, college students were able to reply correctly more often than any other group that penalties for possession of marihuana had not been changed recently.⁹ On the other hand, inmates of Youth Authority penal facilities were not better informed than the general public, even though this group was much more likely to commit crime in the future. Equally revealing was the fact that students from high schools in high-delinquency areas knew just as little about mini-

⁸ The California data show the following contrast in percentage of sample with correct answers:

	Public	Prisoners
First-Degree Robbery	8%	85%
Assault	35%	59%
Rape with Injury	18%	43%
Forgery	17%	50%

(Unpublished data from the California poll conducted by Social Psychiatry Research Associates.)

⁹ 65 percent of the college students correctly answered that no change in penalty had occurred, compared to 47 percent of adult prisoners and 38 percent of high school students in a low-delinquency area, the second and third highest correct-answer groups on this question. Unpublished data taken from the California poll conducted by Social Psychiatry Research Associates (1968), *supra* note 4.

num and maximum adult penalties as students from high schools in low-delinquency areas.¹⁰ With the exception of the college-student answers on marihuana, it would thus appear that many potential offenders have levels of information as low as those demonstrated by the general public, but that firsthand experience with punishment in adult prison facilities is a great teacher.¹¹

These tentative findings cast some doubt on the breadth of any marginal general deterrent effect attributable to higher minimum and maximum sentencing provisions. More important perhaps for present purposes, such findings show that communication of threats is neither automatic nor complete in the criminal justice system. For this reason, variations in the way threats are communicated may lead to different levels of public awareness, and this in turn may affect the likelihood and degree of deterrence.

If information is to play a role in deterring individuals from criminal conduct, they must have access to it and must remember it at the time that decisions about criminal conduct are made. With this task as a goal, effective communication will require delivering the message to a threatened audience, presenting the message in ways that will make members of the threatened audience pay attention and remember the information being conveyed, and, if possible, associating the information contained in the threat with the threatened behavior in the minds of audience members so that their recollection of the terms of the threat will be greatest when it is most needed—at the time when criminal alternatives are considered.

Passing a new law will, by itself, have no effect on the perception of those whose conduct the law seeks to alter. Formal and informal channels of communication—including newspaper and television accounts of the new threat and stories of those punished for law breaking—will bring the message to members of a threatened audience, but the California prison survey suggests that word of mouth, in many circumstances, may be the most successful means of communication. Some research findings indicate that, in order to reach and influence most members of the threatened audience, the threat will have to be repeated a number of times, with each repetition not only increasing the number of people exposed to the threat but heightening the comprehension of those who have been previously exposed.¹²

¹⁰ See *Public Knowledge of Criminal Penalties*, *supra* note 4.

¹¹ *Ibid.*

¹² See Barmack and Payne, *The Lackland Accident Countermeasure Experiment*, 40 Highway Research Board Proceedings, 513 (1961). The Lackland experiment is one of the few investigations of propaganda techniques used to alter conduct in a field setting. The authors report a three-month lag between the introduction of the countermeasure (an information and persuasion campaign with some changes in the threatened consequences for accident records) and

In many situations, authorities seek to capture the attention of a threatened audience by using examples of those punished for law violations. Judges sentence offenders with the objective in mind that potential criminals will hear of the sentence and that this message will result in general deterrence.¹³ In recent years, the administration of some punishments, notably the death penalty, has galvanized public attention. In other countries, the names and punishments meted out to tax offenders are published, both as a punishment for violation and as a mechanism for drawing the attention of the community to the existence of punishment for the violation. While the aim of such practices is to enhance deterrence by drawing the attention of members of the threatened audience to the punishment precept, there is little evidence to indicate whether they have succeeded. Two studies of the homicide rate just before and just after death sentences in Philadelphia and executions in California do not provide evidence of any net reduction in homicide rate that could be attributed to publicity about the executions.¹⁴ Other programs for drawing attention to punishment have not been evaluated. The capital punishment case may be exceptional, because with this type of crime the emotional arousal and power of suggestion associated with the death penalty and with the offense of homicide may actually create homicidal tensions at the same time as it may deter some potential offenders.¹⁵ In other cases, drawing attention to episodes of punishment may have counter-deterrent effects on those individuals who imagined the penalty to be worse than it was. More often, however, it would seem likely that publicity of this kind, if it has any effect, will tend in the direction of deterring crime.

A special problem in the communication of information about threat and punishment is that of bringing these considerations to the attention of potential law violators at the time that decisions about law violation are to be made. The moment of truth in the life of a potential deviant seldom takes place in the local

signs of a significant effect. One explanation of this lag is that "the spread of information about the countermeasure is an accretive process which necessitates repeated announcements . . . and word-of-mouth communication until a substantial majority of the population becomes aware of the countermeasure."

¹³ A Federal judge in Chicago was quoted by the Chicago Sun Times in 1967 as stating, at the time of sentence, that the penalty he regularly fixes for draft-law violators had been recently increased as the result of increased violation. An even more explicit case of courts sentencing offenders on the assumption that potential offenders were listening closely was one chapter of the story of the Great Train Robbery in Great Britain. See 80 L. Q. Rev. 473 (1964).

¹⁴ See the studies of Savitz and Graves, reprinted in Bedau, *The Death Penalty in America*, at 315-32.

¹⁵ In Dr. Graves' study, the homicide rate before executions was reported to be above average, while the rate just after executions was reported to be below average, consistent with the theory that increased arousal attributable to the atmosphere leading up to the execution could have affected the rate of homicide. See *Ibid.*, at 329. Given the great number of factors that could influence the apparent findings, the study must be viewed as merely suggestive.

law library. A threatening agency must either try to get its message through at the precise time that such decisions are made, or seek to plant the association between crime and punishment so firmly in the minds of potential offenders that the thought of penalties will naturally accompany the considerations of the threatened behavior. On occasion, it is possible to place reminders of prohibition and penalty at the scene: speed limit signs and other posted notices in public places serve as notice that certain behavior is forbidden, but also act as reminders that unpleasant consequences will accompany apprehension. The campaign in Michigan to post signs that read

DRUNK DRIVERS GO TO JAIL

made explicit this second function of on-site legal commands. These examples show rather clearly, however, that most legal threats cannot be directly inserted by will of the threatening agency at the site of possible law violation. Where this type of reminder is impractical, the only adequate substitute will be an association on the part of members of the threatened audience. And such an attempt is likely to produce more consumer resistance than even the most unpalatable of commercial products—it is perhaps best compared to the task of getting people to associate chocolate candy with dentists.

Threat as a Persuasive Appeal

If the first task of a threatening agency is communication of information, its second task is persuasion. The threatening agency is not a dispassionate participant in the communication process, with no stake in how the information affects behavior. Each message about the content of a threat is an agency appeal designed to reduce the quantity of threatened behavior. And since "information alone seldom provides sufficient impetus to change attitudes or actions toward a given object,"¹⁶ it is important to consider those aspects of communication other than information that might influence the ways in which people respond to threats.

The presentation of legal threats has involved a number of persuasion techniques, perhaps the most common being the heavy emphasis on a. the unpleasantness associated with being caught and b. the high probability that violation will lead to apprehension. Emphasis is confined in most cases to the maximum penalty possible for an offense, and appeals read like the aforementioned one about drunk drivers, or

LITTERING IS PUNISHABLE BY \$500 FINE

¹⁶ Leventhal, Singer, and Jones, *Effects of Fear and Specificity of Recommendation upon Attitudes and Behavior*, 1 J. Personality and Psych. 20 (1965).

or perhaps like this

**FALSE STATEMENTS ON THIS DOCUMENT
CONSTITUTE PERJURY
AND ARE PUNISHABLE BY IMPRISONMENT**

Often an agency will seek to highlight the probability of apprehension by telling members of the threatened audience about the means available for detecting violations; two frequent instances of this appeal are

SPEED TIMED BY RADAR

and

**OUR CAMERAS ARE MAKING
A CONFIDENTIAL RECORD
OF THIS TRANSACTION**

Private detective agencies, in apparent pursuit of general deterrence, post notices in conspicuous places to the effect that they service the particular shop or building. Less commonly, agency appeals try to downgrade the attractiveness of threatened behaviors or seek to secure compliance by means of appeals to the honesty or patriotism of the threatened audience.¹⁷

One issue relating to the presentation of threat-appeals stems from whether a high degree of emotional arousal on the part of a threatened audience will create a greater deterrent effect. In the belief that "shaking up" an audience will focus attention on the foolishness of bad driving, many local traffic courts and traffic-safety programs show films that depict violence on the highway in the most graphic of terms.¹⁸ No legal-threat campaigns have ever been subjected to evaluative research in order to determine whether such emotion-laden approaches enhance deterrence, but a number of psychological experiments have been conducted in closely analogous circumstances, with mixed results. The pioneer test of the effect of "fear-arousing" communications was published by Janis and Feshbach in 1953.¹⁹ In that study, randomly selected groups of high school students heard three different types of lectures on dental hygiene: one group heard a lecture designed to have a strong fear appeal, with frequent references to pain and harm to teeth; the second group heard a presentation with a moderate amount of threat appeal;

¹⁷ The most famous recent campaigns of this type are "Every Litter Bit Hurts" and "Only You Can Prevent Forest Fires."

¹⁸ The advertising description of one such film, "Signal 30," stresses the blood-and-gore aspects (in color) as educational. The picture has been used in a number of driver-improvement courses administered by traffic courts.

¹⁹ Janis and Feshbach, *Effects of Fear-Arousing Communications*, 48 *J. Abnormal and Social Psych.* 78 (1953).

and the third group heard a lecture that focused on other reasons why dental hygiene was a good idea. A higher percentage of those students confronted with the strong threat-appeal reported newly awakened worries about dental hygiene, but a lower percentage of them reported conforming to the recommendations of the lecture than in either of the other two groups. When the experiment was repeated, no significant difference in effect was found when the three different threat intensities were compared.²⁰

Subsequent research involving variations in the "fear-arousing" content of appeals to use automobile seat belts or take inoculations tended to show that results vary. Some experiments produce significant differences; others do not. A number of explanations have been suggested for the variety of research results. Janis and Feshbach suggest that one reason why strong fear-arousing messages might reduce conformity is that such tactics arouse aggression as well as anxiety.²¹ Another theory is that scare techniques might work better than others on groups that are not afraid to begin with, but that such appeals may produce a counter-reaction in those who already are anxious about the subject of the communication.

Experiments to date on the "fear-arousing" content of appeals are not of central importance to the student of deterrent threats because:

1. the findings are far from conclusive;
2. the appeals and audiences used for experimental purposes differ from the setting of most criminal threats. In particular, the criminal threat is made by an agency with the capability of creating unpleasantness, unlike the dental hygiene lecture, where the persuader has no power to make his prophecies come true.²²

However, these tentative explorations do call into question the efficacy of fear-arousal as a consistently successful method of securing compliance. And, collectively, such research makes the case for testing the effectiveness of fear-arousing appeals in criminal law and related areas.²³

²⁰ Moltz and Thistlethwaite, *Attitude Modification and Anxiety Reduction*, 50 *J. Abnormal and Social Psych.* 231 (1955).

²¹ See Hovland, Janis, and Kelly, *Communication and Persuasion*, at 83 (1953).

²² *Ibid.*, at 82: "[W]here the communicator has the power to administer severe punishments and the audience has already learned not to ignore his threats, strong fear appeals are likely to induce a high degree of conformity."

²³ Perhaps the best place to start such an investigation would be in the related areas of traffic safety and traffic law. The National Safety Council has conducted holiday safety campaigns for some time that stress the number of deaths expected in a given holiday period, and these campaigns have been criticized in recent years. Traffic courts use fear-arousing materials as a part of driver-education programs they compel some offenders to attend. Large numbers of drivers are exposed to such appeals, and the stakes in the traffic-safety area are higher than anywhere else in the criminal justice system in terms of lives lost and property damage.

Personalizing Threats

In the model of simple deterrence put forward by early thinkers, there were two assumptions:

1. that the threat of the criminal law was always issued by the threatening agency to society in general by passing a law;
2. that the information and persuasive appeals that created a deterrent effect were communicated to all men in similar ways.

Yet appeals to refrain from criminal conduct can be issued in many different ways: to society in general; to particular groups; to an audience that has been physically assembled to hear about a threat; or even to individuals, by means of letters or personal interviews. Personal interviews are, of course, a much more expensive method of communicating information and appeals than issuing threats to a general audience. For this reason, such intensive appeals will typically occur only among special high-risk groups (usually prior offenders) or in experiments designed to establish whether different types of communication affect behavior.

There is some basis for believing that the more personalized a particular communication may be, the greater the chances that it will affect behavior. Since the advent of the computer, some commercial firms go to great lengths to personalize advertising appeals—printing the name and address of the recipient on the outside of the envelope in a mailing campaign and addressing the recipient by name a number of times in the course of presenting their appeal.²⁴ The theory behind this practice may be that the public is less likely to dismiss personalized communications and may react more favorably to appeals when there is evidence that the firm is thinking of them personally in relation to the appeal. With respect to threats, this type of practice might influence behavior by producing the impression among members of an audience that somebody is paying special attention to their conduct.

Field experiments designed to test the effects of particular types of appeals have employed personalized letters and interviews with mixed success. In one test of whether normative appeals (PAYING TAXES HELPS YOUR COUNTRY) and threatening appeals (COMPUTERS CAN CATCH YOU) would affect tax-paying behavior, both appeals being issued by a non-governmental agency, there was a significant increase in the

²⁴ For example, Publishers Clearing House, a magazine sales firm, uses name and local residence references twice in the same page of one 1969 contest promotion letter. *Reader's Digest* used six different references to the recipient's name and address, besides referring to two other local residents by name, in a 1969 contest promotion.

amount of income reported and the amount of taxes actually paid by subjects of both appeals.²⁵ This tax experiment can hardly be viewed as conclusive evidence that personalized appeals have more influence than general appeals, inasmuch as no controlled comparisons were made with similar groups that had been exposed to general appeals with the same content. But the possibility that personalization helps to explain the results obtained in this experiment suggests that the effects of personalization should be tested. And the possibility that personalization contributed to the effect of the experiment is an obstacle to any conclusion that less personalized appeals of the same type as those used in the tax study would have had the same effects.

Personal interviews are extremely expensive, but most other forms of communication are far less costly. In cases where deficiencies of information or attention may impair the efficacy of threats, correcting these deficiencies will usually prove less expensive than other changes designed to increase threat effectiveness. To the extent that changes in communication can improve the effectiveness of threats, and that extent is presently unknown, a failure to take communication into account will result in more costly attempts at reducing crime.

In sum, there is no reason to believe that a complete understanding of the effects of threats on behavior is attainable by considering the legal system as a branch of the advertising profession; neither is there much danger that considering threat as communication will lead to overemphasis by officials on this aspect of deterrence. Variation in the substance of threats is surely more important than variation in form. But analysis that focuses on threat as communication makes explicit the fact that the perceptions of an audience, rather than the threat as intended by the agency, will determine the degree to which legal threats will achieve desired goals. Similarly, a communication perspective clarifies the role that assumptions about public knowledge play in theories which stress the importance of variations in probability of apprehension and severity of threatened consequences in predicting the outcome of threats.

D. Applicability and Credibility

If a legal threat is to prove effective as a simple deterrent, members of the threatened audience must believe that the threatening agency is both willing and able to impose consequences on them for committing the threatened act. Such a belief depends on audience awareness of a threat, as discussed above, and on two further conditions:

²⁵ Schwartz and Orleans, *On Legal Sanctions*, 34 U. Chi. L. Rev. 274 (1967).

1. those threatened must believe that the threatening agency wishes to apprehend and punish them personally if they commit the threatened act;

2. those threatened must believe that the agency is capable of discovering and punishing violations of the threat.

These two conditions refer, respectively, to the *applicability* and *credibility* of threats.

Applicability

Even if law-enforcement agencies are capable of enforcing threats, members of an audience will not fear the imposition of consequences unless they are persuaded that the threat is meant to apply to them. If a threat has been generally unenforced for a period of time, and this is known by a threatened audience, it may result in the belief that the threat is insincere. When a threat is issued to society in general, but only certain classes are caught and punished, members of a class that go unpunished may develop an elitist theory of the legal threat; they recognize the threat as real, but feel it is directed at others.

In one study of penalties and enforcement practices at a large midwestern university,¹ it was found that campus police for some time had ticketed all cars found in "NO PARKING" zones, but nothing had been done to collect fines from faculty members who had been ticketed but did not voluntarily pay. When the parking problem grew worse, the university publicized a new policy, increasing the fine for multiple offenders and announcing that parking fines would henceforth be deducted from faculty paychecks. After the new policy was announced, the rate of prohibited parking by faculty members decreased, but this decrease was largely confined to those who had been the most persistent offenders before the change—those who had not paid the fines under the old system.² Thus, it appears that announcing that faculty members would be fined, rather than the increase in fine, was responsible for most of the decrease in prohibited parking. Before the change in policy, nonpaying faculty members could reason that their cars received tickets because the police could not distinguish them from student cars, and that the nonenforcement of the fines showed that the university did not mean the parking restrictions to apply to them. For such a group, the new policy might have been the first notice that the university intended to restrict faculty parking in the prohibited zones.

In a similar vein, when laws against gambling or holding unlicensed parades are not enforced against church bingo or parading Elks, those groups may continue to violate the terms of such

¹ Chambliss, *The Deterrent Influence of Punishment*, 12 *Crime and Delinq.* 70 (1966).

² *Ibid.*, at 72-75.

laws without fear of apprehension and without notice that their behavior is considered wrong by the threatening agency. Under these circumstances, the threat of consequences will not produce even the moral impetus to abide by the law that might accompany knowledge that the conduct was considered wrongful.

Credibility

Even if a threatening agency is willing to punish wrongdoers, it may not be able to do so in all cases. Yet if audience members are to be deterred from committing a threatened behavior because they fear the imposition of consequences, they must believe that the threatening agency is capable of catching and punishing some offenders. Moreover, if some people have strong drives toward a threatened behavior or little fear of the consequences threatened, their estimate of the *specific probability* of getting caught may have a significant effect on whether they decide to risk the consequences. If this is the case, the greater the perceived likelihood of being caught, the more often processes of simple deterrence will persuade a potential offender to refrain from crime.

There is almost universal agreement among commentators that the opinion of a potential criminal about his chances of apprehension is important in predicting the effectiveness of threats.³ Most often, this consensus is expressed in the theory that the *objective probability* of apprehension will influence the efficacy of a legal threat. On occasion, writers express a faith in the marginal deterrent effect of comprehensive enforcement, while doubting that increased penalties pay similar dividends, as when Dr. Temple predicts:

The effectiveness of a deterrent is derived less from its severity than from its certainty.⁴

Though the objective probability that commission of a crime will lead to imposition of consequences is of unquestioned importance to deterrence and will help explain why some threats operate more effectively than others, a complete emphasis on objective probabilities may be misleading for two reasons:

1. if audience members perceive that a threat applies to them, the moral message that the behavior is forbidden can influence law-abiding people to refrain from crime even if the probability of apprehension is quite low;
2. predictions based on objective probabilities of apprehension may be inaccurate because subjective judgments about

³ See, e.g., Andenaes, *Punishment and the Problem of General Prevention*, 114 U. Pa. L. Rev. 149, at 160-164; Temple, *The Ethics of Penal Action*, First Clark Hall Lecture, 1934, at 33; Shaw, *The Crime of Imprisonment* (1946 ed.).

⁴ Temple, *supra* note 3, at 33.

personal chances of being caught, rather than the cold mathematics of crime, will determine how an individual responds to the threat of consequences—and the relationship between such judgments and objective probabilities is imperfect.

People may underestimate or overestimate the probability that they will be caught because of incomplete information about impunity rates for a particular crime. In addition, factors other than objective probability, such as personal feelings of optimism or pessimism, or propaganda about the chances of apprehension, may play an important role in personal judgments about the element of risk in a specific crime.⁵ Emphasis on the objective probabilities of apprehension may also conceal important insights about how and when changes in enforcement affect the perceptions of a threatened audience, for such changes may have a gradual rather than an immediate effect on subjective judgments about risk, and change in the objective chances of apprehension may affect some people differently than others.

Three Introductory Studies

Research to date supports the theory that the perceived credibility of a threat serves to condition its deterrent effectiveness, but there are indications that the process is more complex than many early writers believed. In Denmark, an unusual opportunity to study the effects of decreasing the apparent probability of apprehension occurred when the German Occupation Government arrested the Copenhagen Police Force en masse during the Second World War. Reacting to this emergency, citizen groups in Copenhagen established vigilante groups and increased the penalties threatened for major crimes. During this policeless period, the rates of many crimes where the offender could not be identified by the victim (such as robbery, burglary, and larceny) increased approximately tenfold. Other crimes, where the offender could be identified without police work, did not increase in frequency to any spectacular degree.⁶ It is unknown to what extent the large increases in crime were due to the same number of criminals committing many more crimes rather than to a greater number of people deciding to commit crimes.

In Detroit, police dissatisfaction with wages and working conditions led to a more restricted form of "police holiday." During a period lasting a minimum of seven months in 1967, the same number of police continued on traffic patrol, but issued about half as many tickets to motorists for moving violations. If De-

⁵ See the discussion and references cited *infra* subsection A, notes 4-7, and accompanying text.

⁶ Trolle, *Seven Months Without Police*, cited from Andenaes, *The General Preventive Effects of Punishment*, 114 U. Pa. L. Rev. 949, at 962 (1951). Additional information about Professor Trolle's volume (not available in English) was provided by Professor Andenaes.

troit's motor-vehicle accident rate is an accurate index of the number of traffic offenses committed, the number of actual violations did not increase, because the accident rate actually declined.⁷ Although violations of traffic laws are found to have occurred in many accidents, it is far from clear that accident rates are an acceptable index of rates of traffic-law violation.⁸ But the fact that accident rates did not rise at all is some indication that Detroit's police holiday did not have a spectacular effect on the rate of traffic violations.

One reason why Detroit's experience may have been different from that of Copenhagen is that the same number of police remained on the street in Detroit. Thus, the cues (mainly police presence) that many citizens had of the extent of traffic enforcement went unchanged, even though the objective probabilities had changed markedly. In Copenhagen the rise in the crime rate might even have reflected some overestimate of the actual decrease in impunity rates because the traditional police presence had been completely eliminated.

The British experience with the Road Safety Act of 1967 may provide another example of changes in the perceived credibility of a new legal policy differing somewhat from the objective change in risks of apprehension. Immediately after the much publicized Act went into effect, providing for a new blood-alcohol percentage definition of drunk-driving and equipping the police with portable "breath test" kits with which to screen suspected drunk drivers, the rate of nighttime traffic fatalities dropped sharply, indicating a substantial decrease in the rate of drunk-driving.⁹ As time passed, the rate of traffic fatalities increased somewhat from the low levels experienced right after the

⁷ Detroit police reports for 1966-67 show the following comparisons in moving violations:

	1966	1967	% Change
Jan.-April	163,873	152,423	- 7
May-Dec.	265,234	128,617	-52

Statistics on fatal accidents, obtained from the Detroit Police Traffic Division, show no trend upward during late 1967:

Motor Vehicle Accident Fatalities

	1966	1967	% Change
Jan.-April	79	62	-22
May-Dec.	100	155	- 3

Total accident figures decreased dramatically after April of 1967:

	1966	1967	% Change
Jan.-April	26,121	23,973	- 8
May-Dec.	63,119	45,101	-29

However, this decrease might be another result of a slowdown in police reporting.

⁸ For a description of efforts to investigate the relationship between accidents and violations in California, see Coppin and Peck, *The 1964 California Driver Record Study* (1967).

⁹ See Great Britain Ministry of Transport, Press Notice No. 892, December 19, 1967; No. 7, February 8, 1968.

law went into effect,¹⁰ which may indicate that drivers had reevaluated the impact of the change in enforcement on their personal chances of being apprehended for drunk-driving. Whether the burst of publicity and the element of unknown risk had caused drivers to overreact to the change in the law at the outset, or whether the passage of time and personal experience produced an underreaction to the no-longer-new change in enforcement policy, is impossible to tell, but the role of subjective factors in the deterrent effect of the Road Safety Act is established if either of these interpretations explains the pattern of accident fatalities after the law's introduction.¹¹

Certainty and Credibility

The different types of stimuli that may influence the perceived credibility of a legal threat include:

1. actual changes in the probability of apprehension that become known through the publication of general statistics on crime clearances;
2. actual or merely apparent changes in probability of apprehension that are communicated to an audience through publicity about inspection or apprehension of particular persons (BANK CASHIER JAILED FOR EMBEZZLEMENT) or groups (ROUNDUP OF DRUG SELLERS UNDERWAY);
3. publicity about new methods of enforcement (COMPUTERS ENLISTED IN WAR AGAINST FALSE ALARMS);
4. perceptions of changes in the level of enforcement that come from the personal or word-of-mouth experience of audience members with the symbols of enforcement, such as more police on the street;

¹⁰ The Ministry of Transport reports that October-May serious and fatal nighttime accidents decreased 37 percent in the months following the effective date of the law but increased 20 percent from a much lower base in the period October 1968 through May 1969. Personal communication from J. Betts to the author, October 1969.

¹¹ A somewhat more ambiguous indication that increases in certainty of apprehension deter crime is the finding that States with a higher number of prison admissions per 100 reported offenses tend to have a lower crime rate. Whether this means that crime is deterred by more efficient police work, or simply suggests that it is easier to apprehend a greater percentage of criminals when the crime rate is low, is unclear. Only the former interpretation would be evidence of the marginal deterrent effect of increases in threat credibility. Professor Tittle, who reports the finding that higher proportionate enforcement is correlated with lower crime rates, proposes one test of whether low crime rates are a cause or effect of relatively high probabilities of apprehension: he obtained the correlation between probability of apprehension and the ratio of police to population, and found that as probability of apprehension tends to increase, the ratio of police employees to population tends to decrease (the correlation obtained was $-.53$). The data do not, however, negate the possibility that greater probability of apprehension is the result of lower crime rates making police work easier, because the police burden may best be seen as the ratio of police to crimes rather than population, and a high-crime-rate area may have a high ratio of police to population and a low ratio of police to crimes, while a less crime-prone area may have fewer police per thousand citizens but more police per thousand crimes. There is also the disquieting possibility that apparent "certainty" is achieved by differences in reporting practices. See Tittle, *Crime Rates and Legal Sanctions*, 16 *Social Problems* 409 (1969).

5. personal or word-of-mouth experience of audience members with apprehension.

Of all these influences, it seems probable that personal experience (whenever present) exerts the most powerful effect on perceptions of credibility. If a man drives under the influence of alcohol once and is apprehended by police, certainly this experience is likely to increase his estimate of the risk of apprehension he runs by repetition of such conduct in the future. The same kind of change in perception can be expected if a person is stopped by police in a check for drunk-driving but gets off because he was not under the influence of alcohol at the time. News that friends or relatives have been apprehended or inspected will have a similar effect, though perhaps will exert less influence than a first-person experience. By the same token, committing a crime without being apprehended, or having personal knowledge of people who commit offenses without detection, will decrease personal estimates of the risks involved in a particular crime.

A Swedish survey of drivers provides evidence that personal experience with apprehension machinery not only increases perceived risk of apprehension but decreases the rate of drunk-driving among those who have been exposed to such experience. In that survey, drivers who reported having been stopped and screened by Swedish traffic control police had less subsequent drunk-driving than unchecked drivers.¹² There is less reason to assume that personal experience with increases in the number of police, and nothing more, can reduce crime. In New York City the rate of street crime decreased after the saturation of a small high-crime-rate area with extra police.¹³ But because the New York experiment succeeded in increasing the objective likelihood of detection while increasing the presence of enforcement personnel, this study does not necessarily show that apparent enforcement has an independent influence on the credibility of threats.¹⁴

In the aggregate, there is a direct relationship between increased objective probability of apprehension and increases in the perceived credibility of threats that result from personal experience with apprehension: the total number of persons exposed to apprehension will increase and decrease in relation to the total amount of enforcement. For the whole of a particular audience, then, changes in perceived credibility based on this type of experience will occur only with changes in actual probability of apprehension. With respect to police presence, the

¹² Klette, *On the Functioning of the Swedish Legislation Concerning Drunken Driving* (unpublished, 1966).

¹³ New York City Police Department, *Operation 25* (1955).

¹⁴ See *Ibid.*, at 9-15.

relationship is somewhat less direct. In rare cases such as occurred in Detroit, the probability of apprehension may change without any corresponding change in the degree of police presence or in methods of detection. More commonly, increased police presence will not increase the probability of apprehending offenders on a one-to-one basis: doubling the police presence in a community (and thereby doubling exposure to police) will not necessarily double the number of arrests or the clearance rate for street crimes. But the objective probability of apprehension will tend to increase or decrease along with variations in the presence of enforcement machinery.

There is no necessary relationship between publicity about new methods of enforcement or prosecution of violators and increases in the actual probability of apprehension. If these announcements affect the subjective judgments about risk of apprehension made by potential criminals, they represent an opportunity to increase threat credibility without increasing enforcement. But such an opportunity is limited by the powerful effects of personal experience. Where potential criminals are likely to gain personal experience of apprehension risks, either through committing crimes and escaping without detection or through personal knowledge of the successful criminality of others, personal knowledge will chip away at the facade of credibility over a period of time. The publicity campaign might increase the perceived credibility of the legal threat in the short run under such circumstances, but perceptions of risk would decrease as personal experience accumulated. One side effect of this type of process might be that audience members exposed to publicity campaigns and subsequently persuaded by other information that the risk of detection was not as represented might discount any future announcements of breakthroughs in crime prevention. If so, publicity without substance may decrease the general credibility of legal threats among some potential criminals.

In situations where many potential criminals are not exposed to personal experience with enforcement machinery, the role of general publicity campaigns in influencing public perceptions of the risk of detection is more significant; such campaigns may persuade large segments of the population that the risks of crime are greater than is actually the case. Very few citizens have any personal knowledge contradicting the maxim, "You can't get away with murder." Given an area where the crime rate is low and examples of undetected crime are not widely known, the facade of enforcement can establish permanent impressions of threat credibility in excess of actual clearance rates. And law-abiding members of society will spend most of their lives dependent on

secondary sources for their impressions of the efficiency of most categories of criminal-law enforcement.

The fact that law-abiding members of society depend heavily on secondary sources for perceptions of threat credibility does not, by itself, mean that publicity campaigns that affect such perceptions will decrease the crime rate, for widely represented among such groups are people who do not need a deterrent. It is only when potential criminals are not heavily exposed to personal experience that second- and third-hand impressions of the credibility of threats will have a permanent influence on the perceptions of those for whom the credible legal threat is most necessary.

If it is true that there is some danger of undermining the credibility of legal threats by using extensive publicity even though there has been no change in the substance of law enforcement, it is also true that dramatic increases in the efficiency of law enforcement will fail to achieve maximum impact without extensive publicity. For some potential offenders, personal experience with the enforcement of a law will not occur until months or years after a change in enforcement takes place, and such an experience may be the result of law violation that could have been prevented. The credibility of legal threats is enhanced more quickly, and among a greater number of potential offenders, if publicity accompanies increases in the ability of a legal system to apprehend offenders.

E. Variations in Threatened Consequences

Since the prospect of unpleasant consequences is the fuel on which the machine of deterrence is supposed to run, differences in the character and extent of threatened consequences may explain why some threats influence behavior more than others. Considering the role of consequences in the deterrent equation raises questions about:

1. the range of occurrences that should be defined as the consequence threatened by a particular communication;
2. the different kinds of unpleasantness that threats may communicate;
3. the effects of changes in the severity of threatened consequences on crime.

The Scope of Threatened Consequences

If one were to ask a judge to describe the penalty for driving while intoxicated, he would probably confine his answer to the fine or sentence of imprisonment provided in the penal code of his jurisdiction. If the question were rephrased as "Why might

people wish to avoid being convicted of this offense?" the same official might respond more volubly. He might mention the unpleasantness associated with arrest and trial for driving while intoxicated, a process that many people would fear more than the sentence of the court. He might speculate on why jail is an experience that people wish to avoid, describing the unpleasantness of the surroundings and restrictions imposed by jails, but also mentioning the effect of conviction and jailing, not only on a person's standing in his community, but in terms of people who are of particular importance to the offender.

This expanded description relates back to the definition of threatened consequences in two ways.

First, it demonstrates that some of the incidents of the administration of criminal justice, other than formally prescribed punishment, should be considered threatened consequences. In the case of driving while intoxicated, the legal system intends that the process of apprehension should be unpleasant, and members of the threatened audience will share this view. There would appear to be no good reason for restricting the definition of threatened consequences so as to exclude official actions that may be as significant as formally prescribed punishments, simply because they are incidents of processes leading to conviction.¹

Second, the importance of the effects of jail on personal standing in the community highlights the fact that official *actions* can set off societal *reactions* that may provide potential offenders with more reason to avoid conviction than the officially imposed unpleasantness of punishment. Because such reactions emanate from sources other than the threatening agency, and may not be an intended result of punishment, they cannot be considered to be part of the consequences threatened by an agency for specific offenses. However, these secondary reactions must be studied if the effectiveness of particular threatened consequences is to be understood. For example, the social disapproval that jail might precipitate will surely have different degrees of influence on skid row drunks and potential anti-trust violators,² just as they will operate with more force on certain types of shoplifters than on others.³ For this reason, the effectiveness of the threat of jail as a means of deterring criminal behavior will vary with the attitudes of different groups toward a result of jail that is

¹ With respect to the power of apprehension and interrogation, Cameron notes: "Among pilferers who are apprehended and interrogated by . . . store police but set free without formal charge, there is very little or no recidivism." Cameron, *The Booster and the Snitch* (1966) at 151.

² See, e.g., Levald and Stub, *The Revolving Door: Reactions of Chronic Drunkenness Offenders to Court Sanctions*, 59 J. Crim. L., C. and P.S. 525 (1968).

³ Cameron, *supra* note 1, at 164. "The contrast in behavior between the pilferer and the recognized and self-admitted thief is striking."

outside the boundary of formal legal punishment. And while the definition of legal consequences should not include unofficial community responses, any study of the effects of legal consequences must encompass all of the meanings that the threat of consequences conveys to members of a threatened audience.

Types of Unpleasantness

A great variety of threatened deprivations may function as reasons why members of an audience might wish to refrain from committing threatened offenses. The different types of unpleasantness conveyed by threats may condition different patterns of threat response, and thus be related to some of the variations in threat effectiveness. The major forms of unpleasantness conveyed by threats include economic deprivation, loss of privileges, confinement, physical punishment, and social stigma.

Economic Deprivation

The threat of economic disadvantage through such mechanisms as fines or lost deposits is often used in the regulation of minor offenses, and large fines are provided as optional forms of punishment for more serious offenses. In addition, the award of money damages as punishment or compensation in civil cases is often seen as an attempt by the legal system to deter noncriminal behavior through the threat of economic deprivation. When the main force of a deterrent threat is the unpleasantness of a fine or cost, the operation of the legal threat appears to be close to that of a price system. The measure of threatened punishment can be rather precisely calibrated by dollar amounts, and both the offender and the legal system may tend toward viewing the fine as the "price" of the threatened behavior, a point of view that might cause those who have paid the price to feel no moral compunction about their offense, and cause those who have collected the fine to attach less moral significance to the offense being punished in this manner than if other forms of punishment had been used.

In one sense, the saliency of economic threats increases with wealth: the threat of economic deprivation only operates on those who have economic resources to lose, and elevation of the level of fine threatened is of significance only to those who have sufficient resources to pay the lower fine. In a second sense, the significance of a fine threat is inversely proportional to financial means, for the threat of a \$10 fine would seem to be more severe to a man with only \$100 than to a man with \$1,000. The threat of small fines would thus seem more important to less wealthy members of an audience, while the threat of very large fines should have more influence on those with the means to pay them than on persons without significant accumulations of capital.

Economic deprivations can be used to threaten activities that are motivated by the desire for economic gain (in which case the threat of punishment is peculiarly "in kind") or to threaten activities that are motivated by other desires. While studies have shown the threat of small fines to be effective in requesting the frequency of certain types of behavior, the studies to date have dealt with minor offenses that are not strongly motivated, and there is no reason to suppose that economic threats are of any unique efficacy.⁴ However, economic deprivation is one form of punishment that promises a direct gain to the punishing agency in the form of the money taken from offenders by the act of punishment. By contrast, most other forms of punishment result in significant costs to the punishing agency.⁵ In this respect the existence of a fine serves as an incentive to criminal-law enforcement, where the costs of other forms of punishment might serve as a brake on widespread enforcement.⁶

Loss of Privileges

In many situations, conviction for an offense will result in the offender losing privileges normally available to most members of society. For some offenses of minor and intermediate severity, the loss of privilege may be the most unpleasant of consequences threatened, and will be specifically related to the offense (as when serious or persistent traffic violations lead to the revocation of the offender's license to drive). With quite serious offenses, the loss of privileges will be a relatively minor part of the total punishment, and will not necessarily be related to the offense leading to the loss (as when convicted felons are deprived of voting rights, eligibility for public office, or the opportunity to lawfully possess a firearm). When the lost privilege relates specifically to the offense leading to punishment, as in the driving example, the threat of consequences may be of special significance to potential offenders, because this group is more likely than others to place importance on the privilege. Thus, the propensity of persistent traffic offenders to commit such offenses is some evidence either of frequent driving or of the special emotional

⁴ Studies to date of fine threats have related to illegal parking, traffic offenses, and non-criminal conduct, while the effect of fine threats on major crimes has not been studied. By contrast, most of the studies of imprisonment as a deterrent have concerned crimes such as homicide, robbery, and assault. In one study, however, fines were found to operate as a greater deterrent to recidivism of chronic drunks than jail sentences. See Lovald and Stub, *supra* note 2.

⁵ Thus, Professor Shelling defines a threat to be the announcement of "an act that one party would have no incentive to perform, but that is designed to deter through its promise of mutual harm." Shelling, *An Essay on Bargaining*, 41 *Am. Economic Rev.* 281 (1956), at 282.

⁶ The incentive to enforcement presented by fine systems is most evident when it produces minimum ticket-quotas for parking and traffic police. While other incentives to enforcement exist in other areas of crime control, it is only when the threatening agency stands to profit in individual cases of conviction that increases in the level of enforcement will result in any direct financial gain.

significance of driving to this particular group. The loss of privileges that are not specifically related to the offense, particularly when attached to conviction for major crimes, may have less significance to potential criminals than to most other citizens. It is, for example, highly probable that the average citizen places more value on his opportunity to vote or run for office than does the potential armed robber.

The loss of privileges unrelated to the offense is not generally discussed or evaluated as a deterrent mechanism when attached to other major penalties for serious crimes. However, the ban on the lawful possession of firearms by felons,⁷ while not designed as a deterrent to potential felons becoming actual felons, is viewed as a means of preventing convicted felons from obtaining guns that might be used in future crimes. Since firearms remain readily available in most areas of the United States to convicted felons through unlawful channels,⁸ the principal aim of this type of regulation would appear to be that of deterring felons from possessing and thus being tempted to use firearms. This approach has not as yet been the subject of statistical evaluation. The loss of driving privileges for persistent or serious traffic violations is intended both as a general deterrent addressed at large to all potential traffic violators and as a mechanism to reduce driving (and therefore the risk of violations) among persistent offenders who have such privileges revoked. The effect of such threats on the general rate of traffic violations has not been studied, but there has been a considerable discussion and some evaluation of license revocation as a means of reducing driving violations among persons whose licenses are revoked. In this regard, it has been argued that the essentially deterrent thrust of revocation (since revocation generally does not make it physically more difficult for an individual to gain access to a car) is more effective than fines on persistent traffic offenders.⁹ Professor Packer has, however, expressed some doubts about the efficacy of revocation as a means of treating traffic offenders, because the practice employs a weak threat of detection where the incentive to drive without a license is strong.¹⁰

⁷ 18 U.S.C. (1968) 924 (c).

⁸ See Newton and Zimring, *Firearms and Violence in American Life* (1969) at Chapters 1, 12-14.

⁹ Middendorf, *The Effectiveness of Punishment and Other Measures of Treatment* (1967).

¹⁰ "Unfortunately, we have no assurance that license suspension or revocation would be an effective sanction. Failing some dramatic technological advance that would make it possible to identify unlicensed drivers without stopping and questioning them, there is every reason to believe that large numbers of people would simply accept the risk of being caught and would continue to drive. The use of criminal punishment would simply be postponed one step rather than avoided. There would be, if anything, a decrease in the deterrent efficacy of the law, because an unlicensed driver is less likely to be apprehended than one who is drunk." Packer, *The Limits of the Criminal Sanction* (1968) at 255.

The main thrust of Packer's point deals with revocation as a deterrent to future violations

The criticism of driver's license revocation as a special deterrent points up a general problem with the use of loss of privileges as a means of deterring further offenses by those subject to revocation. The real meaning of loss of privileges (unless highly reliable means for monitoring the use of the privileges exist) is the addition of a legal threat to an existing one, where the punished group has already ignored the existing threat. The same type of criticism could be leveled at the threat of lost privileges as a marginal general deterrent, because in order to outperform the threat of fines or jail sentences, the loss of privileges would have to influence the behavior of some people who are not impressed by the threat of other sanctions for traffic offenses. In the case of license revocation, however, there is no reason to reject out of hand the notion that some traffic offenders will take the threat of revocation more seriously than the threat of other punishment for traffic offenses. Thus, if driving without a license is either more severely threatened than other traffic crimes or easier to detect, it may prove more effective than alternative sanctions as a general deterrent to traffic violation, and even as a special threat conveyed by way of revocation to convicted traffic offenders. As is the case in so many controversies, a feasible program of further research is the surest method of assessing the pitfalls and potential of loss of privileges as a countermeasure in a limited but important sector of the criminal justice system.

Confinement

Terms of penal confinement, ranging from a few days to the remainder of an offender's life, are one of many alternative sanctions for minor crimes and, in this country, the usual punishment threatened for major infractions. Apart from the fear of imprisonment because it is an incident for stigmatization, which

by those who have had their licenses revoked, and not with the general deterrent efficacy of the threat of revocation, for he adds, "The apparatus of the criminal law, for all its terror, usually produces a less onerous punishment than license revocation would be perceived as being." And although the difficulty with apprehension might dilute the public perception of the disadvantages of revocation, it would probably not do so completely.

With respect to the credibility of license revocation, the quoted statement produces a rare opportunity to disagree with Professor Packer's analysis. A driver who is both drunk and driving without a license is no less likely to be apprehended than one who is merely drunk, and far easier to convict of a traffic violation. The penalties for driving after license revocation appear to be the highest meted out to traffic offenders of any kind, according to a study of sentencing in the Detroit traffic court. (Zimring, *Punishment Theory and Traffic Offenders*, unpublished, 1966). And the driver without a license can be apprehended for this offense whenever he is stopped by a police officer, not merely when he is drunk. General traffic violations of the kind that betray the unlicensed driver occur far more often than drunk arrests.

Thus, while many people, perhaps even a majority of the class, may continue to drive after suspension or revocation, the revocation procedure and enforcement are not so toothless as to preclude the possibility that many others will not.

Professor Crampton doubts the effectiveness of license revocation in the more limited area of drunk-driving control, because many drunk-driving offenders are addicted to alcohol, although this does not necessarily mean they are also addicted to driving. See Crampton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 U. Mich. L. Rev. 421 (1969).

will be discussed more generally under a separate heading, there is much in the experience of penal confinement worthy of avoiding, including loss of freedom to act and make choices, invasion of privacy, rigid discipline, and living conditions far below ordinary standards of society. To paraphrase Lincoln on the experience of being tarred and feathered, if it weren't for the honor of imprisonment, there would still be powerful reasons for potential offenders to do without it.

Prison life also has a few characteristics that might offset its manifest disadvantages for some people—the prisoner is fed and sheltered, albeit substandardly, and is relieved of the often agonizing responsibility to make any decisions about the course of his daily life, and of the burden of fending for himself.¹¹ But the disadvantages of penal confinement outweigh the advantages by an overwhelming margin, and it is only among those who have been rendered dependent by previous exposure to imprisonment that any inclination toward a prison environment has been noted.¹²

The quality of a person's life-style in society may have some bearing on the extent to which imprisonment is considered undesirable, because the relative deprivation of confinement should be greatest in cases where the contrast between life on the outside and the prospect of prison is most extreme. To this effect, mass media in the United States have found the contrast in living conditions between prior life and prison to be noteworthy in the case of James R. Hoffa, former president of the International Brotherhood of Teamsters; the same prison conditions provoke little comment when notorious criminals of lesser wealth serve their sentences. But the relationship between life opportunity in society and the relative unattractiveness of the prospect of penal confinement can be dangerously overstated: the most disadvantaged of our citizens stands to lose a precious measure of personal freedom through penal confinement, and his ability to distinguish between life in prison and life in society may be considerably greater than that of dispassionate observers. With total lack of personal liberty as the common denominator of penal confinement, the prospect of prison may well function with equal effectiveness as a disincentive among rich and poor.

By the same token, what is essentially prison-like about prisons will probably mean that the unattractiveness of prison as a general deterrent is relatively insensitive to many changes in the conditions of penal confinement. If this is the case, conjugal visits,

¹¹ See Morris, *The Habitual Criminal* (1951) at Chapter 6 for a description of some personality types apparently suited to the discipline and dependency of prison life more adequately than to the rigors of life in society.

¹² See Clemmer, *Observations on Imprisonment as a Source of Criminality*, 41 J. Crim. L., C. and P.S. 311 (1950), for a discussion of the role which experience with prison might play in developing patterns of dependency.

protein diets, and television privileges can be added or subtracted from the basic environment of penal confinement without affecting the fundamental aversion to loss of freedom experienced by the vast majority of our citizens.

The perceptions of prison life held by those who have experienced periods of confinement, and members of groups who have not, are worthy of serious study by psychologists, but have not as yet received a great deal of attention. It would be of interest, and some importance, to determine whether potential criminals view penal confinement in the same way as legislators and penal authorities—as period of days or years during which experiences will occur—or whether some potential criminals see confinement most prominently as a series of deprivations, with the period of time of secondary importance. It would be natural for a legislator to assume, when making decisions about penalties for deterrent purposes, that 20 years in prison is twice as much as ten years. But there are reasons to suppose that many potential criminals (particularly those without any experience with confinement) view the prospect of prison in a different light. Apart from normal tendencies to discount future pain and pleasure, the *intensity* of confinement as an experience rather than the length of the experience might dominate the perception of most potential offenders, with only those who are case-hardened to the deprivations of prison life measuring the unpleasantness of possible future confinement in a time-frame. To the extent that time assumes secondary importance in the perception of confinement as a prospect worth avoiding, a 20-year term is not in any meaningful sense twice the deprivation that a potential offender sees in ten.

Physical Punishment

Every healthy organism seeks to protect itself from unpleasant physical sensations, and to stay alive. Legal systems have, as long as deterrence has been a goal of criminal sanctions, sought to mobilize strong drives to avoid pain and death as a means to reduce crime. The imposition of physical punishment is a basic or primitive criminal sanction in at least three senses:

1. The drive to avoid pain and preserve life is a common denominator for all men—if a man has nothing else to lose, he still has an interest in preserving his physical security.
2. The imposition of physical punishment requires less advanced technology and fewer resources than the imposition of penal confinement over a period of time.
3. The drive to avoid physical punishment need not be based on any feelings of loyalty toward the agency threatening this type of consequence, whereas the drive to avoid being branded

deviant is only frightening to the extent that a threatened audience has some respect for the social institution making that judgment.

It has also been suggested that the imposition of physical punishment is primitive in a pejorative sense, because such punishments show little regard for the interests of the offender, and brutalize society at large. In this regard, some have maintained that the threat and imposition of brutal punishments impede the moral development of societies that resort to them, and may undetermine the moralizing effects of punishment. Thus, while it can be argued that the willful taking of life merits capital punishment on other grounds, there are those who see a peculiar inconsistency in showing society's abhorrence of killing by taking the life of the offender.

Agencies will resort to physical punishments in certain situations where alternative foundations for deterrence may not be readily available. The threat of physical punishment is used extensively, for example, when the threatening agency does not command the loyalty of its audience, as in the case of occupying powers trying to secure the obedience of an enemy population, or governments attempting to subdue internal rebellion. In most Western nations the use of extreme physical punishment is commonly restricted to offenses that are considered particularly reprehensible, or to offenders for whom other mechanisms appear to be ineffective, as, for instance, where corporal and capital threats are reserved for persons who are already confined in penal institutions.

Because the drive to avoid pain is basic to all men, and the drive to preserve life is not only basic but of ultimate importance, there is some reason to view such consequences as likely to produce the broadest and most extensive of deterrent effects, but there is little in present research to indicate that either corporal or capital punishment has any unique deterrent efficacy when other harsh measures, such as long-term imprisonment, are also available. Modern discussions of corporal punishment have discarded the notion that such punishments have salutary effects on those actually punished. Little is available in the way of research on the relative effectiveness of corporal punishment as a general deterrent; if the threat of such punishment outperforms the threat of other penal measures, the evidence of this phenomenon is so far undiscovered.

Research into the effectiveness of capital punishment versus protracted imprisonment as deterrents to criminal homicide is abundant. Studies have compared homicide rates of neighboring States with similar social environments but contrasting penalties

for homicide, and concluded that executions have no discernible effect on homicide rates.¹³ Research efforts have focused on the same jurisdiction before and after the death penalty was either introduced or abolished without finding any change in the rate of homicide that appeared to be attributable to change in penal policy.¹⁴ Other strategies of research have been used, and produce no finding of the special effectiveness of the threat of death.¹⁵

If the threat of death has no marginal deterrent value when compared with protracted imprisonment, it still may be true that capital punishment would serve as an effective marginal deterrent in other types of crime more susceptible to the influence of variations in threatened punishment, and that the death penalty, even in homicide, would function as an effective marginal deterrent when compared with much lower terms of imprisonment or lesser penal measures. What these studies do establish, however, is that the special effectiveness of even the most extreme of physical punishment as a means of securing obedience to law cannot be assumed.

Stigmatization

Most men place a high value on the regard of their friends and neighbors, and on their standing in society. The discovery that a person has committed a crime can change the community standing of an individual because social feelings about the crime will attach to social judgments about the criminal. In addition, the consequences of apprehension for criminal behavior may carry with them important measures of social reprobation. Imprisonment results in the socially unpleasant status of prisoner, and the label is likely to last longer than the sentence of imprisonment. Since one of the most frightening prospects of social life is what Lewin called "the danger of exclusion from the group," the possibility that criminal activity might lead to stigmatization, a process that involves elements of symbolic and actual exclusion, may serve as a significant deterrent to crime.

The relationship between legal punishment and social stigmatization varies from case to case. Some types of trial-and-punishment proceedings are specifically designed to bring down the wrath of society on the offender, the institutions of public display in the pillory and the publication of names of guilty offenders being not the least examples of such intentions. Many of the conditions of prison life in modern times have been described as ceremonies of degradation meant to convey social disapproval. In other cases, stigmatization attaches to knowledge that an of-

¹³ See the papers collected in Bedau, *The Death Penalty in America* (1964), at 258-332.

¹⁴ See *Ibid.*, at 274-84.

¹⁵ See *Ibid.*, at 284-332.

fender has been apprehended for a particular crime, or punished in a particular way, without any extra efforts on the part of the punishing agency. Indeed, stigmatization may cling to punishment and conviction even when the legal system tries to discourage it. But if social stigmatization can exist independent of legal efforts to achieve or accentuate it, the prospect of stigmatization must still be counted as a formidable element of the message communicated by many legal threats.

The prospect of stigmatization functions differently than the threat of other types of consequences (such as pain or confinement) because it is of special importance to those who attach great significance to the judgments of others, and because the sting of community attitudes is difficult to administer to offenders in calibrated doses. Among members of a threatened audience, the fear of stigmatization will thus be greatest among those who are most socialized, those presumably least in need of a deterrent in the majority of cases. When stigma attaches to an individual as the result of punishment for a serious crime, it is more likely to be a total destruction of reputation than a small step down the ladder. And when an offender has been stigmatized once, the effects of this process will tend to stay with him for many years. Having earned the status of criminal, the offender might feel he has little to lose from further stigmatization and, correspondingly, he will have less incentive to avoid consequences that bring with them the threat of stigma.

If the threat of particular consequences functions as a deterrent because it carries the prospect of stigma, as well as other deprivations, it is essential to recognize that variations in the severity of the nonstigma penalty are not necessarily accompanied by upward or downward shifts in the stigma value of punishment of similar magnitude. Doubling a prison sentence from five to ten years is not likely to double the social consequences of conviction. To the extent that fear of stigmatization, rather than fear of time in prison, influences the behavior of a threatened audience, this change cannot be expected to exert a great marginal deterrent effect. And since the threat of further social stigma may mean little to the man who has already been branded a criminal, the same threat of consequences may have less meaning to those who have already been stigmatized than to other classes of potential criminals.

F. Variations in Severity of Consequences

Since the power of a legal threat to function as a simple deterrent comes from the unpleasantness of the consequences threatened, one natural strategy for increasing the deterrent efficacy

of threats is to increase the severity of threatened consequences. The theory of increased penalties as a marginal deterrent is simple and straightforward: all other things being equal, an increase in the severity of consequences threatened should reduce the number of people willing to run the risk of committing a particular criminal act, in much the same way that increases in the price of a product will decrease the public demand for it.

If variations in the severity of threatened consequences were indistinguishable in effect from the influence of price increases, there would be reason to assume that all increases in severity would tend to reduce the number of threatened offenses committed,¹⁶ but there is no basis for concluding that the extent of the marginal deterrent effect produced would be substantial in all cases. Let us suppose that apples are selling for 20 cents a pound and close substitutes such as oranges or pears are 25 cents a pound; doubling the price of apples would have a much more significant effect on the quantity demanded than if apples were 20 dollars a pound, with close substitutes selling for 25 cents, and the price of apples were subsequently doubled. And doubling the price of apples would tend to have less of an effect on the quantity of apples demanded if there are no close substitute commodities available, than if a number of other types of food are available to consumers that have the same attributes that make apples desirable. For similar reasons, when penalties for criminal activity that many people find attractive are quite low, thereby making crime a reasonable alternative to legitimate means of obtaining gratification for many persons, even a high probability of apprehension may leave a high rate of the threatened behavior, and increases in the severity of threatened consequences can be expected to have a more substantial marginal deterrent effect than if the level of consequences threatened is already quite high in relation to the benefits obtainable through criminal means. Increases in severity would also be expected to produce more dramatic marginal deterrent effects when noncriminal or less severely threatened alternatives exist for getting that which makes the threatened behavior attractive than when no such alternatives exist.

Elements of the comparison between effects of price changes and severity of threatened consequences take on an air of unreality because some of the examples of commodity pricing used above are rather ludicrous: it is probable that if apples were selling for 80 times as much as other forms of fruit, doubling their

¹⁶ See Stigler, *The Optimum Enforcement of Laws* (unpublished, 1969), at 3: "The offender is deterred by the expected punishment, which is (as a first approximation) the probability of punishment times the punishment—\$100 if the probability of conviction is 1/10 and the fine \$1000. Hence, increasing the punishment would seem always to increase the deterrence,"

price would have no effect on sales because that quantity would be zero at either price. But the very whimsicality of that example may point up differences between the function of price changes and changes in the level of threatened consequences that force some modification of the theory of increase in severity as a marginal deterrent. One important difference between penalty and price is that it can be assumed that a potential buyer will know the price of a product before making a purchase decision; no such assumption can be made about the potential criminal's knowledge of the consequences threatened for a particular behavior. Ignorance about the severity of threatened consequences, which is widespread among potential criminals,¹⁷ may lead to irrational conduct, on the order of buying \$40 apples, and will negate the possibility that change in consequences will operate as a marginal deterrent for the ignorant.

A second difference between penalty and price is that the price of a product is a disadvantage to purchase that will occur with certainty, while the consequences threatened for an offense will occur only some of the time. This factor, by itself, would not necessarily impinge on the marginal deterrent effect of increases in the severity of threatened consequences in cases where the risk of apprehension remains constant, for if potential offenders believe that their chances of apprehension cannot be dismissed, the risk of a high penalty provides more incentive to avoid crime than the risk of a low penalty. However, if potential offenders use the uncertainty of apprehension as an excuse for believing that they will not be caught, they will be immune to the influence of increases in the severity of threatened consequences. And this perception of personal immunity may be widespread among those whose behavior must be affected if increases in threatened consequences are to operate as a marginal deterrent, both when the risk of apprehension is generally quite low, and when the threatened consequences are so high at the outset that only the foolhardy would find it worthwhile to run the risk of apprehension and punishment.

A number of studies on the impact of penalty increases underscore the point that wholesale importation of economic models and unitary assumptions about the effects of penalty shifts are not consistent with existing data. Efforts to discern whether the death penalty reduces homicide more than protracted imprisonment, mentioned earlier, support the conclusion that the addition or elimination of the death penalty has no effect on homicide rates. Studies in single jurisdictions before and after upward shifts in

¹⁷ See subsection C, notes 4-6 and accompanying text, *supra*.

penalties provided for rape,¹⁸ marihuana possession,¹⁹ and assaults on police officers²⁰ have found no change in the trend of crime rates that could be attributed to the change in penalty, although studies of crime-trends in a single jurisdiction are less reliable than the series of studies on capital punishment and homicide. Two efforts to study a rarely enforced Nebraska law providing much stiffer maximum sentences for bad checks over \$35 than for smaller checks failed to find any difference in the frequency of the larger checks that could be attributed to the difference in threatened consequences.²¹ Chambliss found that parking offenses decreased after increases in the fines threatened for persistent offenders, although other changes in policy toward parking offenders probably accounted for the major share of the decrease.²²

Rusche and Kirchheimer confronted the issue of marginal deterrence in a broader framework by analyzing rates of a number of different crimes in England, France, Italy, and Germany from 1910 to 1928.²³ In England, the authors note a small decrease in crime, together with a trend toward greater leniency. In France, rates of most crimes remained stable, while punishment levels decreased.²⁴ In Italy and Germany, punishment for major crimes increased, but the crime rate fluctuated without any apparent relationship to punishment levels.²⁵ As the authors of this study recognized, the countries being compared differed substantially in attributes other than punishment policy, making it impossible to draw positive conclusions about the effect of higher penalties on crime rates. But the figures from this study "provide no basis for assuming that the policy of punishment affects criminality."²⁶

Gibbs²⁷ and Tittle²⁸ analyzed crime statistics and punishment data from the various States in the United States in an effort to determine whether variations in the probability of apprehen-

¹⁸ Schwartz, *The Effect in Philadelphia of Pennsylvania's Increased Penalties for Rape and Attempted Rape*, 50 *Crim. L., C. and P.S.* 509 (1968).

¹⁹ California Assn. of Justice, *Office of Research, Crime and Penalties in California* (1968), at 12. The California statistics on marihuana deal only with the number of reported arrests, because no reliable estimates of the gross number of crimes are available for this crime without a victim willing to report the offense to the police.

²⁰ *Ibid.*, at 10-12.

²¹ See Beutel, *Experimental Jurisprudence* (1957). In 1967, a study supported by the Center for Studies in Criminal Justice at the University of Chicago used different methods to come to the same conclusion. See Zimring, *Bad Checks in Nebraska, A Study in Complex Threats* (unpublished, 1968).

²² Chambliss, *The Deterrent Influence of Punishment*, 12 *Crime and Delinq.* 79 (1966).

²³ Rusche and Kirchheimer, *Punishment and Social Structure* (1939).

²⁴ *Ibid.*, at 193-200.

²⁵ *Ibid.*, at 200-205.

²⁶ *Ibid.*, at 200.

²⁷ Gibbs, *Crime, Punishment, and Deterrence*, 48 *Southwest Social Science Quarterly* 515 (1968).

²⁸ Tittle, *Crime Rates and Legal Sanctions*, 16 *Social Problems* 409 (1969).

sion or severity of punishment were related to variations in the rate of particular crimes. The Gibbs study related only to homicide, while the Tittle study involved homicide, assault, larceny, burglary, robbery, sex offenses, and auto theft. For one crime, homicide, higher than average severity of sentences was significantly correlated with lower than average crime rates when figures for all States were analyzed without distinctions based on region of the country.²⁹ For the other offenses, no significant correlation between severity of sentences and the crime rate was found, apparently leading to the remarkable conclusion that severity of sentence influenced the rates of the crime thought to be among the least detorable of offenses, but did not similarly affect such traditional property crimes as larceny and burglary.³⁰ However, when severity of punishment and crime rates were compared by grouping States into regions, States with penalties higher than the average for their regions did no better than those with lower penalties in homicide, or in the other categories of crime where nationwide totals had also shown no apparent relationship.³¹ It thus appears that regional differences in crime that are unrelated to severity of punishment were responsible for the nationwide correlation between punishment levels and crime.³²

The studies to date illustrate some of the difficulties involved in evaluating the impact of severity of consequences on crime

²⁹ *Ibid.*, at 415.

³⁰ *Ibid.*, at 415-417.

³¹ The procedure followed to control for regional effects in Professor Tittle's data was (1) the division of the country into five regions—East, South, Border, Midwest, and West; (2) the calculation for each region of the mean rate of the particular crime and the mean length of sentence for that crime; and (3) the rating of each State with respect to whether it was above or below the average for its region in rate of particular crime and in severity of sanction. It was found that while, for instance, the correlation between average prison sentence and homicide rate for the Nation as a whole was $-.46$, in only 21 of the 46 States for which data were available did a State with higher than regional average penalties show a lower than regional average rate of crime, to the same effect, did a State with lower than regional average penalties experience a higher than regional average homicide rate. At the same time, in 25 of the 46 States, mean sentences and mean crime rates were both higher or lower than the regional average. I conducted this analysis of the data, with Professor Tittle's assistance.

³² The principal problem with using an undifferentiated national sample of States is that areas, such as the Deep South, that have very high rates of homicide appear to regard intraracial killing as less serious than other areas of the country. Thus, the South, with a rate of homicide of .09 per thousand during the period studied, compared with .03 for the Midwest and .02 for the East, had an average prison sentence of 89.6 months for homicide, compared with 199.4 for the Midwest and 214.5 for the East, appearing to suggest that higher penalties create less homicide. But when we ask whether those States in the South with higher penalties do any better than their neighbors, the data suggest they do not. The five Southern States with lower than mean sentences for homicide have slightly lower homicide rates than the four higher than mean punishment States. The relationship between severity and rate, undoubtedly present in the nation as a whole, is apparently not a casual one. See note 31 *supra* for data on all 46 States controlled for region, and *supra* note 11, subsection D, for a discussion of the relationship between probability of punishment and crime rates discussed by Tittle. A further problem arises because homicide is also threatened with the death penalty in a majority of states, and is universally threatened in the South, which otherwise has the lowest average penalty for homicide. The Gibbs and Tittle data exclude death sentences.

rates. Comparative study is dangerous, because factors other than the crime rate may cause crime rates to differ, and areas that differ in punishment policy may also differ in these other factors. Studying the crime rate before and after a change in penalty is helpful, but it is difficult to determine on the basis of such studies what the crime rate would have been in the period following the change if the change had not occurred—trends before the change are of some assistance, but trends change. In spite of these methodological problems, existing studies do support a number of conclusions.

First, the cross-cultural and interstate comparisons of sentence severity and the crime rate show that moderate variations in the severity of punishment for serious crimes is not a major factor in explaining the differences in crime rate that are observed in different jurisdictions. While such studies are far from perfect, they do tend to set an upper limit on the amount of variation in the crime rate that might be accountable to punishment policy.

Second, the specific investigations of capital punishment for homicide, and those of upward shifts in the minimum and maximum terms of imprisonment for other major crimes, have tended to produce negative conclusions. It would be tempting to generalize from these specific case studies to the conclusion that increases in severity hold little promise as marginal deterrents, but such a generalization would be unwarranted. Many of the studies of upward shifts in penalty, such as those of the change in punishment for possession of marihuana and assault of police officers in California, base their conclusions on data that cannot completely contradict the possibility that increased penalties had a marginal deterrent effect.³³ Moreover, many of these studies—including the California studies, the Nebraska bad-check sounding, and probably the Philadelphia rape analysis—focused on changes of penalty where public knowledge of penalties was low.³⁴ There is no reason to believe, out of hand, that similar results would be obtained under more favorable conditions. Also important, all of these studies involved moderate shifts in legislatively

³³ The California marihuana study presents the weakest evidence, because it rests on arrest trends rather than changes in the crime rate. And all of the single jurisdiction trend studies leave open the possibility that trends can change, and that shift in penalty may be evidence of a change in trend. However, the cumulative significance of a number of single jurisdiction "before and after" studies, if all fail to reveal changes that could be attributed to the change in punishment policy, is less vulnerable to attack than such studies when considered one at a time. And when comparative and retrospective techniques are combined and frequently repeated, as was the case in the capital punishment studies, the use of imperfect research techniques can lead to the construction of an impressive case for or against marginal deterrence in a particular comparison of penalty threats.

³⁴ See Social Psychology Research Associates, *Public Knowledge of Criminal Penalties: A Research Report* (1968), for data on California. The Nebraska data are discussed in subsection C, *supra*.

prescribed punishments for offenses that were already severely punished. It cannot be concluded that larger jumps in penalty will have no effect on crime rates, particularly when the base penalty for an offense is quite low.

But available data do suggest that increases in legislatively provided penalties for major crimes have little impact as a marginal general deterrent in many situations where officials place great faith in such increases, and this trend could serve as the basis for experimental downward shifts in prison sentences for major crimes where present penalty levels reflect deterrent intentions that may not be producing results.

The failure of many increases in severity of consequences to function as a significant marginal deterrent to major crimes is far from inexplicable. Earlier discussion has alluded to the widespread lack of information about penalties among many classes of potential criminals, to the persistent optimism of many potential offenders, and to the fact that increases in punishment that convey stigma do not necessarily result in increased stigmatization. In addition to these factors, it is likely that increases in the severity of threatened consequences are more or less significant, depending on the relationship between size of penalty increase and size of base penalty. If this is the case, raising a threatened prison sentence from five to seven years will have less impact than raising a threatened penalty from one month to one year, even though the former shift represents more than twice as much additional punishment. In each case, if the higher penalty threat is to have a marginal deterrent effect, it will do so by persuading those who would commit crimes if confronted with the old threat to refrain from criminal conduct because of the increase in threatened penalty. In the case of the five-year base penalty, any marginal general deterrence will have to occur among people who were willing to risk five years in prison, and this group is confronted with only a 40 percent increase in threatened penalty. When a penalty is raised from one month to one year, the relative increase is 1100 percent, and the population among whom marginal general deterrence must operate is not necessarily as intransigent as in the case of the five-year base penalty. There may be people who are just as immune to the threat of consequences in the group of potential criminals threatened by the one-month penalty, and for them the increase in penalty from one to 12 months will have no effect. But since the base penalty is lower, there may be a large number of people willing to risk the month in jail who are not as strongly motivated or as difficult to influence as the group of people willing to risk five years. When the large relative increase

in punishment is put into effect, it may function as a marginal deterrent by substantially reducing the number of crimes committed by these less impervious potential offenders.

If the relative magnitude of increases in marginal deterrence is important, upward shifts in the level of threatened consequences will result in diminishing marginal returns as the base penalty increases. This does not mean, of course, that increases in threatened penalties will fail to produce any marginal deterrence when base penalties are large, for it is possible that such increases will produce relatively small deterrent returns that are of great social importance. Thus, it cannot be said that the diminishing effects of increases in severity in weeding out potential criminals is a reason for rejecting increases in relatively high base penalties as proper policy in all cases.

The Uses of Variations in Severity:

The Fortress and the Stepladder

If potential criminals are responsive to variations in the severity of threatened consequences, how can the legal system make the best use of variations in severity to achieve social defense?

One answer is that, since the goal of all legal threats is to keep the population law abiding, the potential effectiveness of variations in severity of threatening consequences should be used to create the widest possible distinction between criminal and non-criminal behavior by threatening all types of serious crime with penalties which are as severe as possible. The aim of this strategy is to create a walled fortress around criminal activity by using the full power of threatened consequences to keep potential criminals from becoming actual criminals.

Another possible strategy would be to threaten all serious crimes with major penalties, but to save a considerable amount of variation in threatened penalties to underscore distinctions between *types of crime*, as well as between serious crime and law-abiding behavior. This theory sees the existence of threats of conviction and imprisonment as the mechanism for trying to keep all of the population law-abiding, but seeks to use variations in the severity of major penalties to create a stepladder effect, threatening those crimes which are considered most serious with substantially greater consequences than less serious but still major infractions of the criminal code. Thus, while simple larceny, burglary, robbery, and armed robbery are all serious threats to the security of property in society, it is nonetheless true that they are not equally serious crimes. An act of burglary is more serious than simple larceny because it involves the invasion of a person's home or business. Robbery is more serious than burg-

lary because the robber uses force against his victim, which increases personal fear and may lead to injury or death. Armed robbery is more serious than strong-arm robbery because the presence of a weapon increases the risk that a victim will be killed. One method of using variations in severity of threatened consequences is to make the distinction between penalties for different types of crime as great as possible, in order to pressure offenders to commit less serious offenses when total conformity to the law is not obtainable.

Because the range of penalty options in society is not infinite and will be limited by considerations other than deterrence, there is tension between an emphasis on "fortress" and "stepladder" strategies in crime-control policy. To the extent that a fortress approach utilizes severity of consequences as a means of securing greater conformity to law, it requires high penalties for serious crimes of all kinds. Since the range of punishment options is limited, and since increases in threatened consequences are more significant when base penalties are low, the greatest contrast between types of crime is achieved when base penalties are lowest. Table 1 compares hypothetical sentence structures for a variety of property crimes.

Table 1
Two Hypothetical Sentence Structures

	Strategy "A"		Strategy "B"	
	Years in prison	% increase from penalty for next most serious crime	Years in prison	% increase from penalty for next most serious crime
Larceny	5	---	1	---
Burglary	10	100	3	200
Robbery	20	100(?)	9	200
Armed robbery	40	100(?)	27	200(?)
Robbery murder	LIFE	?	LIFE	?

Both schedules are mixes of fortress and stepladder strategies, as are all penalty structures.

The table assumes that the legal system has an equal stake in differentiating between property offenses at each point on the ascending scale, which is probably not true. But it illustrates that Schedule B can maintain 200 percent increases in penalty between classes of property offense without running out of punishment options, while Schedule A can only maintain 100 percent increases. Moreover, while Schedule B confronts the practical

problem of whether life imprisonment really exceeds 27 years by any significant degree when differentiating armed robbery from robbery murder, Schedule A encounters this problem earlier, because assumptions about longevity are involved in the distinction between robbery and armed robbery. It will probably be wise in both sentence structures to increase the contrast between penalties for armed robbery and robbery murder, but this can only be done by decreasing the gap between penalties for other crimes of graduated seriousness, or by lowering the base penalty for larceny.

The extent to which social policy is better served by sentence structures that emphasize fortress or stepladder effects depends on data about the degree to which each strategy is effective in particular situations, and also on questions of relative value that empirical research cannot fully answer. On the degree of relative effectiveness of fortress and stepladder strategies it is important to note that because an increase in the penalty for burglary has reduced the rate of that crime does not mean that all who have been deterred from burglary now obey the law—many may have taken up other forms of crime, where the rewards are higher or the risks and penalties are lower. It may be easier to scale down the dangerousness of crime than to completely eliminate criminal tendencies among an audience of people who would violate laws at a given base penalty.

Beyond the empirical questions of the effects of increases in severity of punishment on potential criminals, a question of relative values may have to be resolved before judgments can be made about the efficacy of fortress and stepladder approaches. Assume that Schedule A in Table 1 produces 20 percent less larceny and 5 percent more burglary, robbery, and armed robbery than Schedule B. Any judgment about the relative effectiveness of the two approaches will necessarily involve determining how many extra larcenies it is worth to society to prevent the added danger of one robbery.³⁵ Empirical research can help define the particular types of harm generated by each type of offense, but the ultimate issue is one of values.

G. The Moral Quality of Threatened Behavior: Conscientious Objection and Deterrence

In most cases when society as a whole views a particular criminal act as morally wrong, those who commit that act will consider it either morally wrong, morally neutral, or permissible because it is the means to an end that is judged to be morally acceptable. Only in the last of these conditions will the threat of

³⁵ See the discussion of this point in Part II, Section 3.

consequences go against the moral sensibilities of the threatened audience, and a sense of moral objection to the threat might not occur even then unless alternative means to the same end are not available. There are, however, a few cases where the community threatens activity that members of the threatened audience regard as morally imperative. In the United States the laws against polygamy as applied to the Mormons,¹ laws prohibiting civil rights demonstrations,² and various provisions of the Selective Service Act as applied against pacifists serve as outstanding examples of this type of occurrence. In such circumstances, if the members of a threatened audience are otherwise in accord with the legal system, the criminalization of morally valued activity will set the stage for conflict between general feelings of loyalty toward society and allegiance to the particular behavior. Often this conflict will be between the individual's loyalty to the all-inclusive society and his loyalty to the particular subculture that subscribes to criminal conduct. In some cases, as with the Selective Service Act since 1965, the moral value placed on the criminal conduct may be largely the product of individual feelings, and a group will have grown around the belief, rather than vice versa.

In cases of conflict where loyalty to the parent society emerges a clear victor, the moral value of the criminalized act will usually fade and will not permanently complicate the task of predicting how the threat's audience will respond to its terms. But if members of a threatened audience retain the strong opinion that the threatened behavior is morally right, predicting their response to the terms of the threat is complicated, and the existence of that particular threat may lead to more basic attitude and behavior changes on the part of some conscientious objectors. Those who retain their former attitudes about the threatened behavior will continue to have strong drives toward engaging in it but will be confronted with the prospect of social stigma and other types of punishment if apprehended.

While a normal response to unpleasant consequences is to avoid them, the moral value placed on the act may cause the moral quality of punishment threats to become inverted. Under such circumstances the social stigma attached to persons apprehended for committing the threatened offense may be viewed by those who value the behavior as evidence of righteousness.³ Pain and deprivation suffered on account of having committed the

¹ See *Reynolds v. United States*, 98 U.S. 145 (1878); *Mormon Church v. United States*, 138 U.S. 1 (1890).

² See *Cox v. Louisiana*, 379 U.S. 536 (1965).

³ An allusion to the inverted moral quality of imprisonment can be found in the title of Martin Luther King's "Letter from a Birmingham Jail."

morally valued act may be translated into symbols of the sincerity of personal convictions and evidence of strength of character. And though powerful psychological forces will still be at work influencing individuals to avoid painful consequences, the process of inversion will limit their effectiveness.

If a group of those who place moral value on threatened behavior exists to give support to the individual confronted with the choice of compliance or punishment, it is far more likely that people will invert the moral quality of punishment and actively rebel against the criminalization of the morally valued act. But people operating without the support of such groups have, under some circumstances, defied such threats, and history pays special recognition to some members of this class. Moreover, it is possible that people placing moral value on a particular form of threatened behavior will coalesce to provide support for inversion of consequences and defiance of the law. The formation and activities of such a group would appear to be the basis of the prosecution case in the recent Boston trial for conspiracy of nine members of an ad hoc anti-draft movement.⁴

The threat and punishment of behavior judged to have moral value may also result in more generalized opposition to the legal system and a greater variety of criminal activities on the part of individuals who rebel at the enforcement of what they consider an unjust law. Inverting the moralizing quality of punishment for a particular act may result in a loss of respect for law in more general terms. This loss of respect would appear to lower barriers to the commission of other types of criminal behavior and could result in higher rates of many types of crime, particularly if other crimes can be related to the ideological goals that underlie the initial rebellion. Some traces of this tendency can be seen in the recent behavior of some "revolutionary" militants in the anti-war and civil rights movements, where feelings of frustration and anger over a series of laws thought to be unjust were generalized over a period of time into a loss of respect for the legal system, leading to the advocacy of a greater variety of illegal tactics.

Yet the behavior of a large number of groups morally opposed to particular laws is surprisingly law-abiding. The Jehovah's Witnesses, the Quakers and, more recently, the vast bulk of those in the pacifist and Civil Rights movements of the 1960s do not generalize defiance of one law into other types of criminal conduct, and members of such groups are very rarely involved in criminal conduct for which no personal moral justification exists. The limits to lawbreaking observed among these groups may

⁴ See *United States v. Spock*, 416 Fed. 2d 165 (1st Cir. 1969).

result from the fact that opposition to particular laws on moral grounds appears most often in groups that have strongly developed moral codes. For these groups the process of inversion is self-limiting because it will take place only when the group's moral judgment is contrary to that of the legal system. For all other types of crime, the moral quality of the threat of punishment will not be inverted, and both the group sense of morality and a legal threat will stand as barriers to the commission of crime. It is only when such a group becomes totally revolutionary that opposition to particular laws becomes a general moral license to crime, and even then, group behavior may be restricted by the constraints of "revolutionary morality."⁵

When authorities are frustrated by conscientious objection to a particular legal prohibition, one method of dealing with such opposition is to increase the penalties threatened for violation. As noted before, some of the sting of threatened consequences will be removed by the process of inversion, but such increases in penalty may still provide members of the threatened audience with reasons for refraining from the threatened behavior. Whether penalty increases will reduce the rate of the particular threatened behavior through increased fear of punishment more than it will increase defiance by solidifying opposition is an empirical question; results vary from case to case. One possibility is that such penalty shifts will reduce the rate of deviancy per 100 objectors, but that harsh penalties will increase the resistance and hostility of those who remain defiant and may also recruit new sympathizers to the cause of the conscientious objectors in all but the most highly polarized of social climates. This pattern of response appears to have been one aftermath of the harsh official and unofficial punishments meted out to civil rights demonstrators in the South in the early 1960s.

Less powerful side effects can occur when legal threats are attached to behavior that has been customary but not supported by strong moral feelings. Resistance to the prohibition of alcoholic beverages, for example, may be widespread when the use of alcohol has been an accepted custom, but such resistance will seldom initially assume the character of a crusade. However, when harsh penalties are used to suppress customary behaviors, or when the prohibition of a behavior is perceived by a group as an attempt to persecute the group rather than deal with the behavior, moral indignation and many of its consequences may

⁵ Common criminals have seldom become heroic figures in ideological movements, and rather stern moral codes usually have been incorporated in revolutionary ideologies. To this effect, Lenin is reputed to have complained that if the German socialists were to board buses in order to nationalize them, they would first pay the fare.

appear, complicating the task of predicting the effect of threat and punishment.

H. Moderating Individual Propensities through Group Pressure

An understanding of group processes is an essential precondition to understanding patterns of individual differences in threat response, because the small family and peer groups that constitute the most important part of our lives shape and modify the attitudes and values that are of importance in predicting how an individual will respond to a threat. Beyond this basic degree of group influence, discussed earlier, there are two situations in which group pressures may determine threat responses:

1. Often a person will be forced to make a decision about his response to a threat that might become visible to other members of his group, in which case strong pressures to conform to group expectations will be generated by the prospect that his decision will become known.

2. In a smaller number of cases, groups rather than individuals are the relevant unit of criminal participation; in such cases, the reaction to legal threats will be collective rather than individual.

When an individual must make a decision about responding to a threat that may become visible to other group members, the individual's fear of disapproval by group members will supply him with an additional reason to heed a legal threat if group values include respect for the law and disapproval of criminal conduct. In some cases, the deviant act itself might be visible to the group if committed, as when obedience to the law demands certain public gestures or disobedience requires a conspicuous change in the individual's life style. In most other cases, the danger of deviant conduct becoming visible to group members will come from the risk of detection or formal punishment.¹ In such situations, the risk of detection includes the risk of visibility, and the prospect of visibility is one of the significant forms of unpleasantness an individual may seek to avoid. But when group values are in conflict with those that underlie the legal threat, the visibility of an individual's response to a threat results in pressure to defy the threat in order to preserve or secure standing with the group. Against the prospect that deviant behavior will result in punishment, the threatened individual must balance the likelihood that failure to defy a threat will lower his standing among the group and result in his being branded disloyal or cowardly. It would thus seem much easier, and much less humiliating, to secure the compliance of a misbehaving child when this process

¹ Andenaes, *The General Preventive Effects of Punishment*, 114 U. of Pa. L. Rev. 949, at 961.

is not visible to his deviant peers rather than in the presence of a group with negative opinions of the value of conformity, and it is likely that in this respect the child is the father of the man.

Group processes are of crucial importance even more directly in the large number of cases where decisions to obey or disobey the legal threat are made by small groups rather than individuals. Studies of juvenile offenders can be taken as evidence that much, perhaps even most, of juvenile crime is group activity. Offenses such as vandalism, gang-fighting,² false fire alarm pulling, pack rape, and many of the property crimes committed by juveniles are typically committed by groups of youths. While group crime is less common among older offenders, it is far from unheard of, and mob violence is by definition a group phenomenon. When threat response is collective, individual members of a group may find themselves willing to risk unpleasantness that would be sufficient to deter them if each alone were responsible for the decision, because the significance and immediacy of group pressures toward participating in criminal activity overwhelm ordinary tendencies toward caution. Because the pressures generated by the group are powerful, it may be that legal threat must reach a particular proportion of the group, analogous to a critical mass, before any of the group members will be restrained by threat from engaging in criminal conduct. And deterring a large proportion of a group contemplating criminal activity may be difficult because fear of the law may not be considered a respectable emotion, and those who feel it may be unwilling to make their fears known. If these suppositions are correct, effective communication among group members will often be necessary if threats are to influence collective decisions.

Section 2. Special Deterrence

Most adults have been exposed to minor punishments for parking and traffic offenses; very few people have been subjected to major penalties. Those who have been subjected to legal consequences, large or small, may react differently to legal threats of all kinds, and particularly to legal threats concerning the behavior that led to previous punishment. For this reason, a separate discussion of some issues relating to special deterrence is appropriate.

Any difference in threat response between previously punished offenders and the rest of the members of a threatened audience could result from:

- a. the fact that apprehended and punished offenders, partic-

² See, e.g., Carney, Mattick, and Calloway, *Action on the Streets*, at 60-66.

ularly serious offenders, are a special high-risk group, independent of their experience with the legal system;

b. changes in attitudes, expectations, or status that the experience of punishment brings about;

c. a mixture of both.

The fact that apprehended offenders are a special group in the population, apart from whatever effects apprehension and punishment might have, is a necessary beginning to any discussion of special deterrence. When half of all those who have been convicted of larceny are arrested for larceny a second time, while less than one percent of all other members of a threatened audience are ever apprehended, some might be tempted to conclude that the apprehension and punishment of thieves does not deter them from further offenses. To the extent that this conclusion rests on a comparison with the criminality of the general population, it is, of course, faulty, because those punished for larceny are a specially selected group of property criminals, while the vast majority of the rest of the population never has and never will commit a serious property offense. If such a comparison is invalid, the only data available on the effect of conviction and punishment on larceny offenders is that half are subsequently reconvicted. It cannot be said that this percentage is just as high as it would have been if these violators had not been previously convicted, because they are part of a group that might otherwise have experienced 80 percent recidivism. It also cannot be said that this percentage is lower than it would otherwise be, since we cannot assume that all of those who commit larceny once will do so again, or that all of those who have been apprehended for larceny once will be caught in the future if they do repeat their crime.

The fact that those subjected to punishment are a special high-risk group of potential future offenders establishes the importance of studying the reactions of this group to punishment and the threat of punishment, because previously punished persons will be responsible for a far larger per capita amount of crime than the rest of the population. The share of crime that can be attributed to previously punished individuals will vary with the type of crime: previously convicted killers form a very small percentage of homicide arrests,¹ but previously convicted robbers, narcotics sellers, and forgers are believed to be responsible for a

¹ An FBI study confined to persons with histories of arrest for serious crimes found that 922 out of 194,550 were arrested for homicide in a two-year period. Of those repeat criminals arrested for homicide, 7 percent, or about 65, had been arrested for homicide once before in five years, and none more than once. FBI, *Uniform Crime Reports—1967*, at 35.

large share of the total amount of these crimes.² And those who have been convicted and punished for some major crime are much more likely than the rest of the population to become involved in other forms of serious crime later in their careers.³

Understanding the responses of previously punished offenders to legal threats involves consideration of all of the variables alluded to in the previous discussion of general deterrence, as well as recognition of the fact that apprehension and punishment will probably produce important changes in the attitudes and circumstances of offenders—changes that affect the propensity of such persons to commit crimes and their susceptibility to the influence of legal threats. Apprehension for committing a crime may cause offenders to revise upward their estimate of the probability of being apprehended again; it may also produce a public exposure of the individual's crime that can either sensitize him to the moral gravity of his act or harden his resistance to community judgments.

Punishment of offenders may cause a number of changes in attitude that affect their propensity to commit crimes in the future. Some of these changes are closely related to the effect of threats and others are not, but all are important to comprehending the role of special deterrence in crime prevention. Punishment effects that might condition future criminality include changes in:

- a. the offender's attitude toward threatened consequences;
- b. the offender's attitude toward the threatened behavior;
- c. the offender's attitude toward society;
- d. the offender's ability to live within the law.

Each of these facets can be affected by the nature, extent, timing, and social context of a particular punishment.

Changes in Offender's Attitude Toward Punishment

Commentators have suggested that experience with punishment may produce in its subjects changes in attitudes toward punishment that both increase and decrease the degree to which punishment is considered worth avoiding. Lewin, whose research

² Of the repeat criminals arrested for robbery, 30 percent had been arrested for robbery at least once before in five years; of the repeat criminals arrested for narcotics crimes, 56 percent had been arrested for narcotics offenses at least one other time previously in five years, and 36 percent had been arrested two or more times previously in five years; of the repeat criminals arrested for bogus checks, 48 percent had at least one previous charge, with 27 percent experiencing two or more. See *Ibid.*

³ Thus, while previously convicted killers do not account for much homicide, those with serious arrest records of any type are responsible for quite a bit. Using the FBI figures on homicide, among 194,550 persons with arrest records, 922, or slightly less than 5 percent of all homicide arrests nationally, could be attributed to this sample during 1966-67. See also, Willit, *Criminal on the Road*, at 214-20, wherein serious traffic offenders are found to have much higher than average involvement with nontraffic offenses.

involved the effects of punishment on children, found important changes in each direction. He concluded that,

When punishment has been previously administered, the negative valence of the punishment (to its subject) is very strong.⁴

One reason for this effect is that punishment leads to an "increase in the degree of reality of the punishment,"⁵ by acquainting the subject with the sting of unpleasantness at first hand. This personal experience brings the unpleasantness of punishment much closer to the potential offender than threats which communicate a threat of unpleasantness that is "farther off" psychologically. But Lewin also states that the experience of punishment makes subjects "become callous to the punishment and thus less sensitive to threats."⁶

In part, such an effect could be the result of the prospect of a particular punishment losing its uniqueness to the already punished subject. This would be particularly true when punishment assumes most of its negative value from censure, because once a person has lost a considerable amount of standing in the community, the threat of future censure conveys little by way of further deprivation. In some cases, exposure to censure will cause an individual to react defensively by rejecting the values of the group that rebukes him, as when Lewin predicts that "severe punishment is apt to lead to a revolution in the child's ideology."⁷ Thus, while punishment may operate both to increase and decrease the amount of anxiety its subjects experience about future punishment, it seems more likely that increased anxiety about future punishment would be dominant when highly socialized persons are subjected to minor punishments, and more likely that callousness to punishment would assume a major role in the punishment of less socialized persons and in the administration of penal measures that depend on feelings of strong social loyalties or fear of the unknown.

Research into the effects of punishment on attitudes toward the unpleasantness of threatened consequences is not plentiful. Cameron found that often-punished "professional" shoplifters appear to take the stigma of arrest and the prospect of conviction in stride, while amateurs apprehended for the first time appear to display new awareness of the seriousness of being caught.⁸ In some part, this greater sensitivity on the part of less experi-

⁴ Lewin, *Reward and Punishment*, in *A Dynamic Theory of Personality—Selected Papers of Kurt Lewin*, 1951, at 135.

⁵ *Ibid.*, at 162.

⁶ *Ibid.*, at 135.

⁷ *Ibid.*, at 138.

⁸ Cameron, *The Booster and the Snitch* (1964), at 163-65.

large share of the total amount of these crimes.² And those who have been convicted and punished for some major crime are much more likely than the rest of the population to become involved in other forms of serious crime later in their careers.³

Understanding the responses of previously punished offenders to legal threats involves consideration of all of the variables alluded to in the previous discussion of general deterrence, as well as recognition of the fact that apprehension and punishment will probably produce important changes in the attitudes and circumstances of offenders—changes that affect the propensity of such persons to commit crimes and their susceptibility to the influence of legal threats. Apprehension for committing a crime may cause offenders to revise upward their estimate of the probability of being apprehended again; it may also produce a public exposure of the individual's crime that can either sensitize him to the moral gravity of his act or harden his resistance to community judgments.

Punishment of offenders may cause a number of changes in attitude that affect their propensity to commit crimes in the future. Some of these changes are closely related to the effect of threats and others are not, but all are important to comprehending the role of special deterrence in crime prevention. Punishment effects that might condition future criminality include changes in:

- a. the offender's attitude toward threatened consequences;
- b. the offender's attitude toward the threatened behavior;
- c. the offender's attitude toward society;
- d. the offender's ability to live within the law.

Each of these facets can be affected by the nature, extent, timing, and social context of a particular punishment.

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enced "snitches" may be a function of higher degrees of socialization, and to some extent it may be the result of having more to lose in the way of community standing. Once apprehended, the snitch who is set free without formal charges almost invariably refrains from future shoplifting.⁹

One opinion study sought to determine whether prison inmates were more or less sensitive to variations in the threat of censure than college students, when making predictions about whether a hypothetical bank teller would embezzle funds.¹⁰ Sensitivity to the risk of censure and other factors were measured by the variations in prediction that occurred when the risk of apprehension and other conditions were altered. Strangely, the study appears to give some support both to the theory that prisoners are more sensitive to the risk of censure-bearing punishment than to other factors *and* to the theory that the prisoners have less "ethical risk sensitivity" than college students; prisoners showed more sensitivity to variations in what was termed the risk of censure than to factors such as variations in the amount that could be gained, but showed less sensitivity to censure in general than the college students.¹¹ But this cannot be taken as evidence that experience with prison has an effect one way or the other on sensitivity to censure, because the prisoners may have had different value-orientations than the college students long before they ever went to prison. Moreover, the prisoners may have been more interested in projecting a socially acceptable image when filling out the questionnaire than in divulging the factors which influence their personal conduct when confronted with the opportunity to commit crimes.¹²

Changes in Attitude Toward the Threatened Behavior

When punishment is considered as a possibility by members of a threatened audience who have not experienced it, it is psychologically "farther off than [the] desired goal"¹³ attainable by committing the threatened offense. Once punishment is administered, the increased reality of the punishment experience may lead to changes in the subject's evaluation of the behavior that led to his discomfort. The experience of punishment may act, in Professor Andenaes' words, "as a moral eye-opener," bringing home to the offender the fact that his behavior is considered seriously wrong and thereby reducing the probability

⁹ *Ibid.*, at 151.

¹⁰ Rettig, *Ethical Risk Sensitivity in Male Prisoners*, 4 *Brit. J. Crim.* 582 (1964).

¹¹ *Ibid.*, at 587-88.

¹² This possibility is discussed in detail in Hawkins and Zimring, *Deterrence and Survey Research* (unpublished 1968), at 43-44.

¹³ Lewin, *supra* note 4, at 163.

that the offense will be repeated. Failing moral revelation, the experience of punishment may make clearer to the offender the disadvantages that accompany the offense and by association give him more unpleasant feelings about the behavior, particularly if the punishment occurs soon after commission of the threatened behavior. On the other hand, the experience of punishment may cause offenders to experience conflict about the wisdom of their behavior and may lead the individual to rationalize that, after all, the opportunity to commit the threatened act was worth the punishment. In the process of such rationalization, the threatened behavior may acquire a value to subjects higher than it had prior to punishment.¹⁴

This tendency to revalue behavior that has led to discomfort, in order to rationalize decisions, has been noted in laboratory experiments where the measure of sacrifice or discomfort was small: in one case, girls who were forced to undergo a protracted initiation in order to hear a dull sex lecture rated the lecture more interesting than girls who were subjected only to a mild "initiation."¹⁵ It is not clear whether more severe punishment would lead to a greater degree of the "it was worth it" effect or whether the whole process of rationalization would break down where the unpleasantness suffered is too great to permit a realistic judgment that the act could be worth the punishment. Moreover, because those caught and punished for committing offenses know that apprehension is uncertain, punished offenders can always find ways to rationalize without changing their opinion of the value of the threatened behavior: the offender can say to himself, "I shouldn't have been caught"—or, more ominously, "Next time I won't be caught"—and continue to see his initial offense as justified because the unpleasantness suffered was simply the result of bad luck.

In the criminal process, present penalty structures are high enough so that it would be difficult for most punished offenders to conclude that criminal conduct was worth the price they paid, and it seems reasonable to suppose that punishment will create negative associations with particular forms of threatened behavior, and with lawbreaking as a general concept, that outweigh any tendency to view the pleasures of criminal conduct through rose-colored glasses. However, it is not clear that punishment will lead to significant changes in attitude in all cases. The prospects for deflating the attractiveness of criminal alternatives are probably best when the consequences of apprehension

¹⁴ See generally Festinger and Aronson, *The Arousal and Reduction of Dissonance in Social Contexts*, in Cartwright and Zander, ed., *Group Dynamics, Research and Theory* (1960); Cohen and Brehm, *Explorations in Cognitive Dissonance* (1964).

¹⁵ *Ibid.*

activate latent moral judgments in the offender (as in the case of amateur shoplifters) and where drives toward the threatened behavior are initially weak. When the drive to commit an offense is strong and the reality of punishment does not bring the offender's moral sensibilities to bear on his criminal propensities, the likelihood of attitude-change is lessened.

Changes in Socialization

When the imposition of consequences for violation of a legal threat is an important event in a man's life, it may lead to changes in his attitudes toward society that influence his future behavior. This possibility is recognized by those who administer penal facilities and has led to the advocacy of rehabilitation as one goal of correctional administration. The theory of rehabilitation suggests that some forms of threatened consequences afford the opportunity to reorient the values of their subjects by discouraging commitment to antisocial values and encouraging loyalty to prevailing social norms. The notion of rehabilitation as a result of punishment differs from narrower theories of punishment as a means of discouraging criminal conduct by associating unpleasantness with criminality in the mind of the offender, because rehabilitation also involves the transmission of positive social norms, which would tend to reduce criminality independent of the negative value of punishment.

It is also possible that the experience of punishment will lead to less favorable attitudes toward social norms on the part of punished offenders. The punishment process often generates hostility on the part of its subjects and creates some pressure to reject prevailing norms in order to protect self-esteem when punishment has conveyed a rejection of the offender by the social order. And since prison subjects the offender to constant association with others who have antisocial values and criminal skills, the net result of the punishment experience on an offender's attitudes may be an increased identification with deviant values. Isolating the factors that determine whether experience with punishment will produce greater or lesser loyalty toward prevailing social norms is a task beyond the scope of this discussion. It is sufficient for present purposes to note that either the rehabilitation or further alienation of punished offenders will have a significant impact on their future conduct.

Changes in Ability To Function

Some types of threatened consequences will affect the ability of offenders to live comfortably within the law. Social stigma and punishment-induced feelings of dependency can limit the

opportunities available to punished offenders and impair the capacity of offenders to take advantage of such opportunities as remain. In other cases, job training and the treatment of physical and mental conditions in a prison setting can make the punished offender more capable of functioning effectively in society than he had been prior to serving his sentence. If propensity to commit crimes is related to opportunities to obtain gratification through legitimate means, the changes in status and ability that different punishment regimes may produce will affect recidivism rates among punished offenders.

Many of the changes that punishment can produce are not centrally related to the effect of threats on future conduct. If rehabilitation reduces recidivism because many former offenders wish to conform to prevailing social norms, it would be unwise to attribute this improvement wholly to greater sensitivity to threats or to expect that punishment per se is responsible for the decrease in subsequent criminality. Other possible punishment effects on future criminality, such as changes in the offender's attitude toward threatened consequences, will be the result of changes in patterns of threat response.

The only method of testing punishment as a special deterrent is the study of future criminality among punished offenders, but any such test will show the results not only of special deterrence but of the many other positive and negative influences that punishment might have on future criminality, because a particular form of punishment will produce a mix of effects. It will be possible to test higher versus lower prison sentences or prison sentences versus probation by randomly varying the penalties given to convicted offenders, or simulating this experiment by using base expectancy tables. But if prison sentences reduce subsequent criminality more than probation, does this mean that prison is a more effective special deterrent, or that it creates more opportunity for rehabilitation? If prison and probation lead to the same results, does this mean that imprisonment does not perform as a marginal special deterrent, or that the negative aspects of imprisonment balance off its greater special deterrent force? How much of the difference in recidivism, if there is any, is attributable to changes in attitude toward the threatened behavior and how much to changes in attitude toward punishment? At times it will be possible to experimentally vary one or two separate factors of possible importance in predicting future criminality, but when large variations in punishment policy are tested (as when sentences involving penal confinement are compared with those that do not), it will be difficult indeed to un-

ravel the different types of variables that might explain differences in recidivism.

Yet, in policy terms, the problem of unraveling the various effects of different types of punishment is more apparent than real, for the crucial question is always whether a program has a desirable net effect on future criminality, not whether some aspects of punishment that are inseparably bound up with forces pulling in the opposite direction would tend to reduce crime if they could be isolated. In cases where punishment effects can be isolated by varying penal sentences, they can be tested individually to determine whether their presence has any effect on recidivism. If a set of punishment components cannot be separated, the only significant question is the effect of the set as a whole, rather than the effect of certain parts, and variations in punishment will provide the opportunity for such a test.

In one respect, the study of special effects is easier than that of general deterrence because different groups can be exposed to different treatments, using methods that control for variations other than punishment that might undermine the significance of results. Once punishment-groups have been selected and treated, keeping track of their criminal records will provide much more reliable guidance to the student of special effects than can be obtained by studying general deterrence through analysis of movements in the total crime rate.

And while it is difficult to institute more than one legal threat for a particular behavior in a jurisdiction, a number of different types of threatened consequences can be imposed on convicted offenders in ways that generate reliable knowledge about the relative effects of different types of punishment. While such studies cannot discern the total amount of special deterrence attributable to a particular punishment, they can tell us about the much more important marginal effects that particular policies might have.

The major barrier to controlled study of different punishment regimes, other than inertia, is the objection that such methods require treating groups of similar offenders in different ways, a practice that many see as ethically obnoxious.¹⁶ Yet detailed study of present patterns of sentencing in our criminal courts supports the conclusion that the variation in punishments meted out for the same offenses and same types of offenders by different judges is already extreme¹⁷ and produces many of the costs associated with unequal treatment, without any of the benefits of controlled study.

¹⁶ For a full discussion of this issue, see Morris, *Impediments to Penal Reform*, 33 U. Chi. L. Rev. 627 (1966), at 645-55.

¹⁷ See Green, *Judicial Attitudes in Sentencing*, at 67-71.

A substantial number of studies dealing with the subsequent criminal records of released prisoners bear on the marginal special effects of increased severity of sentences. Simple recidivism comparisons have tended to show that among persons convicted of the same crimes, those treated more leniently have lower rates of subsequent criminality than those punished more severely,¹⁸ but when such comparisons are controlled for differences in the offender groups other than type of punishment, the dominant feature of the results is that overall differences between various methods of treatment are small or nonexistent.¹⁹

If the overall rates of recidivism do not vary with severity of punishment, some prediction studies provide evidence that this apparent lack of difference could be the result of more severe punishment producing significant positive effects in some types of offenders and significant negative effects on others that tend to balance out.²⁰

But it is one thing to say that severe punishment is ineffective as a marginal special deterrent and quite another to suggest that punishment does not produce special deterrent effects. The studies of increases or decreases in length of penal confinement have no impact on the argument that the experience of apprehension, conviction, and punishment has a powerful restraining influence on those who encounter them. An FBI study of more than 17,000 persons released from custody in 1963 found that while more lenient penalties were associated with lower rates of rearrest, those who had been acquitted or had charges against them dismissed experienced a 91 percent rearrest rate within four years, compared to a rearrest rate of less than 60 percent for persons convicted and punished.²¹ This finding is more suggestive than conclusive, because the FBI study did not relate release and rearrest data to specific types of crime or age and because of possible bias in the sample. But this type of finding, and the shoplifting study alluded to earlier,²² suggest that apprehension and conviction may substantially reduce future criminality.

Taken as a whole, studies of recidivism establish that those subjected to punishment for major crimes commit many more crimes after their release than other groups in the population, but fewer perhaps than they would if they had not been caught.

¹⁸ See, e.g., California Department of Corrections, *Parole Outcome and Time Served for First Releases Committed for Robbery and Burglary—1965 Releases* (unpublished, 1968).

¹⁹ Andenaes, *Does Punishment Deter Crime?*, 11 *Crim. L. Quarterly* 76 (1968), at 93.

²⁰ See Warren, *The Case for Differential Treatment of Delinquents*, *Annals of the American Academy of Political and Social Science* 47 (January 1969), at 48.

²¹ *FBI Uniform Crime Reports—1967*, at 37.

²² Cameron, *supra* note 8.

Those studies that suggest the lack of a marginal special deterrent effect associated with longer prison sentences provide a basis for official experiments with reducing punishment for major crimes. When findings on the lack of marginal special effects are integrated with parallel studies on the marginal general effects of increases in threatened punishment for major crime, they make an impressive case for the reduction of the present scale of major criminal sanctions in the United States.

Concluding Reflections

One of many dangers in a survey treatment of a topic such as deterrence is the lack of focus that is likely to accompany the attempt to provide broad coverage. After touching on some of the many factors that condition the effectiveness of legal threats, it would perhaps be appropriate to search out basic themes which underlie the preceding analysis.

The first such theme is an overwhelming sense of the specificity of findings in research in deterrence. A particular legal threat involves a mix of factors—communication, enforcement, type and extent of threatened consequences, type of behavior, social attitudes—and the mix will be different for different threats. Since it is difficult to know precisely why a policy does or does not achieve results, it is dangerous to generalize from a particular finding to propositions about the marginal deterrent effects of other types of threat, or of the same threat with different levels of enforcement or communication. It will thus require a large number of studies of different types of threat before plausible generalizations about marginal deterrence emerge from research.

A second recurrent theme is the difference in texture between issues of absolute and marginal deterrence. The larger concept of deterrence encountered when discussing whether and how threatening behavior will reduce its rate is more complex and more difficult to study than the narrow issue of whether particular changes in the conditions of a legal threat produce results worth their cost. In the foreseeable future, research opportunities in deterrence will be spread unevenly over the range of issues—we will have ample opportunity to study the short-range marginal effects of modest changes in threat composition that normally take place in the process of administering the criminal law, but little opportunity to study large jumps, up and down the scale of punishment, or the results of decriminalizing behavior that society has regarded as dangerous. Since generalization is difficult, uneven research opportunities make for uneven progress in our understanding of deterrence. Future research will reveal more about marginal deterrent effects than about deterrence, more about small changes than large changes. We will be putting this knowledge to use long before basic issues about the effects of threat and punishment have approached a resolution.

A program of research in the coming years should include experiments in different methods of threat communication; the evaluation of procedures such as intensive police patrol and computer monitoring that increase probability of apprehension; the experimental reduction of penalties for major crime; and the experimental introduction of new ways of treating offenders in areas such as traffic crime, where the political climate permits changes in the kind as well as extent of threatened consequences. As more becomes known, experimental variations in the conditions of threat and punishment can be increased if advances in knowledge make public and official attitudes about crime control more flexible. But the relationship between increased knowledge and changes in official attitudes is by no means automatic. A communication gap already exists between the level of information available about the effects of legal threats and official beliefs. And any real progress in penal policy will depend as much on closing this gap as on our willingness and ability to increase knowledge.

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