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THE DETERRENCE CONCEPT IN CRIMINOLOGY AND LAW

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The author is a Ford Fellow and Research Assistant in Sociology in Vanderbilt University at Nashville, Tennessee. He lays bare some evidence of loose thinking in criminology.

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Current discussion of the deterrence concept among criminologists and jurists reflects the influence of scientific thought upon basic legal principles. While some jurists have openly questioned the efficacy of deterrence as a legal principle, others (probably representing the majority) maintain that it is still an indispensable part of the legal system. Criminologists are likewise in disagreement. The more extreme critics of modern law and penal policy consider deterrence archaic and regard all forms of punishment as somehow primitive and unscientific. Other criminologists express quite different viewpoints. Because agreement is lacking the concept has become a focus for scholarly interest in both the fields of criminology and jurisprudence.

The purpose of this paper is twofold. First, to present a schema for the analysis of deterrence. Separate variables within the schema are identified and discussed. Second, a review of some empirical findings pertaining to deterrence is undertaken. The validity and limitations of existing knowledge relating to the concept are indicated. Further, the necessity for a precise specification of the particular problem under study is emphasized. It is suggested that one of the major failings of current thought with respect to deterrence is the inability to relate such empirical data as is available to a meaningful conceptual framework.

Before turning to the first of these two topics, deterrence will be defined. Then, briefly, the trend of thought among American jurists and criminologists will be noted.

Deterrence is usually defined as the preventive effect which actual or threatened punishment of offenders has upon potential offenders. The principle is of ancient origin. In antiquity torturous deaths and mutilations were exacted with the thought of making an example of the malefactor. It is for this reason that crucifixion was employed as a means of execution by the Romans. The deterrent principle has been prominent throughout history in systems of punishment. The English practice of drawing and quartering represents one of the most ingenious devices for edification of the potential criminal. The hangings at the crossroad were intended to achieve the same end, though in a somewhat less spectacular manner. In Colonial America the use of the pillory and stocks served to remind those of evil inclination that the course of lawlessness had its disadvantages. In sum, it may be said that the deterrence concept has been evident through the ages in Western thought concerning crime and punishment.

TRENDS OF THOUGHT AMONG JURISTS AND CRIMINOLOGISTS

Most jurists take the position that deterrence is necessary for the maintenance of the legal system and the preservation of society. This conception of deterrence is clearly stated by Sir John Salmond: "Punishment is before all things deterrent, and the chief end of the law of crime is to make the evil doer an example and a warning to all who are like-minded with him."¹ American jurists tend to emphasize other aspects of punishment, but deterrence generally remains as a cardinal principle of the law.

Among criminologists the situation is quite different. Not being primarily concerned with the maintenance of a more or less coherent body of legal rules, American criminologists have frequently dismissed the deterrence principle as unjustifiable. Indeed, some penal reformers appear to regard deterrence and all forms of punishment as stigmata of barbarism. For example, it has been suggested that punishment be abandoned as a policy, that deterrence is ineffective, and that the concept itself is fallacious since it is based upon instilling fear in the populace.² Or to quote an extreme expression of this viewpoint: "If the community cannot afford both police and guidance experts, then it would do better to choose guidance experts."³ Apparently police and law are of secondary importance. And deterrence need not be considered at all.

Most criminologists do not adhere to such extreme positions. It is pertinent to note, however, that social scientists tend to focus attention upon the criminal population with consequent emphasis upon the reformation of offenders. As a result of this concern with rehabilitation, the protective and deterrent aspects of punishment and law have been neglected.⁴ It is a contention in this paper that the concept of deterrence has been incorrectly and prematurely dismissed as invalid by many social scientists. The presentation which follows will endeavor to substantiate this viewpoint.

It is the major thesis of this paper that the deterrent effect of a particular type of punishment is an empirical variable dependent upon several factors. The schema which is presented includes the following factors: (1) the social structure and value system under consideration, (2) the particular population in question, (3) the type of law being upheld, (4) the form and magnitude of the prescribed penalty, (5) the certainty of apprehension and punishment, and (6) the individual's knowledge of the law as well as the prescribed punishment, and his definition of the situation relative to these factors. Empirical research may identify other relevant variables. This schema is not offered as an inclusive or definitive formulation. Rather, it is offered as a framework for analysis and future research which transcends the dichotomous classification of deterrence as either effective or ineffective, necessary or detrimental.

¹ SIR JOHN SALMOND, *JURISPRUDENCE*, London, Sweet and Maxwell, Ltd., 1947, p. 111.

² HARRY E. BARNES and NEGLEY K. TEETERS, *NEW HORIZONS IN CRIMINOLOGY*, New York, Prentice-Hall, 1945, Chapter XIX.

³ PAUL H. LANDIS, *SOCIAL POLICIES IN THE MAKING*, New York, D. C. Heath and Company, 1952, p. 185.

⁴ An exception is found in the writings of Ross—"it is not too much to declare that for afflictive punishment the sole justification known to the social scientist is its deterrent effect." E. A. ROSS, *SOCIAL CONTROL*, New York, The Macmillan Company, 1922, pp. 107-108.

It may be stated then that the effectiveness of deterrence is dependent upon the particular society in question. A specific penalty may be quite efficacious as a deterrent measure in one society, yet have little effectiveness in another. Thus, as Malinowski observed, the threatened use of magic was a potent deterrent among the people of the Trobriand Islands.⁵ By contrast the Incas maintained a low crime rate by means of severe punishments; the death penalty was inflicted for murder, theft, arson, sorcery, incest, adultery, and other offenses.⁶ Numerous additional instances of the differential deterrent effect of penalties in various societies have been recorded in anthropological writings. In modern Western nations a similar situation may be observed, although the contrasts are usually not as clearly drawn. An example which does indicate modern differences rather well is the ineffectiveness of many deterrent measures in countries occupied by the Nazis during World War II when similar measures are generally effective elsewhere.⁷ In this regard, it should be noted that the deterrent effect of a law may depend upon who has established the legal prescription and in what manner this was done; for instance, whether by decree or legislative action.

The effectiveness of specific deterrent measures is not only dependent upon the society designated, but, more precisely, upon the particular social system and value system in that society. This qualification is necessary when referring to modern western nations since each contains numerous social systems. In homogeneous primitive societies this distinction would have little significance. The influence of value systems upon deterrence and criminality is a subject that has received scant scholarly attention. Nevertheless, it seems unjustifiable to omit from consideration such cultural aspects as the prevailing legal ideology of the society, including attitudes of the people toward the application of law. There is ample evidence to support the position that a complete breakdown in law enforcement is quickly followed by widespread crime and social chaos. This historical observation indicates that the people's respect for the legal ideology and its administration may determine the effectiveness of deterrent punishments.

In addition it may be postulated that a definite population must be specified when considering the effectiveness of a deterrent measure. Hence, it is necessary to state whether the criminal or non-criminal population is referred to. Traditionally the deterrence concept has been largely restricted to potential criminals, i.e., those who have not committed offenses but who might do so. This restricted use of the term as well as the usual failure to specify a particular population has resulted in considerable ambiguity.⁸ Some writers discuss deterrence with reference to the criminal group, others consider only its effect upon society at large, while many do not indicate at all to whom they refer. Obviously, specification of the population under study

⁵ BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY*, New York, Harcourt, Brace and Company, 1926, Part II.

⁶ GEORGE PETER MURDOCK, *OUR PRIMITIVE CONTEMPORARIES*, New York, The Macmillan Company, 1934, p. 432.

⁷ JOHN ANDENAES, *General Prevention—Illusion or Reality?* *JOUR. OF CRIM. L., CRIMINOL., AND POL. SCI.*, Vol. 43, (1952-1953), pp. 176-198.

⁸ Continental literature does make the useful distinction between general and special prevention.

(not necessarily only with respect to criminality, for other attributes such as sex, class, or race may be identified) is an important factor in any analysis of deterrence.⁹

A third factor which has significance is the type of law being upheld. For it seems likely that laws which reinforce existing mores are apt to be more effective than those which prohibit behavior not regulated by group sentiment. This point requires qualification, for the deterrent effect of a law is relative to the potential number of violators of the particular preventive measure. Thus, it would be inaccurate to consider a legal enactment prohibiting incest as an effective deterrent solely because the law was rarely violated. Such a situation might merely indicate that the enactment was unnecessary or that the number of potential violators was negligible. Conversely, the fact that a considerable number of persons violate a general preventive measure is not in itself sufficient evidence to demonstrate its failure as a deterrent force. For it may well be that abolishment of the measure would result in general violation of the law. For example, this is probably the case with regard to many commercial and traffic regulations. As Andenaes notes, such general preventive (deterrent) measures primarily determine the extent to which these rules will be obeyed.¹⁰

A fourth item included in the schema is the form and magnitude of the established penalty. The type and severity of punishment as related to its effectiveness in deterring potential criminals is a subject that has received considerable attention by criminologists, jurists, and historians. Most of the interest, however, has been either speculative, doctrinaire, or lacking in conceptual clarity. Since this aspect of the deterrence concept has received extensive treatment by criminologists, it will be discussed separately below. Suffice it to state now with reference to the schema for analysis that the type and magnitude of the penalty prescribed are variables included within the deterrence concept.

A further factor which may affect the adequacy of a deterrent measure is the certainty of apprehension and punishment. This involves risk. Criminals and non-criminals tend to avoid offenses for which detection and prosecution are likely for other safer endeavors.¹¹ Thus it seems likely that the potential criminal con-

⁹ Thus, in Morris' study one finds a statistical analysis of the deterrent effect of length of imprisonment upon the subsequent criminality of incarcerated offenders; NORVAL MORRIS, *THE HABITUAL CRIMINAL*, London, Longmans, Green and Company, 1951, pp. 368-369. Cohen observes that the deterrent effect of imprisonment is probably small, but it cannot be denied; MORRIS R. COHEN, *REASON AND LAW*, Glencoe, The Free Press, 1950, p. 60.

¹⁰ ANDENAES, *op. cit.*, p. 182. In his incisive discussion of general and special prevention, Andenaes considers six types of law: police regulations, economic crimes, property violations, moral offenses, murder, and political crimes. Each of these types is considered with reference to prevention and its particular nature and limitations indicated.

¹¹ Numerous historical cases in which greater certainty of detection and prosecution was followed by a decline in the number of offenses are noted by Tarde. Thus, he attributes a decline in the incidence of poisoning in the middle of the nineteenth century to the increased risk of detection resulting from discoveries in chemistry and toxicology. GABRIEL TARDE, *PENAL PHILOSOPHY*, translated by Rapelje Howell, Boston, Little, Brown, and Company, 1912, Chapter VIII. In the United States evidence of the effect of certainty of apprehension upon deterrence is found in the decline of bank robberies and kidnappings following the enactment of new federal legislation which increased the chance of punishment. See: DONALD R. TAFT, *CRIMINOLOGY*, New York, The Macmillan Company, 1950, pp. 322, 325, 361.

templates both the prescribed penalty and the probable chance of apprehension. It is not held that possible offenders always or even usually act in such a rational manner. Rather, it is maintained that this constitutes one factor which can be significant in determining the deterrent effect which a particular measure may have.¹² The risk factor is an empirical variable and should be considered as such.

The last factor of the schema is related to the preceding one. For the deterrent effect of a law obviously depends upon the individual's knowledge of the law and the punishment prescribed as well as his personal evaluation of these and other circumstances. A law can have no deterrent influence upon a potential criminal if he is unaware of its existence.¹³ The same is the case with respect to particular penalties. So too the risk factor. It may be stated, then, that the previously mentioned factors are in large part operative as a deterrent force upon the individual according to how he defines the situation. This statement does not negate an actuarial analysis of the deterrence concept, it merely indicates that the existing state of knowledge among the population relative to the previously mentioned variables is in itself an independent empirical variable. As in the other instances, the efficacy of the subjective factor in the operation of a specific preventive measure can be ascertained only by observation and experiment.

VALIDITY OF EMPIRICAL DATA

The first part of this article presents a schema for analyzing the deterrence concept; the second section is devoted to an examination of the validity and limitations of existing empirical data. Three points will be emphasized: (1) the doctrinaire and unscientific attitude of much contemporary material, (2) the methodological weaknesses of existing research in this area, especially the failure to isolate relevant variables in the study of deterrence, and (3) the lack of a frame of reference for analysis.

Among the so called reform group of American criminologists the notion is prevalent that all punishment is somehow unjustifiable. Deterrence is regarded as a discredited concept which the backward-looking legal profession upholds either through self-interest or ignorance. This viewpoint is quite common. Two examples should suffice for illustrative purposes. Ellington states that, "The belief that punishment protects society from crime by deterring would-be law breakers will not stand up before our new understanding of human behavior."¹⁴ While Caldwell concludes his study of "The Deterrent Influence of Corporal Punishment Upon Prisoners Who Have Been Whipped" (in which he investigated the special preventive effect of whipping

¹² Tappan notes the importance of certainty of punishment and further emphasizes the differential effectiveness of deterrent measures upon various groups. He states that deterrent penalties do not function with uniform effect. In some instances, deterrence is quite ineffective owing to the irrational or passionate nature of the crime. In general, however, this is not the case: "To state the matter in simplest terms, some men are deterred from crime just as surely as some are motivated to crime." PAUL W. TAPPAN, *CONTEMPORARY CORRECTION*, New York, McGraw-Hill Book Company, 1951, p. 9.

¹³ Andenaes observes that deterrence is more effective when the individual knows from personal experience that the law means what it says. ANDENAES, *op. cit.*, p. 180.

¹⁴ JOHN R. ELLINGTON, *PROTECTING OUR CHILDREN FROM CRIMINAL CAREERS*, New York, Prentice-Hall, Inc., 1948, p. 43.

upon a group of Delaware offenders) by the observation that the entire American system of punishment should be eliminated.¹⁵ The significant fact concerning these two illustrations and others of a similar nature is that the positions advanced are not supported by valid data. The protestations are but doctrinaire statements without adequate factual basis. The failing is in the inability or unwillingness to separate value-judgments from scientific knowledge.¹⁶

A review of the available empirical studies of deterrence reveals serious methodological weaknesses. The deficiencies may be classified under two headings: (1) failure to isolate significant variables, and (2) lack of controlled observation. In the first case, several of the previously mentioned variables are combined, or relevant dimensions are entirely neglected, so that the final results are inconclusive. Numerous variables are involved without being identified, measured, or related to other components.¹⁷ Secondly, the research may lack controls for significant factors and be based upon biased or insufficient observation of the phenomenon. For example, studies of homicide rates—as employed in determining the deterrent effect of capital punishment—which neglect to consider the age-sex composition of the population are of questionable validity since these attributes are known to correlate highly with the homicide rate.

The third point to be made concerning the limitations of existing empirical data with respect to deterrence is the lack of an adequate frame of reference. Thus, much of the research does not distinguish the effectiveness of a deterrent measure from its desirability. These two are separate problems. For a penalty may be quite effective as a deterrent, yet undesirable.¹⁸ Lack of conceptual clarification is also noticeable in the inability to identify significant variables and relate these to a common schema for analysis. Unless the research problem is clearly defined, operational procedures specified, and the interpretation related to empirical findings on a single level of analysis, the results are not likely to be either valid or significant.

THE DEATH PENALTY

In order to indicate more accurately the limitations of contemporary research with respect to deterrence, and, at the same time, clarify the three points already

¹⁵ ROBERT G. CALDWELL, *The Deterrent Influence of Corporal Punishment Upon Prisoners Who Have Been Whipped*, AMER. SOCIOLOGICAL REV., Vol. 9, No. 2, (April, 1944) pp. 171-177. Caldwell fails to clearly distinguish between general and special prevention; further, he generalizes far beyond any factual support when he condemns "the entire program of punishment itself."

¹⁶ Further consideration of this topic would include discussion of the semantic problems confronting much current criminological research and writing. Thus, the derogatory connotation given the term punishment is usually associated with a corresponding glorification of reformation and rehabilitation. Of course, imprisonment is punishment whether the incarceration be directed toward reformation or not. Merely labeling a particular punishment as reformatory does not alter its character.

¹⁷ This difficulty has been commented on by Michael and Adler who point out that significant variables are frequently ignored. JEROME MICHAEL AND MORTIMER ADLER, *CRIME, LAW AND SOCIAL SCIENCE*, New York, Harcourt, Brace and Company, 1933, p. 181.

¹⁸ Use of the lash may be an effective deterrent in a particular situation, but quite undesirable for other reasons. On this point see: EDWIN H. SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY*, New York, J. B. Lippincott Company, 1939, p. 560.

made concerning current empirical findings, it seems pertinent to consider separately the deterrent effect of the death penalty. Since this aspect of the deterrence concept has received more attention by criminologists than any other, a brief review of the topic should provide information of some significance and generality.

At the outset, doctrinaire statements can be summarily dismissed. Barnes' notions that, "History also shows us that severe punishments have never succeeded in deterring people from committing crime,"¹⁹ and that, "The writers of this book are so thoroughly opposed to the continuation of capital punishment that they find it hard to concede that a person of any reasonable cultivation and possessed of even rudimentary knowledge of criminology can defend the perpetuation of this relic of human barbarism,"²⁰—such notions are contrary to both historic fact and contemporary knowledge. Kirchwey's declaration that statistical evidence is uniformly negative with reference to the efficacy of capital punishment in reducing the homicide rate is similarly without factual support.²¹ These doctrinaire expressions of opinion have no place in science.²²

Statistical data pertaining to the effectiveness of capital punishment as a deterrent measure are generally inconclusive. This observation is made by both Sutherland and Taft with regard to current American data.²³ Yet certain observations may be made within the schema already outlined. First, the deterrent effect of the death penalty varies from one nation to another, and perhaps from one locale or region to another. The previously mentioned anthropological data support the first part of this statement. With respect to local variations, as among the forty-eight states, careful analysis is necessary. There is no valid reason for assuming that the death penalty has (or does not have) a uniform deterrent effect throughout the United States. Statistical presentations which adduce data from one or more states collected over a brief time period as evidence of the general failure (or success) of deterrence are unacceptable. Usually these studies are methodologically inadequate even to establish the efficacy of the death penalty within the restricted area selected.

Capital punishment can be totally effective as a deterrent in so far as convicted criminals are concerned. The executed murderer is no longer a threat to society. He has been permanently deterred. The death penalty can be quite effective. Indeed, under some circumstances it may be the only measure which possesses a deterrent force.²⁴

¹⁹ HARRY ELMER BARNES, *SOCIETY IN TRANSITION*, New York, Prentice-Hall, Inc., 1952, p. 744.

²⁰ Barnes and Teeters, *op. cit.*, pp. 434-435.

²¹ George W. Kirchwey, *Capital Punishment*, *ENCYCLOPEDIA OF THE SOCIAL SCIENCES*, 1934, Vol. III, p. 195.

²² Jerome Hall has cogently criticized the scientific pretensions of modern positivistic criminologists. He claims that the so called new penology is based upon implicit and unsupported dogmas. Further, the doctrines which have been advanced (reformation, determinism, rejection of punishment and deterrence and others) are "sheer pretensions to scientific knowledge" based upon "fast and loose play with history and statistics." JEROME HALL, *Criminology*, in *TWENTIETH CENTURY SOCIOLOGY*, GURVITCH AND MOORE, editors, New York, The Philosophical Library, 1945, pp. 360-365.

²³ SUTHERLAND, *op. cit.*, pp. 564-565; TAFT, *op. cit.*, pp. 329-331.

²⁴ That capital punishment has been effective as a deterrent measure in numerous historical periods under various political circumstances is an established fact. (See TARDE, *op. cit.*, Chapter IX. "The Death Penalty.") That it has been ineffective under certain conditions is also established.

The failure to identify relevant variables in studies of the deterrent effect of the death penalty and to relate these to a meaningful frame of reference—or schema for analysis—has resulted in confusing and conflicting findings. Usually investigation of deterrence is combined with exhortations condemning the death penalty as a means of punishment. The research is formulated to prove or disprove a value-judgment, with the outcome that the prejudices of the social scientist are not distinct from the empirical findings. Further, studies of capital punishment are ordinarily not confined to a restricted and definite problem area. Not infrequently the research confuses the efficacy of deterrence with the function of punishment in general, or inverts cause and effect in declaring that the death penalty contributes to crime. As Hans Von Hentig has noted, this area has become fertile ground for undocumented speculation: "Since an exact examination of the secondary impact of punishment is not feasible, this field has become a refuge for unscientific claims."²⁵

To recapitulate, it may be said that current empirical data is inconclusive with regard to the deterrent effect of capital punishment. It has been shown, however, that the death penalty can be an effective deterrent under certain conditions. It has been noted that the categorical acceptance or rejection of the death penalty as a deterrent is a meaningless position. Relevant variables must be identified, measured, and related to an analytical schema. Only then will data be secured which can meet the criteria of scientific knowledge.

CONCLUSION

In conclusion, the limitations of the schema for analysis which has been presented should be made explicit. Attention has been focused on the dimensions of the deterrence concept and the empirical variables which seem necessary to a consideration of the effectiveness of any single preventive measure. The schema, therefore, is restricted in its applicability to overt or manifest consequences of prescribed penalties as these are reflected in criminal statistics. The exposition has not considered the other possible purposes of punishment (or functions of punishment) such as vengeance, expiation, maintenance of social solidarity, protection, reformation, or the need to uphold the ideology of law. Each of these subjects is a legitimate area for scientific study.

This paper has presented a schema for the scientific analysis of a concept. The importance of conducting criminological research with reference to deterrence on a single level of analysis has been indicated. The suggested procedure involves a precise definition of the problem with the concomitant separation of value-judgments from empirical findings. It also necessitates the restriction of research to problems with empirical referents.

Such an outcome is to be expected. It is a thesis of this paper that attempts to prove capital punishment (or any deterrent measure) effective or ineffective per se, without reference to other variables, is a meaningless proposition. It is either an effective or ineffective deterrent depending upon other factors.

The desirability of capital punishment is another question. Advocates of the abolition of the death penalty have generally focused their attention upon proving that it is ineffective as a deterrent. This argument seems curious. For there are more valid reasons for opposing the death penalty than the dubious one of impugning its effectiveness as a deterrent measure.

²⁵ HANS VON HENTIG, *Punishment*, ENCYCLOPEDIA OF THE SOCIAL SCIENCES, 1934, Vol. XII, p. 712.