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Theory of the Stability of Punishment, A.

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A THEORY OF THE STABILITY OF PUNISHMENT

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One of the more interesting theses advanced by Durkheim, and subsequently by others, is that crime is a "normal" and not a pathological attribute of society "provided that it attains and does not exceed a certain level for each social type." [1] Durkheim meant by this that a particular level of crime is "an integral part of all healthy societies." [2] Far from being some aberrant form of societal maladjustment, it is a necessary result of the same phenomena which promote and maintain social solidarity. [3]

For Durkheim, the essential mechanism contributing both to the stability of a society and to the natural occurrence of crime was the "collective conscience" or "the totality of beliefs and sentiments common to average citizens of the same society." [4] When these beliefs and sentiments are held strongly by most of the members of a society, they form the social glue which binds the individuals in the society together. Yet, because of the unavoidable individual variations in the degree to which these sentiments are held, there will always be persons whose individual embodiment of the collective conscience is insufficiently developed. As a result, these persons will often engage in actions which are a serious affront to the collective conscience, and thereby defined as criminal.

The collective conscience, then, provides a cognitive structure which serves as the basis for organizing individuals into a collectivity by providing them with a group identity. At the same time this structure partitions the class of possible and actual behaviors into those which are acceptable and those which are unacceptable, thereby creating the possibility of crime. That is, actions can only be deemed as criminal in the context of a body of rules held in common and governing the way men live together.

One of the more recent attempts to document this Durkheimian notion is the work of Kai Erikson. [5] Once again, the presence of crime in societies is regarded as natural and emanating from the same process which preserves social stability. Erikson, however, speaks of this fundamental process in the less esoteric terms of boundary maintenance, which is the continual clarification of the normative outlines of a particular social group. As the cultural integrity of the group is specified and reinforced, the phenomenon of crime is also born.

In addition to accounting for the origin of crime, both Durkheim and Erikson outline the subsequent functional role of crime, or more accurately of the social reaction to crime, for a social group. At the same time that crime arises out of the mechanism for social solidarity, the reaction to crime also contributes to the maintenance of that social solidarity. As the society acts to punish the criminal, it also articulates the sentiments or norms characteristic of the society and reinforces them in its members. Thus, not only is crime in a society natural, but the response to it serves a useful purpose by continually clarifying and reaffirming the essential beliefs which define that society.

An important corollary to the notion that crime is both natural and functional for social life is that the extent of crime in any particular social group will generally be maintained at a specific level. While the optimal level may vary with social type, the observed level in any given group will rarely fall short of or exceed the relevant optimum. Durkheim even suggests that it may be possible to specify exactly the optimum level of crime for the various social types. [6] Furthermore, Erikson's

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[1] E. DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 66 (S. Solovay & J. Mueller transls. 1964).

[2] Id. at 67.

[3] It should be emphasized that Durkheim was quick to point out that societal normality should not be confused with individual normality. While the existence of some crime is normal for society, that does not mean that the individual criminals are to be considered normal. The fact that there are persons with poor control mechanisms may be determined by the social structure, but these persons are, nevertheless, maladjusted at the level of the individual. Similarly, he maintains that while crime is normal that does not mean that it should not be regarded with displeasure. Just as a pain is a normal, yet uncomfortable attribute for biological organisms, so crime is a normal, but abhorrent feature of social life.

[4] E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 79 (G. Simpson transl. 1964).

[5] K. ERIKSON, THE WAYWARD PURITANS 3–29 (1966).

[6] E. DURKHEIM, supra note 1, at 66.

work includes an attempt to offer some empirical evidence for this claim.[7]

In this paper, the preceding analysis of the existence of stable levels of crime will be critically re-examined and an alternative position about the constancy of *punishment* will be offered. It is our contention that in their discussions of criminality and deviance both Durkheim and Erikson were not referring to the class of all acts which would be considered criminal or deviant if discovered. Rather, they were concerned with only those acts which are publicly recognized as criminal (deviant) and punished in some way. An alternative account of the stability of punishment is then developed by formulating the phenomenon in terms of a homeostatic process. Finally the analysis will be subjected to empirical testing using data from the United States and Norway.

THE STABILITY OF PUNISHMENT

At first glance the notion that there is a stable level of crime for any society seems to have some clear empirical implications which can be examined. A closer look, however, reveals that there are enormous difficulties attending the measurement of levels of crime. In the strict sense, the level of crime would have to include any act which is a violation of some criminal statute. This is, however, extremely difficult if not impossible to determine.

In the first place, not all crimes can be detected. When a distinction is drawn between crimes with victims, such as assault and robbery, and private crimes, such as prohibited narcotics use or sexual practices between consenting adults, it is apparent that in the absence of extensive spying or self-reporting, most private crimes will go undetected. There are also an indeterminate number of victim crimes which are never reported (this is most common in the case of rape). Furthermore, even in the cases where crimes are detected, there are wide variations in the degree of enforcement and in some cases a known infraction is completely ignored by the authorities. Thus, while the level of reported or detected crimes can be determined with some effort, there is no way of knowing exactly how many crimes have been perpetrated without public awareness. It is, therefore, uninformative to speak of a stable level of crime in this strict sense.

There are indications in Durkheim's and Erikson's works that both men, when they speak of

stable levels of crime, are referring only to those crimes which come to public attention through the punishment of the wrongdoer. For example, Durkheim stated that "an act is criminal when it *offends* strong and defined states of the collective conscience."[8] Similarly, Erikson maintained that "deviance is not a property *inherent in* any particular kind of behavior; it is a property *conferred upon* that behavior by the people who come into direct or indirect contact with it."[9] Furthermore, for both men a crime is known by the characteristic reaction to it, namely its punishment. In each case, the primary concern is with crimes for which there is a public awareness of and response to the act. The level of crime they speak of, then, includes only those acts which are publicly recognized as crimes and punished accordingly. Hence, it is not the level of actual criminal behavior which is stable, but rather the level of punished criminal acts.

A BEHAVIOR DISTRIBUTION AND PUNISHMENT THRESHOLDS

In order to explore the interaction between behavior and its punishment, we posit a statistical distribution of general form, $f_B(x)$, representing the distribution of crime-related behavior in a society. The notion of such a distribution is not new; it has been used and discussed by Cavan[10] and by Wilkins.[11] The basic concept of the distribution reflects the diversity of conduct in any society, ranging from the severely criminally deviant to the compulsively moralistic. The general structure of this distribution is depicted in Figure 1. For simplicity, we initially consider only the one-dimensional distribution. The actual distribution is, of course, far more complex. The FBI, for example, uses 29 crime types in its Uniform Crime Reports, and even these are highly aggregated.

We can hypothesize that in this behavior space a society establishes a boundary threshold, B_0, which defines unacceptable or criminal behavior, that is, individuals who engage in behavior $B > B_0$ are deemed to be punishable. We might introduce here a punishment severity function, $g(B)$, which is monotonic increasing with B, to reflect the expected severity of the punishment to be imposed on an individual convicted of behavior B.

Under this model, we can then denote the

[7] K. ERIKSON, *supra* note 5, at 163–81.

[8] E. DURKHEIM, *supra* note 4, at 80 (emphasis added).
[9] K. ERIKSON, *supra* note 5, at 6 (emphasis in original).
[10] R. Cavan, *The Concepts of Tolerance and Contraculture as Applied to Delinquency*, in 2 SOCIOLOGICAL Q. 243–58 (1961).
[11] L. WILKINS, SOCIAL DEVIANCE (1964).

$f_B(x)$

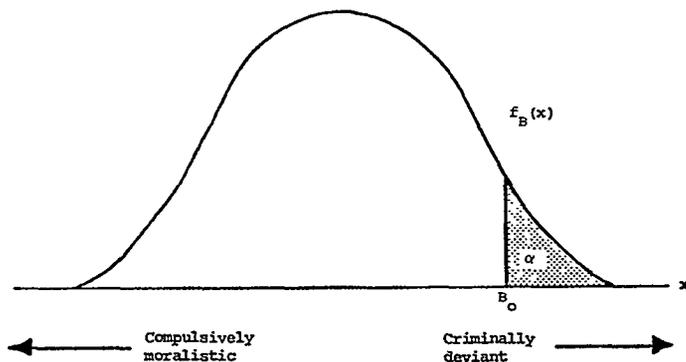α

B_0

x

Compulsively
moralistic

Criminally
deviant

FIGURE 1
THE BEHAVIOR DISTRIBUTION

punishment delivered by the society as the following integral:

$$\alpha = \int_{B_0}^{\infty} g(x)C(x)f_B(x) \, dx \qquad (1)$$

where C(B) is the probability of the arrest and conviction of someone who has engaged in behavior B. This integral represents the gross punishment meted out by the society. If C(B) represented the rate of conviction of people engaged in behavior B, then the integral α would represent a rate (say an annual rate) of punishment.

We hypothesize here that in a given society, during a relatively stable period, there is a balance of forces that maintains α fairly constant. The rationale for this argument is fundamentally that the level of punishment in a society is homeostatic. That is, there are a variety of processes in the society which operate to maintain a constant level of punishment, and this level adapts to changing levels of actual crimes as reflected in shifts in the behavior distribution. Under this hypothesis, if behavior were to become less deviant through a decrease in the occurrence of infractions (*i.e.*, a shift to the left in the behavior distribution), an issue explored by both Durkheim[12] and Erikson,[13] then the society would respond according to Durkheim's model by re-defining previously minor infractions as crimes, and punishing these. The result would be the stable maintenance of a reasonable amount of punishment.

In this process, for instance, if $\alpha(B_0)$ decreases as a result of the behavior shift, then we would see the threshold reestablished to a new value, $B_0' < B_0$, which encompasses more types of behavior as crimes, so that $\alpha'(B_0') = \alpha(B_0) = \alpha$.

[12] E. DURKHEIM, *supra* note 1.
[13] K. ERIKSON, *supra* note 5.

On the other hand, if the population were to become more deviant through a shift of the distribution to the right, then the society can choose to retain the same punishment thresholds, B_0, and accept the consequently higher values of punishment, $\alpha' > \alpha$. Alternatively, the society could accommodate to the shift by revising its standards toward greater leniency. It does so by creating new thresholds, $B_0' > B_0$, or by creating revised punishment procedures and adjusting these such that the punishment integral, α, remains constant. Thus:

$$\alpha = \int_{B_0}^{\infty} g(x)C(x)f_B(x)$$
$$= \int_{B_0'}^{\infty} g'(x)C'(x)f_B'(x) \, dx \qquad (2)$$

The social factors accounting for this hypothesized withdrawal reaction could certainly include economic considerations. Increased punishment implies increased expenditures for processing and confinement as well as lost economic activity of those punished, and the society may be unwilling to undertake this increased economic burden. But there would also be considerations of social stability, which try to avoid alienating too large a portion of the population from the society by labeling them and their associates as deviant, and thereby risking the fundamental stability of the society.

IMPRISONMENT RATE AS A MEASURE
OF PUNISHMENT

While the argument for a stable α may well be reasonable, it is empty without some empirical validation, which requires indications of a society's punishment behavior. There could be many such
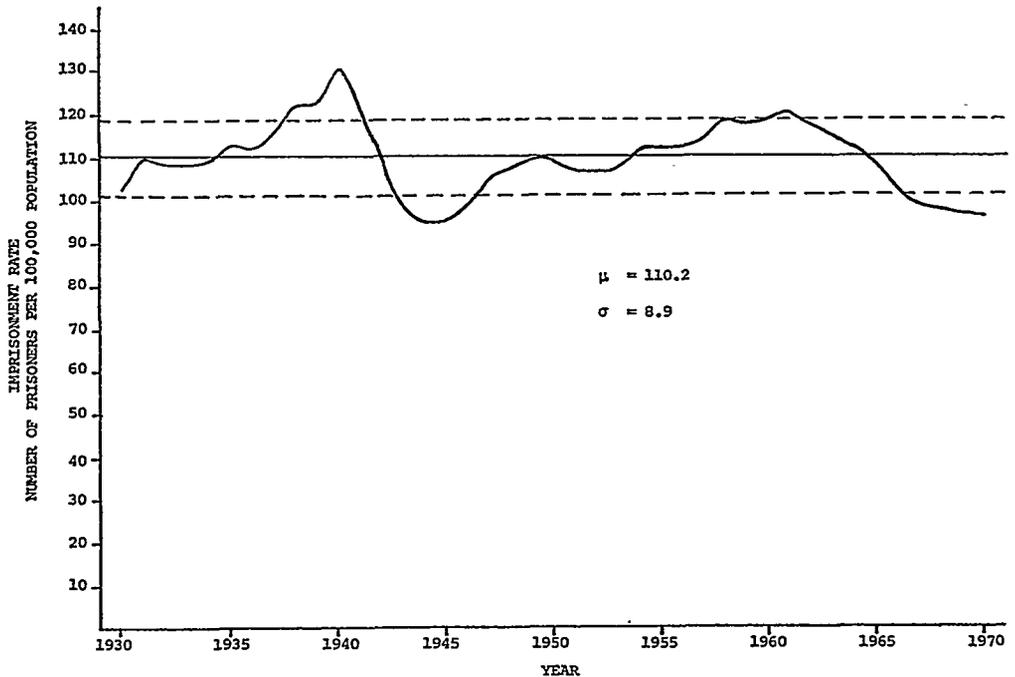
FIGURE 2
ANNUAL IMPRISONMENT RATE IN THE UNITED STATES: 1930-70

indicators. Among the possibilities are arrest rate, conviction rate, imprisonment rate, and prison populations. We first explore the imprisonment rate and its time history as a measure of punishment.

Even if these data prove to be stable, however, this would still fall short of definitive proof of the argument for a stable α. First, punishment takes many forms in a society, and each form has its characteristic severity. In addition to prisons, there are juvenile institutions, mental institutions, and various forms of community supervision and restraint. Even prior to conviction, arrest and trial represent punishment in themselves. Nevertheless, we believe that the severity of punishment in prison sufficiently dominates these other forms to warrant principal attention initially. If the imprisonment data are found to be reliable and the process is found to be stable, then it would be appropriate to explore these other forms of punishment to determine the stability of their time trends.

Figure 2 depicts the imprisonment rate in the United States in prisoners per 100,000 population for the period 1930-1970.[14] It can be seen from

Figure 2 that over that period the imprisonment rate was reasonably constant, having an average value of 110.2 prisoners per 100,000 population and a standard deviation during that time (as shown by the dotted lines) of 8.9 prisoners per 100,000 population. The coefficient of variation is thus 8.1 percent. The stability of the time series is especially noteworthy when it is considered that the population of the United States increased by over 50 percent in this same period.

The anomalous points are principally those during World War II (when the military represented an available alternative for many who might otherwise have been in prison). Somewhat less apparent is explanation for the peak around 1940. Were the peak to have been in 1940 alone, then the completeness of the census data for that year might have been blamed. The peak, however, spreads from 1938 to 1941, and so it could have been a depression aftermath effect, a war precursor, or simply a smoothing factor applied to smooth out a real 1940 peak. Even when these anomalies are included, however, the rate remains surprisingly stable.

The stability is more apparent in Figure 3, in

[14] U. S. CENSUS BUREAU, STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO PRESENT (1960). U. S. DEP'T OF COMMERCE, STATISTICAL AB- STRACT OF THE UNITED STATES—1970 (1970); U. S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES—1972 (1972).
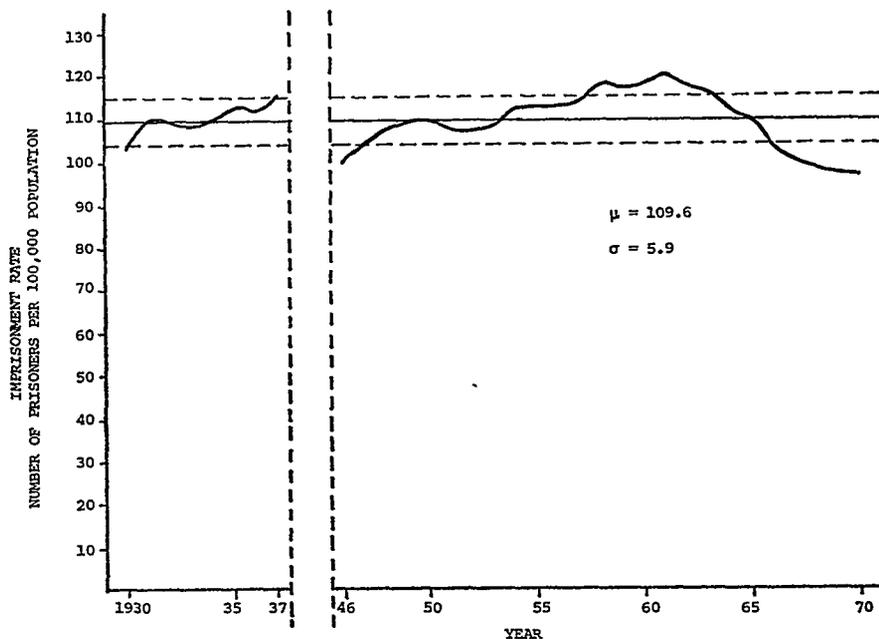
FIGURE 3
ANNUAL IMPRISONMENT RATE IN THE UNITED STATES: 1930-37, 1946-70

which the data for the years 1938-1945 have been dropped. The slightly revised mean is thus 109.6; the standard deviation drops to 5.9, and the coefficient of variation is 5.4 percent.

It is interesting to note that the imprisonment rate since 1961 has shown a distinct downward trend. This is in marked contrast to the 31 percent increase in reported arrests between 1960 and 1970. One possible explanation for the declining imprisonment rate could be saturation of existing institutions. It might be that all the available prison cells are filled, and the increasing population divided into the fixed number of prisoners would cause the rate to decline. It turns out, however, as shown in Table 1, that even the absolute number of prisoners has been declining since 1961. Furthermore, there is considerable evidence that prisons in the U.S. are far from saturated. In fact, there has been an increasing tendency throughout most of the nation for shorter prison sentences, for more use of probation and for other forms of community supervision.

CROSS-CULTURAL COMPARISON

It is reasonable to expect that even if the value of α is constant, its value would vary from one society to another. One would expect, in particular

that a more homogeneous society, with less variability in its behavior distribution would have an imprisonment rate significantly lower than a more heterogeneous society that is otherwise comparable. This argument derives from a consideration of the distance in the behavior distribution. An individual with behavior $B_1 < B_2$ is presumed to reject B_2 and to exert some pressure for punishment of B_2. For a fixed B_1, this pressure is hypothesized to be a monotonic increasing function $h(D)$ of the distance $D = B_2 - B_1$. As the variance of the behavior distribution increases, there is a greater frequency of the larger distances, and hence a higher imprisonment rate.

Similarly, one would expect that in two otherwise similar societies, the more permissive would have a lower α. Here, the two societies differ in their $h(D)$ function, with the operational definition of "society 1 is more permissive than society 2" being that $h_1(D) < h_2(D)$.

With respect to a punitive society, it is less clear how its punishment rate would respond. It might be that a "disciplining" society would have a higher value of α because it punishes more severely (i.e., a higher value for the h function) or it might have a lower value because its people are more disciplined, (i.e., the variance of the $f_B(x)$

TABLE 1

UNITED STATES PRISON POPULATIONS: 1930–1970*

Year	Prison Population	U.S. Population** (in Thousands)	Prisoner Rate per 100,000	Year	Prison Population	U.S. Population** (in Thousands)	Prisoner Rate Per 100,000
1930	127,495	123,188	103.5	1951	165,680	154,360	107.3
1931	137,082	124,149	110.4	1952	168,233	157,020	107.1
1932	137,183	124,949	109.8	1953	173,579	159,636	108.7
1933	136,947	125,690	109.0	1954	182,901	162,417	112.6
1934	138,220	126,484	109.3	1955	185,915	165,270	112.5
1935	144,665	127,362	113.6	1956	189,575	168,174	112.7
1936	143,573	128,181	112.0	1957	195,414	171,229	114.1
1937	149,357	128,961	115.8	1958	205,493	174,882	118.8
1938	159,382	129,964	122.6	1959	207,446	177,830	117.7
1939	161,075	131,028	122.9	1960	212,953	180,671	118.6
1940	173,706	132,122	131.5	1961	220,149	183,691	120.8
1941	165,439	133,402	124.0	1962	218,830	186,538	118.3
1942	150,384	134,860	111.5	1963	217,283	189,242	115.7
1943	137,220	136,739	100.4	1964	214,336	191,889	112.6
1944	132,356	138,397	95.6	1965	210,895	194,303	109.5
1945	133,649	139,928	95.5	1966	199,654	196,560	102.7
1946	140,079	141,389	99.1	1967	194,896	198,712	99.1
1947	151,304	144,126	105.0	1968	—	200,706	(98.1)***
1948	155,977	144,631	107.8	1969	196,007	202,677	97.6
1949	163,749	149,188	109.8	1970	196,429	204,879	96.7
1950	166,165	151,683	109.5				

* *See* footnote 14, *supra*, for the three sources of data in this table.

** Including Armed Forces Overseas.

*** The prison population and rate for 1968 were unavailable. The rate was, therefore, estimated from the curve.

function has been reduced). The introduction of punitive operations to a previously more permissive society would be likely to generate immediately a higher value of α. As stability was reached, then deterrence would shift the behavior distribution to the left, lowering α as a result. These dynamics during a period of instability require further exploration.

We have begun to explore the cross-cultural aspects of this issue. Professor Nils Christie of the University of Oslo has collected and provided us with some of his data on Norwegian prisons. The imprisonment rates for Norway for 1880 to 1964 are presented in Figure 4.[15] The Norway data cover 85 years, a considerably longer time span than the U.S. data. Again, the stability is clear, although less striking than in the U.S. data. The mean imprisonment rate is 52.5 prisoners per 100,000 population, with a standard deviation of 8.2 and a coefficient of variation of 15.6 percent. As was anticipated, the imprisonment rate is significantly

lower than in the United States, presumably at least in part because of the greater homogeneity of the Norweigian population.

Similar comparisons are needed for other countries. Review of Christie's[16] data for other Scandinavian countries seems to show effects similar to those for Norway. Data from other countries are needed to provide an appropriate mix of cultural environments, historical trends, and characteristic levels of punishment.

MULTIDIMENSIONALITY OF THE BEHAVIOR
DISTRIBUTION

We can now turn to an exploration of the multi-dimensional character of the behavior distribution. In view of the variety of behavior labeled and treated as "crime," it is necessary to deal with the behavior variable, B, as a vector variable. The 29 separate categories of offenses in the Uniform

[15] Letter from Nils Christie to Alfred Blumstein, May 24, 1971.

[16] N. Christie, *Changes in Penal Values*, 2 SCANDINAVIAN STUDIES IN CRIMINOLOGY—ASPECTS OF SOCIAL CONTROL IN WELFARE STATES (1968).
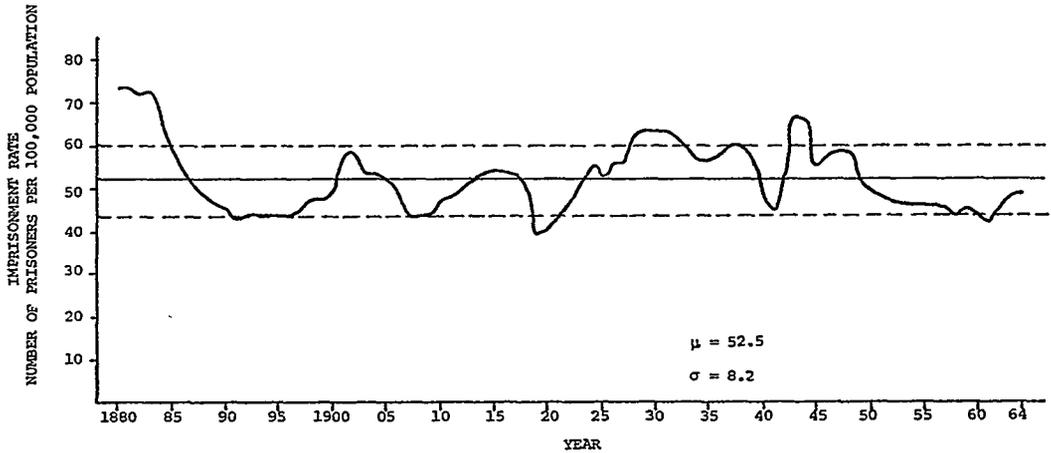
FIGURE 4
ANNUAL IMPRISONMENT RATE IN NORWAY: 1880-1964

Crime Reports,[17] for instance, include such internally diverse categories as other assaults, sex offenses, disorderly conduct, and "all other offenses (except traffic)."

Treating B as a vector requires a revision of expression (1) as follows:

$$\alpha = \int_{B_{0_1}}^{\infty} \cdots \int_{B_{0_n}}^{\infty} g(x_1, \cdots, x_n) \quad (3)$$
$$\cdot C(x_1, \cdots, x_n) f_B(x_1, \cdots, x_n) \, dx_1 \cdots dx_n$$

In this case, then, changes can occur along any of the dimensions of the behavior distribution. Thus, some actual crime rates can increase while others decrease. More severe punishment can be imposed on some crimes while others receive more gentle treatment. In particular, since B_0 is now a vector of the form $(B_{0_1}, B_{0_2}, \cdots, B_{0_n})$, there is a wide range of choices in setting the individual B_{0_i} components subject only to the requirement expressed in equation (3) above that the total integral be α. Thus, as the behavior distribution shifts, the thresholds for some serious crimes, say murder and robbery, can remain fairly constant,

[17] FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS (1970). The categories used are the following: murder and nonnegligent manslaughter; manslaughter by negligence; forcible rape; robbery; aggravated assault; burglary; larceny; auto theft; other assaults; arson; forgery and counterfeiting; fraud; embezzlement; stolen property; vandalism; weapons; prostitution; sex offenses; narcotic drug laws; gambling; offenses against family and children; driving under the influence; liquor laws; drunkenness; disorderly conduct; vagrancy; all other offenses (except traffic); suspicion; curfew.

while the B_0 levels of some other components change in order to maintain a constant α.

The prime candidates for more significant revision are the non-victim crimes. As the behavior distribution shifts to the right (*i.e.*, an increase in the occurrence of criminal deviance), then the society can become more lenient with respect to such crimes. This leniency can take several forms. The corresponding component of B_0 can be increased so that only the more serious version of that behavior is dealt with (*e.g.*, narcotics traffic rather than use). Alternatively, the severity of the punishment function, $g(x)$, can be reduced by an increased willingness on the part of prosecutors, judges, or juries to drop charges or to use lesser charges. Judges can reduce the punishment by more frequent use of probation or suspended sentences. Prison sentences can be shortened by either changes in sentencing by judges or earlier release on parole. All of these serve to reduce the contribution to α by those offenses on which adaptation occurs.

These effects can be explored with the arrest data for 1960, 1965 and 1970 reported in the 1970 Uniform Crime Reports (Table 2). During the period 1960 to 1970, there was an increase of 31 percent in reported arrests with an increase of over 20 percent in the second half of the decade alone. During this same decade, the number of reported index crimes increased by 176 percent and the crime rate per population increased by 144 percent.[18] Similar increases were reported for the crimes of violence (156 percent and 126 percent)

[18] *Id.* at 65.

TABLE 2

TRENDS IN UNITED STATES ARRESTS FOR SELECTED CRIME TYPES*

Crime Type	1970 Arrests[a]		Percentage Change in Arrests	
	Number (in thousands)	Rate/ 100,000	1960-70[b]	1965-70[c]
Total	6,500.3	4,287.7	+31.0%	+20.7%
Violent[d]	241.9	159.6	+83.2	+48.4
Property[d]	1,028.9	678.6	+87.4	+40.5
Robbery	87.7	57.8	+120.2	+80.5
Burglary	285.4	188.3	+61.6	+32.4
Larceny	616.1	406.4	+108.2	+51.1
Stolen Property	61.5	40.6	+358.5	+206.3
Narcotics	346.4	228.5	+740.6	+575.0
Prostitution	49.3	32.5	+57.6	+37.4
Liquor Laws	222.5	146.7	+58.8	+13.9
Sex Offenses	49.3	32.5	−23.3	−22.3
Gambling	84.8	55.9	−38.1	−28.6
Drunkenness	1,512.7	997.8	−14.4	−8.5
Disorderly Cond.	589.6	388.9	+2.8	−6.4
Vagrancy	101.1	66.7	−41.5	−17.2
Suspicion	70.2	46.3	−56.4	−18.4
Family/ Children	56.6	37.3	−5.6	−15.7

* All crime types with a decrease in arrests are shown in the table. Those crime types not shown changed at rates similar to those indicated for the aggregated categories of violent and property crimes.

The figures in each column are not directly comparable since they are based on different reporting populations. The 1970 arrest figures in columns 1 and 2 are the most complete indicating arrest data from all agencies reporting in 1970. The percentage changes from 1960 to 1970 and from 1965 to 1970 use subsets of this data. In each case only data available from those agencies reporting in both years (1960 and 1970, or 1965 and 1970) are used. The percentage changes, therefore, represent changes in the number of arrests for comparable population bases.

[a] Source: FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS-1970 Table 23. *See* footnote 17 *supra*.

[b] Source: *Id.* at Table 24.

[c] Source: *Id.* at Table 25.

[d] The category of violent crimes includes murder and non-negligent manslaughter, negligent manslaughter, forcible rape, robbery and aggravated assault. Property crimes include burglary, larceny and auto theft.

and for the crimes against property (180 percent and 147 percent). There is considerable debate[19] over how much of this increase is due to increases in reporting rate, how much is due to the effects of inflation (*e.g.*, an increase in the price of bicycles increases the number of index larcenies of $50 or more), and how much is due to other non-behavioral shifts that cannot easily be calibrated. Despite these uncertainties, it is generally accepted, as concluded by the President's Commission on Law Enforcement and the Administration of Justice, that:

> 1. The number of offenses—crimes of violence, crimes against property, and most others as well—has been increasing. Naturally, population growth is one of the significant contributing factors in the total amount of crime.
> 2. Most forms of crime—especially crimes against property—are increasing faster than population growth.[20]

These conclusions were reached in 1966, when the reported crime rate increase was less than in the remaining years of the decade. It can thus reasonably be asserted that there was a significant shift to the right in the United States' behavior distribution during the 1960's.

Table 2 lists only a selection of the large majority of the crime types for which reported arrests have increased. It lists all seven of the 29 crime types whose reported arrests have decreased: sex offenses, gambling, drunkenness, disorderly conduct, vagrancy, suspicion, and offenses against family and children. Aside from offenses against family and children (which involve matters like non-support and desertion, and which may be more civil than criminal in nature), these are all victimless crimes, and are of the kind where the discretion over B_0 has the greatest flexibility.

The striking exception in this pattern of decline in arrests for non-victim crimes is the violation of narcotics and drugs laws for which arrests have increased by 740 percent over the entire decade and by 575 percent over its last five years. This rate of increase in the drug law arrests is clearly contradictory to the trends in the other victimless

[19] *See, e.g.*, 2 STAFF REPORTS OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE —CRIMES OF VIOLENCE (1969); M. Wolfgang, *Uniform Crime Reports: A Critical Appraisal*, 111 U. PA. L. REV. 708 (1963).

[20] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 40 (1967).

crimes. The explanation for this effect can only result from a consideration of the dynamics of the adaptation process. The shift of the B_0 values in response to shifts in the behavior distribution is certainly not instantaneous. Rather, the B_0 shift results from various forms of recognition of the need for the shift, and a subsequent accommodation. Thus, it may be hypothesized that during the latter part of the sixties, drug abuse, including marijuana and narcotics, expanded so rapidly (*i.e.*, the behavior distribution rapidly moved to the right on the narcotics-laws dimension) that any revision of enforcement policies could not keep up with that shift. The rapidity of the behavioral shift is indicated by the fact that there was only one narcotics arrest recorded in the Wolfgang cohort of 9,945 Philadelphia boys who had amassed 10,214 arrests by the time they were 18 years old in 1963.[21]

The sharp increase in drug law arrests has led to a significant re-examination of the laws, and several clear steps have been taken to increase B_0. In the Comprehensive Drug Abuse Prevention and Control Act of 1970,[22] Congress changed possession of marijuana for personal use from a felony to a misdemeanor.[23] In 1972, the National Commission on Marijuana and Drug Abuse recommended that possession of marijuana for personal use should no longer be a federal or state offense.[24] These moves are clearly in the direction of a liberalized adaptation of B_0 to the shifts in the behavior distribution, lagged perhaps by several years.

Thus, in the case of narcotics we see that a transformation of the behavior distribution to the right led to an increase in the punishment for drug use, with an associated growth in α. A reaction against this increase has led to the establishment of new, more tolerant B_0 values. The dynamics of this process, including assessment of the time lags in the response system, still need further exploration.

The 359 percent increase in the number of arrests for stolen property is also illuminating. The criminal justice system can maintain a constant α, not only by moving B_0, but also by adjusting

the severity of punishment, $g(B)$, for a given behavior. One of the ways this is accomplished is by reducing the severity of the offense charged. In many jurisdictions, an individual arrested for theft is often charged with the trio of burglary, larceny and receiving or possessing stolen property. Burglary requires the most rigid standards of proof for conviction and carries the most severe sentences, and the opposite is true for stolen-goods offenses. In the face of a general property-crime arrest rate increase of about 8 percent per year over the decade, and an increase over the decade of 62 percent in burglary arrests and 108 percent in larceny arrests, the rate of increase in stolen-goods arrests has been about 359 percent. Thus, it would appear that many individuals who formerly would have been charged with burglary or larceny are being charged with the less serious offense of receiving stolen goods.

This whole process of α-stabilization is fundamentally an implicit one. There is no individual or body within the society that says "our α is too high, let us revise our $g(B)$ function or our B_0's." Rather, this description merely reflects the marginal changes resulting from an intricate, continuous process in which a complex of social forces, continually in conflict, win and lose a series of small battles. Certainly judicial authority represents a significant factor in these outcomes. The sequence of liberal criminal law decisions of the Warren Court did their share to maintain α. By making it harder to convict a defendant, they presumably reduced the conviction function, $C(B)$. One of the results of this was an increase in the need for better evidence to warrant conviction, and the consequent use of lesser arrest charges like receiving stolen goods.

POLICY CONJECTURES AND SUMMARY

Evidence seems to be developing that the United States crime rate increases of the 1960's are leveling off and may even begin to decline. It is still an open question how much of this can be attributed to demographic effects (*e.g.*, aging of the population) and how much to resources committed to the enforcement or prevention activities engendered by the public concern over the problem of crime. If, however, we do hypothesize that the United States behavior distribution is now shifting to the left (*i.e.*, less crime is occurring), then some conjectures are possible about the society's response to those shifts in the 1970's.

[21] M. WOLFGANG, R. FIGLIO & T. SELLIN, DELINQUENCY IN A BIRTH COHORT 69 (1972).
[22] The Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236 (codified in scattered sections of 21, 42 U.S.C.).
[23] 21 U.S.C. § 844 (1972).
[24] REPORT OF THE NATIONAL COMMISSION ON MARIJUANA AND DRUG ABUSE—MARIJUANA: A SIGNAL OF MISUNDERSTANDING (1972).

The initial consequences of the shift to the left would first be a temporary reduction in α, followed by an adaptation to more severe punishment and more rigid threshholds to restore α to its normal value. Statements by public officials in early 1973 have called for life imprisonment and mandatory minimum sentences for certain offenses like trafficking in narcotics. Shifts to greater restrictiveness in the B_0 threshholds are also possible. There may be a tightening in the recently loosened controls over the victim crimes. It may even be more likely that some forms of behavior like ecological nuisance activity will become increasingly of concern to the criminal law. It is unlikely that the larger criminal justice establishment created with federal funds through the Law Enforcement Assistance Administration will let itself become bored from inactivity. If other service activities are not found into which to divert those resources, then they are likely to assure that α is at least maintained.

If, on the other hand, the behavior distribution continues to shift to the right, then we can reasonably expect to see increasing pressure for the decriminalization of the victimless crimes.

In this paper, we have critically reexamined Durkheim's claim of the existence of stable levels of crime and offered an alternative argument for the stability of punishment. We have presented a theoretical structure which characterizes deviant behavior and society's response to it in terms of a multidimensional behavior distribution which can vary over time. We have hypothesized and provided some empirical evidence to support a conservation theory that suggests that society tries to impose a fairly constant level of punishment, at a rate α, and that the behavior it punishes responds to shifts in the behavior distribution. The punishment should vary between societies and should reflect consideration of a society's homogeneity and its permissiveness toward deviance.

As the behavior distribution of the society becomes more deviant, then in order to maintain a constant α, there must be a slackening of the behavior thresholds that warranted punishment in the past, or a reduction in the severity of the punishment for a given offense. Since these changes in thresholds or in severity can be chosen reasonably independently, we would expect to see more flexibility in the treatment of the victimless crimes than of the victim crimes, and these changes are in fact reflected in arrest data.

Clearly, further development of this theory is needed. There should be consideration of the differences in the behavior of different demographic groups and their differing vulnerability to punishment. Further development is needed to identify factors that influence the characteristic punishment rate of a society. Dynamic analysis is needed to account for the time lags in the response process, and the effect this may have on cyclical aspects of the punishment rate.

More fundamentally, the theory still requires further empirical validation. Some account must be taken of other modes of punishment than imprisonment. The constancy of the punishment rate must be tested in settings other than the United States and Norway. And the response process shown with United States arrest data for victimless crimes must also be tested in other societies. Based on the limited validation thus far available, however, this theoretical construct appears to be an important extension and significant modification of the perceptions of Durkheim as evolved by Erikson.