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The Evil Christ Crucified: The Ritual Function of Punishment

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THE EVIL CHRIST CRUCIFIED: THE RITUAL FUNCTION OF PUNISHMENT

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"In one part of New Zealand an expiation for sin was felt to be necessary; a service was performed over an individual, by which all the sins of the tribe were supposed to be transferred to him, a fern stalk was previously tied to his person, with which he jumped into the river, and there unbinding, allowed it to float away to the sea, bearing their sins with it." In great emergencies the sins of the Rajah of Manipur used to be transferred to somebody else, usually to a criminal, who earned his pardon by his vicarious sufferings. To effect the transference the Rajah and his wife, clad in fine robes, bathed on a scaffold erected in the bazaar, while the criminal crouched beneath it. With the water which dripped from them on him their sins also were washed away and fell on the human scapegoat.[1]

INTRODUCTION

With the ascendancy of the utilitarian social philosophy, American penal law has focused on the effect of criminal punishment in reducing the incidence of crime.[2] The criminal actor is said to de-

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1. J.G. FRAZER, THE GOLDEN BOUGH 542-43 (abr. ed. 1922) (emphasis added). The notion of another serving as the expiation for one's guilt is central to Christianity. The Protestant Episcopal liturgy includes the following incantation: "Hear also what Saint John saith. If any man sin, we have an Advocate with the Father, Jesus Christ the righteous; and he is the Propitiation for our sins." THE BOOK OF COMMON PRAYER 76 (1952).

2.

> The utilitarian or preventive position . . . has considerable appeal although, as we shall see, it does not suffice as a justification for punishment. Its premise is that punishment, as an infliction of pain, is unjustifiable unless it can be shown that more good is likely to result from inflicting than from withholding it. The good that is thought to result from punishing criminals is the prevention or reduction of a greater evil, crime.

H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 39 (1968) [hereinafter PACKER].

serve punishment because of his criminal violation; additionally, his character will be reformed through the application of penal sanction, others will be warned not to transgress, and society will in some cases be protected by the malefactor's isolation.[3] Beyond this, it is urged that "punishment" is of itself a misplaced concern, since "correction" should be the focus of attention.[4]

Nevertheless, as one shifts his inquiry from the purposes of "criminologists" to those of the general population, it is well recognized that punitive and expiatory concerns gain weight.[5] It is for that reason that these latter concerns, which have been much neglected in the literature of the last 50 years, require some understanding. Many commentators have made careful and satisfactory examinations of the rationale and philosophical justifications, or lack thereof, of criminal punishment.[6] This much tilled ground will not be turned here except to the extent necessary to show the limitations of official invocation of these theories as responses to the question of the purpose of criminal punishment in contemporary society. One may argue that an understanding of the psychology and sociology of punishment does not justify punishment in either a moral or philosophic sense; nonetheless, a failure to understand the underlying forces compelling the desire to punish the offender prevents a sensible approach to the criminal sanction as a reflection of community needs and desires. Identification of a superior moral or philosophical position will not suffice as the basis for a legal decision; "where the voice of popular consciousness speaks in no uncertain tones, the task of the jurist is a merely technical one. The content of the legal proposition is given by society."[7] The question which then must be answered is, What are the psychological and sociological

3. *See generally* THEORIES OF PUNISHMENT (S. Grupp ed. 1971). In his introduction, the editor notes the elements in the integrative theory of punishment:

> Punishment involves working with the offender in such a manner that he can be reassimilated into the community. Simultaneously, society asks that we treat the individual in such a manner as to effectively mitigate, if not completely satiate, the demands for retribution. Further, there is some expectation that the offender be dealt with so that his treatment will serve as an effective deterrent to potential offenders.

4. R. ARENS & H. LASSWELL, IN DEFENSE OF PUBLIC ORDER 69 (1961).

5. *Id.*

6. See, *e.g.*, E. PINCOFFS, THE RATIONALE OF LEGAL PUNISHMENT (1966). Professor Pincoffs states at the outset of his work: "I shall be concerned solely with the rational foundations of punishment; not with its history, sociology, or psychology." *Id.* 1. *See also* T. HONDERICH, PUNISHMENT (1969).

7. E. EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 198 (1936).

bases of the community's demand for the punishment of the offender?

I. PUNISHMENT AND RITUAL

As a matter of linguistic precision, infliction of punishment requires a subject who is an offender. An individual who is the subject of official sanctioning must be guilty of an offense, or at least have guilt ascribed to him; otherwise, punishment consists of no more than the mere infliction of suffering.[8] It is by requiring the element of guilt that the social function of punishment is broadened beyond the conventional purpose of reduction of crime. Without guilt, the state could attempt to determine who *might* commit crimes; such persons would be considered dangerous, and thus proper subjects for isolation and treatment—viewed as a matter of "social surgery" rather than as a matter of punishment or sanctioning.[9] Nevertheless, while the objective of retribution[10] is often buttressed by a utilitarian defense, retribution is sought in its own right because the wicked are to be punished.[11] Retribution as a conscious justification of punishment is complemented by the expiatory function of punishment: men are responsible for their deeds, evil deeds are the product of evil men or evil inclinations, and punishment purges society of evil men or purges men of evil inclinations. At this

8. The requirement of the guilt element is characteristically reflected in accepted definitions of punishment: "It may then seem, given these rudimentary differentiations, to be *an authority's infliction of a penalty,* something unwanted, *on an offender,* someone found to have broken a rule, *for an offence,* an act of the kind prohibited by the rule." HONDERICH, *supra* note 6, at 1.

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> Of course, the suffering or harm in which punishment consists can be and is inflicted on innocent people, but this is not punishment, it is judicial error or terrorism or, in Bradley's characteristically repellent phrase, 'social surgery'. The affliction or suffering on a person is only properly described as punishment if that person is guilty.

Quinton, *On Punishment,* in PHILOSOPHY, POLITICS AND SOCIETY 86 (2d ed. P. Laslett 1967).

10. The classic defense of the retributive objective can be found in J.F. STEPHEN, LIBERTY, EQUALITY, FRATERNITY (R. White ed. 1967).

11. "The retributive view rests on the idea that it is right for the wicked to be punished: because man is responsible for his actions, he ought to receive his just deserts. The view can take either of two main versions: the revenge theory or the expiation theory." PACKER 37. *But see* Mabbott, *Punishment,* 49 MIND 152 (1939), where it is urged that a person should be punished not because he is "wicked" but because he "has broken the law."

conscious level, the punishment ritual is subject to attack by those of a deterministic persuasion, who see the fault not in man's deeds but in his personality structure or his social environment; it is argued that without responsibility, there can be no guilt, and hence no need to expiate and no logical basis for revenge on a criminal actor.[12] While the deterministic view of man may prevent us from charging an ultimate free choice to the actor, however, still the actor made the decision to act, no matter how determined, and it is this guilty act which is the subject of expiation.[13]

At this point, the focus should shift to the unconscious. While the traditional discussion of guilt has focused on "moral guilt,"

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12. This deterministic view of man shifts the approach to censored behavior from the antisocial act to the antisocial person; the act becomes largely irrelevant and the articulated concern is with *treatment* rather than *punishment*.

> The underlying rationale of this treatment model is deceptively simple. It rejects inherited concepts of criminal punishment as the payment of a debt owed to society, a debt proportioned to the magnitude of the offender's wrong. Instead it would save the offender through constructive measures of reformation, protect society by keeping the offender locked up until that reformation is accomplished, and reduce the crime rate not only by using cure-or-detention to eliminate recidivism, but hopefully also by the identification of potential criminals in advance so that they can be rendered harmless by preventive treatment. Thus the dispassionate behavioral expert displaces judge and theologian. The particular criminal act becomes irrelevant except insofar as it has diagnostic significance in classifying and treating the actor's particular criminal typology.

AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE 37 (1971).

13. *But see* J. MICHAEL & H. WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION (1940), where the authors reject the argument that acceptance of a deterministic view of man negates the efficacy of punishment:

> Determinists have attacked the retributive theory on the ground that it presupposes a non-determinist view of human behavior. They have argued that the idea of personal guilt is incompatible with a recognition of the fact that the individual's will to do evil is itself a product of his heredity and environment; that the individual ought not to be held at fault for willing what antecedent conditions caused him to will; and that if there is any fault, it must rest with these antecedent conditions. See, for example, McConnell, Criminal Responsibility and Social Constraint (1912) 48 *et seq.* To the extent and only to the extent, that one who holds the retributive view reasons from his belief in freedom of the will, or that the justice of retribution is, intuitively, dependent upon such freedom (*cf.* Kohler, [PHILOSOPHY OF LAW, 1914] at 281), is this attack relevant. It is not decisive because if there is any basis, intuitively, for the justice of retribution, there is no logical reason why it may not remain even if determinism be admitted, why, in short, one may not intuit the justice of punishing those who have the capacity to deliberate and choose to do evil, even though one concede that their choices may be determined.

Id. 8 n.15.

a conscious analytic concept, rather than on "psychological guilt," a construct of the unconscious,[14] once the latter factor is acknowledged, the function of punishment as a purgative can be understood: punishment reinforces our own resistance to transgression and expiates our own desire to transgress.[15] Criminal punishment thus serves the function of ritual, which is central to the creation of social solidarity. Psychiatrist Erik Erikson has provided a theory of the process of ritualization which gives rise to a sense of legal obligation.[16] Ritualization is viewed as a social or community formalization of rules of conduct which results in personal inculcation of standards to be acted upon; "[i]n its adult elaboration into a *judiciary procedure* . . . this judicious element is reaffirmed on a grand scale; making all-visible on the public stage what has developed in each individual as an inner process."[17] Through the criminal process, an offender is identified who serves as an "example" upon whom the community projects its "inner shame"; Erikson sug-

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> The dynamically important sense of guilt remains as such unconscious, although the concomitant anxiety becomes conscious. The sense of guilt is generated by the superego. Without the formation of such an internal authority, psychological "guilt" does not occur. (For brevity's sake, we shall in the following say "guilt" instead of "guilt feelings" or "sense of guilt," a semantic inaccuracy for which common psychoanalytic usage pleads legitimacy.) Guilt must not be confounded with apprehension, which in the context of our particular interest is the proper designation of the "fear of being caught"; nor is the feeling of guilt the same as a conscious and realistic fear of impending punishment.

G. PIERS & M. SINGER, SHAME AND GUILT 15-16 (1971).

15.

> The urge to punish wrongdoers is not always an impersonal demand that the law keep its promises. Often it is an outlet for our own antisocial aggressiveness which we have more or less effectively but guiltily repressed. It is a weapon in our own struggle against trends and drives which we do not admit to consciousness. We should be continuously aware that over-assertion of a prosecuting, punishing, attitude toward law breakers reveals the intensity of our own struggle and the instability of our own emotional equilibrium.

H. WEIHOFEN, THE URGE TO PUNISH 138 (1956) (footnote omitted).

16. Erikson, *Ontogeny of Ritualization,* in PSYCHOANALYSIS—A GENERAL PSYCHOLOGY 601 (R. Loewenstein et al. eds. 1966). The interplay between punisher and punished is critical for the satisfaction of the elements of ritualization as defined by Erikson:

> [B]ehavior to be called ritualization in man must consist of an agreed-upon interplay between at least two persons who repeat it at meaningful intervals and in recurring contexts; and that this interplay should have adaptive value for the respective egos of both participants.

Id. 602-03.

17. *Id.* 611.

gests that the trial process and imposition of the verdict is a highly stylized expiation ritual:

> The conflicting evidence which parades past the parental judge, the fraternal jury, and the chorus of public opinion matches the unceasing inner rumination with which we watch ourselves. Judgment, finally, is ceremoniously pronounced as based on sanctified agreement rather than on passing outrage or personal revenge; and where repentance is not strong enough to ask for punishment, the verdict will impose penalties for the culprit's "own good". . . .[18]

The expiation ritual, then, can be viewed as a purgative of "inner shame" and of a social contagion. The need is to examine the origin and nature of this shame and the nature of the fear of the contagion, and to determine what function punishment serves with reference to them. Further examination will reveal the extent to which these retributive and expiatory demands result in a need to punish, and the extent to which that need can be limited in the face of competing desires to treat and rehabilitate.[19]

II. RATIONALIST JUSTIFICATIONS OF PUNISHMENT

There is a compelling need to rationalize human activity; this

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18. *Id.* 611-12.

19. Smith and Pollack ask a series of rhetorical questions to which they offer no answer, but which does reflect the contemporary situation with regard to the social function of punishment:

> What is our philosophy of punishment? Do we punish for vengeance? Do we punish for retribution, because every crime must be balanced for a suitable punishment? Do we punish in the hope that others will be deterred from future crime? Do we punish to protect society by removing a dangerous criminal from our midst? Do we punish in the hope that the criminal will be rehabilitated and turned from his evil ways? Or, do we punish because, when punishment is imposed on the transgressor, the societal bonds are made stronger?

A. SMITH & H. POLLACK, CRIME AND JUSTICE IN A MASS SOCIETY 225 (1972). The authors themselves admit they "do not have a clear-cut or consistent philosophy of punishment." *Id.* 226.

The answer may be that we punish for all these reasons and that no single consistent philosophy of punishment is possible. It may be, however, that various aspects of the criminal process serve as occasions for the satisfaction of one or more of these purposes, but that no phase of the process can or should hope to serve them all. For instance, the public spectacle of the trial and the condemnation of jury and judge serve the retributive and expiatory purposes, while the sentencing and ultimate disposition serve the rehabilitative and isolative demands.

is particularly true in the case of punishment, which has as its consequence the infliction of suffering or deprivation of liberty.[20] This need for rational justification has been joined with a passion to humanize criminal punishment and, in fact, to shift from penology (from the Greek *poine,* meaning *penalty*) to corrections (from the Latin *corrigere,* meaning to *lead straight*).[21] These rationalist and humanitarian concerns with punishment culminated in the United States Supreme Court's *per curiam* decision in *Furman v. Georgia,*[22] which has had the effect of preventing the imposition and carrying out of the death penalty as it is presently established and applied.[23] While the *per curiam* opinion holds no more than that "the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments,"[24] the three

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> The problem of punishment arises mainly but not only for the reason that the practice involves what traditionally has been called suffering. It involves a deliberate and avoidable infliction of suffering . . . . It has sometimes been suggested that it is in part an automatic reflex of society, like that of a living body to injury. This is at best darkening metaphor, and any suggestion that punishment is wholly an ungoverned reaction would be absurd.

HONDERICH, *supra* note 6, at 7 (footnote omitted).

21.

> [I]t would seem desirable that the work of the criminal court should cease with the finding of guilt or innocence. The procedure thereafter should be guided by a professional treatment tribunal . . . .
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> The primary duty of such a sentencing and treatment-guiding body would be to determine the therapeutic plan appropriate to the individual as a member of a class whose past responses to various forms of sentence have been systematically investigated. . . . It would perform its functions on the basis of intensive psychiatric, psychological, and social reports based on examination of each offender at a diagnostic and classification center to which the criminal court judges would commit offenders without fixing either the institution or length of sentence. The ultimate duration and type of corrective treatment would of course call for modification in the light of the progress of the individual offender under the program of psychological, characterial, and social therapy prescribed in each case by the treatment tribunal.

S. GLUECK, LAW AND PSYCHIATRY 152 (1962).

22. 408 U.S. 238 (1972).

23.

> [W]hatever else one may make of the per curiam decision and nine opinions rendered by the Court in *Furman v. Georgia,* it is clear that five of the Justices believe at least that capital punishment, as presently administered, violates the eighth amendment against cruel and unusual punishment.

Junker, *The Death Penalty Cases: A Preliminary Comment,* 48 WASH. L. REV. 95 (1972) (footnote omitted).

24. 408 U.S. at 239-40.

joined cases presented the occasion for each of the justices, in separate opinions, to consider the nature and purposes of criminal punishment.

Mr. Justice Marshall, in his concurring opinion, concedes that a law violation is necessary before punishment can be inflicted but rejects retribution, in its common usage, as a function of punishment, and instead places the emphasis on deterrence, isolation and rehabilitation of the dangerous.[25] Marshall asserts that the *justification* of punishment is the issue of importance, not the *purpose* of punishment, and he posits that no punishment can be morally justified unless its subject has broken the law.[26] Marshall goes on to condemn retribution as a *reason* for punishment, while acknowledging that it may be a *purpose* or *effect* of punishment:

> Our jurisprudence has always accepted deterrence in general, deterrence of individual recidivism, isolation of dangerous persons, and rehabilitation as proper goals of punishment. Retaliation, vengeance and retribution have been roundly condemned as intolerable aspirations of a government in a free society.[27]

However, it is the retributive *purpose* of punishment which justifies the requirement of offense before its imposition. Isolation of

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25. *Id.* 314.

26. *Id.* 342-43.

27. *Id.* 343. Marshall seems compelled to reject retribution as a purpose of punishment in order to reach his conclusion that the death penalty is prohibited by the eighth amendment:

> [P]unishment for the sake of retribution was not permissible under the Eighth Amendment. This is the only view that the Court could have taken if the "cruel and unusual" language were to be given any meaning. Retribution surely underlies the imposition of some punishment on one who commits a criminal act. But the fact that *some* punishment may be imposed does not mean that *any* punishment is permissible. If retribution alone could serve as a justification for any particular penalty, then all penalties selected by the legislature would by definition be acceptable means for designating society's moral approbation of a particular act . . . .
>
> To preserve the integrity of the Eighth Amendment, the Court has consistently denigrated retribution as a permissible goal of punishment. It is undoubtedly correct that there is a demand for vengeance on the part of many persons in a community against one who is convicted of a particularly offensive act. At times a cry is heard that morality requires vengeance to evidence society's abhorrence of the Act. But the Eighth Amendment is our insulation from our baser selves.

Id. 344-45 (footnotes omitted).

dangerous persons, deterrence of individual recidivism and treatment might be properly imposed if we could detect or predict character elements in individuals which would indicate a threat of danger; there is no necessary requirement in logic or in nature that bad acts precede the imposition of social restraint.[28]

Perhaps it should be observed here that Mr. Justice Marshall seems to be confining his conception of the retributive justification to the seeking of vengeance rather than broadening his discussion to the classical view of retribution as stated by Kant, with which Marshall appears to be in implicit agreement. Kant argues that punishment can only be imposed upon an individual as a consequence of his having committed a crime. To punish for the good of society or for the purpose of reforming a person would violate the Kantian first principle, which holds that no person can be used as a means to the purposes of someone else.[29] Kant concludes that only this refined sense of retribution can satisfy the principle of justice, since if one is punished for committing a crime, then the degree of punishment will reflect the nature of the offense and the punishment itself will be made by the court, following a determination that the person to be punished has violated the law.[30]

While agreeing with the underlying assumption of the retributive position that "the only reason that punishment is morally good or morally justifiable is that someone has broken the law,"[31] Marshall seemingly rejects the position that the punishment should reflect the guilt of the actor rather than the needs of deterrence or rehabilitation. This rejection, in part, stems from Marshall's apparent distinction between the retributive justification of punishment, as formulated by Kant, and Marshall's own formulation of the "vulgar" retributive purpose of punishment, which, it is asserted, is

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28. Professor Packer makes the point that the detection of personality factors could be considered as significant as evidence of offensive behavior:

> The criminal law could be concerned with people's thoughts and emotions, with their personality patterns and character structures. It is true that if this rather than conduct was the focus, it would still be expedient in most cases to ascertain these essentially internal characteristics through inquiry into conduct. But if these internal characteristics were the focus, conduct would simply be evidence of what we are interested in rather than the thing itself, and we would not hesitate to use other evidence to the extent that it became available.

PACKER, *supra* note 2, at 73.

29. I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100 (J. Ladd transl. 1965).

30. *Id.* 101.

31. 408 U.S. at 342.

vengeance. From Marshall's perspective, this purpose of punishment is to be rejected: "Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance."[32] This notion of the purpose of punishment is derived from the view best stated by Sir James Stephen, who asserted that punishment satiates a felt need for revenge against the criminal actor and vindicates the desire for a sense of justice.[33] Stephen's position was that criminal behavior is punished not merely because it is dangerous or results in harm, but because criminal acts result in a need for gratification in the minds of the general population. This need for revenge or for satisfaction of felt resentment should be gratified in a regular public and legal manner, since these needs are part of human nature and underlie the system of criminal law itself.[34] Marshall's rejection of retribution as vengeance which satisfies an "irrational" need follows in the rationalist and utilitarian tradition,[35] but the question remains whether society benefits from the satisfaction of these "instincts" or "irrational needs," so that the social bond is in fact conditioned upon the "rejection" and "punishment" of the transgressor. In any case, the popular demand for satiation of the retributive desire cannot be overlooked. Evidence of this demand can be observed in the widespread movement in the state legislatures to restore the death penalty. In California, for instance, where voters approved a proposition which called for restoration of the death penalty, the governor of the state told the legislature that "the people of California gave us a mandate to restore capital punishment."[36]

In another concurring opinion in *Furman,* Mr. Justice Stewart took issue with the view that retribution and the satisfaction of a need for vengeance are not valid justifications for punishment.[37] Stewart's argument is not that the infliction of punishment creates a social bond among the members of society, but rather that it preserves the social order by removing the need for self-vindication or personal revenge. Stewart posits that the instinct for retribution is

32. *Id.* 343 (footnote omitted).

33. STEPHEN, *supra* note 10, at 152. *See* P. DEVLIN, THE ENFORCEMENT OF MORALS 16-18 (1965).

34. STEPHEN, *supra* note 10, at 152.

35. This tradition is perhaps best exemplified by J.S. MILL, ON LIBERTY (1859), and has been restated in H.L.A. HART, LAW, LIBERTY AND MORALITY (1963).

36. N.Y. Times, Mar. 11, 1973, § 1, at 1, col. 7.

37. 408 U.S. at 308.

part of the nature of man and that civilized society channels this instinct into the criminal justice system, thereby gaining a measure of social stability. Without the imposition of punishment upon those who are felt to "deserve" it, citizens may resort to "self-help, vigilante justice, and lynch law," which are the "seeds of anarchy."[38] Stewart, then, joins the rationalist and utilitarian tradition in his defense of retribution by accepting as a given the desire for vengeance without exploring the underlying impulses that demand retribution; rather, he merely focuses on the need to satisfy these impulses in a manner calculated to avoid social disorder.

The position that retribution is justified in its own right was taken by Mr. Justice Powell in his dissenting opinion in *Furman*.[39] While noting the declaration of Mr. Justice Black over two decades ago, in *Williams v. New York*,[40] that "[r]etribution is no longer the dominant objective of the criminal law; [r]eformation and rehabilitation of offenders have become important goals of criminal jurisprudence,"[41] Powell asserts that "[i]t is clear, however, that the Court did not reject retribution altogether."[42] Not only is retribution a possible objective of the criminal sanction, urges Powell, but a proper one; he concedes that while retribution alone may not be a worthy justification in a moral sense, it does have utility for a system of criminal justice which requires public support.[43] Powell seemingly takes the view that the rational and utilitarian values in retributive punishment lie in its declaration of socially reprehensible behavior and its affirmation of the standards for legal conduct. In support of his position, Powell cites with approval the testimony of Lord Justice Denning before the British Royal Commission on Capital Punishment, where the view was taken that deterrence, reformation and prevention are not sufficient as the purposes of punishment, but rather, that the objective of denunciation of wrongdoing must be recognized as an essential device for maintaining respect for law.[44]

38. *Id.* Stewart sees no need to determine the impact of the retributive purpose of punishment on the maintenance of the death penalty since he defines the question in *Furman* to be the constitutionality of the death penalty as it is presently administered: "The constitutionality of capital punishment in the abstract is not, however, before us in these cases." *Id.*

39. *Id.* 452.

40. 337 U.S. 241, 248 (1949).

41. 408 U.S. at 452.

42. *Id.*

43. *Id.* 453.

44. *Id.*

Denning concludes, "The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not."[45]

Here we find the limit of the rationalist approach to punishment, for Lord Denning posits the proposition "that the punishment inflicted for grave crimes should adequately reflect the revulsion felt . . . ."[46] An understanding of this "revulsion" requires an examination of the unconscious, and of the conditions of guilt and anxiety. These, it goes without saying, are elements of the human condition, and they will not be negated by a failure to find rational justifications or purposes for punishment.

The primary utilitarian justification of punishment, however, remains its deterrent effect, both in the restraint of others from crime (general deterrence), and in the dissuading of the subject of punishment from further crime (special deterrence).[47] The classical formulation of the deterrent function of punishment posits that the threat of punishment operates as a factor at the conscious level to discourage the choice of criminal activity by someone who might otherwise be disposed to such activity. Jeremy Bentham, the most influential of the social utilitarians, suggested that the criminal law should attach enough pain to the commission of a criminal offense so as to outweigh the pleasure obtained from the criminal act, thus resulting in the deterrence from criminal behavior.[48] Bentham, how-

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45. *Id.*

46. *Id.*

47.

> The classic theory of prevention is what is usually described as deterrence: the inhibiting effect that punishment, either actual or threatened, will have on the actions of those who are otherwise disposed to commit crimes. Deterrence, in turn, involves a complex of notions. It is sometimes described as having two aspects: after-the-fact inhibition of the person being punished, special deterrence; and inhibition in advance by threat or example, general deterrence.

PACKER, *supra* note 2, at 39.

48. It should be observed, however, that Bentham did not limit the purpose of punishment to deterrence but considered the functions of rehabilitation, isolation and retribution as valid:

> The immediate principal end of punishment is to control action. This action is either that of the offender, or of others: that of the offender it controls by its influence, either on his will, in which case it is said to operate in the way of *reformation*; or on his physical power, in which case it is said to operate by *disablement*: that of others it can influence no otherwise than by its influence over their wills; in which case it is said to operate in the way of *example*. A kind of collateral end, which it has a natural tendency to answer, is that of

ever, did not restrict his analysis to the effectuation of special deterrence, but rather proposed that general prevention ought to be the chief end of punishment, through which social order can be best obtained:

> [W]hen we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent, but also to all those who may have the same motives and opportunities for entering upon it, we perceive that the punishment inflicted on the individual becomes a source of security to all.[49]

This principle of deterrence permeates the system of contemporary criminal justice, but the question of its efficacy remains open. Most critics of the deterrent purpose of punishment cite statistical evidence of the increases in crime and the rate of recidivism and conclude that punishment has had little effect either as a general or special deterrent.[50] However, such statistical evidence of increases in crime or recidivism can never be conclusive, for one may always urge that the incidence of crime would be greater yet but for the continuing threat of criminal punishment. The question of the extent to which members of the general population have formed and had reinforced, by the threat of punishment, those limits on personal conduct which conform to societal prohibitions, also remains open.[51]

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affording a pleasure or satisfaction to the party injured, where there is one, and, in general, to parties whose ill-will, whether on a self-regarding account, or on the account of sympathy or antipathy, has been excited by the offence. This purpose, as far as it can be answered *gratis*, is a beneficial one.

J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158 n.a (1970).

49. J. BENTHAM, *Principles of Penal Law*, in 1 THE WORKS OF JEREMY BENTHAM 396 (J. Bowring ed. 1843).

50. *See* W. BROMBERG, CRIME AND THE MIND (1965), where the actual increase in total crime reported as well as the rate of recidivism are cited as evidence of the lack of efficacy of punishment as a deterrent. In answering the question as to the deterrent effect of punishment, Bromberg concludes:

> The deterrence effect of punishment on potential offenders in the population, measured by the incidence of first offenders and the constantly increasing number of such offenders . . . readily answers this in the negative. As to recidivism . . . we must draw the conclusion that the majority of offenders have *not* been benefitted by incarceration.

Id. 413-14.

51. The inquiry as to the effect of punishment not only as a general deterrent but as a foundation for restraints on all social conduct, while of the utmost significance, may be an inquiry to which there can be no conclusive response. Dean

In applying the principle of deterrence to the penalty of capital punishment, all of the justices in *Furman* conceded the deterrent effect of punishment and concluded that the death penalty could be an effective deterrent. Mr. Justic White, however, argued that the present infliction of the death penalty is so infrequent and so irregular that its deterrent effect is negated.[52] While conceding the morality and utility of punishment as a general deterrent and accepting its general effectiveness, White concluded that the infrequency with which the death penalty has been inflicted in recent times has removed it from the realm of those punishments which in fact are to be preseumed to be effective as deterrents.[53] White apparently concurs in the general assumption of criminal law scholars that to be effective as a deterrent, punishment must be swift and certain.[54] This, of course, does not take into account the influence of the threat of punishment in the creation of the entire climate of adherence to social norms. Moreover, the proposals of President Nixon, made in response to *Furman,* indicate agreement with White's observations: identify certain crimes for which the penalty is relatively certain, improve the system of offender detection, and speed up the criminal process to assure swift and certain infliction of punishment.[55]

Francis Allen has raised the question of the underlying influence the threat of criminal punishment has on social behavior:

> Must it be assumed that deterrence operates only as a mere threat of force requiring a calculation of pleasures and pains by the potential offender? Or does deterrence result from a more subtle process? Is it possible that criminal penalties may affect behavior by reinforcing popular moral attitudes toward certain forms of conduct, thereby subjecting the individual to powerful extra-legal guidance and control? If so, what is the role of the death penalty in this process? It may be at least worth considering whether this most drastic expression of state power does, in the manner indicated, induce some persons to avoid the whole range of legally condemned acts and not only those directly punishable by death.

F. ALLEN, THE BORDERLINE OF CRIMINAL JUSTICE 96 (1964). Dean Allen concludes that it is most important to concede that there is no definitive response to this area of inquiry: "The point is that we do not know." *Id.* 97.

52. 408 U.S. at 310 (White, J., concurring).

53. *Id.* 312.

54. *See* C. JEFFERY, CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN 44 (1971).

55. *See* Weaver, *Strong Medicine Indeed,* N.Y. Times, Mar. 18, 1973, § 4, at 3, col. 1, where the particulars of various administration proposals are noted, including the following:

> The President would legalize execution for assassins, skyjackers, kidnappers, killers of prison guards and law enforcement officials, traitors in time of war,

Mr. Justice Marshall likewise accepts the deterrent function of punishment, but rejects the proposition that the death penalty is in any case a more effective general deterrent than imprisonment. Marshall begins by suggesting the difficulty of proving that punishment has a general deterrent effect.[56] He goes on to assert that it is simple to determine the failure of capital punishment to serve as an effective deterrent by merely noting the number of capital offenses committed; he admits, however, that the extent of its success as a deterrent will never be known, since we will never know how many persons have refrained from committing a capital offense because of fear of the death penalty.[57]

Nevertheless, Marshall cites with approval statistical studies to the effect that neither abolition nor reintroduction of the death penalty has had any effect on the homicide rates where such legislative action has occurred, and he cites studies which show that the deterrent effect of capital punishment is no greater in those communities where executions take place than in communities where they do not.[58] Finally, without denying the general deterrent function of punishment, Marshall concludes that the death penalty lacks this deterrent effect: "In light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect."[59] It should be pointed out that Marshall limits his analysis of deterrence to the effect of punishment as a conscious factor to be considered in the case of premeditated crimes; this, of course, fails to take into account the effect of the threat of punishment on the unconscious, which performs an inhibiting function on premeditated as well as unpremeditated acts.[60]

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saboteurs, spies, bombers of public buildings and anyone who commits another federal crime that results in death.

If the sentencing jury found one or more aggravating factors—such as creating risk to personal life or the national security—the death penalty would be mandatory. But a jury finding of one mitigating factor—a defendant under 18 or one who acted under duress—would be an absolute prohibition against capital punishment.

Id. col. 2.

56. 408 U.S. at 347 (Marshall, J., concurring).

57. *Id.*

58. *Id.* 348-51.

59. *Id.* 354.

60. Marshall makes this clear in a footnote:

In reaching this conclusion, I maintain agreement with that portion of Stephen's hypothesis that suggests that convicted criminals fear death more than

Mr. Justice Powell observes in his dissenting opinion that deterrence is an "appealing justification" of punishment, and concludes that statistical studies are not sufficiently conclusive to form the basis of a judgment that the death penalty is not efficacious as a deterrent.[61] Powell cites with approval[62] the opinion of Mr. Justice Marshall in *Powell v. Texas*,[63] where Marshall himself concluded that the question of the validity of the deterrent effect of penal sanctions had not achieved a sufficiently conclusive resolution to reason that "such sanctions are ineffective in any particular context or for any particular group of people who are able to appreciate the consequences of their acts."[64] If Marshall was correct in his opinion in *Powell* that it is impossible to measure the special deterrent effect of penal sanctions, how much more valid is his observation in the case of the general deterrent effect of the criminal sanction, when we face the need to inquire into the unconscious of the great mass of the law-abiding public.

Traditionally, then, the deterrent theory of punishment has focused on the conscious weighing by the criminal actor of the threat of punishment against the benefit or satisfaction to be derived from a criminal violation. The unconscious of the apparently law-abiding member of society has not been probed to consider the impact of the threat of punishment or sanction in compelling his behavior and in the development of conforming personal codes of conduct. Some commentators, such as Herbert Packer, have placed great emphasis on the unconscious influence of the threat of punishment.[65] While conceding that the influence of the threat of punishment becomes more subtle and complex at the level of unconscious motivation, Packer concluded that "[t]he existence of a 'threat' helps to create

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> they fear life imprisonment. As I stated earlier, the death penalty is a more severe sanction. The error in the hypothesis lies in its assumption that because men fear death more than imprisonment after they are convicted, they necessarily must weight potential penalties prior to committing criminal acts and that they will conform their behavior so as to insure that, if caught, they will receive the lesser penalty. It is extremely unlikely that much thought is given to penalties before the act is committed . . . .

Id. 354-55 n.125.

61. *Id.* 454-55.

62. *Id.* 455-56.

63. 392 U.S. 514 (1968).

64. *Id.* 531. *See generally* Radzinowicz, *Them and Us*, 30 CAMB. L.J. 260, 268-70 (1972).

65. *See generally* PACKER, *supra* note 2.

patterns of conforming behavior and thereby to reduce the number of occasions on which the choice of a criminal act presents itself."[66] The unconscious must be explored at this level if we are to discover the efficacy and function of criminal punishment; it is insufficient to limit our concern to the conscious motivations of those who overcome the threat of punishment and proceed to commit a criminal offense.

Punishment is often said to be justified not because it reforms offenders, but because it affords an *opportunity* to reform them. At most, punishment may result in the offender's acknowledgment of guilt, which in turn will facilitate reform, but certainly punishment does not result in this "self-awareness of guilt" in all cases. Moreover, punishment is not the only condition under which reform might take place. The central element of punishment is suffering, and for a practice to be a punishment it must involve suffering. All constraints of freedom involve suffering or deprivation (including those forms of rehabilitation which require restraints), but these have been distinguished from those constraints which follow a criminal trial and involve reprobation. It is the *constraint* following the criminal conviction which constitutes the punishment. Thus, the rehabilitation or reform which follows cannot be considered a punishment nor a purpose of punishment; it is merely concomitant to the punishment itself.

There are, finally, two additional purposes of criminal punishment which are often cited in contemporary legal literature: isolation of dangerous persons, and treatment.[67] These, too, are perhaps

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66. *Id.* 43. Packer describes the dynamics of deterrence in the "normal" unconscious:

> 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.

Id.

67. Judge Marvin Frankel presents a list of ends which contemporary commentators view as the purposes for the imposition of criminal sanctions. According to Frankel these are:

> *Retribution,* the exaction of payment—"an eye for an eye."
>
> *Deterrence,* which may be "general" (i.e., discouraging others than the defendant from committing the wrong), "special" (discouraging the specific defendant from doing it again), or both.
>
> *Denunciation,* or condemnation—as a symbol of distinctively criminal "guilt,"

best considered as activities which are occasioned by the infliction of punishment (deprivation of liberty). H. L. A. Hart effectively represented this position when he wrote that "[r]eform can only have a place within a system of punishment as an exploitation of the opportunities presented by the conviction or compulsory detention of offenders."[68] The fact that isolation and treatment of dangerous persons are not limited to occasions where punishment is intended to be inflicted suggests that the infliction of punishment merely occasions the attainment of these purposes. Preventive detention and civil commitment have as their objectives the isolation and the treatment of persons who are dangerous to themselves or others; it is impossible to distinguish the techniques employed to achieve isolation and reform where they are applied involuntarily and without criminal proceedings from those occasions where they are employed following criminal conviction. Hence, while isolation and rehabilitation of dangerous persons may or may not be socially beneficial, they are neither the purpose of nor a justification for criminal punishment.[69] Punishment has as its purpose the deprivation of its subject; "the criminal must pay." The objectives of reform, treatment and isolation have as their objects "to make men good" or "to incapacitate." It is important to maintain this distinction if one is to understand the function of punishment in the community.

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as an affirmation and re-enforcement of moral standards, and as reassurance to the law abiding.

Incapacitation, during the time of confinement.

Rehabilitation or *reformation* of the offender.

M. FRANKEL, CRIMINAL SENTENCES 106 (1973).

68. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 26 (1968). Hart emphasizes that rehabilitation cannot be a justification, and hence, not a purpose, of punishment: "It is not an alternative General Justifying Aim of the practice of punishment but something the pursuit of which within a system of punishment qualifies or displaces altogether recourse to principles of justice or proportion in determining the amount of punishment." *Id.*

69. The view that the harm inflicted and the danger threatened by the potential offender are of primary importance shifts attention from "punishment" to "treatment" and requires that the "criminal court" be replaced by the "diagnostic center." This would necessitate a major shift from the attention on "crime" to a concern with "harms," for which there would be "strict liability." Here, isolation and treatment become the central concern and purpose for detention. The notion of punishment for retribution, deterrence and denunciation fades in significance. *See generally* B. WOOTTEN, CRIME AND THE CRIMINAL LAW (1963).

III. PUNISHMENT AND THE SOCIAL BOND—A SOCIOLOGICAL VIEW OF CRIMINAL PUNISHMENT

The sociological theory of punishment denies the existence of empirical evidence to support the efficacy of deterrence and denies the appropriateness of punishment as a source of satisfaction of a personal demand for revenge. Rather, it finds in the infliction of punishment the vindication of the community value consensus and the reinforcement of social solidarity. Talcott Parsons has succinctly stated this sociological view of the function of punishment: "Punishment is primarily a symbolic expression of adherence to the common values of the *conscience collective,* and, in so far as this is the case, it is irrelevant to judge it by intrinsic standards such as its effectiveness as a deterrent to crime."[70] To understand the sociological function of punishment, it is useful to make the distinction between manifest and latent functions, between conscious motivation for social behavior and the objective consequences of social acts.[71] Robert Merton has reported on the numerous occasions where sociological observers have distinguished between the subjective disposition of social behavior, including needs, interests and purposes, and unrecognized objective functional consequences of social arrangements resulting in unintended service to society.[72] The substance of criminal punishment, from this perspective, can be viewed as having objective functional consequences for society entirely separate from the immediate subjective reasons for imposing punishment.

Emile Durkheim produced an analysis of the sociological function of punishment focusing on its latent functions or consequences for the community, rather than placing primary emphasis on the manifest function or consequence to the criminal.[73] Durkheim first suggested the necessary relationship between punishment and the social nature of crime: crimes are those acts which seem harmful to

70. T. PARSONS, THE STRUCTURE OF SOCIAL ACTION 309 (1937). Parsons bases this conclusion on the work of Emile Durkheim:

> The function of punishment is held to be to prevent the violation of rules through fear of the consequences. But Durkheim shows empirically that to a very large extent punishment does not bear this character. It is rather a symbolic expression of the community attitude toward the crime—a severe punishment is a mode of reaffirming the sanctity of the norm the criminal has broken. It is of symbolic, not utilitarian, significance . . . .

Id. 402-03.

71. *See* R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 114-38 (2d ed. 1968).

72. *Id.* 116.

73. *Id.* 115.

the society which punishes them, so that penal rules express not essential conditions of social life, but those conditions which *appear* essential to the group which observes them.[74] The origin of the notion of crime arises from violations of the collective conscience: "[A]n act is criminal when it offends strong and defined states of the collective conscience."[75] Durkheim describes crimes as acts universally disapproved of by the members of a society, acts that shock sentiments found in all healthy consciences in a given society, with the consequence that "penal rules announce the fundamental conditions of collective life for each social type."[76] Crimes, however, are not limited in the sociological view to violations of pervasive and intensive sentiments intrinsic in the society. They also include violations of and challenges to duly constituted authority, since once governmental authority is recognized and accepted, the state itself can enforce promulgated rules of conduct through the imposition of penal sanctions upon violators.[77] Hence, it may be seen that the essence of crime is not the deprivation of an individual interest, but a community deprivation: "Crime is not simply the disruption even of

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74. E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 73 (1933) [hereinafter DURKHEIM].

75. *Id.* 80. Durkheim defines the collective conscience in the following manner: "The totality of beliefs and sentiments common to average citizens of the same society forms a determinate system which has its own life; one may call it the *collective* or *common conscience.*" *Id.* 79.

76. *Id.* 72-73. It should not be concluded that Durkheim posits a universality of sentiment, since he concedes that the collective conscience can operate through leaders or administrators of the penal sanction:

> [S]imply because collective sentiments are enforced only through certain intermediaries, it does not follow that they have ceased to be collective while localizing themselves in a restricted number of consciences. This delegation may be due either to the very great multiplicity of affairs which necessitate the institution of special functionaries, or to the very great importance assumed by certain persons or certain classes and which makes them the authorized interpreters of collective sentiments.

Id. 77.

77. The power to create administrative crimes stems from the sociological function of authority: "[W]herever a directive power is established, its primary and principal function is to create respect for the beliefs, traditions, and collective practices; that is, to defend the common conscience against all enemies within and without." *Id.* 84. But Durkheim asserts that the power of authority is not limited to enforcing community sentiment: "Once a governmental power is instituted, it has, by itself, enough force to attach a penal sanction spontaneously to certain rules of conduct. It is capable, by its own action, of creating certain others." *Id.* 83.

serious interests; it is an offense against an authority in some way transcendent."[78]

The nature of punishment follows from the nature of crime. It is the collective imposition of repression to expiate the violation of the collective conscience. Durkheim defines punishment as consisting essentially of a passionate reaction of graduated intensity exerted by society through an official body, which imposes sanctions upon those violators of given rules of conduct.[79] The suffering inflicted as punishment is not justified because it satisfies intrinsic (*i.e.*, personally vindictive) impulses, but because it serves as a social defense. Durkheim justifies this refined concept of vengeance by identifying its social contribution as one of defense against what is perceived to be evil, and hence, dangerous.[80] This is not, it is argued, useless cruelty, though it may consist of a mechanical reaction or irrational movement which appears as an unintelligent attempt at destruction. Rather, the urge to punish is at its core an instinctive act of defense against what is in fact a menace: "The instinct of vengeance is, in sum, only the instinct of conservation exacerbated by peril . . . . Vengeance is far from having had the negative and sterile role in the history of mankind which is attributed to it."[81] Legal punishment as collective retribution, however, is distinguished from personal vengeance by its organized nature and its official administration. The social character of punishment is demonstrated by the fact that, once imposed, it cannot be lifted except by the government in the name of society; if punishment were merely designed for personal satisfaction, the offended party could always forgive and remit the punishment.[82] Moreover, the existence of the tribunal to which has been entrusted the administration of punishment is the fundamental factor which gives punishment its societal character and removes it from the realm of private vindictiveness.[83]

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78. *Id.* 85.
79. *Id.* 96.
80. *Id.* 87.
81. *Id.* 90.
82. *Id.*
83. Durkheim observes that it is not the codification of crimes and penalties, nor the existence of a criminal procedure, which is crucial to the societal nature of punishment, since these did not exist in primitive societies, but the existence of a tribunal, whether it be the community as a whole or a delegated authority, which administers the penal sanction:

> It is not, then, in the regulation of punishments that the distinctive organization of this type of repression consists. It is, moreover, not in the institution of

It follows from the existence of the collective conscience, which is offended by criminal acts and expiated by the infliction of penal sanctions, that punishment contributes to the existence of social solidarity: "Its true function is to maintain social cohesion intact, while maintaining all its vitality in the common conscience."[84] It is the social nature of offended sentiments which creates the social character of the demand for punishment, and hence, the basis for the social cohesion produced by the infliction of punishment. The notion is that everyone is attacked; therefore, everyone opposes the attack. It is important, however, and it should be underscored, that this is a collective reaction and not merely a general one, since the hostility arises with a unity, and it is not merely a reaction produced in a series of isolated individuals: "Crime brings together upright consciences and concentrates them."[85] It is the attack on this common conscience that requires the infliction of punishment to reinforce or maintain the solidarity produced by the commonality: "Crime thus damages this unanimity which is the source of their authority."[86] From this perspective, crimes are considered to be of two types: those which violate the collective conscience, and those which challenge the authority representative of the collective. Punishment in both cases serves to maintain the collective and produce social solidarity. Both offenses against the collective conscience and offenses against

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criminal procedure. The facts that we have just cited show quite well that that remained faulty for a long time. The only organization which meets us everywhere that there is punishment properly so called is that resident in the establishment of a tribunal. In whatever manner it is composed, whether it comprises all the people, or only a select number, whether or not it follows a regular procedure as much in the instruction of the affair as in the application of the punishment, because the infraction, instead of being judged by each, is submitted to the consideration of a constituted body, because the collective reaction has a definite organ as an intermediary, it ceases to be diffuse; it is organized.

Id. 96.

84. *Id.* 108.

85. *Id.* 102. Durkheim describes the community reaction to a criminal outrage, which he concludes is the production of a public attitude:

We have only to notice what happens, particularly in a small town, when some moral scandal has just been committed. They stop each other on the street, they visit each other, they seek to come together to talk of the event and to wax indignant in common. From all the similar impressions which are exchanged, from all the temper that gets itself expressed, there emerges a unique temper, more or less determinate according to the circumstances, which is everybody's without being anybody's in particular. That is the public temper.

Id.

86. *Id.* 103.

the official organ threaten the existence of what Durkheim labels the "essential social likenesses" and the "social cohesion" which follows from the existence of the "likenesses"; the law of penal punishment results in individual adherence to the "minimum of resemblances" required for social unity and develops community respect for the symbol of these "resemblances," which in turn guarantees them.[87]

The sociological function of punishment, then, is the restoration and maintenance of the common conscience; crime breaks a social link which cannot be restored except through expiation.[88] Thus, while punishment involves an infliction of suffering upon the criminal actor, its chief function is to maintain social solidarity. The benefits of punishment are to be found in its operation as an expiation for the law-abiding citizenry, which is the repository of the common conscience. Punishment is, in this view, designed to act upon the upright citizen, since it seeks to repair the damage done to the collective sentiments. It can fill this role only where there is a collective sentiment of sufficient strength to justify the repair.[89]

The sociological theory of criminal punishment is supported by the nature and method of the administration of punishment. For instance, there is no equivalency between the social injury resulting from a criminal act and the suffering imposed by criminal punishment, nor is there any idea that the infliction of punishment will serve as a restoration; there is, rather, a commensurability between the punishment and the amount and kind of suffering or deprivation which will satisfy common opinion. Moreover, a sense of community is derived from the establishment and maintenance of the tribunal which is to administer a system of punishment. It has been observed that lynch law is the very essence of retribution, but that it lacks that socially coalescing effect of punishment imposed by a criminal

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87. *Id.* 106. It should be noted that the sociological view of punishment does not rest on the identification of a restricted harm, nor on the dangerousness of criminal acts, but on the challenge to the collective conscience made by the criminal act:

> All the acts which offend them are not dangerous in themselves, or, at least, are not as dangerous as they are made out to be. But, the reprobation of which these acts are the object still has reason for existing, whatever the origin of the sentiments involved, once they are made part of a collective type, and especially if they are essential elements, everything which contributes to disturb them, at the same time disturbs social cohesion and compromises society.

Id. 107.

88. *Id.* 107-08.

89. *Id.* 108-09.

tribunal.[90] The existence of the court and its activity provide a more tangible focus for allegiance than the more abstruse notion of law and order, since allegiance is readily exercised as an "attitude of hostility to the lawbreaker as an enemy to the society to which we belong."[91]

George Mead has described the development and exercise of respect for law which is created by our observation of the criminal process. Mead posits that it is not the legal definition of rights and their preservation that is the center of our interest but "the capture and punishment of the personal enemy, who is also the public enemy," which in turn suggests that our respect for law is actually the obverse side of our hostility toward the criminal.[92] A second contribution to social solidarity results from the cohesion felt among the citizenry as the criminal is branded an outsider by the infliction of punishment upon him; the "revulsions" toward criminality result in a "sense of solidarity" within the community. This sense of community results in part from having excluded the law transgressor, as well as from the development in each citizen of inhibitions toward criminal acts.[93]

The recognition of the social coalescence function of punishment and its dynamic in rejecting the criminal suggests that the earlier observation that the functions of punishment are limited to retribution and deterrence, and cannot include rehabilitation as a purpose of punishment itself, is correct. While rehabilitation, as a reuniting of citizens, may be a separate social goal, it is inconsistent with the

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90. *See* Mead, *The Psychology of Punitive Justice*, in 2 THEORIES OF SOCIETY 876 (T. Parsons et al. eds. 1961).

91. *Id.* 879.

92. *Id.*

93. *Id.* 880. Mead asserts that crime and punishment are the fundamental conditions for the existence of a society:

> [T]he attitude of hostility toward the lawbreaker has the unique advantage of uniting all members of the community in the emotional solidarity of aggression. While the most admirable of humanitarian efforts are sure to run counter to the individual interests of very many in the community, or fail to touch the interest and imagination of the multitude and to leave the community divided or indifferent, the cry of thief or murder is attuned to profound complexes, lying below the surface of competing individual effort, and citizens who have separated by divergent interests stand together against the common enemy . . . . Seemingly without the criminal the cohesiveness of society would disappear and the universal goods of the community would crumble into mutually repellent individual particles.

Id. 881-82.

use of punishment as a socially coalescing force. Mead observes that we prosecute and punish the criminal while claiming a desire to reinstate the offender as soon as he indicates a changed attitude. This combination, it is asserted, is impossible, since to understand is to forgive and to deny the responsibility which the law affirms, and to prosecute is to awaken hostility in the offender and to render impossible an attitude of mutual comprehension.[94]

This suggests, then, that punishment of criminals and treatment of deviants are two distinct social activities. Punishment, turning on guilt and infliction of suffering, separates the offender from and reinforces the existing cohesiveness of society. Treatment of deviants, whether dangerous or not, is directed at reintroducing the offender or potential offender back into the social system. While treatment focuses on the offender, punishment acts primarily on the non-offender population; it serves as a social bonding agent in maintaining the values and order supported by the common conscience.[95]

The function of punishment in the community can best be observed in the primitive society. Paul Radin has reported on crime and punishment among the Basuto of South Africa.[96] There, crime, as for most societies, is a willed act which involves a deprivation by one person of the rights of another as recognized by the tribe; punishment necessarily follows crime, and takes the form of atonement

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94. *Id.* 882.

95. The English jurist Lord Patrick Devlin urges the need to recognize the elements of value and order which are the basis for society, and suggests the function of criminal punishment in maintaining these elements, and hence, in maintaining society:

> What makes a society of any sort is community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives; these latter ideas are its morals. Every society has a moral structure as well as a political one: or rather, since that might suggest two independent systems, I should say that the structure of every society is made up both of politics and morals. . . .
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> . . . .
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> . . . If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.

DEVLIN, *supra* note 33, at 9-10.

96. P. RADIN, THE WORLD OF PRIMITIVE MAN 248-49 (1953).

or reparation.[97] Radin describes the essence of criminal punishment in the primitive society: there must be a realization that the offender has disrupted the harmony of communal life, and that by his punishment that harmony may be restored.[98] While in a primitive society the essence of the harm is the material loss caused by the crime (the death of a tribesman, for example, or the loss of physical property), the harm suffered by a more complex society is the weakening of the force which compels the conforming behavior upon which social order depends.[99] Hence, the restoration of the social harmony requires not reparation for a loss, but denunciation of non-conforming behavior.

In considering the sociological function of punishment, it is inappropriate to consider any individual proceeding, for in no single instance will the benefit to social solidarity outweigh the immediate deprivation to the sentenced offender. As John Kaplan has observed: "Probably the most serious problem with retribution as a justification for punishment in our criminal system is that the idea works well wholesale, but not at retail."[100] Nevertheless, it is the failing of contemporary commentators that they have focused on the criminal actor and the questions of treatment and rehabilitation to the exclusion of the broader question of the implications of the criminal law and its system of punishment for the wider social community. Retribution, denunciation of the offender, and affirmation of the common bond of citizenship and its code of conduct are all afforded by the infliction of criminal punishment. It may be too much to say, as does Mead, that "without the criminal the cohesiveness of society would disappear and the universal goods of the community would crumble into mutually repellent individual particles."[101] Nevertheless, the punishment of the criminal underscores the prohibitions violated and unites the law-abiding citizens into a community of the

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97. *Id.*

98. *Id.* 249.

99.

> Wherever criminal justice, the modern elaborate development of the taboo, the ban, and their consequences in a primitive society, organizes and formulates public sentiment in defense of social goods and institutions against actual or prospective enemies, there we find that the definition of enemies, in other words the criminals, carries with it the definition of the goods and institutions.

Mead, *supra* note 90, at 881.

100. J. KAPLAN, CRIMINAL JUSTICE 15 (1973).

101. Mead, *supra* note 90, at 882.

self-righteous, which appears central to a society which would have law and order.

IV. PUNISHMENT AND THE UNCONSCIOUS— A PSYCHOANALYTIC[102] THEORY OF PUNISHMENT

The existence of the unconscious prevents a purely rationalistic approach to punishment; the urge to punish does not follow simply from a calculated determination that some social benefit will follow from inflicting suffering upon the guilty. It certainly is not enough to say that punishment will compel contrition on the part of the criminal, who, now relieved of guilt, will conform to societal demands. Yet we do feel compelled to distinguish between those who lack responsibility for their crimes and those who do not. This limitation on the infliction of punishment to the responsible criminal offender reveals an underlying attitude which seeks more than rehabilitation,[103] and which requires examination.

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102. An examination of the psychoanalytic insights into the desire to punish and the gratification and consequences of punishing is developed here to the exclusion of other psychological theories, not because these other theories do not offer insights, but because it is felt that psychoanalytic writings offer the basis for a comprehensive explanation of the urge to punish. "[I]mplicit in psychoanalytic psychology are a number of insights regarding crime, criminals, and the criminal law that, plainly, are of value to persons concerned with criminal justice planning and reform . . . ." Schoenfeld, *Psychoanalysis, Criminal Justice Planning and Reform, and the Law*, 7 CRIM. L. BULL. 313, 314 (1971).

103. *See* A. GOLDSTEIN, THE INSANITY DEFENSE (1967). With regard to the deterrent function, only responsible men are said to be properly subject to criminal punishment, since "there is some suspicion that the threats and the examples are likely to deter only if the person who is *not* involved in the criminal process regards the lessons as applicable to him." *Id.* 13. Goldstein maintains that the process of identification is difficult, since denial is most often practiced so that the average person is likely to be deterred only if he identifies with the offender and the offending situation. *Id.* This requires that the offender satisfy the common notion of acting with responsibility.

With regard to the retributive attitude, Goldstein asserts that the general feeling is that "a sanction ought not to be imposed in situations in which the initial impulse to anger was likely to give way, even among victims, to feelings of compassion." *Id.* 12. Hence, the retributive theory requires that the subject of punishment be blameworthy, and this in turn requires that he be like other men.

Finally, "blameworthiness" is required to separate those who are to be treated from those who are to be punished. Some must be punished because they are to be blamed; "it is widely assumed that 'blame' plays a critical role in maintaining individual responsibility and social order . . . ." *Id.* 15.

The central question remains to be answered, What is the source of the need to blame? This requires an examination of the unconscious of the general citizen.

Through an examination of the unconscious, it can be determined that punishment is not alone for the criminal.[104] A cursory examination of psychoanalytic theory would suggest that the urge to punish is a manifestation of the sadistic impulse, which relates cruelty to the sexual drive, and which takes the form of aggression against its object.[105] Nevertheless, the sadistic impulse does not seem to be a satisfactory explanation, since the desire to punish is not focused on a particular offender but on the generality of offenders. Moreover, the urge to punish is tempered by the feeling that the measure of punishment is not the quality of suffering inflicted upon a subject, but the commensurability of the punishment to the degree of the offense.[106] Nor is it sufficient to say that the urge to punish arises from some demand for revenge against the offender, since the injury has not been personally endured; the vengeance of retribution produces not so much an individual satisfaction as a communal sense of relief. Furthermore, there is, mixed with the demand for revenge for the loss or suffering of the victim of the crime, a sense of compassion for the offender who becomes the object of punishment. This can be seen in the general abhorrence of the lynching and in the demand that the infliction of punishment be done in a "humane" manner.[107] Yet, it seems evident that the urge to punish arises from

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104. P. ROAZEN, FREUD: POLITICAL AND SOCIAL THOUGHT 138-39 (1968).

105. Freud locates the origin of sadism in the aggressive or subduing activity in sexual encounters; he writes that "[s]adism would then correspond to an aggressive component of the sexual impulse which has become independent and exaggerated . . . ." S. FREUD, THREE CONTRIBUTIONS TO A THEORY OF SEX 21 (1930). Extrapolating from the manifestation of sadism in interpersonal sexual relations, Freud suggests that this impulse, which is of primitive origins, is expressed in the societal context:

> That cruelty and sexual impulse are most intimately connected is beyond doubt taught by the history of civilization, but in the explanation of this connection no one has gone beyond the accentuation of the aggressive factors of the libido. The aggression which is mixed with the sexual impulse is according to some authors a remnant of cannibalistic lust . . . .

Id. 22.

106. Professor Radzinowicz, in summarizing the essentials of the "liberal" doctrine of criminal law, describes the limiting influences on the severity of punishment:

> [A]s to the severity of punishment. This must be strictly limited. Whilst it should be proportionate to the crime, it should not go beyond the points necessary to prevent the criminal from injuring anew his fellow-citizens and to deter others. . . .
>
> [A]s to the nature of penalties. Punishment should correspond with the offence in nature as well as extent.

L. RADZINOWICZ, IDEOLOGY AND CRIME 10-11 (1966).

107. The image that comes to mind is that of the condemned man being given

a felt need in those who would have punishment inflicted. While sadism and revenge may be reflected in this urge, there is perhaps a more deep-seated, and in a sense more satisfactory, origin of the urge —to gain a measure of self-control by obtaining that reinforcement which comes from punishing those who transgress the social code, and thereby vindicating it. Friedrich Nietzsche summarized the effect of punishment in providing this reinforcement in a simple aphorism: "The object of punishment is to improve him *who punishes*,—that is the ultimate appeal of those who justify punishment."[108]

To understand the psychodynamics of criminal punishment, one must first understand the process by which one becomes a member of society and the function of prohibitions within this socialization process. Freud observed that the natural state of man is characterized by an instinctual aggressiveness, and that the function of socialization was a harnessing of this psychic force and a redirecting of it: "Civilization, therefore, obtains mastery over the individual's dangerous desire for aggression by weakening and disarming it and by setting up an agency within him to watch over it . . . ."[109] This instinctual aggressiveness is accompanied by primitive and savage urges which must be curbed if society is to be formed and maintained; the curbing of these urges is accomplished by developing adherence to a social code which inhibits their destructive expression.[110] Neverthe-

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a fine meal on the day of execution and being presented the opportunity to make peace with his God. One commentator has noted that:

> Lethal gas is certainly a painless, indeed, a pleasant form of meeting death, and humanitarian sentiment would indicate the desirability of making it a universal method of execution pending that time when civilization will have advanced sufficiently to do away with capital punishment entirely.

H. BARNES, THE STORY OF PUNISHMENT 245-46 (1930).

108. F. NIETZSCHE, JOYFUL WISDOM (K. Reinhardt transl. 1960).

109. S. FREUD, CIVILIZATION AND ITS DISCONTENTS 70-71 (J. Strachey transl. 1961) [hereinafter CIVILIZATION].

110. Freud explains the expression of the primal urges and their suppression by reference to the primal crime of patricide, followed by remorse and suppression of these urges:

> One day the expelled brothers joined forces, slew and ate the father, and thus put an end to the father horde. Together they dared and accomplished what would have remained impossible for them singly. Perhaps some advance in culture, like the use of a new weapon, had given them the feeling of superiority. Of course these cannibalistic savages ate their victim. This violent primal father had surely been the envied and feared model for each of the brothers. Now they accomplished their identification with him by devouring him and each acquired a part of his strength. The totem feast, which is perhaps mankind's first celebra-

less, the primitive instincts and native aggression remain. It has been held that the general public interest in crimes, as reported in the media or newspapers, and as depicted in movies and books, serves as proof that the primitive criminal desires remain with us, though through suppression and displacement they are controlled.[111] It follows that it is more expeditious for us to participate as onlookers in the crimes and punishments of others than to acknowledge our own urges and to suffer the consequent shame.[112]

Ranyard West, in his study of the psychological origins of law, lays down as his first premise: *"It is upon the fact of the potential criminal in every man that I would give to law its psychological grounding."*[113] It follows that the crucial element of the civilizing mechanism is a "sense of guilt," which is felt when a transgression is committed, or when there is a desire to commit a transgression.[114] These transgressions are violations of social prohibitions; Freud concluded that "every prohibition must conceal a desire." Thus, a "desire to murder actually exists and the taboo as well as the moral prohibition are psychologically by no means superfluous but are, on the contrary, explained and justified through our ambivalent attitude towards the impulse to slay."[115] The development of the social instinct, which the law serves to bolster,[116] provides an inhibition on the aggressive impulse. The development of internal control of ag-

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tion, would be the repetition and commemoration of this memorable, criminal act with which so many things began, social organization, moral restrictions and religion.

S. FREUD, TOTEM AND TABOO 247-48 (A. Brill transl. 1918) (footnotes omitted) [hereinafter TOTEM].

Freud goes on to describe the reaction to the primal crime as the suffering of remorse and the institution of social restrictions:

After they had satisfied their hate by his removal and had carried out their wish for identification with him, the suppressed tender impulses had to assert themselves. This took place in the form of remorse, a sense of guilt was formed which coincided here with the remorse generally felt. The dead now became stronger than the living had been, even as we observe it to-day in the destinies of men. What the father's presence had formerly prevented they themselves now prohibited in the psychic situation of "subsequent obedience . . . ."

Id. 249 (footnotes omitted).

111. Grotjahn, *The Primal Crime and the Unconscious,* in SEARCHLIGHTS ON DELINQUENCY 312 (K. Eissler ed. 1949).

112. *Id.*

113. R. WEST, CONSCIENCE AND SOCIETY 165 (1945) [hereinafter WEST].

114. CIVILIZATION 71.

115. TOTEM 92.

116. WEST 166.

gression is supplemented by denial of the aggressive instinct itself. The repudiation of our own aggressiveness is facilitated by imagining it in others; through projection, we accomplish "the blackening of others by forcing upon them, in our imagination, our own unconscious feelings."[117]

Thus, the criminal actor engages in conduct in which we unconsciously desire to engage;[118] we identify with the criminal in his violation of the prohibition.[119] As one commentator has observed: "[T]he offender acts out antisocial impulses which so many people would like to act out but do not dare to because of fear of the consequences. Unconsciously they identify with the criminal because of their own latent antisocial tendencies . . . ."[120] This desire to gratify our assertive instincts and our identification with the criminal actor create a sense of guilt,[121] which demands expiation. Punishment of the criminal offender relieves our own sense of guilt and reinforces the prohibition which we desire to violate.[122]

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117. *Id.* 163.

118. "Crime does not depend for its survival upon social injustice or upon individual abnormality. A very great deal of it flows from weaknesses common to almost all of us. Greed, jealousy, fear, violence are as much part of human nature as generosity, courage, integrity." Radzinowicz, *supra* note 64, at 268. *See also* Note, *Punishment: The Reward for Guilt,* 5 BUFF. L. REV. 304, 305-07 (1956).

119.

> The crime and punishment ritual is a part of our lives. We need crimes to wonder at, to enjoy vicariously, to discuss and speculate about, and to publicly deplore. We need criminals to identify ourselves with, to secretly envy, and to stoutly punish. Criminals represent our alter egos—our "bad" selves—rejected and projected. They do for us the forbidden, illegal things we *wish* to do and, like scapegoats of old, they bear the burdens of our displaced guilt and punishment —"the iniquities of us all."

K. MENNINGER, THE CRIME OF PUNISHMENT 153 (1968).

120. D. ABRAHAMSEN, THE PSYCHOLOGY OF CRIME 3 (1960).

121. Abrahamsen asserts that the identifying observers "somehow vicariously demand and accept the punishment to relieve their own guilt feelings." *Id.*

122. S. PUTNEY & G. PUTNEY, NORMAL NEUROSIS 49-50 (1964). The Putneys pose the question, Why do we punish? Their response is that "there lurks within each breast a small and secret desire to murder, rape and pillage." *Id.* 49. They then suggest the expiatory function of punishment:

> The presence of the criminal offers a convenient opportunity for projection. The adjusted man can assert that it is the murderer who has aroused his horror. He demands the killer's death, claiming to know that [he] will never change, that his vicious nature will represent a threat to society as long as he is allowed to live. Perhaps, but it is the potential murderer within that he sees so clearly
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> . . . .

Id. 50.

Freud went beyond the discovery that punishment of the criminal reinforces the suppression of the aggressive instincts to suggest that the infliction of punishment serves as a "mechanism of [social] solidarity" in the face of a violation of a social prohibition. In the observation of the criminal act, Freud found a "temptation to imitate," which creates a "fear of the contagious example." This fear arises from the fact that "[i]f some one has succeeded in satisfying the repressed desire, the same desire must manifest itself in all his companions; hence, in order to keep down this temptation, this envied individual must be despoiled of the fruit of his daring."[123]

There is a secondary benefit in punishing the criminal: he is a socially approved target for the aggression which is suppressed with other primitive urges. According to the theory of psychodynamics, if by suppression or deprivation the natural object of instinctual impulses is not available, energy is rechanneled from one object to another by a process of displacement.[124] For society in general, one justifiable outlet for aggression, which can be rationalized and can provide relief of suppressed assertiveness without creating conscious feelings of guilt, is the punishment of the criminal, whose commission of violence, violation of the laws, and failure to conform make

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Menninger suggests that the mechanism of displacement is used to expiate the sense of guilt derived from the desire to satisfy the impulse toward criminal conduct:

> The vicarious use of the criminal for relieving the guilt feelings of "innocent" individuals by displacement is no recent theory, but it constantly eludes public acceptance. The internal economics of our own morality, our submerged hates and suppressed aggressions, our fantasied crimes, our feeling of need for punishment—all these can be managed in part by the scapegoat device.

MENNINGER, *supra* note 119, at 154.

123. TOTEM 126.

124. C. HALL, A PRIMER OF FREUDIAN PSYCHOLOGY 79 (1954). Snell and Gail Putney have described the process of suppression, displacement and projection:

> Because the adjusted individual experiences the deprivations which are normal in his society, he experiences the tension which reflects chronic deprivation. This tension is interpreted as anger, with the result that he feels a continuous sense of rage, varying from mild annoyance to fury. *Needfulness is thus transmitted to rage—and then to outrage.* The individual assumes that he has been provoked by those who seem to block his desires: first his parents, later his teachers, ultimately authority in general. There is part of every man that longs to strike out at . . . society itself. . . .
>
> Yet to admit such violent desires seems threatening, and the adjusted person alienates this potential. . . . The presence of the criminal offers a convenient opportunity for projection.

PUTNEY & PUTNEY, *supra* note 122, at 49-50.

him a morally acceptable target.[125] Freud viewed this process of selecting an acceptable target for aggression to be "really one of the fundamentals of the human code of punishment which rightly presumes the same forbidden impulses in the criminal and in the members of society who avenge his offence."[126] He concluded that punishment is itself the expression of suppressed aggression, since "[n]ot infrequently the punishment gives the executors themselves an opportunity to commit the same sacrilegious act by justifying it as an expiation."[127]

The existence of society depends on the primacy of the social instinct over the aggressive or assertive instinct.[128] While most men behave as though their social instinct dominates, the fact is that the primacy of this instinct is based on a precarious restraint of the aggressive impulse, and this aggressiveness, "which we can detect in ourselves and justly assume to be present in others, is the factor which disturbs our relations with our neighbor and which forces civilization into such a high expenditure [of energy]."[129] It is a primary function of law to remedy the individual's inability to totally control the personal aggressive impulse.[130] While much social activity involves sublimation and displacement of aggression into acceptable enterprises, it is the function of the criminal law and punishment to demarcate and enforce the outer limits of aggressive expression; "[i]t hopes to prevent the crudest excesses of brutal violence . . . ."[131] Civilization, then, involves the subjugation of the individual and his impulses for the collective good, which is realized in the form of social solidarity and power.[132] Law, as the chief instrument of civilization, has as its function the implementation of the social instinct in man.[133] Freud maintained that social life is made possible when collective strength outweighs the individual and remains united against all separate individuals; this occurs when the "power of [the] community is . . . set up as 'right' in opposition to

125. Eissler, *Scapegoats of Society*, in SEARCHLIGHTS ON DELINQUENCY 295 (K. Eissler ed. 1949) [hereinafter Eissler].
126. TOTEM 126.
127. *Id.* 127.
128. WEST 159-60.
129. CIVILIZATION 59.
130. WEST 166.
131. CIVILIZATION, *supra* note 109, at 59.
132. *Id.* 42.
133. WEST 169.

the power of the individual, which is condemned as 'brute force'."[134] The grant to or seizure by the community of power, then, is the decisive step toward civilization. Law, including the system of crimes and punishment, represents the general will and negates the possibility of free realization of individual instinctual impulses; society is characterized by the rule of law, "to which all—except those who are not capable of entering a community—have contributed by a sacrifice of their instincts, and which leaves no one—again with the same exception—at the mercy of brute force."[135]

A major factor in the creation of the social bond is the negation of the individual's original hostility to the authority which would deny him free realization of his instinctual impulses.[136] As one might imagine, aggressiveness develops in the child first against the parent, and then against the authority which obstructs gratification of the primal impulses, or whatever other instinctual satisfactions he demands.[137] As has been suggested, part of this aggression is deflected;[138] some of this psychic energy, however, is invested in an identification with authority itself. West suggests that this identification with authority results from an awareness that law, enacted and maintained by the authority, is a matter of personal self-interest:

> [W]here men make laws for the government of themselves their object may be defined as *to express and to implement their own physical, mental, and spiritual needs by preserving that balance between the demands of their self-assertive and social instincts which they have agreed upon as necessary to their common social life.*[139]

This notion of law as an extended self-discipline of man may be considered as the psychological source of the obligation to obey law.[140] And the identification with law and authority serves as the source of the superego in the individual, which functions to produce social conformity.[141] Moreover, identification with authority in the

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134. CIVILIZATION 42.

135. *Id.*

136. See text at note 124 *supra.*

137. CIVILIZATION 76.

138. See text at note 127 *supra.*

139. WEST, *supra* note 113, at 169.

140. *Id.*

141. Brenner describes the function of the superego, corresponding in a general way to conscience, as:

(1) the approval or disapproval of actions and wishes on the grounds of rectitude,

formation of the superego permits the direction of aggressive impulses toward the exercise of authority, both in the relief of guilt feelings, and in the displacement of these feelings unto the punished criminal. As Freud suggested, "By means of identification he takes the unattackable authority into himself."[142]

It has been observed that "[t]he institution of a scapegoat plays an important role in ancient and primitive cultures and furnishes the background for the Christian religion as well . . . [and] the idea of the human scapegoat has never been abandoned . . . ."[143] For the individual, the renunciation of instinctual drives and aggressive impulses leads to frustration, which may be turned inward, leading to guilt feelings and the need for self-punishment,[144] or outward, in the form of war against "the enemy," or as racial or religious discrimination.[145] War is unsatisfactory because it involves such a great element of self-destruction; discrimination and persecution are unsatisfactory because they conflict with contemporary morality and liberal humanitarianism.[146] For society in general, the outlet for aggression which can be rationalized, and which can provide relief by externalizing this conflict of assertive and social impulses without creating conscious guilt feelings, is the punishment of the criminal.[147]

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(2) critical self-observation, (3) self-punishment, (4) the demand for reparation or repentence of wrongdoing, and (5) self-praise or self-love as a reward for virtuous or desirable thoughts and actions.

C. BRENNER, AN ELEMENTARY TEXTBOOK OF PSYCHOANALYSIS 126-27 (1955).

142. CIVILIZATION 76. As has been described, Freud locates the origin of the "human sense of guilt" in the killing of the primal father, and characterizes the dynamic of "the sense of guilt [as] an expression of the conflict due to ambivalence, of the eternal struggle between Eros and the instinct of destruction or death." *Id.* 79. *See generally* T. REIK, MYTH AND GUILT (1957).

143. Eissler 293. Ruth Eissler observes that while indulgence in undisguised sacrificial ceremonies "would be offensive to our conscious demands and beliefs," the need for a disguised ritual of sacrifice remains. *Id.* 293-94. Dr. Eissler suggests that this need is a consequence of the degree of repression of instinctual impulses required in modern society; "the stricter the social demands are, the more intensive will be the conflict between the aggressive impulses of the individual and these demands." She concludes, "This discontent in our civilization has to find outlets." *Id.* 294.

144. *Id.* This attitude characterizes much of existential literature. Frederick Hoffman, in considering the problem of self-assertiveness (evil) and consequential self-punishment in the novels of Dostoevski, observes that: "The initial recognition of the evil within himself, if it leads to acceptance rather than defiance, turns unconscious evil into conscious good." F. HOFFMAN, FREUDIANISM AND THE LITERARY MIND 320-21 (1945).

145. Eissler, *supra* note 125, at 294.

146. *Id.* 294-95.

147. *Id.* 295.

The ritual of sacrifice is crucial to the expiation of guilt feelings, which may be unconscious and represent repressed desires to satisfy instinctual impulses.[148] This sense of guilt requires no prohibited conduct, but only a repressed *desire* to engage in the prohibited conduct: "[A] sense of guilt could be produced not only by an act of violence that is actually carried out (as all the world knows), but also by one that is merely intended (as psycho-analysis has discovered)."[149] It is important to realize that this sense of guilt in the "innocent" is largely unconscious: "[T]he sense of guilt produced by civilization is not perceived as such either, and remains to a large extent unconscious, or appears as a sort of *malaise,* a dissatisfaction, for which people seek other motivations."[150] The ritual of sacrifice as an atonement for guilt serves a crucial function in the expiation of the unconscious feelings and in the formation of a sense of community among those relieved of the repressed feelings. The nature of the ritual of sacrifice can be seen, according to Freud, in the "manner in which, in Christianity, this redemption is achieved—by the sacrificial death of a single person, who in this manner takes upon himself a guilt that is common to everyone . . . ."[151] The criminal, as the object of punishment, takes on our guilt feelings due to our repressed desires to satisfy instinctual drives; his punishment is our redemption.[152]

It should be pointed out here that there is a blending of the expiatory and retaliatory demands. Both represent a reaction of the individual against felt attacks, one inner and the other outer; the criminal poses a direct attack, while repressed impulses also threaten expression as they are sympathetically aroused by the criminal act. The ritual of sacrifice serves both the expiatory and retaliatory

148. CIVILIZATION 84.

149. *Id.* Freud suggested at one point that a subconscious sense of guilt, arising from suppressed desires, resulted in some criminal behavior as the actor sought to justify his sense of guilt:

> [S]uch deeds are done precisely *because* they are forbidden, and because by carrying them out the doer enjoys a sense of mental relief. He suffered from an oppressive feeling of guilt, of which he did not know the origin, and after he had committed a misdeed the oppression was mitigated. The sense of guilt was at least in some way accounted for.

S. FREUD, *Some Character-Types Met with in Psychoanalytic Work,* in CHARACTER AND CULTURE 179 (P. Rieff ed. 1963).

150. CIVILIZATION, *supra* note 109, at 82-83 (footnotes omitted).

151. *Id.* 83.

152. *See* F. ALEXANDER & H. STAUB, THE CRIMINAL, THE JUDGE, AND THE PUBLIC 214-17 (1931).

needs; "[t]he necessary reactive reinforcement of our own repressions comes to expression through the principle of expiation, while the retaliatory trend serves as a revenge for the attack coming from without."[153]

The demand for expiation is itself ambivalent, since it is satisfied by contrition as well as by the suffering of punishment on the part of the criminal transgressor. It should be noted that this ambivalence is, however, complicated by the fact that the retaliatory demand stands alongside that of expiation and does not involve the same ambiguity. Nevertheless, compassion following acceptance of guilt is a direct consequence of our own feelings of self-guilt, arising from suppressed feelings of aggression which coincide with the expressed aggression of the criminal actor. Theodor Reik has suggested the redemptive role of the criminal, which arises through our desire to see the criminal actor saved; by saving the criminal, we, who share in a "sense of guilt," save ourselves as well.[154] This desire for redemption is said to be evidenced by the great value placed on the acknowledgment of guilt by confession, which is an alternative to suffering as a means to salvation. Reik, in examining the question of redemption in the criminal proceeding with reference to the significance attached to the criminal confession, began by suggesting that the criminal accusation is an implied self-accusation, since "society has its own share of guilt in that crime that had been committed."[155] The confession is viewed as having an "atoning and cathartic effect," since the confession, which implicitly includes a concealed accusation of society, permits an "unconscious identification with the criminal, the comparison of one's own psychic process with his, and the condemnation of his and our instinctual impulses."[156] Reik concludes that "both judge and audience wait for the criminal's confession to lift a heavy ban, as it were, as if to gain the possibility of a comparison with one's own psychic life, the possibility of unconscious identification with the delinquent."[157]

The process of retaliation and expiation, along with the desire for redemption through self-accusation, is exemplified in the case of William H. Heirens, charged with the murders of a 6-year-old girl whom he dismembered, a woman brutally killed in her hotel apart-

153. *Id.* 221.
154. *See generally* T. REIK, THE COMPULSION TO CONFESS (1959).
155. *Id.* 277.
156. *Id.* 288.
157. *Id.*

ment, and another woman, who was also mutilated.[158] Following extensive newspaper reports and demands for the arrest and prosecution of the murderer of these women, Heirens was arrested and injected with sodium pentothal, which produced a confession. Even though this confession was inadmissable, a tremendous sense of relief followed its obtainment. Eissler reports that "[a]fter [the confession] a tremendous relief was expressed in the daily press and the subsequent reporting of the Heirens case for a while showed an almost sympathetic tone."[159] But when Heirens repudiated the confession, a hostile attitude returned: "After the drug-induced confession however, when the murder suspect refused to give a voluntary, written confession, the attitude of the newspapers changed into one of great hostility and vindictiveness and again showed signs of apprehension and alarm."[160] It has been suggested that intolerance or hostility is the projection of guilt, while tolerance and compassion involve a partial identification and "acceptance of one's own part in every crime."[161] In "tragedy,"[162] the onlooker identifies with the hero, acknowledging "fault," but willing to join in atonement by suffering. In the process characterized by the "movie-goer" or the observer of the criminal process, however, identification stops at the moment when suffering and punishment begin, and righteous identification is made with the prosecutor who insists on punishment.[163]

Infliction of punishment and maintenance of the criminal process, then, have the functions of expiating the sense of guilt growing out of repressed impulses, and of reinforcing in a dramatic way those prohibitions which restrain the individual and which constitute a social order. As Herbert Packer concluded, the dynamics of criminal punishment involve more than merely carrying out "literal threats" against the criminal actor. It is in the symbolic operation of the criminal process that we find its true significance: "The ritual of the criminal trial becomes for all of us a kind of psychodrama in which we participate vicariously, a morality play in which innocence is protected, injury requited, and the wrongdoer punished."[164] The

158. Eissler 299-305. *See also* Kennedy, Hoffman & Haines, *A Study of William Heirens,* 104 AM. J. PSYCHIATRY 113 (1947).

159. Eissler 301.

160. *Id.*

161. Grotjahn, *supra* note 111, at 312 (emphasis omitted).

162. See note 164 *infra.*

163. Grotjahn, *supra* note 111, at 313.

164. PACKER, *supra* note 2, at 43-44. Elements of the ritual placement of the burden of community guilt are present in the theory of the drama:

criminal process serves to vindicate good over evil, and provides a subtle expression of the principle that "the wicked do not flourish." The process of criminal punishment reinforces the most basic requirement of organized society: a code of social conduct in the form of law. "These public rituals, it is plausible to suppose, strengthen the identification of the majority with a value-system that places a premium on law-abiding behavior."[165]

The psychodynamics of criminal punishment suggest that the rationalist humanitarian approach is not sufficient to explain its function or purpose. A psychoanalytic theory of punishment suggests that irrational and unconscious elements must be considered in evaluating the validity and justification for punishment. Albert Ehrenzweig, after examining the psychodynamics of punishment, conceded the importance of attending to the unconscious needs which are satisfied by its infliction:

> Far from supporting a plea for abolition of oedipal punishment, proof of that punishment's irrational origin and function demands recognition of such unreason as an inescapable element of our criminal process. For irrational urges, of course, are as real as rational considerations.[166]

V. ACCOMODATING THE NEED FOR RITUAL PUNISHMENT IN THE CONTEMPORARY CRIMINAL PROCESS

Mr. Justice Oliver Wendell Holmes, Jr., once observed that the "first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."[167] Once it is acknowledged that the community demands the punishment of offenders it is incumbent upon the law to recognize this demand and to deal with it in the design and administration of the criminal process.[168] This is not to say that

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> [T]he tragic sentiment may mean an assumption of primacy in a felt community of guilt . . . . Whether the manifestations are neurotic or healthy, the drawing of general responsibility to oneself is in sharp contrast with the melodramatic strategy: in that way of life one deals with general guilt by finding a public victim, that is, a scapegoat. At one ailing extreme, consciousness takes on excessive burdens; at the other, no burdens at all.

R. HEILMAN, TRAGEDY AND MELODRAMA 124-25 (1968).

165. PACKER 44.

166. A. EHRENZWEIG, PSYCHOANALYTIC JURISPRUDENCE 220-21 (1971).

167. O. HOLMES, THE COMMON LAW 41 (1881).

168. *See, e.g.*, M. COHEN, REASON AND LAW 50 (1950).

there are no restraints on the damands for retribution and expiation, nor that any form of punishment, including the death penalty, must be inflicted. Rather, it is to suggest that the law should not simply focus on such objectives as rehabilitation, treatment or isolation of offenders, to the exclusion of inflicting punishment which community needs demand.

How, then, to fashion the criminal justice system to accommodate the demand for punishment without negating the utilitarian and humanitarian direction of criminal reform?[169] Instead of examining any particular punishment or the relationship between certain punishments and particular crimes, it is perhaps more fruitful to consider the criminal process in general and the occasions where the retributive, expiative and deterrent objectives of punishment might be best realized. Here three alternatives will be considered: punishment administered as part of the criminal trial itself, without regard to ultimate disposition; punishment as a court-imposed sentence separable from any rehabilitative or treatment disposition; and finally, punishment as a system of fixed sentences reflecting the particular crime committed, rather than as individual sentences fashioned to meet the particular conditions of criminal defendants.

Sheldon Glueck has maintained that the work of the criminal court should cease with the finding of guilt or innocence. Instead, post-conviction procedure should be guided by a professional treatment tribunal, which would facilitate rehabilitation and treat-

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169. After an analysis of the retributive and deterrent objectives of punishment, Wheeler sets out a series of limitations which would maintain a system of criminal punishment but make it acceptable to contemporary moral and humanitarian principles. These limitations include the following:

> (1) Punishments must be proportional to the severity of crimes, and punishments must therefore be made as variable, equable, and commensurable as is reasonably possible. (2) Before a substantially new punishment may be employed, it must be shown that it is variable and equable to substantially the same degree as currently available alternatives and that it in addition serves to promote characteristicalness, exemplarity, or frugality to an extent greater than that of currently available punishments. (3) The discretion of judges and administrators is to be limited by forbidding judges from creating new punishments, forbidding administrators from creating new punishments, and requiring penal statutes to specify within the traditional void-for-vagueness bounds the nature of the punishment to be administered.

Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment,* 24 STAN. L. REV. 838, 873 (1972). *See also* Wheeler, *Toward a Theory of Limited Punishment II: The Eighth Amendment After* Furman v. Georgia, 25 STAN. L. REV. 62 (1972).

ment.[170] This proposal, on its face, would seem to negate all opportunity for the infliction of punishment, and would convert the criminal process into an admitting procedure for medical treatment and social rehabilitation.

This procedure, however, would not necessarily prevent the infliction of punishment, if we consider the criminal trial as providing more than mere determination of guilt or innocence. A first consideration is posed by the opportunity for publicity, which may be considered part of the punishment itself. When we consider the socially coalescing function of the criminal trial and the ritual of expiation, it becomes clear that full reporting of the criminal proceeding facilitates a major social function of the criminal process. While most of the current discussion of publicity and the criminal process has focused on fair trial and the benefits for the efficient and acceptable administration of justice,[171] it should be recognized that public awareness of the trial and final determination is central to the concept of ritual punishment.[172] Without publicity, the trial becomes an administrative action and loses all of its social and psychological significance for the community. Finally, publicity of a trial and conviction leads to the convicted person's awareness of community condemnation and is suffered by him as a castigation; such public exposure is in itself a punishment.

A second significant opportunity for the infliction of punishment within the criminal trial, and before ultimate disposition of the case, is at the time of the announcement of the finding of guilt. At this point, the judge may avail himself of the opportunity to *denounce* the criminal act and to *castigate* the convicted criminal actor. This would be no more than a conscious verbalization of the criminal justice process itself, since the legislature, by enacting the criminal

170. See note 21 *supra*.

171. "After a criminal case has been tried or disposed of without trial, criticism of the outcome or of the conduct of the court, attorneys, law enforcement officers or others who were involved in the case is essential to the improvement of the criminal process." ABA COMM. ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 18 (App. Draft 1968). *See also* ASS'N OF THE BAR OF THE CITY OF NEW YORK SPECIAL COMM. ON RADIO AND TELEVISION, RADIO, TELEVISION AND THE ADMINISTRATION OF JUSTICE (1965).

172.

> There is, of course, much that is done and much that needs to be done in informing and educating the public on broader questions of the relationship between crime and society, the nature of the criminal process, the conditions of confinement, and the efforts at reform. These should not be slighted . . . .

ABA COMM., *supra* note 171, at 51.

code, has denounced the conduct, and the trier of fact has castigated the defendant by finding him guilty. This criticism is suffered by the convicted since it is personal criticism which compromises his ego, and is interpreted as a rejection which is perceived as punishment. Moreover, denunciation and castigation are the essence of the ritual function of punishment, since the code of conduct is reaffirmed, the guilty are repudiated and guilt is expiated.

Under the above approach, the criminal process would be terminated at this point and the subject would then be considered for ultimate disposition, whether it be treatment, detainment or return to the community. While a stigma would be attached to having been found guilty and castigated, certainly it would be no greater than if one were sentenced in the conventional sense. Moreover, the return of the convicted person to the community would reflect an assessment by psychiatrists, social workers and the like, that the individual could now conform to the community standards for conduct, rather than that he had served a sentence which in some way reflected his guilt or the nature of his crime, and no more. It might be found that the feeling of reprobation in the community would be dissipated in the process of denunciation and castigation, rather than continued in the form of rejection and discrimination against the previously convicted.

A second approach to punishment is presented by the dual or two-part sentence. The first sentence is imposed by the court and constitutes the punishment, since it reflects the nature of the crime or the culpability of the defendant; the second is imposed as an "indeterminate" or "correctional" sentence, which reflects the need for treatment or isolation. Sir Leon Radzinowicz has reported that a modification of the idea of the two-part sentence was adopted by the British Parliament in 1908, but that it saw little use. He indicates, however, that on the European continent there was much greater hospitality to the two-part sentence, "the first related to the immediate crime, the second to the need for preventive custody."[173] Hostility to the two-part sentence can come either from those who reject the appropriateness of punishment or from those who are hostile to preventive detention, but it does represent a compromise which satisfies both attitudes to a degree. The most significant criticism from a functional viewpoint is that the two-part sentence involves a logical absurdity incomprehensible to the convicted per-

173. RADZINOWICZ, *supra* note 106, at 124.

son: as he concludes his criminal sentence, he must begin his correctional or indeterminate sentence.[174]

While some would suppress the entire practice of criminal punishment, and limit the function of criminal sentencing to providing a time for treatment and rehabilitation,[175] the most generally accepted view is one that sees a blending of considerations, including punishment, isolation and treatment. This latter view is best exemplified by the American Bar Association, which adopted a general principle of sentencing permitting broad judicial discretion: "The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant."[176] Increasingly, however, objection to the broad discretion required to balance a number of competing objectives, along with distrust of and disillusionment with the treatment or rehabilitative model, has led to a demand that sentences be correlated to the gravity of the offense, accompanied by consideration of history of past offenses and reduction in sentence for "good behavior" while confined. The American Friends Service Committee has published a report which represents this latter view in setting out two principles for criminal punishment; they are "the principle that the law should deal only with a narrow aspect of the individual, his criminal act or acts,"[177] and a corollary principle that "persons found

174. *Id.* 124-25, *quoting* Professor Graf zu Dohna, in MITTEILUNGEN DER INTERNATIONALEN KRIMINALISTISCHEN VEREINIGUNG 201-02 (N.F. 1 Band 1926). The convicted offender's probable response to the two-part sentence is anticipated as follows:

> "Imagine that an offender, having served his sentence of ten or fifteen years hard labour, is called before the Governor of the prison and told: 'To-day expires the term of your punishment. Justice requires that punishment shall now stop.' When the prisoner, however, is about to depart, the Governor adds: 'Oh no, no we must protect society: you will enter preventive detention.' Whereupon the offender asks: 'What change then is there to be in my life?' To which he will get the reply: 'Up to now you have been detained in the east wing of the prison; from now on you will be detained in the west wing.'"

Id.

175. See note 21 *supra.*

176. ABA COMM. ON SENTENCING AND REVIEW, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (App. Draft 1968).

177. AM. FRIENDS SERV. COMM., *supra* note 12, at 147. One should note that the liberal movement toward treatment and reform has to some degree been halted, partially because of dissatisfaction with the effects of treatment and reform, but even more significantly, from a humanistic concern with the dignity of man, which is in part compromised by the mechanistic view of man required by various treatment techniques. *See* Lucas, *Or Else,* THE PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, 1968-69, in MORAL

guilty of the same criminal act under the same circumstances [should be] dealt with uniformly."[178] The philosophy underlying the above proposal reflects an awareness of the sociological and psychological bases of criminal punishment, which have been neglected by reformers favoring indeterminate or preventive sentencing. The report concludes that:

> When we punish the person and simultaneously try to treat him, we hurt the individual more profoundly and more permanently than if we merely imprison him for a specific length of time. We make it more difficult for him to be received back into full dignity. And more importantly, we do not succeed in maximizing compliance with the law, since focusing on the criminal rather than the crime tends to support the fiction that a few "criminals" are the most frequent and most dangerous law-breakers rather than the more tenable view that criminal acts are committed by a very large number of persons, perhaps the vast majority, who are spread throughout all sectors of society.[179]

This approach, of course, leads to a vast reduction in the discretionary power of the judge, and places a responsibility on the legislature to determine penalties (punishments) for the various offenses.

Reflecting a distrust of treatment techniques and a lack of faith in predictive techniques, United States District Court Judge Marvin Frankel has likewise called for a reduction in judicial discretion and an identification of the purposes or objectives of particular sentences. Judge Frankel centers his criticism on the present primacy of the

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PROBLEMS (J. Rachelo ed. 1971), where Lucas describes the view of punishment as humanitarian, in contrast to rehabilitation:

> Contrary to their protestations, the enlightened reformers who would replace punishment by a form of treatment chosen scientifically by sociologists are more illiberal and inhumane than their opponents. The traditionalists at least regard people as people to be addressed in the second person as rational agents, not discussed in the third and manipulated as experimental material. Laws, rules and moral precepts can be understood and can be rationally obeyed: and penalties, although essentially heteronomous, are also external. In order to secure obedience to the law, they do not take it upon themselves to alter a man's personality against his will, but only the factors he takes into account, and by bringing certain adventitious factors into his calculations, hope to tip the balance in favor of the right and against the wrong.

Id. 234.

178. *Id.* 148.

179. *Id.* 147-48.

trial judge's discretion in sentencing: "Our practice in this country, of which I have complained at length, is to leave that ultimate question [of length and severity of sentence] to the wide, largely unguided, unstandardized, usually unreviewable judgment of a single official, the trial judge."[180] Frankel cites the United States Supreme Court opinion in *Gore v. United States*[181] for the principle that '"the apportionment of punishment,' its 'severity,' its 'efficacy or futility,' all 'are peculiarly questions of legislative policy.'"[182] The legislative responsibility would be discharged, according to Frankel, by inclusion in the criminal code of provisions "listing and defining the legislatively decreed purposes or objectives the community has chosen to pursue, for the time being, by means of criminal sanctions,"[183] and by requiring the judge to set out in his sentence "which among the allowable purposes were the supposed bases for each particular sentence."[184] In this way the punishment aspect of the sentence would be identified and emphasized in a way that would serve the community. The reduced judicial discretion would be exercised so as to produce a sentence profile, which would be open to community examination. Frankel describes this sentence profile as "a checklist of factors that would include, wherever possible, some form of numerical and other objective grading. . . . I suggest that 'gravity of offense' could be graded along a scale from, perhaps, 1 to 5. Other factors could be handled in the same way."[185] This proposal, admittedly providing a compromise between the punishment and treatment-isolation objectives of the criminal sanction, does provide a basis for requiring the imposition and identification of the "punishment" elements of the sentence. It thus allows for achievement of the denunciatory, retributive, and expiatory demands of the community in satisfaction of the urge to punish.

It should not be overlooked that requiring the legislature to assign punishments for crimes and requiring the judges to set out the purposes to be achieved by their sentences not only vindicates the community's need to punish, but also places constraints on the ability to punish, so that sadism, vengeance and discrimination may not be given full vent. As one commentator observed: "The prin-

180. FRANKEL, *supra* note 67, at 112.
181. Gore v. United States, 357 U.S. 386, 393 (1958).
182. FRANKEL, *supra* note 67, at 105.
183. *Id.* 107.
184. *Id.* 108.
185. *Id.* 114.

ciple underlying the desire to limit the power of judges and administrators to invent, select, and modify punishments is the principle of limiting governmental power generally."[186] If the urge to punish is inherent in socialized man and is demanded by a civilized community, it is perhaps incumbent upon us to recognize that urge and to cope with it, both through assignment of penalties for specific crimes and through the limitation on judicial discretion which results from the requirement of a justification for all criminal sentences.

VI. CONCLUSION

A rationalist utilitarian approach has come to dominate American criminal law theory. This approach has sought the justification of punishment in a restricted retributive function and in deterrence, both special and general. While some have urged rehabilitation and isolation of dangerous persons as the proper objectives of the criminal process, these are not the functions of punishment, but merely activities accomplished as a consequence of detention. An examination of the sociological contribution and the psychoanalytic elements of the dynamics of criminal punishment suggests the limitations of the rationalist approach. The sociological theory of punishment holds that punishment serves to maintain community values and order, by identifying and attacking the violator of the collective conscience, and by stimulating the existence and maintenance of the community itself. A psychoanalytic examination of punishment suggests that it serves to assuage a sense of guilt, arising from repressed instinctual urges to violate societal prohibitions, by reinforcing those prohibitions through the ritual denunciation of the criminal actor and the expiation of his offense. Criminal punishment serves, then, as a social ritual which gives rise to a sense of community, served, in turn, by the effect of punishment in reinforcing those prohibitions on the exercise of instinctual urges which would lead to social disorder. The criminal process can accommodate and

186. Wheeler, *Toward a Theory of Limited Punishment II: The Eighth Amendment After* Furman v. Georgia, 25 STAN. L. REV. 62, 82 (1972). Wheeler asserts that "treating" the criminal rather than "punishing" him may result in excesses in use of state power. He cites a proposal of Dr. Karl Menninger, whom he describes as a critic of all punishment, that all criminals be removed from general society for life for even petty crimes if it should be determined that they cannot be treated and rehabilitated. *Id. See* Menninger, *Medicolegal Proposals of the American Psychiatric Association,* 19 J. CRIM. L. & C. 367, 376 (1928) (now J. CRIM. L.C. & P.S.).

restrict the nature of the inflicted punishment by including within the trial process a denunciation of the criminal offense and a castigation of the criminal actor. It is, however, in the legislature's assignment of sanctions for offenses and in the judge's determination of sentence that the needs of the community to punish can be satisfied and restricted, through the identification of that part of the sanction or sentence which is imposed in satisfaction of the urge to punish. Erik Erikson has suggested that the ritual of punishment is endemic in human society:

> [T]he judicial element has become an indispensable part of man's phylogenetic adaptation as well as his ontogenetic development. It is hard to think of a ritual which does not include a judicial discrimination between the sanctioned and the out-of-bounds, the holy and the profane, the elect and the damned—to the Last Judgment.[187]

The ritual of punishment, then, is inherent in socialized man; it should be recognized and limited by legislative assignment of penalties and judicial identification of the basis for sentencing.

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187. Erikson, *supra* note 16, at 612.