

Criminal Law and its Influence upon Normative Integration

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Volume 7, Number 1, January 1974

URI: <https://id.erudit.org/iderudit/017031ar>

DOI: <https://doi.org/10.7202/017031ar>

[See table of contents](#)

Publisher(s)

Les Presses de l'Université de Montréal

ISSN

0065-1168 (print)

1718-3243 (digital)

[Explore this journal](#)

Cite this article

Zupančić, B. (1974). Criminal Law and its Influence upon Normative Integration. *Acta Criminologica*, 7(1), 53–105. <https://doi.org/10.7202/017031ar>

Article abstract

INFLUENCE DE LA JUSTICE CRIMINELLE SUR L'INTEGRATION NORMATIVE

Ce document est separé en trois parties : 1) la théorie de la peine ; 2) l'aspect psychologique de l'intégration normative ; 3) l'aspect sociologique de l'intégration normative. Il trace les grandes lignes des propositions suivantes.

1. L'ordre social engendre l'anomie, si la structure sociale et la conscience sociale dominante ne correspondent pas au degré de développement de la société.
2. L'anomie affecte la société dans son ensemble, mais l'intensité du processus anémique varie selon les divergences entre les intérêts d'une strate sociale particulière et les intérêts représentés par la justice criminelle.
3. Le processus anémique démontre la nécessité du changement dans la structure normative de la société. Il ne réussit pas cependant à faire la différence entre les normes socialement utiles et celles qui ne le sont pas.
4. La structure sociale normative dominante est un système fortement articulé. Comme tel il ne peut changer que dans son ensemble et non pas de façon partielle. Le choix doit être fait, soit de la défendre comme un tout, ou de ne pas la défendre du tout.
5. La structure normative, à ce moment doit être défendue en tant que tout, particulièrement parce que le processus anémique l'attaque en tant que tout.
6. Le droit pénal influence les sentiments collectifs à travers la peine. Plus le sentiment collectif est intense plus il est renforcé par la punition. Si cette intensité n'est pas assez forte, la peine ne fera que dissimuler l'anomie ou même catalysera le processus anémique.
7. L'influence de la peine n'est pertinente qu'en fonction des citoyens qui respectent les lois, parce que c'est là que le sentiment collectif est suffisamment intense.
8. Le manque d'identification au système normatif dominant affecte la théorie sociale et ceux qui sont chargés de faire respecter la loi. Cette tendance liée à la concentration de l'attention sur des délinquants, produit ou tend à produire une application de la justice criminelle moralement neutre.
9. Si nous voulons que la peine ait une influence positive sur l'intégration normative, si nous voulons que la peine soutienne le sentiment collectif il faudrait que sa connotation morale soit préservée.
10. Toutefois, la peine n'est pas une solution au problème de l'anomie. Dans le système de justice actuel, elle peut le diriger vers différents secteurs de la vie sociale ou le forcer à changer. Devant les besoins toujours plus grands de changement des valeurs et structures sociales, ses buts devraient être de défendre les valeurs sociales de base qui expriment les besoins de la société entière. Cependant elle ne peut défendre ces valeurs qu'en défendant le système normatif dans son entier, l'anomie ne pouvant se développer dans certains secteurs sans affecter les points vitaux de la structure normative.
11. En conséquence l'application de la justice criminelle aura nécessairement un effet ambivalent : elle intensifiera l'intégration normative de certaines normes à l'intérieur de certains secteurs de la société, et en même temps elle augmentera l'anomie de certaines normes dans d'autres strates sociales.

**CRIMINAL LAW AND ITS INFLUENCE
UPON NORMATIVE INTEGRATION**

Bostjan Zupančič

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This paper was submitted to Harvard Law School in partial satisfaction of requirements for the degree of LI. M.

The necessity of false values. —
One can refute a judgment by proving its conditionality : the need to retain it is not thereby removed. False values cannot be eradicated by reasons any more than astigmatism in the eyes of an invalid. One must grasp the need for their existence : they are a consequence of causes which have nothing to do with reasons.

NIETZSCHE
(The Will to Power)

INTRODUCTION

Normative integration is a social process in which social norms get accepted, that is, integrated. Since the process as a whole depends on the nature of the norm itself it might be useful to describe the nature of the social norm before embarking on the discussion about normative integration. The norm, as the name already suggests, will be most often defined according to its deontological function and thereby reduced to its moral connotation. In theology, for example, this is possible because the normative function derives its justification from a transcendental entity and therefore there is no need to explain the social origin of the norm. It is only recently that the other aspect of social norms has been described : insofar as the norm actually lives in society through the individual behavior, it is not only prescriptive, but also descriptive. In linguistics, it has been said, the grammar does not only say how the people ought to use the language, but actually describes what is happening when the people speak and write. The same holds true for the games where the norm actually is a constitutive element of the game in the sense that there would be no game should the players not obey the rules from the very beginning. Paradoxical as it may seem, this is also true for society and therefore also for religion as the first explicit formulation of the social norms. However, in the area of law the norm was traditionally regarded as a prescription of how the people ought to behave. Throughout history the norms of the law derived their justification from a moral ideal, most often from a religious one (the doctrine of natural law is the latest example).

This had, as a consequence, an exclusively deontological concept of the legal norm.

Consequently, legal reasoning was essentially independent from pragmatic policy considerations, although these actually influenced the creation of norms through the underlying morality, which, on the other hand, was the result of social needs. Without direct interference of policy considerations, the legal reasoning was seemingly independent from them. Since the legal norms and their interpretations lived in a relatively closed and self-sufficient system, legal reasoning and the whole legal system were autonomous. The norm was understood as independent of reality, moreover reality was supposed to live up to the norm. Whereas in science the laws are formulated to express and explain reality, in law the reality was understood as something that has to be the function of the law. The dominant morality, although formed according to the needs of those who proclaimed and enforced it, was more or less indiscriminately accepted. In other words, the law corresponded to the needs of society at the particular stage of development and the function of the law was understood as purely prescriptive. This principle has been based on the firm foundation of morality.

However, at a certain stage of development it becomes clear that the law is but *la cristallisation du passé pour étrangler l'avenir*. But it was not only the anarchists (Kropotkin) who came to that conclusion. Russell wrote : « In the modern world, the principle of growth in most men and women is hampered by institutions from a simpler age » (see Chomsky, 1971). When it becomes clear that the law is only a means toward a certain end, then it also becomes clear that there is a possibility of a frequent disjunction between means and ends and the notion of law is therefore understood instrumentally. On the other hand, it also becomes clear, that the norm expresses the reality, that it is not only *prescriptive*, but also *descriptive* (see Wittgenstein, 1966).

The law, because of its occasional inadequacy for attainment of implicit ends, transcends its positivistic definition. The norm ceases to be sacrosanct and is manipulated by the teleological interpretation to an unprecedented extent. Its inflexibility becomes occasionally a serious obstacle to the attainment of underlying policies. Consequently, the logical analysis has to be extended beyond the norm, i.e., it is applied according to the interest the

norm is supposed to sustain. The legal reasoning becomes purposive (Dworkin, 1969).

Consequently, the norm can be defined as a *delimitation of interests*. The interests in the last analysis depend on power. This view, devoid as it is of any moralistic approach, points to an anomic situation because the morality, which used to serve as a powerful rationalization, is no longer internalized. This morality was strong after the bourgeois revolution when the aspirations of the new social order were clear and accepted. It corresponded to the needs of the society as a whole, although it served primarily the interests of the leading social class. This morality became the dominant social consciousness and expressed itself through social practice, thereby reinforcing its own basis, the collective sentiments.

This morality was expressed in the law. The law was enforced through established institutions. It permeated the social consciousness, because it was disposed to accept it as inevitable. In other words, there was a *dialectical relationship between the law and social consciousness*. This relationship can only be defined dynamically as one of mutual positive reinforcement. It meant the acceptance of law and its underlying morality, a process which we will term *normative integration*¹.

1. If normative integration is meant as integration of norms as defined by law, then it is in positive correlation with the *normative homogeneity* of society. The normative homogeneity of society can be seen *vertically*, that is, how many norms are shared in all the classes, but it can also be seen *horizontally*, that is, how many norms are accepted in the same class. Here, the values that developed historically will very often remain, even after they no longer serve a purpose and even inhibit social development. In this respect American society is very different from the European one. In Europe, the old morality of aspiration and duty did not completely disappear after revolution. The old aristocratic values remained alive, transformed themselves into bourgeois values and mingled with them. Class inhibitions, for example, are more evident in Europe than they are in the United States, although the classes are structured in almost the same manner. The new bourgeois morality, because of its only partial acceptance, allowed for the development of new ideologies that questioned the capitalist one. From this, two consequences at least followed: first, the integration of the capitalist normative structure was not as intense as in America, which was virtually born into capitalism. Capitalism, with all its good and bad consequences, could never be as intense as in America: there were too many conflicting values which inhibited the entrepreneurial activity and allowed only for a limited development in this direction (see Duverger, 1967). Second, because of the less intense internalization of the dominant ideology, there was enough place for development of alternative ideologies as Communism, Socialism, etc. These in turn enfeebled the process of internalization of the dominant ideology. This made the European social conscience more « eclectic » and skeptical.

Anomie is the counterpart of normative integration and its apparent negation. It cannot be defined as an absence of norms, because there still exists the enforced normative system. But this system is not internalized any more because of the disjunction between the social and cultural structure (Merton, 1971). However, anomie is normlessness only from the standpoint of the officially enforced normative system. Apart from that, it is an expression of a definable set of norms which is opposed to the norms of social structure. Anomie is therefore only a particular kind of morality². The criminal population, for example, has very well defined aspirations and criteria of good and bad. The fact that this morality is contrary to the legal system does not mean that the criminal population does not have any norms at all. Their morality is in fact the only logical response to the social conditions in which they live. If they behave according to the dominant social consciousness, they often renounce their own interests.

This morality, incongruent as it is with the socially proclaimed one, is perceived from the standpoint of the existing social order only as a negation and not as an attempt of constructing a new positive normative structure. Anomie is diffuse, negative in its manifestation and there are no social institutions that would express it. It is not structured in itself. As such it is *not selective* and attacks the existing normative structure as a whole (Erikson, 1968, p. 173). It is indiscriminate as to which social values have to be preserved because they, in fact, are socially useful. Nevertheless, it is an anticipation of the new morality and its function is to diminish the influence of the old one.

Merton (1971, p. 460-465) describes three responses to anomie : ritualization, retreatism and rebellion. All of them are indiscriminate and except for rebellion they do not have any genuinely constructive background. Because of this, it seems to be necessary to sustain the existing normative structure by fostering normative integration until the old can be replaced by a more suitable new normative structure.

2. Erikson (1968, p. 174-175) describes the concept of negative identity, which as an individual phenomenon is but an analogue to anomie as a social process. Nevertheless, the rejection of identification with the existing social institutions logically implies an underlying set of unexpressed and not articulated values which are in conflict with those offered by the society.

From what was said above it would follow that the stronger the previous normative integration, the stronger the following anomic reaction. This is so because the intense normative integration petrifies the social contradictions inherent in the existing social order. The collective sentiments become conditioned to certain responses and the ideology is internalized to a greater extent³. When this response, which is also manifested in the law, becomes inadequate, it amplifies the dimension of its own incongruity with actuality. In the society and in the individual there is little place for the new social and individual consciousness and identity to develop in a positive way. The strength of the old inadequate consciousness prevents the positive reaction to arise and consequently the individual and the society inevitably react negatively to the extent the previous internalization of values conflicts with the existing social conditions. Therefore, the more constructive the previous normative integration, the more destructive its anomic reaction. The more homogeneous the society is in the phase of normative integration, the more heterogeneous in the time of anomie.

But even though we accept the inevitableness of this trend of development, we are still concerned with the defense of *certain* norms against the threat of their anomic negation. But since it is impossible to select some norms which ought to be defended and exclude others, we have to defend the system as a whole. The legal system is a highly articulated system of interdependent rules and it expresses the normative structure of a certain social order. It is not possible to change only certain values and rules without changing the system as a whole. Exactly because we deal with a *system* and this system also represents certain interests, the evolutionary change is limited in the possibility of its extent. Once the law has exhausted the bounds of possibilities for change in the framework of a given social structure, it has to be enforced as a whole, not only partially. Further concessions are politically unacceptable, although the rigid enforcement may speed up the anomic processes.

Punishment as a moral reaction, that is, as the morally understood criminal responsibility, has a positive effect on the

3. Chomsky (1973) has elaborated on the processes that make intellectuals internalize and legitimize ideology although they could be aware of its inadequacy.

sustainment of normative integration and therefore a negative, a diminishing effect on the anomic processes.

However natural the anomic response may be, it is indiscriminately destructive towards all the norms. Therefore, it is desirable to keep it under control. This cannot be achieved merely by morally neutral response to the violation of norms. However difficult it may be to find or construe the moral base to punishment, this is the postulate of the administration of criminal justice ⁴.

It is only natural that the lack of identification with the moral standards started to permeate the social institutions which are the very embodiment of the morality underlying the criminal law. This is symptomatic and logical. However, in the present moment there is also a need for preserving the moral nature of the norms, at least those that prohibit the unquestionable *mala in se*.

If the criminal law is not totally devoid of influence upon the normative integration, and we believe it is not, this attitude of moral neutrality, which seems to pervade the modern theory of criminal law, is wrong because it fails to establish any positive differentiation between various degrees of social adequacy of the norms. It generalizes the negative attitude towards the moral connotation of the norm, just as the criminal anomic response does this on the other side of the line of power.

The doctrine of the morally neutral role of the criminal law, fortunately, is still mainly of academic nature (and importance). The majority of the systems of criminal law and administration of criminal justice still, and inevitably so, function on the premise of moral responsibility. The derision of this moral attitude on the part of theory, we believe, is out of place.

This kind of theory, here we refer mainly to the traditional *Scuola positiva* with Ferri and its modification by Gramatica and Marc Ancel into *la Défense sociale nouvelle*, deals with utilitarian arguments, supposedly of humanitarian nature. It proposes to replace the syllogism crime-responsibility-punishment by another

4. Szasz, 1963, p. 97 : « Bazelon offered another reason for not wishing to punish offenders. He dislikes blaming people, and *does not wish to pass moral judgments* on their conduct. As I understand the judge's job, however, this is precisely what he is expected to do. » (Emphasis added) (Szasz refers to Judge Bazelon's Isaac Ray Award Lectures : *Bazelon, Equal Justice for the Unequal*, 1961).

sylogism crime-establishment of dangerousness-treatment. Besides the arguments concerning fundamental human rights, which would obviously be endangered by this kind of development, this theory and its variations can be defeated on its own premises. This doctrine looks upon morality as something that is *eo ipso* irrational and does not serve any practical purpose. It juxtaposes its pragmatic arguments to this « irrationality ». Consequently, if it is possible for us to show that morality in the criminal law serves very practical purposes of normative integration, it would be proven that the doctrine is wrong.

It must be clear here, that the nature of argumentation in this paper is not different from the one described above. My argumentation is pragmatical and purposive too. It refers to questions outside the criminal law. We are not juxtaposing two different kinds of thinking, the a prioristic with the purposive, we are only confronting two levels of purposive legal reasoning.

We will examine *punishment*, the *psychological* aspect and the *sociological* aspect of normative integration. Criminal law is enforced upon the presumption of punishment as an effective means of control of human behavior. Therefore, the nature of punishment and its influence upon the human behavior has to be examined first in order to prove that punishment has the effects it is presumed to have. Normative integration, on the other hand, is both an individual and a social process. Punishment is always inflicted upon the individual, it cannot be otherwise, therefore it is important to see how it does influence the acceptance of social values in those punished but also in those who *only know that somebody was punished* for certain behavior. Here the process becomes social and becomes different from the one going on in the individual consciousness. Punishment is much more important in relation to those who obey the law than in relation to those who violate it. This has been an accepted hypothesis.

But, as we will see, punishment is no longer easy to define. In the times of corporal punishment there was no pretense about the influence of punishment upon the offender's personality. Today, the aspirations behind punishment are different and therefore punishment itself has changed considerably⁵. Very often, however,

5. Compare, Friedrich Nietzsche, 1965, sec. 201, p. 114 : « There is a point in the history of society when it becomes so pathologically soft and tender that among other things it sides even with those who harm it, the criminals, and does this quite seriously and honestly. Punishing some-

it was only the label that has been changed and one has to take care to distinguish the change in denotations from the change in the actual treatment of offenders. With the actual change in the nature of punishment, however, there also emerges a need for the change in the role of the criminal law. Corporal punishment was a much lesser invasion of privacy than the attempt to change the offender's personality. Therefore, *a fortiori*, the safeguards of the criminal law have to be preserved.

In every society punishment is associated with moral stigmatization and while this stigmatization is in itself a part of punishment it is also an expression of the law-abiding citizen's individual reaction to punishment. It indicates the successful internalization of moral norms. Psychology has developed concepts that explain how, in human personality, certain agencies inhibit the morally unacceptable behavior. It would be the aim of enforcement of the criminal law to sustain these agencies in their inhibiting functions.

When people communicate with one another there develops a social conscience which is more than a simple sum of individual consciences. It is less flexible and relatively independent. It contains the same moral inhibitions and since it is more difficult to change, it is important for the criminal law to rely on it and to sustain its moral functions.

We, therefore, have three questions. *First*, one has to *define punishment* and since punishment is always a concrete action in relation to the individual, punishment can only be defined in this connection. *Secondly*, punishment has its immediate influence on the *individual* who is being punished, but it also has an influence upon *other* individuals and supports their moral convictions. *Thirdly*, punishment influences the social consciousness and it is therefore necessary to examine *how* and *under what conditions* this occurs.

Accordingly, this paper is divided in three sections : I. Theory of Punishment, II. The Psychological Aspect of Normative Inte-

how seems unfair to it, and it is certain that imagining « punishing » and « being supposed to punish » hurts it, arouses fear in it. « Is it not enough to render him *undangerous* ? Why still punish ? Punishing itself is terrible. » With this question, herd morality, the morality of timidity, draws its ultimate consequence. Supposing that one could altogether abolish danger, the reason for fear, this morality would be abolished, too, *eo ipso* : it would no longer be needed, it would no longer *consider itself* necessary. »

gration and III. The Sociological Aspect of Normative Integration.

We will trace the outline of the following propositions :

1. Social order generates anomie, if social structure and the dominant social conscience do not correspond to the stage of development of society.
2. Anomie affects the society as a whole, but the intensity of anomic processes varies according to the discrepancy between the interests of the particular interest stratum of society and interests represented in criminal law.
3. Anomic processes indicate the necessity for change in the normative structure of society. They fail, however, to differentiate between the norms which are socially useful and those which are not.
4. The dominant normative structure of society is a highly articulated system. As such it can change only as a whole and cannot change partially. The choice has to be made whether to defend it as a whole or not to defend it at all.
5. The normative structure, therefore, has to be defended as a whole, especially because the anomic processes attack it as a whole.
6. Criminal law influences collective sentiments through punishment. Punishment reinforces collective sentiments inasmuch as they have a sufficient level of intensity. If the level of intensity is not high enough, punishment will only reduce the visibility of anomie or even catalyze the anomic processes.
7. The influence of punishment is, therefore, relevant primarily in relation to the law-abiding population, because it is there that the collective sentiments are sufficiently intense.
8. The lack of identification with the predominant normative system has affected social theory and the agencies which enforce criminal law. This tendency, together with the concentration of attention upon individual offenders has produced or tends to produce a morally neutral application of criminal law.
9. If we want punishment to have a positive influence upon normative integration, if we want punishment to sustain or enhance collective sentiments, the moral connotation of punishment must be preserved.

10. However, punishment is not a solution to the problem of anomie. In the system of formal justice it can channel it into different areas of social life or force it to take a different form. In the situation of the progressively advancing need for change of the social and value structure, its aim must be to defend the basic social values which express the needs of the society as a whole. It can defend them, however, only by defending the normative system as a whole, because anomie cannot be allowed to develop in some areas without affecting the vital centers of the normative structure.

11. Consequently, the enforcement of criminal law will necessarily have an ambivalent effect : it will intensify normative integration for some norms in some strata of society, and at the same time it will enhance anomie for other norms in other strata of society.

A. THEORY OF PUNISHMENT

Every legal norm must have a sanction. Without sanction, the norm is a mere recommendation, it is *lex imperfecta*. Criminal law differs from other branches of law, not by the fact that it punishes, but by *the nature* of its punishment. Those areas of social life that are believed to be very important are protected against acts which would harm them, by the kind of punishment which affects not only personal property but also personal liberty. While the aim in other disciplines of law is to *influence* behavior, the aim of criminal law is more absolute. Its postulate is to *eliminate* certain kinds of behavior.

Criminal law defines the conditions for criminal responsibility. Criminal responsibility is the bridge between the criminal act and its punishment. It contains all the positive and negative conditions which have to be present in order to warrant punishment (conditions such as *mens rea*, sanity, causal nexus between the deed and the consequence, the correspondence of the act to the abstract definition of the criminal law, etc.). Because of its *legal* importance the question of criminal responsibility often becomes the center of inquiry. It invites ethical argumentation and is often a barrier to a realistic discussion of the nature of the criminal law.

Socially the essence of the criminal law is not criminal responsibility, but punishment. Punishment and its influence upon

the individual and the society is the central question. If punishment proves to be an effective instrument of social control, then criminal law has its *raison d'être*; if not, then it is just an atavistic aggressive response, the attitude of hostility. Therefore, the nature of punishment and of its effects is the preliminary question in defining the role of criminal law.

What is punishment? As it is usually understood, and criminal legal theory does not go beyond this, it is *functionally defined suffering*. The function is twofold: first, it is a retribution for the behavior that frustrated the one who inflicts punishment and, second, it is expected to alter this undesirable behavior in the future. From the standpoint of the one who is punished, punishment is *frustration causally linked to the past behavior*.

The only scientific definition available today is the behaviorist definition of punishment.

1. THE BEHAVIORIST DEFINITION OF PUNISHMENT

In the behaviorist doctrine (see Skinner, 1953) punishment is a phenomenon that influences the process of learning and the process of behavior modification. Every human behavior which is followed by suffering is negatively reinforced. Punishment, be it a natural consequence of behavior or consciously inflicted, is withdrawing the positive reinforcer of the respective behavior and/or presenting the negative reinforcer.

« A positive reinforcer is any stimulus the presentation of which strengthens the behavior upon which it is made contingent. A negative reinforcer (an aversive stimulus) is any stimulus the withdrawal of which strengthens the behavior. »

The effect of punishment is not, as it is usually presumed, the opposite of award. While positive reinforcement actually changes not only behavior but the personality behind, negative reinforcement works only as a counterbalance to positive reinforcement that has already resulted in a certain pattern of behavior. Consequently, one may say that while a positive reinforcement of behavior may stand alone and therefore really guide the behavior, the negative reinforcement is always posterior to positive reinforcement and there is always a conflict between them. If there were no positive reinforcement of the undesirable behavior, there would be no undesirable behavior, so that the actual contrast exists between positive reinforcement of certain behavior

and the absence of *any* stimulus, and *not* between the positive and negative reinforcement.

The effect of punishment is not the opposite of the effect of award, although the behavior would occasionally suggest that. While a positive reinforcement may change the behavior permanently, the negative reinforcement will be efficacious only if in its strength and duration it counterbalances the positive reinforcers of the respective behavior. A habitual property offender, for example, would have to be constantly and consistently punished and his behavior controlled in order to neutralize his behavior pattern. A murderer, on the other hand, if the murder was committed because of family tension, would not have to be punished at all, if we assume that the positive reinforcement of his behavior was eliminated with the death of the murdered person.

If we have the combination of consistent positive reinforcement of undesirable behavior and occasional, inconsistent punishment, the latter will be ineffective : the undesirable behavior responses tend to reemerge and, as it was proven in animal experiments, in the long run the total number of undesirable behavior responses tend to be the same, with or without punishment.

On the other hand, behavior which has consistently been punished becomes the source of conditioned stimuli which evoke incompatible behavior. It establishes aversive conditions which are avoided by any behavior of « doing something else » (Skinner, 1953). No change in the strength of the punished response is implied. The change of the undesirable behavior can only be accomplished by positive reinforcement of different behavior.

Apart from the question of its efficacy, punishment has several undesirable byproducts. Obviously, the most important one is the conflict between the urge towards the original response, that was merely suppressed and the fear and anxiety evoked by negative reinforcement.

If, unorthodox as this may be, we shift here the perspective and use a psychoanalytical explanation, we are obviously defining the neurotic condition. Punishment is frustration and if it cannot be overcome by defense mechanisms, the neurotic condition of inner conflict emerges and develops either into a chronic condition of fear, anxiety and psychosomatic troubles and/or behavioral escapes.

If punishment is to have any effect on the behavior, it has to be consistent⁶. Every undesirable response has to be punished immediately. Without this consistency, of course, the disappearance of the undesirable behavior has to be attributed to the absence of its positively reinforcing stimuli and not to punishment. If the social institutions that inflict punishment according to criminal law cannot react as consistently as required, the effect of punishment upon the people with strongly reinforced undesirable behavior, will not be successful⁷. In fact, this means that unless every crime is uncovered and the offender punished, one should not expect the punishment to have a lasting effect upon the offender. This points to the importance of the police and its techniques of uncovering criminal activity.

2. PUNISHMENT AND AGGRESSION

There is another aspect of punishment in connection with *aggression*. Both Durkheim (1893) and Mead (1934) (*infra*) recognized that « punishment consists of a passionate reaction ».

Aggression is an instinctual response inherited from our philogenetical past. The arousal of this emotion served the biological purpose of preparing an animal to take action, whether this might be in response to fear, or fighting in response to rage. It is accompanied by bodily changes, but this mechanism is still incompletely understood. The feeling of anger originates from the hypothalamus (part of the lower brain), the function of which is to coordinate emotional responses, including anger (see Storr, 1968).

Aggression is an instinctive response, programmed and inhibited in an instinctive way. Lorenz (1963) has shown that there is an inhibition of intra-species aggressiveness in direct proportion to the dangerousness of the aggression equipment at the disposal of the particular species. Carnivora like wolves and lions must be inhibited against attacking other members of their species,

6. This idea was expressed as early as Montesquieu's *l'Esprit des lois*, Book VI, Ch. 1. He emphasizes that it is the inevitability of punishment which can diminish « human corruption » and not its harshness.

7. « Usually the group is not well organized, nor are the practices of reinforcement and punishment consistently sustained. Within the group, however, certain *controlling agencies* manipulate particular sets of variables. These agencies are usually better organized than the group as a whole, and they often operate with greater success... Controlling agencies are concerned specifically with certain kinds of power over variables which affect human behavior and with the controlling practices which can be employed because of that power. » (Skinner, 1953, p. 333-334).

otherwise the survival of the species would be endangered ; and because their aggression equipment is very powerful, the inhibitions must be stronger too because of the greater danger.

In comparison with other carnivora, the human species is ill-equipped for aggression. Consequently, there is not enough instinctual inhibition of intra-species aggression. The development of this inhibition could follow the species mutation in respect to its aggression equipment, but could not follow the behavioral adaptation of the human species, i.e., the development of the *tools* of aggression. Therefore, the human species is in constant danger from itself.

However, as we will see later, in discussion of the psychological aspect of normative integration, there have developed certain inhibitions of social and psychological nature, which, even though not instinctual, nevertheless perform the required inhibitive function. This, for Lorenz too, is the only answer to the question of irrational aggressiveness, namely the development of « moral responsibility ».

With the development of society these inhibitions have evolved *sua sponte*, as an automatic response to the social needs, just as the biological inhibitions evolve automatically according to the needs of the preservation of the species.

In the animal world aggression plays the role of selection and preservation. In human society it manifests itself through vengeance and punishment and thereby also serves the need of preservation of society and individual. Through this development punishment becomes less and less « passionate reaction » and becomes more and more a rational response to undesirable behavior. At a certain stage it passes from the hands of individual vengeance to the societal agencies more free from the instinctual response and therefore in a better position to use punishment rationally.

According to Weber (1967) this is the transition from substantially irrational to *substantively rational* lawmaking and lawfinding. In the case of substantively irrational lawmaking and lawfinding, the decision is influenced by concrete factors of the particular case as evaluated upon an ethical, emotional, or political basis, rather than by general norms. In the case of substantively rational lawmaking and lawfinding the decision is influenced by norms derived from logical generalizations and abstract interpre-

tations of meaning of ethical imperatives, utilitarian rules, expedient rules, and political maxims. Obviously, we are speaking here about a continuous change, and the goal of substantive rationality is not achieved merely by the agent of punishment. The same trend manifests itself once the function of punishment is passed into the hands of the State.

When it becomes clear that punishment does not, in fact, change the energy behind the undesirable behavior, the attention is focused on its influence upon the society as a whole. One assumes that it is not by chance that punishment still exists, in spite of the fact that its inefficiency in modifying the behavior of criminals is proven. This influence of sustaining collective sentiments (Durkheim) behind the repressive law or in Mead's words « the integrative function of the hostile attitude » is then finally taken into consideration (see Andenaes, 1971).

The more aggression there is behind the punishment, and it may well be expressed in « righteous moral indignation », the greater the possibility that it will be irrationally inflicted, rationality being defined in terms of the goal of changing the individual offender. This irrationality may, however, be quite important in relation to the necessary sustenance of the existing moral standards.

While we become more and more aware of the rational aims of punishment, we try to transform it so as to serve the purpose of reformation of the individual. But since we are still unable to give up the aggressive and moralistic connotation of our reaction to violations of social norms, there arises the possibility of conflict between the two goals. On the one hand, the goal of retribution which society still is not able to part with and, on the other hand, the goal of the reformation of the criminal. In other words, we are trying to achieve the influence of positive reinforcement upon the individual in the framework of negative reinforcement. So the idea of punishment gradually becomes more and more eclectic and internally inconsistent, because goals of retribution, deterrence, and reform are certainly not compatible with one another.

3. PUNISHMENT AND TREATMENT

The described ambivalence on the part of society often results in a compromise where the same old practice of retribution is going on, but it is given a different name. In almost all modern systems of criminal justice one is able to detect this euphemistic

trend. What is called « treatment », « reformation », « resocialization » is usually but mere imprisonment.

The question of treatment cannot be separated from the question of punishment, because every treatment is *per definitionem* an intrusion of privacy. Therefore, today the treatment can only be started when the person has committed a criminal act⁸. The original supposedly clear-cut distinction between criminal law and statutes in which the State acts as *parens patriae* (juvenile delinquents, sexual psychopaths, civil commitment cases, etc.) has now been replaced by reintroduction of Constitutional safeguards in these areas according to the model traditionally accepted in the criminal law. Therefore, from the legal standpoint, the treatment and punishment are increasingly understood in the same way, that is, as a deprivation of liberty. The « euphemistic trend » has been largely reversed.

From the sociological and psychiatric standpoint punishment can not be clearly distinguished from treatment. Obviously, the person treated will always understand treatment as punishment, even if he has only to report occasionally to some authority. Psychiatrists speak about « milieu therapy » and about « consciously structured environment », but whoever has been to a mental hospital for the criminally insane can see that it functions essentially as a human warehouse and that there is no treatment different from the « treatment » that inmates receive in the ordinary prison. Hospitals as well as prisons are understaffed and this means that an inmate does not receive sufficient attention to justify the term « treatment ».

In addition to that, the criteria for punishment stem out of the social harm done by the act, while the criteria for treatment do not depend on a single act, but on the diagnosis of the offender's personality. Sometimes both of these criteria will result in the same required time of confinement, but often they will not. Then the compromise between the two is *the criterion of dangerousness*. If the person has committed a serious crime or even repeated it, then he allegedly needs more treatment, but he also deserves more punishment. And since there are no firm standards for the prediction of future dangerousness, the lawyers and psychiatrists are better able to come together. Here the problem emerges only when the act committed is really trivial but the

8. *Robinson v. California*, 370 U.S. 660 (1962)

person is found highly dangerous and so we get a long sentence for a trivial act. But this possibility is much smaller than if we had no compromise criterion of dangerousness.

Then, there are many offenders who are not treatable under any conditions, psychopaths, for example. In this case, to speak about treatment is a farce and commitment is reduced to confinement, i.e., punishment.

In general, one can say that treatment simply is not successful. If there were really effective means of changing the criminal behavior patterns without intrusions of privacy (see Brody, 1973) punishment would no longer be necessary. If there were effective means of treatment requiring confinement, there would be a very low rate of recidivism, and today a high proportion of the prison population are habitual offenders. And this seems to be logical : how could a short term treatment not only efface behavior patterns which needed years to establish themselves as a logical response to certain kinds of environment, but also prevent their reemergence after the reinstatement of the offender into his original environment ?

The rigid distinction between treatment and punishment is *not* justifiable either from the standpoint of criminal law, or from the standpoint of psychiatry and sociology, and least from the standpoint of the offender.

4. SAFEGUARDS : HUMAN RIGHTS AND THE NEW METHODS OF PUNISHMENT

From the development of behavioral psychology emerges the idea that punishment in a more sophisticated form (behavior modification programs, electronic surveillance, operant conditioning, aversive suppression techniques, electronic monitoring, etc.) can be the way of transforming the undesirable behavior if it results in criminal activity.

What is really new in these techniques is that they provide means of *consistent* negative reinforcement and control, while the old « techniques », whether called punishment or treatment were far less consistent. Punishment, as it is traditionally inflicted, is a comparatively primitive tool of negative reinforcement, too remote in time from the behavior it is supposed to prevent in the future, and it is also not connected closely enough with the respective behavior to establish the instinctive and automatic re-

pression of the undesirable behavior. The new techniques may actually require less suffering but have a greater effect. In other words, we still speak of punishment, only that it is more economical : smaller effort and greater effect.

These new techniques require less money, promise more effect, abolish the need for a long confinement, erase the distinction between punishment and treatment, merge the hostile attitude with the friendly one (Moad's distinction, *infra*) and seem to be horrible enough for the general public to satisfy the same requirements as punishment does, and yet the offenders are willing to accept them. In addition to that, the society which is not able to eradicate the conditions which produce crime and other social pathology, and is furthermore not able to abandon punishment as retribution, while the demand for efficacy is constantly growing because of the growing problem of crime, will welcome these new techniques.

The problem, however, is that they conflict with the demand for the protection of fundamental human rights⁹. The liberal political philosophy, which is still the essence of the modern State and social consciousness, emphasizes strongly the protection of human liberty. Legal rules are formal, impersonal, and general in order to guarantee the equal protection of human rights. While this equality is formal, not substantial, because it allows for *de facto* differences between people, it nevertheless restricts the State in political abuse and arbitrariness of substantively irrational justice (Weber, 1967, see *supra*, p. 68).

The role of criminal law is regarded as an inhibition upon the activity of the State. This view is correct, because obviously, punishment is possible without criminal law, but not so the protection of human rights. In the European Continental law this is expressed in the principle of legality (*Legalitätsprinzip*), in American law the same end is achieved through the constant reference to Constitutional safeguards.

9. « Behavioral modification programs and electronic surveillance devices are off the drawing board and await only the failure of community-based treatment programs. Operant conditioning and aversive suppression techniques along with electronic monitoring of an individual's behavior obviously raise *the gravest sort of questions concerning human dignity and liberty*. In addition to high claims of efficiency, proponents of their adoption need only argue that offenders have very few rights now and in the light of the failure of all other techniques « we at least deserve a chance » (Cohen, 1972).

While it was relatively easy to protect human rights when the reaction of the State to the criminal act was purely punitive, and therefore related to the objective act and its consequence and not to the criminal's personality and behavior, this becomes very difficult if the State is allowed to retain control over the individual, at least until he changes his behavior, if not his personality. This smells of totalitarianism and is strongly opposed by lawyers.

There have been some recent legal developments in American practice. These developments affect the protection of the rights of those criminals who really seem to need treatment, because they are insane or so disturbed that they are not held responsible for their acts. The essence of these developments is that the due process requirements are again imposed on commitment proceedings, while previously the State was acting as *parens patriae*, i.e., supposedly in the interest of the committed-to-be and the due process restrictions were not deemed necessary. « The State is acting as *parens patriae*, but the admonition to function in a « parental » relationship is not an invitation to procedural arbitrariness. It has been held that the child is not entitled to bail, to indictment by grand jury, to a speedy and public trial, to trial by jury, to immunity against self-incrimination, to confrontation of his accusers and to counsel (in some states). There is evidence, in fact, that the child gets the worst of both worlds : that he gets neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children¹⁰. »

This seems to be a representative case in the sense it points to the new attitude of legal protection even in the cases where treatment, and not punishment, seemed to be the aim of the State's action. This attitude seems to be present in juvenile proceedings, proceedings of civil commitment, etc.¹¹ *A fortiori*, one might expect, will it be present in the cases where the distinction between treatment and punishment is even more blurred.

The most important requirement concerning the distinction between punishment and treatment, is the requirement of the

10. *Kent v. United States*, 383 U.S. 541 (1966).

11. *Williams v. United States* (250 F.2d. 19) (D.C. Cir. 1957); *Lake v. Cameron* (331 F.2d. 771) (D.C. Cir. 1964); *In re Crosswell's Petition* (28 R. I., 66 A. 55, 58) (1907); *Jackson v. Indiana* (92 S. Ct. 1845) (1972); *Wyat v. Stickney* (325 F. Supp. 781) (1971); *In re Gault* (387 U.S. 1) (1971).

act¹². Treatment is not required for the act but for the personality, yet it seems that the requirement of an unlawful act will remain a condition for treatment as well as punishment. The requirement of the act before any criminal or commitment proceedings can be started is the traditional limitation of the State's right to intrude the sphere of privacy. This requirement, however, is often a barrier to the application of the criterion of dangerousness. For example, in the case of indecent exposure an exhibitionist may be psychiatrically examined and found potentially dangerous of more serious offenses and violence. But indecent exposure is a misdemeanor for which the person will usually be given only a ninety-day sentence. The State will have to wait until he commits a more serious crime before it will be able to commit him for a longer period of time and start a treatment. From a different standpoint, this could be understood as if he had the right to commit this more serious crime. *Robinson v. California* was a decisive case in this respect, where the Supreme Court decided that a person cannot be punished for mere status (of being a drug addict in this case). Civil commitment laws tried to bridge this gap (Maryland's Defective Delinquency Act, for example) but this trend was reversed in *Lessard v. Schmidt*¹³.

5. CONCLUSION

We have seen that punishment originates from an instinctual response. It has passed into the hands of societal agencies but it has not entirely changed its nature. Behavioral science has provided information that would make punishment more effective and more rational. This trend conflicts with the principle of liberty and this conflict has occasionally been obscured by the notion of treatment. Today, however, this conflict is more clearly seen. In fact, the demand for protection of society and the demand for protection of fundamental human rights are two conflicting aims of criminal law. The more the problem of crime becomes pressing, the more is the demand for protection of society emphasized on account of the demand for protection of human rights. In spite of that, the American courts have upheld the Constitutional safeguards.

The basic conclusion to be made in this respect is that the effect of punishment on the individual offender, even if it is de-

12. *Robinson v. California* (370 U.S. 660) (1962).

13. U.S. Court for the Eastern District of Wisconsin, August 10, 1972.

fixed as treatment, is at best dubious. Consequently, the question arises, whether punishment can be justified on some other basis.

B. PSYCHOLOGICAL ASPECT OF NORMATIVE INTEGRATION

We are concerned here with the question of genesis of morality in the individual, that is, how does the moral distinction between right and wrong become part of human mind and behavior. The concrete contents of this distinction vary from culture to culture, from society to society and from one group in society to another. Nevertheless, on a higher level of generality, the question is how does a child start to distinguish between acceptable and unacceptable on a moral basis.

The concept of morality, collective conscience, or whatever denotation may be given to this phenomenon, is a *social* concept. However, there must be something on the *individual* level that brings social morality into concrete life. Although the essence of the phenomenon of morality in its origin and existence is social, it can express itself only through individual behavior. Morality, in other words, is something *universal* which expresses itself through the *particular*. The fact that certain individuals, notably psychopaths, completely lack certain moral abilities, proves that there must be this particular psychological counterpart to the social entity of morality.

Freudian doctrine explains the development of moral judgement through the concept of Oedipus complex. The *behaviorist approach* does not conceptualize beyond the simple theory of operant behavior. The *transactional analysis* (Sullivan, Fromm-Reichmann, Berne, Harris) has merged to some extent both approaches in its concept of Child (see Harris, 1969). There are, of course, several other doctrines, notably those of Melanie Klein (1932), Piaget (1932), and Anna Freud, but here we will focus only on the Oedipus complex theory, since it is more important for our purpose to show the *existence* of the individual process of normative integration, than to discuss the differences between several hypothetical theories.

Freud described the idea of Oedipus complex in his work « The Interpretation of Dreams » (1900). The basic notion is that the child develops sexual attachment (object cathexis) to the parent of the opposite sex. At a certain stage of his development he has

to suppress this love. This suppression runs simultaneously with the process of growing identification with the parent of the same sex. This identification makes him internalize certain standards of behavior and accept them as a part of his own identity. This acceptance is not critical, it is axiomatic in the sense that the child yet has not criteria of evaluation and has no possibility to judge the appropriateness of these values. This identification will provide the starting point, while, paradoxically, it also « becomes the affective position to which that individual will tend to return automatically for the rest of his days » (see Kubie, 1958).

The suppression of the Oedipus complex is followed, if the process of suppression is successful, by the formation of the ego ideal, the superego. Superego is the seat of both our morality of duty and our morality of aspiration¹⁴. This is how our concrete self acquires its deontological counterpart, a relatively independent agency which emphasizes « ought to be » in contrast to what « is ». « Our moral sense is the expression of the tension between the ego and the superego » (Freud 1900, p. 201). Superego represents parents even if their conditioning by love and punishment is not present any more. It « ... observes, directs, and threatens ego in exactly the same way as earlier the parents did with the child » (p. 201).

If all goes well the boy will identify with his father. His superego will be modeled upon this parental figure. Father will himself normally be a socially integrated person, i.e., will, himself, have his own superego modeled upon his father and in addition, his behavior and values will be modified according to requirements of the social climate in which he lives.

The identification described above is a compensation process in which the loss of « the intense object cathexes » is replaced by rewards of pleasing the parents. The better the Oedipus complex is suppressed, the better it transforms into superego. The better developed the superego, the more receptive is the child for internalization of moral values. Through identification, the parents provide the medium between the individual and society and between the past and the present. « The superego of the child is not really built upon the model of the parents, but on that of the parents' superego ; it takes over the same content, it becomes the vehicle of tradition and of all the age-long values which have

14. This distinction is taken from Lon. L. Fuller (1964).

been handed down in this way from generation to generation » (Freud, 1933, p. 95-96 ; see also Laing, 1969, and Jung, 1968, p. 84).

However, the transformation of the Oedipus complex into superego is only the *form* in which the social norms are transferred from one generation to another. The *contents* of what is transferred are determined by the past and the immediate social situation of the family. This is not to say that the social situation does not influence the intensity of this process too.

Anomie can play two kinds of role here. First, it may be that the formation of superego as a process has the same intensity, but the norms transferred acquire a more and more asocial quality. Second, the norms may be socially acceptable, but the process has lost its intensity. Probably both are happening simultaneously. If we speak about the declining importance of the family structure, it cannot be without consequences on the processes that form the child's superego. On the other hand, if an ever greater part of society declines to accept the social normative structure, so that there is a widening gap between the social and cultural structure, we may expect that the values transmitted in the process of growing up will be in progressively greater disjunction with the values needed for the perpetuation of the social structure.

If it is true that it is the family which is the seat of the basic integrative processes which link the individual with the society¹⁵, then, one could argue, the only thing necessary is to strengthen the family and so increase the human receptiveness for moral behavior. But family, of course, is no separate entity distinct from society. The quality of its life reflects the society as a whole since the impressions of the outer world synthesize themselves in the psyches of the parents, are themselves synthesized with the superego and transmitted to the children. Throughout history the family has been one of the strongest institutions. If its viability is declining today, this would, according to the described doctrine, certainly

15. See Fromm, 1955, p. 79 : « The family... may be considered to be the *psychic agency of society*, the institution which has the function of transmitting the requirements of society to the growing child. The family fulfills this function in two ways. First... by the character of the parents... in addition... the methods of the childhood training, which are customary in a culture also have the function of molding the character of the child in a socially desirable fashion. »

mean that the whole process of normative integration is losing its intensity.

The formation of superego does not mean that there will be an immediate introjection of all relevant norms. In this process superego is merely formed as the child becomes a moral being. Its content and continued growth are more and more formed by the society as the child enters into institutions outside the family. Erikson has extrapolated the basic identification process with the father to social institutions. Unnecessary to emphasize, this idea is of paramount importance in understanding the link between the formation of the individual's ability for normative integration and the society's influence in giving the appropriate contents to this form. Social institutions have a relatively independent life and may be inadequate to the particular social conditions. If the conditions change, they reflect the past. This inadequacy will reflect itself either in the lack of the individual's identification with them, or in the individual's personal crisis if he does. Again, normally both processes will be present. Together they will form what Erikson described as an « identity crisis » (1968). There is nothing that could really be done to change this development, because every particular process reflects the universal whole, the society.

The question arises, what is the role of the criminal law in this context? Can punishment stimulate the identification with the norms it protects? There is no clear-cut answer to this question. As we will see later on, Durkheim and Mead presupposed universal moral values and consensus about them and conceived of society as a relatively homogeneous entity. They abandoned the « power theory » introduced by Hobbes and developed by Hegel. This enabled them to speak about society without differentiating between its strata. Therefore, crime and punishment could be confronted in terms of individual and society.

But if we take different interests of different strata of society as conflicting, we can no more speak of crime in general terms. Different norms have different intensities according to the degree the interests they protect are shared in the society. The degree of sharing here reflects the social adequacy of protection.

There is a positive correlation between the correspondence of the norm to the interests of the particular individual and the chance that this norm will be identified with. There is no need of the subtle support of the superego for the obvious, concrete

interests of the individual. Nobody has to be forced to eat, drink, have a sexual life, communicate with fellow human beings etc. Superego represents interests that are more abstract and therefore not sufficiently concrete to have immediate emotional influence characteristic of the primary needs. Where the concrete, immediate interest conflicts with the more abstract and universal one, the superego plays the decisive role. True, the society will try to counterbalance the concrete interests with the concrete counter-interests of avoiding the punishment (this is the essence of Bentham's utilitarian theory) but, as De Greeff proved, the psychology of murder depends primarily on the strength of the superego, not on the fear of punishment.

Therefore, we can say that the superego expresses those values which represent the individual's own interests on a higher level of generality : he, for example, has a concrete interest to kill somebody, but his more abstract interest, because he is a member of society, is that there would be no killing, because this would destroy society and him as its member. This kind of reasoning is also the basis of the theory of social contract.

To correct this statement we must add that the subjective element in the evaluation of interests must not be forgotten, otherwise the norms against the behavior that does not cause any social damage could not be understood. The pleasure principle of Freud is not denied by the concept of superego. Superego protects the individual against social ostracism on the one hand, but on the other hand it also represents the individual's own more general interests. Consequently, the superego is not something alien to the pleasure principle.

Accordingly, we have an interaction between criminal law norms and punishment on the one hand and the individual and societal superego (i.e., morality) on the other hand. This interaction can be one of mutual reinforcement or mutual enfeeblement. In the last analysis this will depend on the intensity of correspondence of different interests within society.

Since the criminal law is in the hands of the power stratum of society, its norms may be in greater or smaller correspondence with the interests of the other parts of the society. In this respect frequency and intensity of the violation of norms of the criminal law will vary in accordance to this lack of correspondence. This

already explains the criminal law's influence on normative integration : crime, obviously, is the pure negation of this influence.

Criminal law has no independent role in its attempt to stimulate normative integration. By itself, it cannot form the norms of moral weight and the withdrawal of its sanction has no immediate impact upon the norm as it lives in the superegos of the people. A legislative action can anticipate the formation of a new social practice and new morality, as in traffic legislation, for instance. In this case the norm of criminal law will easily be accepted and will have its social life. In case of a contradiction between the norm and immediate individual interests, everything depends on the superego. If the superego of an individual has integrated the norms to a sufficient degree, this will manifest itself in the lawful behavior.

The essential question is, under what conditions will the norm reach the superego. Abstracting from the problem of intensity of the Oedipus complex suppression process, we have to deal here with the *quality* of the norms that enter the ego ideals of the individuals. As we said, this depends on the correspondence of interests. It seems to be true, that the most criminal stratum of society is the one that is least socially integrated. This means that its own culture and interests do not correspond to the values of the larger society. This became obvious in the United States when all minority groups went through a period of higher criminality before integration in American society. Another aspect of the same mechanism is the class aspect : the classes that are deprived of the benefits of the productive process feel that the larger society acts against their interests. They have nothing to lose, and they see that social norms work against them, and they become aware that it is irrational for them to conform to them ¹⁶.

Criminal law represents the interests of those who make it. Consequently, the smallest conflict between the legal and moral norm will occur on this level. But it is not entirely wrong to say, as we do in Continental *Strafrechtphilosophie*, that the criminal law is the minimum code of moral standards. The question,

16. In Walpole State Prison I had an opportunity to speak with a black inmate who had spent fifteen out of thirty-two years of his life in prison, all for property offenses. He was very class-conscious, and his philosophy was basically that he has realized the irrationality of abiding with social norms. He said : « They brought me here to change me, but nothing can change my attitude, because it is the only possible one. »

however, is, whose morality does it represent? The example of American Prohibition illustrates the connection between the superego of the legislator and the law¹⁷.

In those areas where the criminal law is in accordance with the contents of the « class superego » it has a very important role to play. The frequently cited Sutherland's passage is entirely wrong :

Laws have accumulated because the mores have been weak and inconsistent ; and because the laws have not had the support of the mores they have been relatively ineffective as a means of control. *When the mores are adequate, laws are unnecessary ; when the mores are inadequate, the laws are ineffective* (Sutherland and Cressey, 1960, p. 11 ; emphasis added).

Laws have not accumulated because mores would be « inadequate » *in general*. They have been inadequate in relation to the standards of the one who has made the laws. More important, « adequate mores » are largely supported by criminal law and that is how they *remain* adequate¹⁸. *Bonos mores* can be either Skinner's automatic goodness in the absence of the conflict of interests, or else they can result from self-restrictions imposed by internalized morality or even genetically coded inhibitions¹⁹.

17. Gusfield (1970, p. 64) differentiates between the instrumental and symbolic function of the legal and governmental designations of deviance. The symbolic function does not have the same rational component typical for the instrumental function. In other words, the legislator is not necessarily concerned with the societal situation in a pragmatic way, but often projects in the law his own ego ideal.

18. Ovidius Naso begins his *Metamorphoseon Libri* with an admirable hexameter reference to the past : « *Aurea prima sata est aetas que vindice nullo, sponte sua sine lege fidem rectumque collebat.* » But even to him, *argumento a contrario*, it was clear that in society *bonos mores* have to be enforced *vindice*, i.e., by force and punishment.

19. « It is often claimed that moral control of behavior is something specifically human. It is now abundantly clear... that other species have developed very effective social controls for inhibiting intraspecies strife, regulating sexual behavior, looking after young and defending territory against enemies... The mechanisms underlying these behavioral analogies of morality have evolved biologically ; they derive from genetical constitution common to the species... The higher the animal in the evolutionary sense, the more these genetically determined mechanisms can be disrupted by adverse environment factors during development ; moreover, in the higher mammals, specific attachments or bonds usually formed early in life play an increasingly important role... In human species, the influence of genetic constitution is *less specific*, yet we cannot discount the possibility that the genetic predisposition facilitates the development of moral controls. We probably underestimate the extent to which we conform to moral rules spontaneously and without realizing the fact. » (Wright, 1971, p. 15, 16, 17).

(To the extent the genetical inhibitions determine human behavior, Sutherland may be right. But these are of comparatively small importance.)

Sutherland's proposition implies the independence of the individual morality from the social practice. But if it does not depend on the social practice, on what does it depend? Psychologically, this concept does not fit either in the behaviorist doctrine, where negative reinforcement represents the instrument of accommodation of individual behavior to the demands of social living, or into the Freudian theory in which the ego ideal grows in social interaction. The proposition, however, has the positive function of diminishing the belief that the criminal law is a kind of *deus ex machina* which can make people behave « adequately ».

Less influence can be ascribed to criminal law in those parts of the social structure which cannot succeed in satisfying their interests in the lawful way. If the people of these classes nevertheless obey the rules of law this can be ascribed only to the restrictive influence of their superegos. The criminal law and its threat provide the necessary rationality of this influence and the support of their internalized morality.

Psychoanalysts have drawn attention to three main motives in our attitude towards law breakers and criminals that operate in addition to the conscious reasons that are more readily recognized... In the first place, the criminal provides an outlet for our (moralized) aggression. In this respect he plays the same role as do our enemies in war and our political scapegoats in time of peace. That some very real satisfaction is to be found in this way is shown by the vast crowds that attended public executions... In the second place, the criminal, by his flouting of law and moral rule, constitutes a temptation to the id; it is as though we said to ourselves, « if he does it, why should not we? » This calls for an answering effort on the part of superego which can best achieve its object by showing that « crime doesn't pay ». This, in turn, can be done most conveniently and completely by a demonstration on the person of the criminal. By punishing him we are not only showing him that « he can't get away with it » but holding him up as a terrifying example to our tempted and rebellious selves. Thirdly... is the danger with which our whole notion of justice is threatened when we observe that a criminal has gone unpunished. The primitive foundation of this notion... lies in an equilibrium of pleasures and pains, of indulgence and punishment. This equilibrium is disturbed, either if the moral

rewards of good conduct are not forthcoming... or if the normal punishments of crime are absent or uncertain... It is to prevent disturbance of the latter kind that we insist that those who have broken the law shall be duly punished. Through their punishment the equilibrium is re-established, without it (so we dimly feel) the whole psychological and social structure on which morality depends is imperiled (see Flugel, 1955).

C. SOCIOLOGICAL ASPECT OF NORMATIVE INTEGRATION

1. DURKHEIM'S THEORY OF COLLECTIVE CONSCIENCE (1893)

Durkheim's definitions of crime, punishment, and normative integration are logically derived from the concept of collective conscience²⁰. His theory of division of labor distinguishes between mechanical and organic solidarity. Mechanical solidarity, typical of ancient societies, is sustained by repressive law, organic solidarity sustained by restitutive law, is characteristic of modern societies, where the division of labor has developed and where, accordingly, there is less need for exertion of force because of the greater structuralization and integration idiosyncratic for the organic structure of division of labor. The more the division of labor is developed and the more interdependent are the organic parts of society, the less need is there to keep society together by force of repressive law.

But inasmuch as the repressive, i.e., the penal law, is still needed, the « directive power », i.e., the organs of the State, represent the collective sentiments, react on their behalf, enforce them and defend them. The directive power is « the collective type incarnate » (Durkheim, 1933, p. 84).

The society is more than the sum of its parts, it is a quality *sui generis*. The same holds true for collective conscience and consequently, even though it lives through individuals, it is more than the sum of individual consciences. These, when brought

20. Durkheim, 1933, p. 79 : « 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 conscience or common conscience... It is by definition diffuse in every reach of society... It is, in effect, independent of the particular conditions in which individuals are placed. »

together, live in an interplay in which they mutually influence one another. The collective conscience is transferred from one generation to another and is relatively independent of the immediate social situation. Society has its own psyche which is essentially the same in all its strata, in all geographical parts of the country where it exists, in all professions ²¹. Collective conscience is also given the attribute of transcendence, which in effect manifests its independence.

Crime is a violation of collective conscience ²². It must not be defined in relation to social needs because such a theory « accords too large a part in the direction of social evolution to calculation and reflection » (Durkheim, 1933, p. 72) and besides, there are crimes that are not harmful to the society at all.

To say that crime is a violation of interests as they are subjectively understood by a particular society, would be a circular definition, a tautology, because it comes down to saying « that societies judge these rules necessary because they judge them necessary » (Durkheim, 1933, p. 73). Only the theory of social conscience can explain why societies have been so often mistaken in imposing practices that were not even useful.

However, Durkheim acknowledges that collective conscience essentially depends on the social needs, when he refers to social utility ²³. Unless, therefore, we assume that Durkheim contradicts himself, we have to modify his own definition of crime : crime is violation of social needs, present and past, as expressed through collective sentiments. The theory of collective conscience does not

21. It is interesting to see how this perception by Durkheim penetrated into psychology. It was taken over by Jung who inventend the notion of « collective unconscious », by which he denotes the archetypes which are transferred independently even of society and are shared by the whole humanity. See Jung, 1968.

22. « ... an act is criminal when it offends strong and defined states of collective conscience » (1933, p. 80). However, Durkheim was not the first one to express this idea ; by the time *The Division of Labor in Society* was written it was at least seventy-two years old. « The fact that an injury to one member of society is an injury to all others does not alter the conception of wrong-doing, but it does alter it in respect of its outward existence as an injury done, an injury which now affects the mind and consciousness of civil society as a whole, not merely the external embodiment of the person directly injured. » (Hegel, 1971, p. 140).

23. « ... the collective type is formed from very diverse causes and even from fortuitous combinations. Produced through historical development, it carries the mark of circumstances of every kind which society has gone through in its history. It would be miraculous, then, if everything we find there were adjusted to some *useful end*. But it cannot be that elements more or less numerous were there introduced without having any relation to *social utility* » (Durkheim, 1933, p. 107 ; emphasis added).

differentiate the various strata of society. Consequently, all in-criminations manifest the psyche of the society as a whole.

Punishment, for Durkheim, is a passionate reaction. The more primitive the society, the more this is evident²⁴. Punishment is not necessarily in accordance with the act, it is often too harsh, and it, moreover, extends even on persons linked to the offender²⁵. « It expands in quite mechanical fashion. The passion which is the soul of punishment ceases only when exhausted » (Durkheim, 1933, p. 86).

According to Durkheim, this essential quality of punishment has not been changed in the modern societies. Punishment, however, has always been a social reaction, even though realized through individual conscience. This coincides with the religious nature of the criminal law in ancient societies. What changed is but the form through which this passion expresses itself : in more structured society punishment itself becomes subject to division of labor, and though it remains vengeance, it is enforced through the organs of the State, through the tribunals. Because society has become more conscious of the purpose of punishment, it tends to restrict the passionate component of it. Nevertheless, the correlation expressed in the maxim that « punishment must fit the crime » still points to the irrational correlation between the strength

24. As we said before, the core of Durkheim's theory in *The Division of Labor in Society* is the distinction between the primitive and advanced society. The primitive society is characterized by its inorganic character, i.e., parts of society can be added and taken away without essential damage to the functioning of society.

Small geographic and demographic extension is characteristic of primitive society. Consequently, the dominant form of consciousness is mechanical solidarity. To this corresponds the repressive law.

The advanced society's structure is organic, the units are interdependent, the geographic and demographic extension are greater, solidarity becomes organic too. Consciousness becomes increasingly personalized, and the influence of collective consciousness is decreasing. This society is defined as an association of traders, and consequently the restitutive law becomes its characteristic. Although Durkheim contrasts his theory to the utilitarian one, in the last analysis his own theory rests on the organic solidarity i.e., complementarity of interests, which is exactly the position taken by the utilitarian philosophy.

On the basis of shared interests organic solidarity is added to the mechanic one. Social order is rendered possible on two conditions : 1. Occupational groups must mediate between the individual and society ; 2. The sanctity of social norms must be recognized and preserved.

25. This mechanical extension of passion is not limited only to primitive societies. It is well known that during World War II the Italians and Germans used to take hostages and execute them in the event one of their people was killed. Soviet Union also used to enforce the law, which prescribed punishment for the members of the family and even of the household of those who defected.

of sentiments the act offends and the punishment. If totally rational, punishment would only correspond to the degree of the corruptness of the criminal, which is not necessarily implied in the crime committed.

Obviously, Durkheim distinguishes here two kinds of « rationality ». First, the rationality of the individual reaction to the crime, the aim of which should be the transformation of the criminal, and second, the rationality of the passion, which in fact sustains the existing collective sentiments and their integrative function.

The second proof of the passionate nature of punishment is the spontaneous social reaction to the crime « which often serves no purpose » and doubles the punishment. This is how the collective sentiments spontaneously reinforce themselves (*supra*, p. 83, 84). Since the punishment has been delegated to an official organ, it is somehow alienated from the society and the collective sentiments do not exhaust themselves through official punishment so that they have to express themselves in the spontaneous aggressive reaction.

Therefore, even if punishment is a passionate reaction and seems irrational in relation to the particular offender, it still serves a very important function ; *it reinforces the same collective sentiments that have produced it.*

Some crimes do not offend directly the collective sentiments, but they offend the organ which represents them (*mala prohibita*). It is, according to Durkheim, the same force that is offended in both cases. This force « is the product of the most essential social likenesses, and has for its effect the maintenance of the social cohesion which results from these likenesses ». Durkheim recognizes the important effect punishment has upon the preservation of social cohesion. He assumes that *all* the values protected by the criminal law are the manifestation of collective sentiments and that every act which violates these norms is a threat to social cohesion. Obviously, the underlying presumption must be, that society is a homogeneous structure and that the criminal law with its enforcement agencies is merely an organ of these collective sentiments.

The natural inference to be made from the Durkheim theory is that the enforcement of the criminal law is far more important for those who respect it, than it is for offenders. It

has much more influence on the law-abiding population, than it has on the criminal one. The chance that the offender will be transformed is relatively small, however, this does not render the punishment purposeless. Since collective sentiments live through mutual reinforcement, it is important that every violation be punished ²⁶.

For Durkheim, then, the really important role of the criminal law is to protect social cohesion « against all enfeeblement ». The criminal law achieves that through demanding from each of us a minimum of resemblances without which the individual would be a menace to the unity of the social body, and in imposing upon us the respect for the symbol which expresses and summarizes these resemblances at the same time it guarantees them » (Durkheim, 1933, p. 106).

For him, then, the criminal law enforces the minimum of conformity required from the individual. Conformity, here, is not directly related to social needs, but to collective sentiments that express them more or less accurately.

Even those collective sentiments that serve no apparent social need must be protected because they are social links and if they are destroyed this would harm social cohesion.

Punishment, consequently, is not only the consequence of living collective sentiments, but also their cause, since it brings them back to life. There is a dialectical relationship between social conscience and the enforcement of the criminal law.

26. Kant, 1929, p. 15 : « Judicial punishment... can never serve merely as a means to further *another* good, whether for the offender himself or for society, but must always be inflicted on him for the sole reason that he *has committed a crime*... The law of punishment is a categorical imperative, and woe to him who crawls through the serpentine windings of the happiness theory seeking to discover something which in virtue of the benefit it promises will release him from the duty of punishment or even from the fraction of its full severity. »

Kant, 1853, p. 35 : « L'impératif catégorique, qui en général n'exprime qu'une seule chose, ce qui est obligatoire, se formule ainsi : agis suivant une maxime qui puisse avoir en même temps la valeur d'une loi universelle. Ainsi, après avoir considéré d'abord tes actions dans leur principe subjectif, tu ne pourras reconnaître qu'il a aussi une valeur objective... » Kant's theory of punishment as a categorical imperative has often been considered intuitive and impossible either to prove or to deny, if not irrational.

But here we see how well it corresponds to Durkheim's theory. Both Kant and Durkheim, deny the importance of social needs, but while Durkheim takes them into account through his concept of social utility (1933, p. 107) and so tries to consider them at least indirectly, Kant writes as a spokesman for collective sentiments without trying to explain them and taking essentially an agnostic point of view (see Kant, 1853, p. 36).

There are two basic mistakes in Durkheim's theory. First, he takes the society as non-class structure. Second, consequently, he sanctifies the social norm.

Sanctification of actuality appears in almost all of the principal classical social theories. Even in Hegel, critical thought is abandoned in the last analysis and the State is rationalized in its function. The same happens in Durkheim's theory, where the directive power is the true representation of collective sentiments. Today, however, this view is largely criticized, the social norms are critically examined and consequently the problem of the relation between the consciousness and actuality, essentially a metaphysical question, is reemerging (see Chomsky, 1971). Durkheim ignores these questions, and therefore his theory, as a whole, although he offers concepts with great explanatory powers, is not correct. However, if our problem is limited and practical, i.e., if we limit ourselves to the problem of the preservation of the *status quo*, as we do, since the question of the criminal law's influence on the normative integration implies the acceptance of the validity of the norms expressed in the criminal law, then we may well use Durkheim's reasoning. But the moment we embark on the discussion of relationship between the collective conscience and reality, where it may appear that the dominant consciousness is not adequate (the disjunction between the social and cultural structure), Durkheim's theory cannot be accepted any more. And since anomie is actually the absence of certain collective sentiments, it would follow from Durkheim's doctrine that they can be brought back to life by punishment, which is simply not true. So we may use this theory only to the extent that collective sentiments really exist; their absence cannot be explained²⁷.

If we accept Durkheim's doctrine, moreover, the criminal will necessarily be defined as « deviate », « abnormal », « in-

27. The criticism of the dominant form of collective consciousness is evident in the works of R. D. Laing. He often assumes that it is the social conscience which is inadequate and if the individual reacts to it with a distorted perception of reality, this is an adequate reaction. Fromm also takes the same standpoint. « It is naively assumed that the fact that the majority of people share certain ideas or feelings proves the validity of these ideas and feelings. Nothing is further from truth. Consensual validation as such has no bearing whatsoever on reason or mental health. Just as there is a « folie à deux » there is « folie à millions ». The fact that millions of people share the same vices does not make these vices virtues, the fact that they share so many errors does not make the errors to be truths, and the fact that millions of people share the same forms of mental pathology does not make these people sane » (Fromm, 1955, p. 23).

sane », etc., because, according to Durkheim, the moral conscience of the nation is *datum*, is right, and all that diverges from it is wrong. As far as aetiology of crime goes, then, it would have to be found exclusively with the individual, not with the society. The Italian *Scuola positiva* rests on the exact same presumption, although it does not follow Durkheim's recommendations concerning punishment.

Society, of course, is no homogeneous entity. It is stratified according to inequalities produced by the right to equality. The previous stratification based on birth and in which social power was distributed in a comparatively constant fashion according to the « highness » of birth, is replaced by formal equality, which, coupled with the inequalities of human nature, produces a new distribution of power. Once this is accomplished it perpetuates itself, not through the rigid standard of birth, but through processes that influence the growth and development of human abilities. It is true that the mobility, the vertical mobility, is much greater, but the initial power structure tends to perpetuate itself. This *eo ipso* generates the conflict of interests, and though the upper strata morality tends to be the dominant morality of society distributed through the social structure, it is less and less accepted by other classes when the historical postulate of the particular social order is accomplished.

We cannot speak of social consciousness as if it were the same in all the classes. Crime would be an exceptional phenomenon of the individual pathology, if there were an overall moral agreement in the society.

Consequently, it simply is not possible to explain *all* incriminations as the resultance of collective sentiments. While Durkheim accepts the gradation of crimes according to the intensity of the collective sentiments they offend, he does not take into account another dimension of the question. It is not only that collective sentiments of the society are more or less strong : this gradation cannot be drawn through the society as a whole. The majority of sentiments are formed according to the concrete interests of the particular social stratum. Social conscience is not pervasive, it is different for the different interest groups. The crime appears in various degrees in different social strata.

Obviously, it is the upper power strata that dictate the stronger social conscience and have the means to make it the

only one that can be publicly defended. Criminal law and its rules express *these* sentiments and interests, and not the sentiments and interests of the other social strata or of the society as a whole. Inasmuch as these differ from the sentiments and interests of other social strata, the crime will occur as a regular phenomenon. Crime can be defined as *an attempt to achieve substantial justice in the society of formal justice*.

Durkheim invents a fiction that even *mala prohibita* offend collective sentiments, simply because they offend their truly representative organ. This fiction enables him to say that the entire criminal law is a manifestation of collective conscience. This would be true if his previous assumption of the society as a homogeneous structure in respect of interests, were also true. But if the criminal law defends primarily the interests of the upper power strata, and the societal interests inasmuch as they are in accordance with the previous ones, it cannot be said that all infractions of the rules of the criminal law, are infractions of the *social* collective conscience.

Durkheim tries to find a common denominator to all the crimes. He tries to define crime through punishment, because, he says, the common consequence means the common cause. Apart from the fact that this is a logical fallacy, it is not true that the punishment in all the cases is the same expression of collective conscience. The punishment of the members of the Spanish revolutionary movement, for example, cannot be equated with the punishment of the murderer.

There is nothing intrinsically criminal common to all the behavior denoted « criminal » by the criminal law. Crime cannot be a scientific entity²⁸, not only because there are tremendous aetiological differences between different criminal acts, but because there is no phenomenological common denominator. How could there be one, if crime is literally made by the legislature, except if we take the legislature as the function of some intrinsic consistent social mechanisms. Consequently, if one tries to define all the crimes in one concept, one is bound to use a circular legal definition. And since *definitio ne sit in orbem* this is no definition

28. « Willing seems to me to be above all something *complicated*, something that is a unit only as a word — and it is precisely in this one word that the popular prejudice lurks, which has the always inadequate caution of philosophers » (Nietzsche, 1966, p. 25). If we replace the word « will » by the word « crime », and perhaps « philosophers » with « jurists » we see the problem.

at all, merely a denotation. Modern criminology is seeking to establish a new approach through the concept of deviance, and deviance can obviously be defined only in relation to the greatest possible homogeneous group, never in relation to the norms formally proclaimed by the « directive power ».

Durkheim claims to use only a descriptive approach in his sociological writing. But he becomes normative, prescriptive the moment he assumes that « the organs » truly represent collective sentiments even though they may not exist in the apparent reality.

2. G. H. MEAD AND HIS THEORY OF PUNITIVE JUSTICE (1918)

Mead's theory belongs to the broader framework of the theory of *symbolical interactionism*. This doctrine is connected with the pragmatic philosophy and psychology of William James and is denoted, in an even broader context, as behaviorist²⁹.

Contrary to Durkheim, Mead dealt with smaller groups and his theory's starting point is not society as a whole. Furthermore, he regarded society as « nothing but the sum total of the social experiences of all its individual member » (Mead, 1934, p. 276). Mead founded his doctrine on the psychological theory of Wilhelm Wundt from which he took the concept of « gesture ». Speaking developmentally, gesture stands between action and speech. Speech is defined in terms of « verbal gestures », and mind can exist only through verbal gestures, because consciousness is nothing but internal talk with oneself. This talk is bound to verbal gestures, called significant symbols.

« Role taking » is another fundamental concept founded on significant symbols, because their playing means taking the role of one's fellow-men. Role taking is the socializing process in which human personality molds itself.

Infrahuman behavior is a result of modified instincts. Modification comes through experience, and when this experience is social, instincts are organized so as to allow social life.

29. See Goricar, p. 62. Compare Marx and Engels, 1970, p. 51 : « Language is as old as consciousness, language *is* practical consciousness that exists also for other men, and for that reason alone it really exists for me personally as well ; language, like consciousness, only arises from the need, the necessity, of intercourse with other men. Where there exists a relationship, it exists for me : the animal does not enter into *relations* with anything, it does not enter into any relation at all... Consciousness is, therefore, from the very beginning a social product, and remains so as long as men exist at all. »

The basic question presented in Mead's theory is, how to find the way in which the *hostile* instincts could express themselves without causing social damage. He applies this theory also to the question of war (the article was published in 1918) and to the question of punitive justice.

As to the latter problem, social damage is manifested by the fact that the hostile attitude makes it impossible to resocialize the offender. Punishment as an expression of the hostile attitude is incompatible with the goal of resocialization. Emotional attitude expressed in the « majesty of law » in the legal battle, corresponds to the hostile instinct. It serves 1) « to exile the rebellious individual from the group » and 2) « to awaken in law-abiding members of society the inhibitions which make rebellion impossible to them. The formulation of these inhibitions is the basis of criminal law. »

The impulses which identify us with the predominant group are *concrete* although the values they protect and represent may be abstract, that is, « are negatively and abstractly conceived » (Mead, 1918). Here, the difference between Mead and Durkheim becomes obvious. While Durkheim deals with the problem of normative integration on a higher level of abstraction and allows more abstract conceptions to support his theory of reinforcement of collective conscience, Mead deals with smaller groups and individuals and does not accept the possibility that social conscience could be influenced by specific mechanisms of its own.

For Mead only the concrete impulses, concrete emotions are capable of reinforcement of our feeling that we are part of the predominant whole.

Therefore, we may say that both Durkheim and Mead recognize the influence of the criminal law upon normative integration, only on different levels of generality. We may mention here that both still use causal analysis to a large extent, but Mead's theory is even more one-dimensional. The true structural approach is not typical for either of them. However, Mead has a much less rigid approach. Durkheim defends the function of punishment almost unconditionally, whereas Mead saw very well that there is an inevitable incompatibility between reinforcing the collective conscience and the concrete aims of punishment. He also realized that the change in social policy from punishment to more efficient

solutions is not merely a question of reason. « Opinions are profound social attitudes » (Mead, 1918, p. 589)³⁰.

It is true that punishment unites « members of the community in the emotional solidarity of aggression » (p. 591). But this hostile attitude provides no « principles for eradication of crime » (p. 590). It is true that society in fact profits from the criminal, because the hostile attitude « reveals common universal values » and « seemingly without the criminal the cohesiveness of society would disappear » (p. 591). On the other hand, there are more and more interests that the members of society have in common and the growing consciousness about them tends to modify this hostile attitude. Hostility may be useful as a unifying factor but it also increases internal intolerance and therefore represses individuality. It is important to see here that Mead deals with interests.

In society where the members have no interests in common, there can be no law, because there can be no agreement as to the procedure of arriving at the rules, and there are no common criteria for the interpretation of rules. In society where all the existing interests would be common interests, where there would be no conflict between the private interests and public interests, no law is needed. In society where some interests are shared and some are not, the law will determine the limits of every interest. Mead is, then, right to say, that the more interests are shared the less need is there for the hostile attitude. « If any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies ; and in the way to their end, which is principally their own conservation, and sometimes their delectation only, endeavor to destroy or subdue one another » (Hobbes, 1909, p. 105). « During the time men live without a common power to keep them all in awe, they are in that condition which is called war, and such a war as is of every man against every man » (p. 106).

From this conflict of interests derives another antinomy. Social solidarity rests on the hostile attitude. The hostile attitude is therefore the basis of social organization. The same hostile attitude produces crime and tries to eradicate it. The positive atti-

30. See also Kadish, 1967, p. 68 : « Perhaps part of the explanation of the lack of success is the inherent limitation of any rational appeal against a course of conduct which is moved by powerful irrational drives. »

tude towards individual offenders is, however, incompatible with the negative attitude.

The system of criminal justice illustrates well this proposition. We want the criminal punished and bettered at the same time. When, however, we have to choose between these two alternatives, we invariably choose punishment. This makes it easy to understand the enormous dimension of social hypocrisy which tries to interpret punishment as treatment. We came so far that often, from the point of view of human rights' protection, we prefer punishment to treatment (see Cohen, 1972)³¹.

Mead tries to go one step further from Durkheim. « What sort of emotional solidarity can we secure to replace that [the hostile attitude] which the traditional procedures have supplied ? » (Mead, 1918, p. 504). Through criminal law and its enforcement the values are represented negatively, but it would be more rational to find a way « towards a functional self-assertion » (p. 504). The answer, for Mead, is *communication* between individuals and groups, « of overcoming temporal and spatial separations of men so that they are brought into closer interrelation with each other » (p. 504).

But communication, of course, is possible only if the interests do not conflict. If it is true that opinions are profound social attitudes and that these attitudes are influenced by interests, it follows that so long as interests will conflict, the attitudes and opinions will conflict too. If the attitudes and opinions conflict, communication is not possible, because we get two monologues instead of dialogue, mutual denial instead of mutual self-assertion.

In this respect Mead's doctrine is similar to Durkheim's. What Durkheim described as the progress from mechanic solidarity to the organic exists in Mead's theory as the progress from the hostile attitude to the friendly one. However, Durkheim is more explicit as to the causes of this progress : the mutual interdependence caused by shared interests and enhanced by the mediation of occupational groups and sanctification of the norm.

31. See also Hegel, 1971, p. 71 : « ... Punishment is regarded as containing the criminal's right and hence by being punished *he is honoured as a rational being*. He does not receive this due of honor unless the concept and measure of his punishment are derived from his own act. Still less does he receive it if he is treated either as a harmful animal who has to be made harmless, or with a view to deterring and reforming him. » (Emphasis added.)

Mead saw a great hope and a good sign in the juvenile proceedings which started to develop in his time. He would be disappointed to see how the treatment attitude towards delinquents degenerated into punishment and how in the end the hostile attitude prevailed³².

Mead's basic thesis that « as the field of constructive social activity widens the operation of the hostile impulse decreases » is entirely acceptable. His excellent presentation of the double role of criminal law, that is, its attempt to achieve positive results with negative means, is confirmed today by many critics in theory of criminal law. The eclectic and disoriented nature of criminal law, undecided whether to punish or to treat and trying both at the same time, is evident. Mead's analysis also proves, as does that of Durkheim, that we must not embark unconditionally on the ideal of treatment forgetting at the same time the moral influence of punishment upon the social conscience.

Mead fails, however, to explain under what social conditions will the constructive social activity widen. Implicit in his doctrine is the theory of conflict of interests. Therefore, the question arises, under what conditions will the quantity of interest conflicts decrease? And this question remains unanswered.

CONCLUSION

We have examined some of the conditions upon which, if we accept the hypothesis, criminal law will have an influence upon normative integration. The basic condition is that there already should exist a certain intensity of normative integration, if criminal law is to influence its further reinforcement, or at least to sustain it.

Criminal law cannot create norms that would actually function in society, unless there is an essential correspondence between these norms and social needs. In other words, criminal law can play the role of catalyst but not the role of creator of normative integration. « In the case of *mala per se* the law supports the moral codes of society... in the case of *mala quia prohibita* the law stands alone » (Andenaes, 1971, p. 81).

The pure Skinnerian interpretation can only be applied in the case of *mala prohibita*, where there, in fact, is no normative

32. *In re Gault*, 387 U.S. 1 (1967).

integration yet. In *mala in se*, as the term suggests, there already is some social acceptance of the norm and the function for the criminal law to perform is to make it clear that the norms cannot be violated and thereby to reinforce already existing moral feelings in the law-abiding citizens. We may complain about the negative influence of the social stigmatization because it hinders the re-integration of the offender into society, but this negative social reaction is a sign that the respective norm is still alive.

The restraint created by the social norm may function on the conscious or on the unconscious level. In the case of *mala in se* the potential offender is not restrained by internalized inhibitions, therefore his « decision making process » operates on the conscious level. He has to decide what chance there is to be caught and punished and what kind of punishment he risks, and weigh this against the « profit » expected from the act. Obviously, in this case it is important that he knows the prescribed penalty, although it might be better if he does not know the chances that he will be caught, because they are often so low.

In the case of an integrated norm these psychological mechanisms do not operate, because rational considerations are inhibited by moral standards internalized by the potential offender. We can imagine that there would be more crime if people made decisions « to commit or not to commit » the criminal acts on the described rational basis. In fact, this is probably the difference between the American and European situation : American society is subject to less inhibitions than the European one (see Slater, 1970, p. 13-14).

It is difficult to see how the complex processes of normative integration could be empirically measured and hypotheses, as the one described in this work, verified. Apart from the general problem of quantification of social and psychological phenomena and the fact that both in the sociological and psychological field the majority of theories are still in the hypothetical stage of development, there is an enormous complexity of different factors, complexity which is almost impossible to be understood in a static way. (Kierkegaard said that consciousness can never be discovered by examining brain cells under the microscope).

The process of normative integration is the interaction of virtually all the factors of social life. Statistical techniques of

finding correlations between the different factors suffer from the fact that the factors are in majority of cases impossible to quantify and that many of the factors are simply not yet discovered.

Very similar to this problem is the one of the Marxist social theory. The methodological postulate of the Marxist doctrine is the dialectical approach, and yet, in fact, the theory is one of economic reductionism, so that in the last analysis the dialectical approach is betrayed and exchanged for causal analysis (compare Schumpeter, 1937).

We may identify certain important connections, as for example, the connection between the interests and needs on the one hand and morality on the other. However, this link is established on a very high level of abstraction and is impoverished to the extent to which abstraction implies the neglect of some other less constant, but in the concrete life, equally important, factors.

Modern, especially American, social science, tries to examine society as an objective phenomenon. This postulate was declared by Durkheim and Weber who tried to devise some instruments (« ideal types », for example) in which the consciousness of the observer would not affect the assignment of meaning to social phenomena³³.

However, no social phenomenon can be separated from the political context to which it is subject through the conflict of interests. The problem of normative integration cannot be examined outside this context and if we try to ignore the fact that crime is not simply a question of poverty and punishment, we will never be able to recognize that the social order as such generates anomie and that social consciousness simply does not correspond to the stage of development of society any more. This statement, of course, implies that there is not much to be done against crime and so also implies that criminology and criminal law are not very important. Consequently, one must expect all the possible opposition from criminologists and jurists, because this affects their own social importance.

33. « ... our mental constitution permits us to arrive at knowledge of the world insofar as our innate capacity to create theories happens to match some aspect of the structure of the world... A system of knowledge and belief results from the interplay of innate mechanisms, genetically determined maturational processes, and interaction with the social and physical environment » (Chomsky, 1971, p. 20-21).

The intensity of the influence of criminal law upon normative integration corresponds to the amount of social norms that were not yet affected by anomic processes. Criminal law inhibits those processes in the areas where social norms correspond to social needs. Where it defends the interests of one interest group against another, criminal law « stands alone » at least in the group in which it is against group interests. And since normative integration is mutual reinforcement, a dialectical process between official enforcement of the norm and the interest, criminal law can have an enhancing influence on the normative integration if there is the needed correspondence, or it may even speed up the anomic processes in the case of the lack of this correspondence.

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ABSTRACTS

INFLUENCE DE LA JUSTICE CRIMINELLE SUR L'INTÉGRATION NORMATIVE

Ce document est séparé en trois parties : 1) la théorie de la peine ; 2) l'aspect psychologique de l'intégration normative ; 3) l'aspect sociologique de l'intégration normative. Il trace les grandes lignes des propositions suivantes.

1. L'ordre social engendre l'anomie, si la structure sociale et la conscience sociale dominante ne correspondent pas au degré de développement de la société.

2. L'anomie affecte la société dans son ensemble, mais l'intensité du processus anomique varie selon les divergences entre les intérêts d'une strate sociale particulière et les intérêts représentés par la justice criminelle.

3. Le processus anomique démontre la nécessité du changement dans la structure normative de la société. Il ne réussit pas cependant à faire la différence entre les normes socialement utiles et celles qui ne le sont pas.

4. La structure sociale normative dominante est un système fortement articulé. Comme tel il ne peut changer que dans son ensemble et non pas de façon partielle. Le choix doit être fait, soit de la défendre comme un tout, ou de ne pas la défendre du tout.

5. La structure normative, à ce moment doit être défendue en tant que tout, particulièrement parce que le processus anomique l'attaque en tant que tout.

6. Le droit pénal influence les sentiments collectifs à travers la peine. Plus le sentiment collectif est intense plus il est renforcé par la punition. Si cette intensité n'est pas assez forte, la peine ne fera que dissimuler l'anomie ou même catalysera le processus anomique.

7. L'influence de la peine n'est pertinente qu'en fonction des citoyens qui respectent les lois, parce que c'est là que le sentiment collectif est suffisamment intense.

8. Le manque d'identification au système normatif dominant a affecté la théorie sociale et ceux qui sont chargés de faire respecter la loi. Cette tendance liée à la concentration de l'attention sur des délinquants, produit ou tend à produire une application de la justice criminelle moralement neutre.

9. Si nous voulons que la peine ait une influence positive sur l'intégration normative, si nous voulons que la peine soutienne le sentiment collectif il faudrait que sa connotation morale soit préservée.

10. Toutefois, la peine n'est pas une solution au problème de l'anomie. Dans le système de justice actuel, elle peut le diriger vers différents secteurs de la vie sociale ou le forcer à changer. Devant les besoins toujours plus grands de changement des valeurs et structures sociales, ses buts devraient être de défendre les valeurs sociales de base qui expriment les besoins de la société entière. Cependant elle ne peut défendre ces valeurs qu'en défendant le système normatif dans son entier, l'anomie ne pouvant se développer dans certains secteurs sans affecter les points vitaux de la structure normative.

11. En conséquence l'application de la justice criminelle aura nécessairement un effet ambivalent : elle intensifiera l'intégration normative de certaines normes à l'intérieur de certains secteurs de la société, et en même temps elle augmentera l'anomie de certaines normes dans d'autres strates sociales.

DERECHO PENAL Y SU INFLUENCIA SOBRE LA INTEGRACIÓN NORMATIVA

Este artículo está dividido en tres secciones : 1) teoría de la punición ; 2) aspectos psicológicos de la integración normativa ; 3) aspectos sociológicos de la integración normativa. Sus grandes líneas corresponden a las propuestas siguientes :

1. El orden social engendra la anomia si la estructura social y la conciencia social dominante no corresponden al estado de desarrollo de la sociedad.

2. La anomia afecta a la sociedad considerada como un todo, pero la intensidad del proceso anómico varía según la discrepancia entre los intereses de un estrato particular de la sociedad y los que representa el derecho penal.

3. El proceso anómico indica la necesidad de cambio en la estructura normativa de la sociedad, pero no permite, sin embargo, diferenciar las normas socialmente útiles y las que no lo son.

4. La estructura normativa dominante de la sociedad es un sistema altamente articulado y, como tal, no puede cambiar parcialmente sino como un conjunto. Hay que escoger, pues, entre defenderlo como un todo o no defenderlo.

5. Por consiguiente, la estructura normativa debe defenderse como un todo, especialmente porque el proceso anómico la ataca como un todo.

6. Por lo que se refiere a la punición, el derecho penal ejerce una influencia sobre los sentimientos colectivos. La punición refuerza dichos sentimientos en la medida en que éstos poseen un nivel de intensidad suficiente. Si el nivel de intensidad no es suficiente, la punición sólo reducirá la visibilidad de la anomia o actuará como catalizador del proceso anómico.

7. Por consiguiente, la influencia del castigo dependerá en primer lugar de las expectativas legales de la población, ya que es aquí donde los sentimientos colectivos son suficientemente intensos.

8. La ausencia de identificación con el sistema normativo predominante ha afectado a la teoría social y a los organismos que aplican el derecho penal. Esta tendencia, junto a la concentración de atención respecto al delincuente, ha producido o tiende a producir una aplicación moralmente neutra del derecho penal.

9. Si se quiere que la punición ejerza una influencia positiva sobre la integración normativa, si se desea que el castigo sostenga o refuerce los sentimientos colectivos, debe preservarse la connotación moral del castigo.

10. Sin embargo, la punición no es la solución al problema de la anomia. En un sistema de justicia formal, puede canalizarla a través de diversas áreas de la vida social u obligarla a adoptar una forma diferente. En la situación de necesidad de cambio de la estructura y valores sociales, que avanzaría progresivamente, su finalidad debe ser la defensa de los valores sociales básicos que representan las necesidades de la sociedad considerada como un conjunto. Sin embargo, puede defenderlas únicamente defendiendo el sistema normativo considerado como un todo, ya que la anomia no puede desarrollarse en diversas áreas sin afectar a los centros vitales de la estructura normativa.

11. Por consiguiente, la aplicación del derecho penal tendrá necesariamente un efecto ambivalente : intensificará la integración normativa de algunas normas en determinados estratos de la sociedad y al mismo tiempo reforzará la anomia de otras normas en otros estratos de la misma sociedad.

STRASRECHT UND DEREN EINFLUSS ÜBER NORMATIVER INTEGRATION

Die Arbeit ist in drei Teile untergliedert : 1) die Theorie der Strafe ; 2) Psychologische Aspekte normativer Integration ; 3) Soziologische Aspekte normativer Integration. Folgende Thesen werden untersucht.

1. Die Gesellschaftliche Ordnung erzeugt Anomie, wenn die gesellschaftliche Struktur und das herrschende gesellschaftliche Gewissen nicht der Entwicklungsstufe der Gesellschaft entsprechen.

2. Die Anomie beeinträchtigt die Gesellschaft als ganzes ; ihre Intensität jedoch ändert sich je nach dem Spannungsverhältnis zwischen den Interessen der besonderen Interessenschicht in der Gesellschaft und den Interessen, die im Strafrecht repräsentiert werden.

3. Anomische Prozesse weisen auf die Notwendigkeit, die gesellschaftliche Struktur zu ändern. Sie vermögen jedoch nicht zwischen solchen Normen, die von sozialen Nutzen sind und solchen, die es nicht sind, zu unterscheiden.

4. Die normative Struktur einer Gesellschaft ist ein System interdependent. Demnach kann es nur vollkommen sich ändern und nicht in Einzelteilen. Die Entscheidung ist zu treffen, ob es als ganzes zu verteidigen ist oder ob es überhaupt nicht verteidigungswert ist.

5. Die normative Struktur ist demgemäß als ganzes zu verteidigen, insbesondere da die anomischen Prozesse sie als ganzes angreifen.

6. Strafrecht übt über die Strafe Einfluß auf kollektive Gefühle aus. Strafrecht bestärkt kollektive Gefühle insoweit als sie von genügender Intensität sind. Wenn die Intensitätsstufe nicht hoch genug ist, kann die Bestrafung nur entweder die Sichtbarkeit der Anomie verringern oder sogar die anomischen Prozesse als Katalysator vergrößern.

7. Der Einfluß der Bestrafung ist damit von Bedeutung im wesentlichen im Verhältnis zur rechtstreuen Bevölkerung, da dort die kollektiven Gefühle ausreichend intensiv sind.

8. Gesellschaftstheorie und die Behörden, die das Strafrecht anwenden und durchsetzen, identifizieren sich in geringem Umfang mit dem vorherrschenden normativen System. Diese Tendenz, verbunden mit der Blickrichtung auf den individuellen Rechtsbrecher, hat bewirkt — oder bewirkt — eine Anwendung des Strafrechts, die moralisch neutral ist.

9. Wenn die Strafe einen positiven Einfluß auf die normative Integration haben soll, wenn die Strafe die kollektiven Gefühle erhärten oder in ihrer Intensität erweitern soll, muß der moralische Aspekt der Strafe erhalten bleiben.

10. Bestrafung ist jedoch keine Lösung für das Problem der Anomie. In einem System formaler Gerechtigkeit kann es die Anomie in verschiedenen Bereichen gesellschaftlichen Lebens treiben oder sie veranlassen, verschiedene Formen anzunehmen. In einer Situation in der das Bedürfnis nach einer Änderung der Struktur von Gesellschaft und Werten zunehmend wächst, muß der Zweck der Strafe es sein, die Grundwerte zu verteidigen, die Bedürfnisse der Gesamtgesellschaft ausdrücken. Die Strafe kann sie jedoch nur verteidigen, in das ganze normative System als solches verteidigt wird, da Anomie sich nicht in einigen Bereichen entwickeln kann, ohne die Lebensnerven der normativen Struktur zu beeinträchtigen.

11. Dementsprechend wird die Anwendung und Durchsetzung des Strafrechtes eine zweiseitige Wirkung haben : es wird die normative Integrationswirkung für manche Vorschriften innerhalb bestimmter sozialer Schichten vergrößern und es wird gleichzeitig in anderen Schichten die Anomie in Bezug auf andere Normen erweitern.

УГОЛОВНОЕ ПРАВО И ЕГО ВЛИЯНИЕ НА НОРМАТИВНУЮ ИНТЕГРАЦИЮ

Эта статья делится на три части: 1) Теория Наказания; 2) Психологический аспект нормативной интеграции; 3) Социологический аспект нормативной интеграции. В ней рассматриваются в общих чертах следующие предложения.

1. Социальный строй порождает аномию, когда социальная структура и доминирующая социальная сознательность не соответствуют степени развития общества.

2. Аномия влияет на общество полностью, но интенсивность аномических процессов изменяется в зависимости от различий (противоречий, несогласия) между интересами особого слоя общества и интересами, изложенными в уголовном праве.

3. Аномические процессы служат признаком необходимости изменения нормативной структуры общества. Тем не менее им не удастся различие между нормами, которые полезны для общества, и теми, которые для него не полезны.

4. Господствующая нормативная структура общества является весьма четко сформулированной системой. Как таковая, она может измениться только в целом и не может измениться частично. Останется ли защищать эту систему в целом, или даже отказаться от ее защиты совершенно.

5. Поэтому нормативную систему надо защищать как целое, особенно потому, что аномические процессы разрушают ее как целое.

6. Уголовное право влияет на коллективные отношения (мнения) при посредстве наказания. Наказание усиливает коллективные отношения (мнения), так как они имеют достаточный уровень интенсивности. Если уровень интенсивности недостаточно высок, то наказание только позитив (ослабит) видимость аномии, или даже катализирует аномические процессы.

7. Влияние наказания применимо в основном в отношении населения, уважающего законы, так как среди этого населения коллективные отношения (мнения) достаточно интенсивны.

8. Недостаточность солидаризация с господствующей нормативной системой оказала влияние на социальную теорию и органы, которые проводят в жизнь уголовное право. Эта тенденция, вместе с концентрацией внимания на отдельных (единичных) правонарушителей, выработала, или имеет тенденцию выработать, морально нейтральное применение уголовного права.

9. Если мы хотим, чтобы наказание имело позитивное влияние на нормативную интеграцию, если мы хотим, чтобы наказание поддерживало (подкрепляло) или усиливало коллективные отношения, то моральное значение наказания должно быть сохранено.

10. Однако наказание не разрешает проблемы аномии. В системе формального правосудия наказание может направить его в отличные (другие) области социальной жизни, или заставить его принять другую форму. В условиях постепенно повышающейся потребности изменения социального и ценностного строя, цель наказания должна заключаться в защите основных ценностей, которые отражают потребности всего общества в целом. Однако наказание может защищать их только поддерживая нормативную систему в целом; нельзя допустить развитие аномии в некоторых областях, затрагивая жизненных (существенных) центров нормативного строя.

11. Поэтому принудительное применение уголовного права будет неизбежно иметь амбивалентное воздействие; оно усилит нормативную интегра-

цию некоторых норм в некоторых слоях общества, и в то же время оно оттенит (подчеркнет) аномлию других норм в других слоях общества.

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