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COULD SUCCESSFUL REHABILITATION REDUCE THE CRIME RATE?*

ERNEST VAN DEN HAAG**

I.

Penologists usually inquire: "Do rehabilitation programs reduce recidivism?"¹ Recently the effectiveness of all programs has been questioned.² In turn, philosophers have debated a moral problem: "Should criminals be punished for their past crimes according to what is deserved, or should they be subjected to future-oriented treatment programs and released when rehabilitated?" Lately there has been a return to justice and away from the treatment model, at least theoretically, but the problem has not been resolved.³ Legislation and sentences continue to reveal an untidy compromise between rehabilitative (treatment) and

* After I wrote the present essay my friend Isaac Ehrlich sent me a reprint of his *On the Usefulness of Controlling Individuals: An Economic Analysis of Rehabilitation, Incapacitation, and Deterrence*, 71 AM. ECON. REV. 307 (1981). My disappointment at not being the first and only author to reach the conclusions presented in the text was offset by my elation at finding that Ehrlich had independently, and in different ways, reached analogous conclusions. Except for some sketchy suggestions in my *Punishing Criminals* (1975), at chapter V *passim* and particularly at 59-60, Ehrlich obviously wrote about the problem before I did. He thus is entitled to priority. There are, however, enough differences in procedure, argument and conclusions to distinguish our efforts despite a remarkable congruence.

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¹ Rehabilitation programs are here defined as attempts to produce law-abiding (or more law-abiding) behavior of convicts, usually by non-punitive means. Rehabilitation is complete when, owing to the program, there is no recidivism. "Recidivism" is shown by any conviction after release. Non-recidivism occurring without rehabilitation programs, be it because of age, unknown factors, or the punitive sanction itself ("special deterrence") need not be distinguished from rehabilitation for the present purpose. (Occasionally "rehabilitation" in the text refers to retirement from any occupation.)

² See D. LIPTON, R. MARTINSON & J. WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT 516-58 (1975) [hereinafter cited as D. LIPTON].

³ Discussion about the two models has not ceased since the 18th century, when the justice model was questioned by Jeremy Bentham and Cesare di Beccaria and later by utopian novelists such as Samuel Butler in *EREWON* (1872). They were opposed by Immanuel Kant and his followers. Recently Kantian retributionist ideas have been refurbished by Andrew von Hirsch in *DOING JUSTICE: THE CHOICE OF PUNISHMENT* (1976). On the other hand, the persistence of probation and parole testifies to the continuing influence of rehabilitationist ideas.

justice (desert) ideas.⁴ I do not propose to discuss either the philosophical or the empirical issue mentioned.⁵ Rather, I want to address a theoretical question which, as far as I know, has not received much attention: What is the likely effect of rehabilitation on the crime rate?

II

Let me assume that rehabilitation is one hundred percent successful. This "total rehabilitation" exceeds the wildest dreams of dedicated proponents, but the assumption will help us focus on the crime rate. Total rehabilitation means that every convict who serves any sentence—be it thirty days, or thirty years, in prison or on probation—becomes a law-abiding citizen upon release; there is no recidivism at any time.

If all criminals were recidivists, total rehabilitation would reduce the crime rate to zero. But recidivists start as first offenders. Even some of the worst crimes, such as murder, may be committed by first offenders.⁶ Since rehabilitation can affect criminals only after their first conviction, even total rehabilitation could reduce neither the rate of first offenses nor the overall crime rate to the extent to which it depends on first offenses.

The proportion of muggers, rapists, or burglars apprehended and convicted upon their first offense is small. Even habitual criminals often remain unapprehended or unconvicted for long periods and are therefore beyond the reach of rehabilitation programs. Meanwhile, they continue their criminal activities.⁷ Thus, even without recidivists many

⁴ Few today would echo Mr. Justice Black's view that "[r]etribution is no longer the dominant objective of criminal law. Rehabilitation and reformation of offenders have become important goals of jurisprudence." *Williams v. New York*, 337 U.S. 241, 248 (1949). Still, we continue to speak of "correctional institutions," not "punitive institutions," and despite demonstrable failure, see D. LIPTON, *supra* note 2, rehabilitation programs continue.

The persistence of the belief in rehabilitation is further demonstrated by the recent decision in *New York v. Jagnjic*, 85 A.D.2d 135, 447 N.Y.S.2d 439 (N.Y. App. Div. 1982). The court remanded for resentencing on the ground that the original sentence would serve no rehabilitative purpose.

⁵ For a discussion, see E. VAN DEN HAAG, *PUNISHING CRIMINALS* (1975). On the empirical issue, I fully concur with James Q. Wilson's conclusion in "What Works?"—*Revisited*, *PUB. INTEREST*, Fall 1980, at 3, that the few rehabilitation programs which show promise are highly structured, demanding, non-permissive, and perhaps even punitive.

⁶ Felony and rape murderers may be recidivists. But they constitute only about a quarter of the homicidal population—although stranger murders seem to be increasing. In 1968, 20% of all murders were committed by individuals who did not know their victims, whereas in 1974 the stranger murder rate had increased to 34%, or by more than 50%. *N.Y. Times*, Mar. 23, 1975, § 1, at 41, col. 6. "Crimes of passion," however, are often committed by first offenders who are convicted after their first crime and frequently "rehabilitated" by it. They tend not to recidivate, regardless of whether or not they are punished. A wife-murderer is likely to be satisfied by killing his wife and uninterested in killing others. He thus meets the definition of rehabilitation offered *supra* note 1.

⁷ Over 650,000 felony complaints were reported in New York in 1980, but fewer than

crimes would continue to be committed, whether by first offenders or by as-yet-unconvicted multiple offenders. One may reasonably estimate that, although recidivists, including career criminals, undoubtedly commit a disproportionate number of many crimes, they do not commit most crimes in most categories.⁸ The more unconvicted offenders start, or continue, criminal activities, the less the elimination of recidivism will reduce the crime rate. Perhaps even total rehabilitation would make only a modest dent in the crime rate.⁹

III

Let me make a second heroic assumption. Regardless of what the actual proportion of first offenders is, suppose that up to now most crimes were committed by recidivists and only a small proportion by unconvicted offenders. Recidivism now is eliminated by our first assumption. One is tempted to infer that the crime rate will be greatly reduced. After all, we are assuming, *arguendo*, that (1) recidivists committed most crimes and that (2) they no longer commit any. It does not follow, however, that fewer crimes will be committed.

We can understand why the crime rate may not fall if, instead of considering the problem on which most theories of crime causation dwell — “who commits crimes and why?”¹⁰ — we ask, “why is the crime

87,000 suspects were arrested and fewer than 9000 received a prison sentence. Only 19 of the 25,000 prisoners in the New York system were serving time for burglary. Kramer, *Keeping Bad Guys Off the Streets*, N.Y. MAG, Feb. 8, 1982, at 38. Similarly, although there were 109,000 automobiles stolen in New York City in 1981, only 19 persons in the entire state received prison sentences for that crime. *Car Reported Stolen Every Five Minutes On New York Streets*, N.Y. Times, Apr. 18, 1982, § 1, at 1, col. 4. Only eight persons served time for auto theft in 1981. Kramer, *supra*, at 38. The data suggest that many recidivists are at large, allowed to continue their criminal careers and that burglary and car theft have been *de facto* decriminalized as first offenses in New York.

⁸ About six percent of the criminal population commit at least 30% of all crimes. N.Y. Times, Apr. 9, 1981, at B3, col. 6. Yet even if the proportion of habitual criminals in the population is higher than six percent, as seems likely, and even if they commit more than 30% of all crimes, a considerable number of criminal acts must still be committed by unconvicted offenders. According to Senator Arlen Specter, who for eight years was D.A. in Philadelphia, “[s]ix percent of those arrested for robbery and burglary committed 60 percent of those crimes.” N.Y. Times, Apr. 25, 1982, § 1, at 63, col. 2. Richard J. Fitzgerald, chief criminal judge in Chicago, asserts that “[e]ighty percent of armed robberies, rapes and burglaries are committed by a relatively small, hard core of men in their late teens.” READER’S DIGEST, Apr. 1982, at 92.

⁹ Quoting statistical data currently available lends a spurious air of precision to what at best are estimates. Owing to the “dark figures” of unreported crime, which victim survey reports cannot fully clarify, and owing to the sealing of the records of juvenile criminals, it is hard to know what proportion of alleged first offenders are *de facto* recidivists. The correct data would, however, have to be very different from present estimates to affect seriously any of the conclusions drawn.

¹⁰ Theories of crime causation in textbooks are almost exclusively devoted to this question. See, e.g., S. REID, CRIME AND CRIMINOLOGY (1976); E. SUTHERLAND & D. CRESSEY,

rate neither higher nor lower than it is?" The subject ultimately is the same: if we know why people commit crimes, and who will do so, we also can know how many people will commit crimes. But the different focus of each question actually leads to a different answer. The first question produces a concern with individual psychological motivation for crime; the second takes motivation as a datum, and considers what else determines the number of persons (or acts) in each crime category.¹¹

The number of persons engaged in any activity, lawful or not, depends on the comparative net advantage they expect. Thus, the number of practicing dentists, grocers, drug dealers, or burglars, depends on the net advantage which these practitioners expect their occupations to yield compared to other occupations available to them. The number of persons engaged in an occupation does not change unless the expected comparative net advantage does;¹² that number can be shown to change when the net advantage does.¹³ Further, if the attrition rate is stable, retired dentists, drug dealers, or burglars, will be replaced at a rate which maintains the number of active practitioners so that it continues to equal the number attracted by the expected comparative net advantage. In short, the rate at which dental or criminal acts will be committed remains unchanged, unless the net advantage of committing them changes. It does not matter what the stable attrition rate is.

Suppose now that the attrition rate suddenly increases: after committing fifty dental acts on the average, all dentists are rehabilitated,

CRIMINOLOGY (1970). Even Travis Hirschi's brilliant treatise, *CAUSES OF DELINQUENCY* (1969), is concerned exclusively with who becomes an offender and why.

¹¹ This is the procedure of economists. They do not focus on "Why did Smith become a delicatessen salesman and Jones not?" but rather on "What determines the number of delicatessen salesmen in the population?" Taking motivation for granted, economists concentrate on changes in the attractiveness of occupations.

¹² The expected comparative net advantage differs from person to person, and depends on an immense number of conditions, most of which are fairly constant, so that a change of one variable (e.g., income) may greatly affect the expected total net advantage. In this respect, there is little difference between criminal and lawful occupations.

I have not attempted to document the role of "expected comparative net advantage," confining myself to illustrating and applying the concept. Aside from formulations that would make the proposition, "[t]he number of persons engaged in any activity . . . depends on the comparative net advantage they expect," analytically true, the empirical evidence is a matter of common sense and universal practice. Few readers would deny that a greater expected comparative net advantage would make any occupation or act more attractive to them than a lesser net advantage. (Those desiring more discussion of the implications will find it in most textbooks of economics.) The application of the concept to crime is discussed in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* (G. Becker & W. Landes eds. 1974).

¹³ Interestingly, Enrico Ferri's assertion that "in a given social environment . . . we find . . . a fixed number of crimes," E. FERRI, *CRIMINAL SOCIOLOGY* 76 (abr. English ed. 1895), *quoted and discussed in* E. VAN DEN HAAG, *supra* note 5, at 84, 84-90, might have pointed in this direction and led to an economic analysis of criminal activity. But Ferri's positive school in fact developed a socio-psychological approach, ignoring economic techniques.

whereas in the past they committed a far greater number of dental acts before rehabilitation. There would be a temporary decline of dental acts. But, if the demand for dentistry is unchanged, the reduced supply of dentists would augment the net advantage for people willing to commit dentistry. The higher net advantage very soon would attract additional new entrants (if one supposes that licensing or study requirements can be overcome), and the net advantage would decline. The old net advantage would be reestablished and the number of practitioners would return to what it was. If all practicing dentists regularly were rehabilitated after fifty dental acts—the newly stabilized rate of attrition—more first offenders and fewer recidivists would engage in dental acts. But as long as the net advantage does not change, the rate at which dentistry would be committed would remain unchanged.

I do not see any relevant difference between dentistry and prostitution or car theft, except that the latter activities do not require a license. The number of practicing prostitutes, car thieves, dentists, grocers, or drug dealers will be determined by the expected comparative net advantage, regardless of rehabilitation rates. Rehabilitation or attrition rates will influence only the rate at which new practitioners enter the occupation and, thereby, the proportion of newcomers in the occupation. If attrition rates rise, the total number of practitioners will decline only during the process of change.

IV

Car thieves, burglars, dentists, and prostitutes sell the proceeds of their activities, or render services for which there is a demand by others. What about offenders who steal money, such as pickpockets, muggers, absconding cashiers, and tax evaders?¹⁴ They commit instrumental crimes (crimes committed for the sake of expected proceeds), but, unlike burglars, they do not depend on the demand of other persons for the harvest, which they consume themselves. And what about rapists? They engage in expressive crimes (crimes not committed to acquire things of economic value) for the sake of their own consumption; the rapist is attracted by the process of rape, not by any proceeds. The demand for the activity of rapists or muggers does not come from other persons as does the demand for dentistry, prostitution, or burglary. There is no market for rape.

Nevertheless, the frequency of rape, or of mugging, is essentially determined by the expected comparative net advantage, just as is the rate of dentistry and burglary. The comparative net advantage consists

¹⁴ Theft of services consumed by the thief may be included in this class, as may many kinds of fraud and "white-collar" crimes.

in the satisfaction (produced by money or by the violative act itself) expected from the crime, less the expected cost of achieving it, compared to the net satisfaction expected from other activities in which the offender has the opportunity to engage. Cost, in the main, equals the expected penalty divided by the risk of suffering it.¹⁵

The expected comparative net advantage often is indeterminate, and it differs greatly from person to person. (Usually it cannot even be cardinally measured.) Nor is the mugger or rapist actually likely to calculate it. But, then, all this is also true for prospective lawyers and plumbers. Still, whatever the distribution of advantages, and despite the inchoateness of expectations, in each occupation there is an average expected net advantage which determines the rate of entrance into lawful and unlawful occupations alike.¹⁶ Wherefore, at any time, we have a determinate rate of rape (per 100,000 persons, or females, or males, in various age groups). The rate would decline if penalties, or the risk of suffering them, were sufficiently increased, thereby decreasing the net advantage; and it would rise if penalties were sufficiently reduced or if they were rarely imposed.¹⁷ But if the expected comparative net advantage does not change, rehabilitation of convicted rapists or muggers at any stable rate will not make any difference. Even with "total rehabilitation," there would be no recidivists, but there would be unconvicted offenders to replace them, for an unchanged net benefit will ultimately attract an unchanged number of offenders.

Nevertheless, there appears to be one difference between rape, mugging, or tax evading on the one hand, and prostitution, burglary, drug dealing, car theft, or dentistry on the other.¹⁸ Rehabilitated dentists, or

¹⁵ Both the rapist and the customer of a prostitute bear costs and expect a net advantage. The customer's cost is the money he pays. The rapist's cost is risk-taking, and he does not pay it to the victim who involuntarily renders the service sought. Similarly, the mugger's cost is risk-taking.

¹⁶ Some crimes, as well as some lawful activities such as acting in plays or movies, attract more persons than the average net income they yield would warrant, as compared to that of other occupations. These activities may involve a strong expressive component; or, despite low average income, people may be attracted because of the possibility of exceptionally high occasional gains, as in a lottery. But this factor is fairly stable. The number of would-be actors or criminals still changes with the expected average net advantage. This matter was first discussed by Alfred Marshall in his classic *PRINCIPLES OF ECONOMICS* (1890) and has become part of accepted economic theory. The latter is well represented by Paul A. Samuelson's neo-classic *ECONOMICS* (10th ed. 1976).

¹⁷ See Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970).

¹⁸ Drug dealing may differ from either type of crime for a logically irrelevant reason. The profit is so great that no penalty is likely to reduce the net advantage enough to diminish the number of dealers. Increased apprehension and conviction rates might have some impact, but it is unlikely that they can be increased enough to matter. Drug dealing can be diminished only by reducing the demand for drugs—by seriously penalizing consumers, as well as dealers. Changes in the penalties or risks of dealers alone are unlikely to be effective.

car thieves, are readily replaced if the demand for their services does not decrease. Increased frequency of rehabilitation merely creates an opportunity for others to provide these services at a sufficient net advantage to attract them. An increased rate of rehabilitation simply leads to a higher rate of first offenses by new entrants. As the net advantage stabilizes, the total number of practitioners reaches its previous state of equilibrium. The new dentists, burglars, or prostitutes did not practice before because, had they done so, they would have depressed the price by increasing the supply. Thus they could have entered only at a lower price (i.e., a lower net advantage) which did not suffice to attract them. With a higher rate of rehabilitation, additional practitioners can enter the market without depressing the net advantage available to them, since they merely replace the greater proportion of practitioners being rehabilitated.

When we consider the supply of muggers or rapists, the situation is quite different. Because they do not sell their product, additional rapists or muggers would not have depressed the net advantage that lured the convicted offenders who are now rehabilitated. Since there is no market for rape, or for the money muggers get from their victims, a nearly infinite number of new offenders could have entered without reducing the net advantage yielded by their crimes.¹⁹ Why didn't they? The failure of additional muggers or rapists to enter these activities before can be explained only by assuming that the net advantage was not sufficient to attract them, although it was sufficient to attract the practicing offenders (whose number was maintained by the normal replacement rate). Therefore, when total rehabilitation eliminates recidivists, the additional muggers and rapists required to maintain the current frequency of mugging or rape will engage in these activities only if the net advantage rises enough to satisfy them. Had the old net advantage been enough for them, they would have entered before.

This is where rape and mugging differ from dentistry or burglary: total rehabilitation would reduce the crime rate for offenses which are independent of markets for proceeds or services. Thus, if the cost (probability and severity of punishment) remains unchanged, total rehabilitation (no recidivism) would mean less mugging and rape—but not less prostitution, dentistry, or burglary. The extent of the decline of

¹⁹ An influx of a "nearly infinite number," although not depressing the benefit, may nevertheless increase the cost of rape or of mugging, and thus depress the net benefit, because prospective victims would be likely to take additional precautions. If one assumes that enough muggings occur so that potential pickings become meager—people don't go out often, or have little money or valuables with them when they do, or are armed—the comparative advantage of mugging declines since the return per victim declines and costs rise. As yet this is a rather academic prospect. Still, people have begun to take extra precautions which do decrease some of the returns of mugging per victim.

muggings, rapes, and of all crimes which are independent of a market for proceeds, depends on the proportion committed by recidivists. The net advantage of mugging or rape will rise only if the cost declines. And only if the net advantage rises would the rate of mugging or rape be maintained if there is total rehabilitation.

V

An assumption has been implied throughout which must now be clarified, namely, that there is a practically unlimited number of persons capable of committing crimes if the net advantage suffices. This assumption was never meant to suggest that every woman is ready to become a prostitute if the price is right, or every man a rapist, burglar, or car thief. We may suppose that many, perhaps most, persons reject crime (or, for that matter, dentistry) altogether, whatever the net advantage. Still, it seems reasonable to assume that the number of potential offenders in most crime categories, although not in all, is likely to vastly exceed the number of actual ones.²⁰ I assume no more than that the number of persons who can be attracted to criminal activities so much exceeds the number now engaged in crime, that replacement of rehabilitated offenders depends only on the expectation of a high enough comparative net advantage. Wherefore, in prostitution, burglary, or dentistry, an unreduced net advantage suffices for an unchanged rate of activity by a constant number of practitioners, regardless of one hundred percent rehabilitation rates. But, as noted above, if there were total rehabilitation, the net advantage of rape or mugging would have to increase to attract the additional rapists and muggers needed to maintain a constant rate of mugging and raping.²¹

VI

Potential offenders exceed actual ones by a wide enough margin to allow us to regard the supply as practically unlimited in most crime categories. But not in all. Where the number of potential offenders is

²⁰ Potential offenders are not likely to register so that their number can be ascertained. On the other hand, if their number did not vastly exceed the number of actual offenders, the deterrent threats of the criminal law would be gratuitous since they are addressed to potential offenders. In a sense punishment itself would be gratuitous for, as an anonymous English judge is supposed to have remarked: "men are not hanged for stealing horses but that horses may not be stolen." Criminologists thus assume with Leo Tolstoy that "the seeds of every crime are in each of us." *Quoted in* G. NETTLER, *EXPLAINING CRIME* ix (2d ed. 1974). We all are potential offenders. Christian doctrine also holds that only by "the grace of God" do we avoid offenses.

²¹ This assumes that additional rapes or muggings could be committed without increasing the risk of punishment. An increased risk would decrease the net advantage, and thus the crime rate.

limited, rehabilitation could reduce the number of actual offenders. Probably there are more potential child molesters than actual ones. Still, the number of potential molesters is likely to be quite limited, if, as seems likely, child molesters have an idiosyncratic personality type which is not all that frequent.²² Hence, the greater the number rehabilitated in any period, the fewer remain to engage in child molesting. Most criminal activities, however, do not require such an idiosyncratic personality. Crimes such as burglary can be learned by many more persons than do engage in them. They will be attracted to these crimes when the expected comparative net advantage suffices. For this reason, the rate at which these crimes are committed is not affected by rehabilitation.

VII

Everything I have said about rehabilitation holds true as well for incapacitation.²³ Offenders are unable to commit crimes (at least extramurally) while incapacitated by imprisonment, just as they are unwilling to do so if rehabilitated. I have used rehabilitation rather than incapacitation to suggest the effects of retirement on the crime rate because incapacitation, in addition to making offenders unable to commit crimes, has a punitive function. The two functions of incapacitation can be theoretically separated, but they are fused in practice. The effect of incapacitation *per se* on the crime rate must be discounted, as the effect of rehabilitation must be, and for the same reasons. But the value of confinement as a device which increases cost (or decreases net advantage) to the criminal remains unchanged, because of its punitive function. Indeed, confinement is now the main instrument available to decrease the net advantage of crime.

VIII

Expected comparative net advantages can be changed by social developments other than changes in the severity or probability of punishment. Fewer rapes and muggings may be committed if internal moral restraints become stronger for any reason (an increase in psychological cost), or if money or sex are valued less²⁴ (a decrease in expected advantage) or become more easily available to prospective offenders without

²² No doubt, each kind of crime attracts only a limited range of personalities, as does each occupation. The personalities required for most crimes, however, occur more frequently than those required for child molesting.

²³ That is, incapacitation, however successful, could not reduce the crime rate except in the cases mentioned in section VI of the text.

²⁴ Rape is probably more often motivated by a desire for aggressive self-assertion than by a desire for sexual gratification, but either can be valued more or less.

committing offenses (a decrease in comparative advantage). If, for instance, every prospective mugger or burglar (we can now ignore the differences) were to experience an increase in his lawful income, the comparative advantage of the offenses would decrease and (if we discount the expressive component of the crime) so would the rate of mugging or burglary. Sociologists who stress the "social causes" of crime therefore propose subsidies in kind or in money to reduce the crime rate.²⁵ Their reforms might work if they could be pushed far enough. There might be less mugging if prospective muggers would earn, or be granted, a lawful income of \$100,000 annually. Nevertheless, those whose income is below the median may still be tempted to rob those whose income is above.

It is unlikely that this social strategy can reduce the crime rate in any real situation. It is the *comparative* net advantage that matters. Whatever social reforms one envisions, differences in income are likely to remain great enough to produce an expected comparative advantage of mugging or burglary sufficient to attract the same number of offenders as before—unless the cost of offending increases so as to decrease the net advantage. Thus, there has been no decline in these crimes as societies have become more egalitarian and prosperous.²⁶ Imagine, if you please, a society so egalitarian that there is only one income difference left: middle-aged wage-earners earn twice as much as young wage-earners (because of greater skills or family needs). Even in this admittedly unrealistic situation, the expected comparative advantage of mugging still could remain sufficient to produce the rate we have now. Moreover, this may conceivably be the case even if everybody were to earn exactly the same income, since people spend at different rates and times and feel different needs. Spendthrift Jack may still be tempted to rob Thrifty Bill. Muggers need not earn less than their victims.

Finally, it is hard to see how economic reform could prevent rape or other crimes committed for the sake of non-economic advantages. Social changes such as greater sexual permissiveness have not led to a reduction in sex crimes. It seems fair to conclude that even the most egalitarian society imaginable would not remove the temptation to commit property and assaultive crimes. Whatever the merits of socio-economic

²⁵ Enrico Ferri in his *CRIMINAL SOCIOLOGY*, *supra* note 13, stressed social causes. Sociologists still blame crime on the effects of poverty, slums, and labeling. Among the most sophisticated are R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* (1968), particularly ch. VI, "Social Structure and Anomie," and T. HIRSCHI, *supra* note 10. For a discussion, see E. VAN DEN HAAG, *supra* note 5, at 73-104.

²⁶ For example, Sir Leon Radzinowicz points out that as prosperity and equality grew in Sweden between 1955-64, the crime rate went up 45%. According to Sir Leon, the trend is worldwide. "[A]s the curve of affluence was gathering momentum, the curve of crime began to follow it." L. RADZINOWICZ, *THE GROWTH OF CRIME 4 passim* (1977).

conomic reform and, specifically, of greater distributive equality, it could not replace deterrent threats and punishments as means of crime control.

Thus, we are left in the main with manipulating the severity and frequency of punishment. Increases of either, in addition to direct effects on the net advantage of crime, have important indirect effects: they strengthen the moral value of lawful behavior. These increases are costly to society but likely to cost less than the crimes they eliminate.²⁷ Whatever their independent merits, other changes, be they religious conversions or income redistributions, are unlikely to influence the crime rate significantly.

IX

I believe I have shown that, with the few exceptions noted, the incapacitation or rehabilitation of recidivists per se (i.e., apart from any deterrent effects) is not likely to affect the crime rate if the comparative net advantage of crime remains unchanged. However, it is possible that the net advantage of crime for recidivists is higher than it is for others. Perhaps recidivists are recidivists because they have fewer moral restraints (i.e., lower psychological costs) or fewer non-criminal opportunities (i.e., higher gross advantages of crime) than others; they may place a higher positive value on committing crimes than do non-recidivists; or they may like to take risks, or to defy the law. Whichever of these hypotheses is true—and present evidence is inconclusive—the net comparative advantage expected from crime by recidivists must be higher than that expected by non-recidivists to lead to the formation of a group of career criminals.

If the net advantage of crime is higher for recidivists than for other offenders, then the average net advantage of crime to the criminal population will be lowered by longer and more frequent incapacitation of recidivists. Those whose net advantage is highest would be eliminated. Hence, advocates of lengthy incapacitation of habitual criminals have a valid point. Crime can be reduced by incapacitating career criminals, thereby reducing the average net comparative advantage of crime, both by increasing the cost (through more frequent or severe punishment), and by reducing the proportion of criminals in the population who expect the highest comparative net advantage from crime.²⁸

²⁷ On the indirect effects of punishment, see J. ANDENAES, PUNISHMENT AND DETERRENCE (1974), particularly "The Moral or Educative Influence of Criminal Law" at 110-28. The annual cost of crime has not been reliably determined. It is generally estimated to be far in excess of the cost of crime control.

²⁸ Rehabilitation of career criminals may have similar effects. Although it would not increase the cost of crime, it still would reduce the *average* net advantage expected from crime,

X

Let me drop now the two unrealistic assumptions retained so far: that rehabilitation is one hundred percent successful, and that most crimes are committed by recidivists. Suppose, more realistically, that a hefty proportion of crimes are committed by unconvicted offenders and that only a few of those convicted are rehabilitated. These more realistic assumptions will make no difference with respect to crimes committed by first offenders and crimes committed in order to sell proceeds or services to third persons, since the frequency of these offenses is independent of rates of rehabilitation or incapacitation.

However, it was suggested above that total rehabilitation would reduce the rate at which rapes or muggings are committed—unless the net advantage is increased by a decrease in cost to the offender sufficient to attract new offenders previously not attracted, who would replace those rehabilitated. If, however, as now assumed, few convicted muggers or rapists are rehabilitated, or if many of these offenses are committed by unconvicted offenders, this reduction becomes negligible.

XI

Does rehabilitation lose all value if it has no effect on the crime rate? Not if one is concerned with saving souls by influencing the moral fate of individual convicts. The moral value of rehabilitation then becomes independent of any impact on the crime rate. Private secular as well as religious organizations are legitimately interested in the moral fate of individual convicts. Perhaps the field should be left to them. Their rehabilitative work should be permitted and encouraged.²⁹ But it should not be allowed to interfere with either of the two accepted social purposes of criminal sentences: doing justice and reducing the crime rate. If such institutions as work release, halfway houses, probation, parole, indeterminate sentences, and judicial discretion in sentencing were meant to reduce the crime rate through rehabilitation, they cannot be justified since they cannot do so.³⁰ Nor can the peculiar immunity often granted juveniles. These practices could not reduce the crime rate, even

by eliminating the criminals who have the highest expectation. (From the viewpoint of deterrence the higher net advantage that habitual criminals expect from crime also justifies increasing the cost of crime to them.) The reduction of the average expected net advantage makes the lengthy confinement of career criminals desirable. The direct incapacitative effect stressed, for example, by James Q. Wilson in *THINKING ABOUT CRIME* (1975) seems less important.

²⁹ Rehabilitation may save the soul or morally improve the life of a convict. Yet by rehabilitating him one also, albeit indirectly, corrupts the soul, or morally worsens the fate, of an unidentified person who is induced to replace the convict in the ranks of criminals.

³⁰ There is no evidence that these institutions foster rehabilitation, whatever their value. See Wilson, *supra* note 5.

if they did rehabilitate; hence they cannot be justified on any consequentialist social grounds. Nor do they contribute to justice. Justice is done according to what the offense deserves, whereas parole and work-release depend on a judgment of the offender's future behavior, or on an attempt to influence it. Whatever its merits, such an attempt is irrelevant to what is deserved by past acts, to doing justice. Hence, present rehabilitative practices cannot be justified on any social grounds, consequentialist or deontological.

XII

The basic purposes of criminal laws and punishments are to do justice according to what is deserved and to deter from crime.³¹ "Doing justice" is essentially a moral matter (although the perception of justice influences people's willingness to abide by the law and, thereby, crime rates). Justice is important to the individual's and to society's moral sensibility. Deterrence, in contrast, is intended to have a direct effect on the crime rate.³² Unlike justice, it is an instrumental purpose of punishment. Deterrence raises the expected cost of crime, thereby decreasing the net advantage.

There are two kinds of deterrence:³³ preclusive and minatory. (The terms are mine, but not the distinction.) *Preclusive deterrence* hinders crimes by making them harder to commit. Dogs, locks, safes, self-defense, private security arrangements, high walls and fences are included in preclusive deterrence, which usually is undertaken at his own expense by the person trying to protect himself, or his property, from crime. Preclusive deterrence usually does not directly involve the law or the courts. *Minatory deterrence* is undertaken at public expense; it is the purpose of the criminal law to threaten those who do what it prohibits with punishment for the purpose of deterring them. The actual infliction of punishment on a sufficient proportion of the undeterred (offenders) makes the threats of the criminal law credible, and thereby deters others.

Just as there can be no doubt that the credible promise of rewards attracts, so there can be no doubt that credible threats will deter, although no threat is likely to deter everyone at all times. Thus, if a siz-

³¹ Contrary to received opinion, I believe that deterrence and justice theories of punishment tend to lead to similar sentences. See van den Haag, *Punishment as a Device for Controlling the Crime Rate*, 33 RUTGERS L. REV. 706 (1981).

³² See E. VAN DEN HAAG, *supra* note 5, at ch. V.

³³ By deterrence I mean "general deterrence," that is, the effects of threats of punishment, or of punishment itself, functioning as a threat, in restraining non-offenders from becoming offenders. This is in contrast to "specific deterrence," the hoped for restraining effect of punishment on the offender.

able fine were credibly threatened to anyone caught perusing this essay, few people would read it. If five years of prison were threatened, hardly anyone would. People can be similarly deterred from other offenses, although, to be effective, the threat must more than offset the attractiveness of the offense, and it must be carried out against a sufficient proportion of offenders to remain credible. If the risk of suffering non-trivial punishment becomes high enough, "crime does not pay" and is less frequently committed.³⁴

Our only hope for reducing the burgeoning crime rate lies in decreasing the expected net advantage of committing crimes (compared to lawful activities) by increasing the cost through increasing the expected severity of punishments and the probability of suffering them. The cost is low enough now to make crime pay for a rising number of persons, because of legal practices which were justified by the hope of rehabilitation and the mistaken idea that rehabilitation could reduce the crime rate. These legal practices, which have made the threats of the law less than daunting, must be abandoned if we are to reduce the crime rate. Probation must become exceptional. Parole and indeterminate sentences must be abolished, and so must judicial sentencing discretion and the numerous other programs meant to reduce the crime rate by rehabilitation. Punishment must become predictable.³⁵ A higher apprehension and conviction rate is also needed, and could readily be produced by changes in counter-productive legal and judicial practices which make "the incarceration of even the most obviously guilty criminal . . . a task comparable to landing a barracuda with a trout-rod and a dry-fly."³⁶ I believe we will move in that direction. Meanwhile, it may help if we stop relying on such dead-end streets as rehabilitation and the practices connected with it.

³⁴ See E. VAN DEN HAAG, *supra* note 5, at 133-42.

³⁵ See van den Haag, *The Criminal Law as a Threat System*, 73 J. CRIM. L. & C. 769 (1982).

³⁶ Bishop, *Lawyers at the Bar*, COMMENTARY, July 1974, at 102.