Justification for Residual Criminal Stigmatization: A Contribution to the Modern Philosophy of Punishment

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Amnesty. Let's all forgive them for mistakes made long ago. Nobody in our community ought to lose his civic rights. Aristophanes, *The Frogs*.

I. Introduction

In the past twenty-five years advances in research have increased awareness of the deleterious effects of criminal sanction to an extent that they are now undeniable from any political or academic viewpoint. The most obvious and immediate unofficial sanction accompanying conviction in a criminal court, social and familial ostracism, has been relegated to the background by application of subcultural theory and empirical demonstration that a single conviction rarely causes severe and lasting effects on family ties. Meanwhile discrimination against ex-offenders in employment markets, both private and public, has been clearly demonstrated in

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2. J. P. Martin & D. Webster, *The Social Consequences of Conviction* 110 (1971) conclude: “Generally speaking the pattern of relationship with the natal family was little changed during the follow-up period. Such changes as occurred followed no consistent pattern.”
4. John Melichercik of the Toronto School of Social Work concluded: “Government, as administrator of penal institutions and parole, tries to induce private employers to hire former offenders. But as employer, government (through civil service) studiously avoids doing what it urges private enterprise to do.”
many countries. American writers have documented widely the loss of civil rights and status of ex-offenders and while there is good reason for the United States to feel more guilty in respect of such stigmatization — civil disabilities are considerably more prevalent in the U.S.A. than elsewhere in the common law world — at least one writer has pointed out that their neighbours across the 49th parallel are far from innocent of such derogation of the ex-offender status. Old convictions can affect licence applications and the contractual, testatory and immigration capacities of the bearer. While police science has highlighted the prejudice toward known offenders that is prevalent in many police departments,


7. J. W. Hunt, J. E. Bowers and N. Miller, Laws, Licenses and the Offender's Right to Work 29-41 (In American Bar Association National Clearinghouse on Offender Employment Restrictions, Removing Offender Employment Restrictions (1976)) lists no less than 306 occupations from which a person in the U.S.A. may be excluded on the basis of an old conviction. Canadian legislation is in general not so comprehensive, although many professions require "good character", and licensing for certain businesses (particularly liquor licences) may be denied to ex-offenders.

8. See for example Canadian Criminal Code, R.S.C. 1970 c.C-34, s. 682(3). In the U.S.A. four "civil death" statutes expressly remove contractual capacity. See Grant et al., supra, note 5, 1030-37


10. For Canada, see Immigration Act 1976, S.C. 1976-77, c.52, s. 19; for England, see Immigration Rules: Control on Entry; for the U.S.A., see Immigration Act, 8 U.S.C.A., s. 482(a)(9)(10)

11. Police use of records has been found to prejudice the ex-offender in several situations, including: surveillance of "known" criminals (M. R. Damaska,
sociological theory has demonstrated the danger that a person once 'labelled' a criminal will develop a self-concept which leads to further criminal activity. It goes almost without saying that the continued existence of various prejudices in the ex-offender's environment may contribute heavily to this process.

The major modern sources of this lasting or residual stigma are technological—principally the electronic data bank and the mass media. One writer has coined the phrase "record prison" to describe the habitat of today's ex-offender. It is indeed to records, official and unofficial that reform has been directed in the shape of "expungement," record sealing, or the "spending of convictions". However, these devices in the main, and particularly in Britain and Canada, operate only when the record-bearer has demonstrated his comparative lack of need for such relief by a long period of crime-free life. There are, too, grave

Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study (Part 2) (1968), 59 J. Crim. L., Criminol. & Pol. Sci. 542; J. Goldstein, Police Discretion Not To Invoke the Criminal Justice Process: Low Visibility Decisions in the Administration of Justice (1960), 69 Yale L. J. 543, 570f; compulsory registration of felons (Note, Criminal Registration Ordinances: Police Control over Potential Recidivists (1954), 103 U. Penn. L. Rev. 60); in field interaction, interrogation and detection, including the discretion to arrest (W. LaFave, Arrest: The Decision to Take a Suspect into Custody 149 (1965); R. C. Smith et al., Background Information: Does It Affect the Misdemeanor Arrest? (1976), 4 J. Pol. Sci. Admin. 111); as primer material for interrogation (R. E. Clift, A Guide to Modern Police Thinking (1965)); "dragnet" arrests (LaFave, supra, at 288); and modus operandi investigations (see e.g. R. Morrish, The Police and Crime Detection Today (1959)).


14. This generic term is often used to describe a range of American measures. For a detailed survey see A. R. Gough, The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status, [1966] Wash. U.L.Q. 147

15. For example under the Canadian Criminal Records Act, R.S.C. 1970, c. 12 (1st. Supp.)

16. For example under the British Rehabilitation of Offenders Act 1974, c. 53
problems in the dissemination of such relief: in Britain spending of convictions is available only to those sentenced to thirty months of imprisonment, or less;¹⁷ in Canada, a requirement for an application by the ex-offender¹⁸ and an investigation of his conduct and circumstances by the National Parole Board¹⁹ ensures that granting of "pards" will be to a very small number of ex-offenders each year.²⁰

In short, the penal systems of today, more than ever before, cause increased suffering to the offender, far beyond that imposed in the official penalty of the sentencing agent. The purpose of this paper is to examine the possibility of justification of such extensive stigmatization, in the light of the traditional theories of punishment, and their conceptions of the role of the penal system. Should there be no justification available, appreciable reforms in the structure of the present-day penal process will be needed in order to modify unofficial stigmatization to a form reconcilable with rational notions of justice. Anticipating the result of the inquiry, such reforms might well include decriminalization of those offences which, while serious enough to merit judicial sanction, are not serious enough to incur the full sanction of penal stigmatization.²¹ They might also include some limitation on the traditional freedom of the press to report names of petty offenders,²² and indeed a modification of data systems away from the present trend to centralization. Also

¹⁷. Id., s. 5
¹⁸. Criminal Records Act, s. 4(1)
¹⁹. Id., s.4(2)
²⁰. I.e. slightly more than 2200 per annum, average 1970-78
²¹. See generally Law Reform Commission of Canada, Our Criminal Law (1976) (recommendation for reduction of scope of criminal law to "core" offences); La Décriminalisation, actes du 3 Colloque international, Bellagio, 7-12 mai 1973, Centre nazionale di prevenzione e difesa Sociale (1975) (general papers). On decriminalization of an area of behaviour see e.g. D. Cruickshank, Alternatives to the Judicial Process: Court Avoidance in Child Neglect Cases (1978), 12 U.B.C.L. Rev. 248. On decriminalization of a specific offence, see United States Congress Select Committee on Narcotics Abuse and Control, Decriminalization of Marijuana (1977)
involved in any scheme of reform must be alternatives to the traditional penal process: not least, diversion. The details of innovation are, however, best left to the draughtsmen of any proposed new system; the object here is merely to develop a comprehensive theoretical scheme by which such advances may be justified.

II. *The Application of Traditional Punitive Philosophies*

Justifying philosophies are well known in the study of punishment; the traditional standpoints have distinguished pedigrees to which reference will be made below. The disadvantages suffered by ex-offenders as a result of conviction, be they imposed by persons or institutions, are clearly punitive in nature in that they are sufferings in themselves, and flow from conviction for a crime. For this reason, discussion regarding the justification of their existence can be fitted into the framework of the traditional theories of punishment. Logically, if the residual effects are an adjunct of the official process then both must be judged by the same criteria.

If the alternative view is taken, namely that the collateral consequences of conviction are not, in reality, a part of the direct sentence, but are a distinct penalty, then they require separate reasons for justification. An argument for the requirement of justification of deprivation of prisoner's rights recently advanced by Mandel, also lends itself well to post-sentence stigmatization:

In the first place, and most directly, . . . prisoners are deliberately made substantially worse off than non-prisoners *in addition to* enforced residence in a prison for a number of years. It is always wrong to deliberately inflict (*sic*) suffering upon human beings, *a fortiori* upon some but not others, unless there are good reasons to justify the practice.

The second set of reasons for requiring some justification for the deprivations stem (*sic*) in part from the undisputable fact the prisoners are drawn, for the most part and to a disproportionate extent, from the relatively powerless and deprived classes . . . . This renders even more initially unacceptable the additional deprivations heaped upon them . . . especially where these deprivations also enhance their powerlessness . . . Furthermore, there are serious ramifications for the class from which prisoners are primarily drawn and, thereby, for society at large. To the extent that deprivations materially enhance prisoners' isolation

from the rest of society and are supported by or themselves engender the notion that prisoners deserve less than other members of their class because they are fundamentally different, lesser human beings, these deprivations will serve to obscure the relationship of the sub-class to the class from which it is drawn. This carries with it the danger that, in so far as imprisonment can be viewed as an added dimension of class inequality, or even as a means of perpetuating class inequality, this function will be disguised. Put another way, in so far as criminality stems from social and not individual pathology, this fact may be obscured by the stigmatizing, isolating and power-draining deprivations which are inflicted on prisoners [footnotes omitted].24

Whether residual stigmatization is viewed as a part of the official penalty or a distinct entity, therefore, a justifying rationale is required. In either event, the scheme of justification developed in relation to the direct penalty encompasses the majority of arguments which may be raised in evaluation of residual stigmatization.

III. The Theories Applied

Commentators on the penal system and on justification of its sanctions, although possibly susceptible of allocation to distinct schools, are rarely in precise agreement as to the justification for, or aims of, a sentencing system. The continuing debate upon the justification of punishment is too long and involved for full discussion here; briefly, however, there are traditionally two lines of argument — retributive and utilitarian.25 The former is the older, and in many respects less complex. Retributivism suffered many years of desuetude as a result of the rise of utilitarianism in the late nineteenth century.26 Of late, disillusionment with utilitarian aims

26. Retributivism is still unpopular as the sole justifying aim amongst modern philosophers. The two main reasons appear to be the tendency to regard criminal acts as a product of environment, circumstances, etc., rather than as a wilful act of an individual making a free choice (although the judiciary still seem to find favour with a view of crime as a voluntary act — see for example R. v. Beaver Creek Correctional Camp Head ex p. McCauley (1968), 2 D.L.R. (3d) 545 (Ont. C.A.): “It is strictly correct to say that the confinement of an inmate in a penitentiary is the result of a voluntary choice on his part.”), and the realisation that the majority of criminals come from the disadvantaged classes. Thus punishment does not redress the balance between the offender and others but tends rather to weight it more
has occasioned a swing of the pendulum back to retribution as a popular rationale, with such eminent theorists as Herbert Packer\textsuperscript{27} and Norval Morris\textsuperscript{28} attempting to formulate an integrated theory of punishment, essentially a compromise wherein no more punishment may be inflicted than the least severe theory authorises in each case.

These philosophical theories will be dealt with in turn. Before commencing the discussion, however, a preliminary distinction may be drawn between the retrospective justification of punishment — taking punishment as a fact and trying to justify it — and prospective formulation of aims for the penal system. The distinction is hazy, for while utilitarianism and retribution may justify punishment, they may also be the aims of the system. A notable exception is the thesis of the Spanish jurist Montero, which, while being an aim of the penal system, does not justify punishment in itself.\textsuperscript{29} Montero’s principle, as condensed by Walker, is that one aim of a penal system should be “to protect offenders and suspected offenders from unofficial retaliation”\textsuperscript{30}. Walker suggests that most people seeking to justify this aim would argue either (a) unofficial retribution leads to further disorder, or (b) unofficial retaliation often imposes excessive suffering on the offender, and he points out that each of these justifications appeals to other theories of punishment; reductivism in the first case, and retributive or humanitarian limitations in the second.\textsuperscript{31} It is not, however, necessary to go to these lengths to remove the Montero principle from the list of potential punishment-justifiers; his principle, admittedly valid and almost universally accepted, is nothing more than a justification for having punishment administered officially. To justify the punishment which is inflicted it is not enough to say

\textsuperscript{27} The Limits of the Criminal Sanction (1968)
\textsuperscript{28} The Future of Imprisonment: Toward a Punitive Philosophy (1974), 72 Mich. L. Rev. 1161
\textsuperscript{29} El Derecho Protector de los Criminales (1916)
\textsuperscript{30} Sentencing in a Rational Society 17 (1969). Sir James Stephen stated the principle more picturesquely: “The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite.” Quoted in Weiler, supra, note 25, at 308
\textsuperscript{31} Ibid.
that otherwise someone else would do it; one needs to look deeper to justify deliberate infliction of harm upon the offender.

It is a worthwhile exercise, however, to examine the implications of Montero’s aim for the discussion at hand. Montero was not concerned with the unofficial side-effects of conviction; rather his argument was directed to the direct sentence of the judicial organ, in preference to the lynch-mob. No doubt he had in mind that the history of the criminal law begins with a take-over by the state of retaliatory powers, in pursuance of a better ordering of society (or increased revenues). But if Montero had directed his mind to the residual stigma discussed herein, he might very well have been disappointed with the penal systems of the western world today. If a principal aim of the penal system is to displace unofficial retaliation, then we fail Montero miserably in respect of the after-effects of conviction.

In essence, then, we already have a reason for reducing unofficial stigma. The paradox is that in our modern sentencing process, official sentence may be reduced on account of other hardships suffered by the offender or his family.32

(a) Retributive Justifications

Retributive theory appears in a number of more or less sophisticated forms; central is the notion that offenders deserve punishment because they have committed a crime.33 Many proponents of this theory appeal to religious or moral values as an underlying motivation.34

This simple form of retributivism does not have specific reference to the application of extra-legal stigma. Where retribution is used as a limiting principle, however, clear consequences arise. Professor Hart has coined the phrase “retribution in distribution” to describe the limiting notion that penalties should be inflicted only on those

32. R. v. Nash (1949), 94 C.C.C. 356 at 358 (N.B.S.C.): “In determining the appropriate sentence [the trial judge] must consider ... any extenuating circumstances which may appear from the evidence.” See further R. v. Kangles (1960), 129 C.C.C. 138 (Sask. C.A.), where a defendant’s “blemish to his name and indirectly to his wife and family” was held to be relevant to reduction of sentence for obtaining money by false pretences.


34. H. Jones, Crime and the Penal System, 3rd. ed. 135 (1965)
found guilty of crime.\textsuperscript{35} Here is a clear cause for censure of stigmatization visited upon those merely arrested, tried and acquitted, or stigmatized due to non-defendant involvement with the trial process.

Secondly, a similarly sophisticated form of retribution is that which attempts to fix the severity of the penalty in relation to the crime committed.\textsuperscript{36} Immanuel Kant is the most noted historical exponent of this view:

What kind of degree of punishment does public legal justice adopt as its principle and standard? None other than the principle of equality (illustrated by the pointer on the scales of justice), that is, the principle of not treating one side more favourably than the other. Accordingly, any undeserved evil that you inflict on someone else among the people is one that you do to yourself. If you vilify him, you vilify yourself; if you steal from him, you steal from yourself; if you kill him, you kill yourself. Only the law of retribution (\textit{jus talionis}) can determine exactly the kind and degree of punishment.\textsuperscript{37}

Again the implications of the position for a theory of residual stigmatization are clear; if retribution were required, it would take a considerable increase in the sophistication of sentencing in modern courts to take account of all unofficial suffering before fixing the official penalty. Suppose the crime were a theft of $10. Defendant A is an unemployed man with 20 previous convictions for dishonesty. Defendant B is a warehouse manager who will lose his job if his bond is revoked. Is it at all possible to impose an official penalty which would balance the scales of disadvantage equally against each one? Presumably only an extremely severe penalty would do equal harm to defendant A as would the mere fact of conviction to defendant B. The alternative is of course to attempt to minimise unofficial stigmatization.

Before leaving retributive theory, it is also worthwhile to consider a related view of punishment, into which retribution often merges — the “expiatory” justification.\textsuperscript{38} This theory, exemplified in Christian teachings by Jesus’ paying the debt for the sins of man upon the Cross, essentially holds that punishment is the purging of

\textsuperscript{36} It is almost trite to point out that the Canadian Criminal Code, for example, fixes sentencing maxima with considerable reference to this principle.
\textsuperscript{37} Supra, note 33.
\textsuperscript{38} See, for example, B. J. Cavanaugh, The Justification of Punishment (1978), 16 Alta. L. Rev. 43, at 46
the guilt of the offender. If serving the official penalty purges guilt, then the imposition of any further disability or prejudice is not justifiable on this basis. One cannot however look to the expiatory theory for consistency; one might note in passing the paradox of much religious discussion of retribution that, while holding that man will atone for his wrongs before God would seem to imply that the man who does not repent should not be punished on earth. To do so would be to expose him to double account for his sins! Presumably religious theorists would also argue against a man having to suffer twice for the same crime, and for more lenient treatment of repentant criminals.39

Retributive principles, at least where delimiting in distribution or severity of sentence, have much to offer to the debate on residual stigmatization. Utilitarian theories and aims, likewise, have clear implications for stigmatizing practices.

(b) Utilitarian Justifications

The essence of utilitarian theory is an attempt to justify punishment in terms of the general benefits to mankind. Rather than focussing on the individual offender and act, the utilitarian seeks to improve the common lot by visiting a lesser harm on the individual. In sophisticated utilitarian theory, the principle “it is better that one man die than that the whole state perish” is mitigated by considerations of desert in the allocation of penalties. Bentham, the father of utilitarianism, wrote as follows:

That punishment which considered in itself appeared base and repugnant to all generous sentiments is elevated to the first rank of benefits when it is regarded not as an act of wrath or vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensable sacrifice to the common safety.40

In practice one suspects that the impressive logic of utilitarianism gives way to a general desire to reduce crime, particularly where

39. Of course the sentencing process already accommodates this last principle. A guilty plea, seen as a confession of the wrongness of the act and therefore as the first step on the road to rehabilitation, is a recognised (though unwritten) ground of leniency in sentencing. It is greatly used to the defendant’s advantage in bargaining with prosecutors; see R. O. Dawson, Sentencing 173 at 179-181 (1969); J. Baldwin and M. McConville, Negotiated Justice (1977). In Chinese law the principle “Leniency to those who confess and severity to those who resist” is of central importance. See R. Edwards, Reflections on Crime and Punishment in China, with Appendix Sentencing Documents (1977), 16 Colum. J. Trans. L. 45 at 57-58

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reported incidence rates are rising, because it is a political embarrassment. Whether this crude aim or the pure utilitarian base is relied upon, several operative mechanisms may be called in aid.

(i) General Deterrence

General-deterrent theory relies upon the notion that the imposition of penalties upon those who transgress the legal norms of a society will put others in fear of the consequences of a similar transgression. Traditionally emphasis was laid upon fear of the official penalty, although of late much research has suggested that the severity or leniency of the official penalty has little effect upon the decision to offend. Apparently most offenders operate on at least a tentative assumption that they will not be caught. However, modification of the offender's perception of the likelihood of being caught (for example, by the widely publicized introduction of roadside breathalyser testing for blood-alcohol levels of drivers) seemingly does affect the rate of commission of non-emotional crimes.\(^{41}\)

This finding has interesting implications for the theory of residual stigmatization. If, on the one hand, however severe the possible penalty (including unofficial stigma) might be, certain persons will still offend, then there is no case for permitting degrading or defamatory consequences to flow from conviction on the basis of deterrence. On the other hand, it may be that a significant proportion of those who do not offend (in the case of most crimes, perhaps the large majority of the population) behave in a conforming manner either due to their own morality (in which case a penalty will not modify behaviour) or because of fear of the unofficial consequences. If I consider the commission of some minor crime, I might consider the possible court appearance, fine, or probation, a minor inconvenience. But the shame and indignity I might feel were my parents, wife and colleagues to know of the conviction would be of a different order. That is not to mention possible professional disadvantages that might be generated.

This personal notion is given considerable support in a wider context by Willcock’s and Stokes’ study of deterrents and incentives to crime amongst 808 English youths in the crime-prone age of 15 to

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41. See for example Walker, supra, note 30, ch. 4. A review of the studies which lead to this conclusion is contained in R. P. Davis, General Deterrence and "Petty" Crime (1979), 143 Justice of the Peace 117
21 years. Subjects were asked to rank eight consequences of "being found out by the police" according to "Which would worry you most?" It is highly significant that the official penalty, on average, rated fourth. The three replies ranked above it were all based on unofficial consequences: "What my family would think", "The chances of losing my job" (even more significantly, those who had no job or were still at school were asked to rate "The chances it would make it difficult to get the sort of job I want"), and thirdly, "Publicity or shame of having to appear in court". Thus it would appear that to remove trial publicity may detract substantially from the general-deterrent effects of criminal process.

Buikhuizen's study of deterrence on car-tire offenders in the Netherlands suggested that three distinct groups may be discerned in the population at large, namely,

a) "Undeterrables"

b) Those who would not offend whatever the penalty, and

c) Those who might be swayed by the likelihood of apprehension or penalty.

The existence of two of these groups, a) and b), may apparently be generalized to most crimes, and although it seems that the size of group c) might decrease significantly as the moral or social severity of a crime increases (hence the negative findings of studies on forcible rape and murder), the existence of that group in minor crime terms presents a possible utility for the added stigmatic effect of post-conviction disabilities. In addition, it may be that unofficial consequences are those most feared by persons who do not offend at all despite increases or decreases in the official penalty.

A penal system based on general deterrence may thus justify loss of civil abilities, encouragement of social ostracism by publication of offenders' names and details of their trials and offence, and

42. H. D. Willcock and J. Stokes, Deterrents and Incentives to Crime Among Youths Aged 15-21 Years, Vol II, Table 44 (1963)
44. See for example B. Schwartz, The Effect in Philadelphia of Pennsylvania's Increased Penalties for Rape and Attempted Rape (1968), 59 J. Crim. L., Criminol. & Pol. Sci. 509. The literature on general deterrence of homicide is immense. Walker (supra, note 30, at 81) concludes that: "Neither the New Zealand nor the American data support the hypothesis that, as a deterrent, capital punishment is more effective than . . . long periods of imprisonment." J. Ehrlich, however, has recently produced a paper arguing the opposite: The Deterrent Effect of Capital Punishment: A Question of Life and Death, [1975] Am. Econ. Rev. 397
indeed employment discrimination against ex-offenders. The theorist relying solely on general deterrence, however, must be prepared to accept other social costs of stigmatization upon those two groups of the population on whom deterrence is not operative, and may in the end achieve greater deterrence of a small group at the expense of increased criminality of a larger group. Penal research is not yet in a state to verify or disprove this prospect, but the very real possibilities have been widely canvassed and are rapidly approaching empirical verification.\textsuperscript{45}

(ii) \textit{Individual Deterrence}

Less research is available on this topic; it is often difficult to know whether an offender who does not repeat is deterred or reformed. The central notion of individual deterrence is of putting the once-convicted individual in fear of the consequences of his own re-offending. Many of the findings of general deterrence may, however, be applied to this concept. The common assumption that man calculates and rationalizes his actions means, firstly, that the less emotional the crime, the more likelihood there is of effective deterrence, and secondly, that manipulation of the offender’s perception of the likelihood of being caught is more likely to yield results than manipulation of the official penalty.\textsuperscript{46} In this light it is pertinent to argue for the continuation of one type of stigmatization — police watchfulness — provided that the offender can be made to feel that he is more likely to be caught should he reoffend. Any usefulness of such an approach would, however, be wasted should other deprivations of civil abilities, in particular employment, be such that the offender is forced into a situation where he feels that he has no choice but to reoffend, despite the increased risk of apprehension. Likewise, if police attention is of such a nature that the offender’s civil liberty is abrogated substantially, there is a danger of the development of an “antilabeller” reaction which would cancel out any benefits to be obtained.

(iii) \textit{Rehabilitation}

Undoubtedly the most popular approach to penal philosophy of recent years, the rehabilitative ethic, is losing much of its charm. Detailed criminological research has suggested the failure of most if

\textsuperscript{45} See generally \textit{supra}, note 12 and accompanying text
\textsuperscript{46} \textit{Supra}, note 41 and accompanying text
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not all known methods of "treatment" criminals to reduce offending behaviour.\textsuperscript{47} As a justification for punishment, reformation is theoretically secure provided that a treatment can be shown to work; however, in the absence of demonstrable results the idea of punishment as reformation becomes a myth no longer justifiable by the notion of "being cruel to be kind". It is beyond the scope of the present discussion to outline the evidence referred to; this has been adequately gathered elsewhere.\textsuperscript{48} Instead, let us assume for the moment that in some way official penalties could be devised which reform the ex-offender. What then are the implications of adherence to a rehabilitative philosophy for unofficial stigmatization?

The case has been most convincingly argued by Aaron Nussbaum in his influential book, \textit{A Second Chance}.\textsuperscript{49} Nussbaum argues that the bulk of crime is the work of comparatively few serious recidivists. Crime would be curtailed drastically, he argues, if the first offender were given positive assistance in his reformation after sentence. The mechanics of Nussbaum's proposals need not concern us here; rather it is his account of the commencement of the cycle of recidivism which is of value. On his return to society, the debt apparently paid, the offender (in the U.S.A.) is faced with an array of disabilities, prejudices and suspicions. His successful reintegration into society is precluded by these bars.

No matter how genuine a reformation the ex-offender may have achieved, or how earnest his quest for rehabilitation, he will remain a prisoner of his criminal record throughout his days.\textsuperscript{50}

Nussbaum's thesis is equally valid for other countries and cultures. A system genuinely rooted in a rehabilitative quest would seek to minimize post-sentence stigmatization. Might it not be, indeed, that residual stigmatization has played a large part in the failure of experimental correctional regimes which might otherwise have succeeded? If all offenders, no matter what their treatment "inside", face the same bleak prospects once released, the failure

\textsuperscript{47} See, for a useful review, R. Hood and D. Sparks, \textit{Key Issues in Criminology} (1970)
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} The argument is summarised in a review by J. Karp in (1975), 42 Brooklyn L. Rev. 408
\textsuperscript{50} Nussbaum, \textit{op. cit.} (1974) 4. The argument is not new: R. G. Ingersoll, writing his \textit{Crimes Against Criminals} in the nineteenth century (publ. posth. 1906) averred that: "There is no reformation in degradation. To mutilate a criminal is to say to all the world that he is a criminal, and to render his reformation substantially impossible." (at 21)
to reform may be attributable to precisely that unofficial prejudice visited upon the offender.

The sociological notion of labelling discussed above provides a social-psychological insight into possible mental processes emphasized by residual stigmatization. Nussbaum's explanation that the offender who is deprived of job opportunities, licences, permits and the like, may as a consequence return to crime, would be refined by the labelling theorist. The offender denied such opportunities is encouraged to change his self-concept to that of "deviant" on conviction; residual stigmatization assists him in maintaining that self-image. Whether one subscribes to Nussbaum's straightforward approach or prefers to examine the perceptual effect on the offender the result is the same: a policy based on rehabilitation cannot tolerate the imposition of residual stigmatization upon the ex-offender.

(iv) Incapacitation

Within the general head of utilitarianism, subject to the all-pervading rule of maximizing benefit, a policy of incapacitation may be pursued.\textsuperscript{51} The word has a sinister connotation, due no doubt to its connections with the death sentence, castration and mutilation. It has its place, too, in more enlightened penology. The \textit{interdit de séjour}, for example, which in France forbids an offender from entering a certain locality, is a form of incapacitation, as is the striking from the register of an embezzling accountant or lawyer who misuses trust funds.

A qualified policy of incapacitation contributes to the theory of residual stigmatization from both directions. The removal of the embezzler from the field of temptation, if it involves debarring him from a profession, is clearly the imposition of a disability, justifiable if one aims to incapacitate. On the other hand, if incapacitation were the only justification, then many other aspects of residual stigmatization — in particular social ostracism and police attentions — may not be justified. Further, a delimitation to necessary incapacitation is consistent with an anti-discrimination law which allows only offences related to the proposed employment to be taken into consideration in a job application.\textsuperscript{52}

\textsuperscript{51} For a defence, see for example J. Q. Wilson, \textit{Thinking About Crime} (1975)
\textsuperscript{52} For example Hawaii Rev. Stats. s. 387-2 (Rep. 1976) which requires a "substantial relationship to the functions and responsibilities of the prospective or continued employment".
With apologies for the inconsistency of this diversion, it seems appropriate to discuss here the notion of incapacitation not in isolation, as I have done with the previous heads, but in its real setting. The justification for this approach is that while retribution and deterrence may be envisaged realistically as forming the sole basis of a reformed modern penal system, a policy of total incapacitation of each and every offender may not, at least in civilized countries. Probably only a 100% death penalty infliction would achieve such an aim.

Incapacitation is, rather, the archetype of a balancing factor in modern penal philosophy. A man while he is imprisoned is incapacitated from many crimes (e.g. bank robbery, impaired driving, heterosexual rape) although others may be facilitated (e.g. homosexual rape, conspiracy). Similarly, bars on entry to professions are protective of the public interest. The dilemma of how long a man’s record should be weighed against him is often poised most acutely in relation to protection of innocent individuals; how long should it be, for example, before a man convicted of pederasty should be allowed to teach at a school? Here the potential harm is viewed as extremely serious, thus even a slight risk may be unjustifiable. Other principles, for example limiting retributivism, tend to intervene lower down the scale, and thus we restore a driving licence to the man convicted of impaired driving after his disqualification. The risk may be as high or higher but the potential harm is viewed as less serious. Seriousness of possible harm governs not only the type of deprivations which may be placed upon an ex-offender but also their duration. Long-term follow-up studies of such serious offenders as rapists and arsonists indicate that they may be more likely than the average member of the public to commit those offences for more than twenty years after a first conviction. In this light, the powerful press lobby on behalf of the public’s “right to know”, which was so successful in defeating New York’s Amnesty Bills, may find some considerable justification.

It is thus open to conclusion that a policy of selective incapacitation (the greatest practical role of incapacitation) will

4. For an account see A. Nussbaum, A Second Chance (1974)
admit of a limited number of post-conviction difficulties being imposed on the offender, including employment disabilities.

(c) *Education and Denunciation*

A concept recently brought into favour is the idea that the imposition of penalties is society's way of saying "what it thinks" of a certain item of behaviour.\(^5\) No one seems to have suggested that this is done for its own sake; indeed Walker has suggested that where a denunciatory theory is proposed it tends to be retribution by another name.\(^6\) It may also be reductivism, if the intention is that the public shall be educated thereby to think badly of crime, and therefore refrain from its commission.

There are a small group of related suggestions, none of them fully explored, which appear relevant to this discussion. One proposal generally mooted in the context of general deterrence, although clearly not a form of deterrence, is that the imposition of penalties has a long-term educative effect on a population in that its members come to believe the behaviour *morally* wrong. Durkheim, in similar vein, argued that:

> Crime brings together upright consciences and concentrates them. We have only to notice what happens, particularly in a small town, when some moral scandal has been committed. They stop each other on the street, they visit each other, they seek to come together, to talk of the event and wax indignant in common. From all the similar impressions which are exchanged, there emerges a unique temper, ... which is everybody's without being anybody's in particular. That is the public temper.\(^5\)

The point has been echoed by Coser\(^5\) and Erikson.\(^5\) However, it is at times unclear whether this "latent function" of deviance is based on public punishment of the criminal, public censure of the criminal, or public censure of the crime. Whichever it may be, it is doubtful that the beneficial effects of public censure are greatly enhanced by allowing continued stigmatization of the offender;

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56. *Supra*, note 30 at 24
indeed, this may even work counterproductively by bringing into disrepute the very system which imposed the official penalty. The philosophy of denunciation, however, applied more to the pronouncement of the penalty than to its consequences, does not hold implications for residual stigmatization as strong as those of other theories.

IV. Social Motivations for Residual Stigmatization

In practice, no penal system adheres strictly to one philosophy; elements of all the above rationales are meshed together, and a penal system might aptly be termed ‘‘the outcome of politics and chance’’. So too might our present practices toward ex-offenders. The above discussion attempts to answer in the abstract the question of why we could stigmatize. Some measures, particularly civil death, are merely anachronistic remnants which in serious debate might receive little support. Apart from those with specific histories, stigmatic practices fall into two groups.

a) Protection of the Stigmatizor

Examples include denial of employment and that social ostracism which is determined by the consideration ‘‘I don’t want my name associated with criminals’’. A less obvious case is those practices directed toward greater police efficiency; this is society, through its agent, protecting itself from the potential future offender.

b) Further Hurting of the Offender

While self-interest and self-preservation are easily appreciated, practices which seem calculated to do damage to the offender over and above the official penalty merely because of his crime or status are harder to explain. Social-psychological theory has thrown into focus two suggestions to explain this phenomenon, which includes social ostracism, unauthorised or unnecessary police brutality, and quasi-judicial prejudice (for example, in licence applications where the permission sought is unrelated to the nature of the offence).

The first suggestion is beautifully phrased by Erikson:

Moral indignation against deviants serves to purge the righteous

from a sense of their own sins and unworthiness, and helps to sustain their moral identity. . . it is against the ground of criminal deviance that the righteous achieve the comforting affirmation of their normality.  

This argument can be applied equally to the imposition of the official penalty and subsequent stigmatization.

A second postulate was proposed by Rosemary Steadman-Allen and myself, in a more specific context. Within the inmate subculture in Britain and North America, those imprisoned for molesting children are brutally stigmatized to the extent that they generally have to be kept under special protection. The seemingly unjust nature of their penalties (which tend to be fairly light in comparison to, for example, embezzlement or large theft offences) is often given by prisoners as the reason for this stigmatization. Generalizing to the free community, might it not be that some stigmatization is directed to enhancing the official penalty to an extent commensurate with the stigmatizor’s view of the desert of the offender? I have never heard anyone other than professionals in the penal system, offenders and their families, and academic commentators, complain that prison sentences are too long. The general view of the proverbial man on the Clapham omnibus is rather that “people get off too lightly”.

V. Conclusion

Social-psychological explanations of reasons for stigmatization in no way justify the practice. The remarkable observation which may now be made is, rather, that in the light of the above discussion, in our present state of knowledge, no theory of punishment presents a tenable case for allowing residual effects to arise. The onus is on

61. Supra, note 59 at 4
63. Miss Steadman-Allen and I suggested in relation to Rule 43, which provides for protection by separate confinement of unpopular offenders, that stigmatization of these offenders serves several purposes, not least of which is to reaffirm the sexual normality of the other prisoners who are often seriously questioning their own orientations due to prolonged heterosexual starvation and overexposure to homosexual situations. We also considered that to some extent the dislike of offenders against children, in particular, was merely an exaggerated reflection of an attitude which would be found outside the prison, but was not as likely to be concentrated in a relatively small group of people all with anti-social tendencies, including propensities to violence.
64. See supra, note 12
the retributivist to devise a just system of accounting for residual effects, if such is possible. If deterrence theory is called in aid, the advocate must first reverse the trend in current research, which is towards showing no justification for an assumption of deterrent efficacy in increased penalties. If rehabilitation is our aim, the degrading and defamatory effects of criminal process are a distinct threat to our chances of success, and, if the theoretical scheme developed by the "labelling theorists" is valid, may in fact be counter-productive in large measure. Only a protective rationale has any real claim to validity, although here again the long-term effects of over-use of legal disadvantages may prove costly.

These arguments suggest that to view the criminal justice system in a vacuum, as the mere imposition of an official penalty, is in the face of modern technological developments more than ever before an unrealistic and dangerous phenomenon. Above all they suggest that the full effect of criminal process should be taken clearly into account at all stages of the present sentencing system, and add great weight to the Law Commission of Canada's plea for restraint in the application of the criminal law. While to evaluate the role of residual stigmatization does not negate the value of a penal system for all cases, it certainly adds with clarity a perspective on the ever-increasing over-use of the criminal sanction.

65. See Our Criminal Law, supra, note 21