FROM THE EDITOR

The essays in this issue speak to the two central questions for a social theory of the criminal justice system: efficacy and justice. In what ways, and to what extent, do criminal sanctions affect behavior? Does the system satisfy one of the paramount criteria of justice—equality? As I will try to show at the end of this introduction, these questions may be related: the cost of greater efficacy may be greater inequality.

The question of efficacy is framed here in three different ways: specific deterrence, general deterrence and, paradoxically, decriminalization. The capacity of the criminal justice system to control behavior through specific deterrence rests on the impact of that system upon the particular person who experiences it. The efficacy of specific deterrence therefore rests on the following assumptions: only a relatively small proportion of the population engages in deviance; a very high proportion of those who do so are apprehended; a very high proportion of those apprehended are punished; these facts are known to the population of deviants; as a result, those who are punished significantly reduce their deviance. The article by Klemke throws considerable doubt upon the validity of such assumptions, although its findings are based on youthful shoplifting and can only with caution be extrapolated to other crimes and criminals. He found that a very large proportion of his respondents—63 percent of a sample of high school students—had engaged in shoplifting. For specific deterrence to control such behavior virtually all—nearly two-thirds of the student body—would have to be sanctioned, and yet we know that the criminal justice system is structurally incapable of coping with such numbers and collapses under their weight when required to do so (as in mass arrests following civil disorders, or widespread disobedience to alcohol or drug laws). Indeed, Klemke found that the majority of crimes do not result in apprehension or punishment. But perhaps most significant are his conclusions about the impact of the criminal justice system upon those it handles. Contact with the sanctioning process does not increase, and may even reduce, fear of apprehension for subsequent crimes. And the experience of being apprehended and punished, far from terminating deviance, may actually increase future deviance.

The views expressed here are entirely my own, and are not necessarily shared by any author in this issue.

https://doi.org/10.1017/S0023921600024385 Published online by Cambridge University Press

If these data are inconsistent with specific deterrence, they fit quite well with an alternative explanation—labeling theory—which argues that the experience of being apprehended and punished confirms the individual's deviant self-image and thereby amplifies deviance. Unlike previous investigators, Klemke found a high level of recidivism following apprehension. He explains the apparent factual difference in terms of methodologies. Earlier studies used as a base population those apprehended but then failed to identify as recidivists those who repeated the crime yet were not apprehended again, thereby systematically understating recidivism. Klemke, using self-reported data that captured virtually the entire population of repeaters, found recidivism rates following apprehension varying from 40 to nearly 60 percent, even though these youth were *not* career criminals. Furthermore, he found that the more severe sanctions, rather than deterring more effectively, increased the deviant self-image of those apprehended and sometimes also increased the rate of recidivism.

If the capacity of the criminal law to control behavior through the mechanism of special deterrence is uncertain, the efficacy of general deterrence becomes that much more important. The theory of general deterrence states that people will adjust their behavior to avoid incurring criminal sanctions even though they themselves may not have experienced such sanctions. The recent report of the National Academy of Sciences (Blumstein *et al.*, 1978) defines the critical question for the theory of general deterrence as the causal direction to be attributed to the very widely observed negative correlation between sanction rates and crime rates: does an increase in the probability and severity of sanctions decrease the crime rate (and vice versa), or does a decrease in the crime rate cause the increase in sanction rate (and vice versa)? The report calls for further studies of specific crimes, criminals, and sanctions in order to answer the question. Two essays in this volume, several of whose authors contributed to that report, respond to this call.

Perhaps the greatest difficulty in seeking an empirical answer to the question is that sanction rates and crime rates are mutually determined. In order to solve the simultaneous equations that describe their relationship it is necessary to choose an identification restriction, a variable that affects one of them but not the other. The choice of this restriction cannot itself be deduced from those equations but must be justified independently. Wilson and Boland are interested in the general deterrent effect of police activity upon crime rates. Their identification restriction is the aggressiveness of patrol strat-

https://doi.org/10.1017/S0023921600024385 Published online by Cambridge University Press

egy, which they assume will affect the arrest rate but will not affect the crime rate independently of its effect upon the arrest rate. In other words, potential criminals adjust their criminal behavior to arrest rates but not to police activity except as it is reflected in those rates. Furthermore, Wilson and Boland adduce evidence that patrol activity is a reasonably elastic variable and is not determined by resource levels, except at the extremes. Using this restriction, they find that a more aggressive patrol strategy does cause a decrease in the rate of certain crimes. Nagin is interested in the deterrent effect of imprisonment on crime rates. His identification restriction is prison capacity, which he assumes affects the risk of imprisonment but does not affect crime rates independently, i.e., except through its impact on imprisonment risk. In other words, officials within the criminal justice system can react to prison capacity because of their limited numbers, common interests, and high level of knowledge, but potential criminals do not. Furthermore, Nagin offers empirical evidence that the prison capacity of each state has been relatively constant, at least in the recent past. Using this restriction, he finds that crime rates affect imprisonment risk—an increase in crime rate causes a decrease in the risk of imprisonment and *not* vice versa.

These findings are not necessarily inconsistent. First of all, it is certainly plausible that prison capacity may be relatively fixed, since the accommodation of additional prisoners requires capital expenditures, and yet a more aggressive patrol strategy may be implemented without increased resources. Second, those officials who determine prison sentences (prosecutor and judge) are likely to be knowledgeable about, and affected by, the constraint of prison capacity in a way that police chiefs and patrol officers are not. Third, police resources may be more elastic than prison resources: legislators and executives may perceive a public mandate to spend more money to capture suspects where they feel no such pressure to increase expenditures for the maintenance of convicted criminals. Finally, it is plausible that potential criminals will be more knowledgeable about, and affected by, arrest rates than by imprisonment risk, and perhaps even more by aggressive patrol activity than by either of those, which is consistent with the finding of Wilson and Boland that patrol activity reduces crime, whether directly or by increasing the arrest rate.

Yet what both these studies lack, as their authors readily acknowledge, is a clear conception of the mechanism by which general deterrence works (if it does). It is here that there is some tension between the conclusions reached by Wilson and Boland and those of Klemke. The former suggest that it is

https://doi.org/10.1017/S0023921600024385 Published online by Cambridge University Press

within the capacity of the police to adopt a more aggressive patrol strategy, that this can increase the arrest rate, and that such an increase will produce a decline in the crime rate, presumably through general deterrence, by persuading those who are *not* apprehended to diminish their criminal activity. But Klemke argues that those who actually experience the criminal process are not deterred, and may instead be confirmed and encouraged in their criminality.

Is there a logical incompatibility between the asserted efficacy of general deterrence and the asserted inefficacy of specific deterrence? Not necessarily, since they operate on populations that are to some degree distinct. It is possible that those who experience the criminal sanction are encouraged to engage in criminality whereas those who do not are discouraged by its threat. And yet that is at least paradoxical: the greater one's experience and knowledge of the criminal justice system the less it dissuades one from crime. This paradox has its parallel in public attitudes toward civil justice, where familiarity may indeed breed contempt (see Crowe, 1978). Thus the two halves of the legal system may be grounded upon similar myths (as I have argued in introductions to recent issues of the *Review*). The paradox also suggests that it is not deterrence—the fear of sanctions—that controls crime, since the more a person knows about the sanctioning process, and the more severe those sanctions are likely to be for that person, the less he is deterred. Rather, avoidance of crime is the product of environmental and internal restraints[1] which, once breached, are further eroded by the experience of the criminal process. The explanations offered by Nagin and Klemke as alternatives to general and specific deterrence are also parallel. Because the criminal justice system today is in a situation of chronic overload an increase in crime decreases sanctions and a decrease in crime increases sanctions, thereby maintaining crime and governmental response in equilibrium. Similarly with specific deterrence. The experience of the criminal justice process *confirms* people in criminality both because they acquire knowledge about the unlikelihood of apprehension and punishment and because they are labeled as criminals.[2] An increase

1. The criminal justice system expresses, reinforces, and helps to internalize those restraints. But because it does so in a symbolic rather than a narrowly instrumental fashion a utilitarian calculus may not adequately describe its effect. This may explain why prison capacity remains relatively constant over time (and also why it varies from state to state).

2. Given the role of prior record in determining sentence, described by Farrell and Swigert, punishment appears to be carefully proportioned to what is necessary to amplify criminality. Klemke shows that the effect of the criminal process in instilling a deviant self-image varies directly with the disparity between the individual's prior self-concept and the criminal label. Mild punishments are sufficient to amplify criminality in a novice, more severe

https://doi.org/10.1017/S0023921600024385 Published online by Cambridge University Press

in crime rates (given relatively fixed resources for the criminal justice system) decreases the proportion of people sanctioned, which may paradoxically allow crime to diminish. A decrease in the crime rate increases the proportion of people sanctioned and thereby increases crime. What we have, then, is a homeostatic mechanism just the *obverse* of deterrence, which maintains relatively constant levels of both criminality and criminal justice system activity.

Decriminalization can be seen as simply another response within a homeostatic system. In one sense it represents an admission of defeat: if both specific and general deterrence are ineffective to control behavior then the state ought to abandon its efforts. Complete decriminalization does occur: the repeal of Prohibition is an example. Yet this, too, is a homeostatic mechanism, for it allows the state to criminalize other areas of behavior. But the article by Aaronson, Dienes, and Musheno deals with a second kind of response, better characterized as diversion from the criminal process into a treatment process. Diversion adjusts the activity of this enlarged control system to cope with a similarly enlarged concept of deviant behavior. Their article offers several illustrations of such an adjustment in the control of public intoxication. Pickups increase after decriminalization because the new treatment centers and civilian pickup teams have expanded the capacity of the state both to apprehend and to incarcerate deviants. Recidivism also increases, which suggests that treatment is a more effective labeling device than punishment, at least for alcoholics. At the same time, when the treatment centers reach their (relatively fixed) capacity the increased number of pickups leads to fewer incarcerations and shorter terms, following a pattern very similar to that described by Nagin. Finally, this entire homeostatic mechanism remains subject to pressures from the external environment, so that complaints from the business community in Minneapolis can lead to the recriminalization of public intoxication under the guise of disorderly conduct. Thus, if decriminalization is seen as an attempt to transform state control of deviance in fundamental ways, it must be judged a failure.

The second major question these articles raise is the entitlement of the criminal justice system to be called a system of *justice*. The attribute of justice they invoke, in common with other articles in recent issues of this journal, is equality—an emphasis that appears to be justified by the findings of several studies that many Americans view equality as the most funda-

---

penalties are needed to intensify the criminal self-image of the experienced offender. Proportioning penalty to prior record achieves just this.

https://doi.org/10.1017/S0023921600024385 Published online by Cambridge University Press

mental meaning of justice (e.g., Sarat, 1977; Casper, 1978). When read together, the evidence of inequality contained in these articles appears overwhelming. We can see this best if we trace the selectivity of the criminal process chronologically. The starting point is the population of those who violate the criminal law, since significant over or underrepresentation by race, sex, socioeconomic status, or some other characteristic may explain similar discrepancies later in the process that would otherwise generate suspicions of bias. Here Klemke's self-report methodology is very helpful, for it establishes that the distribution of criminal behavior is *relatively* equal across such categories and that discrepancies in behavior are much smaller than those found at later stages in the criminal process. This strongly suggests that bias is introduced at the very earliest stages—apprehension—a notion supported by other research (e.g., Blankenburg, 1976). Klemke also suggests that, to the extent labeling confirms and amplifies criminality, and is differentially imposed, it contributes to differences within the population in levels of criminality. This role of the criminal justice system in amplifying earlier bias is the focus of the article by Farrell and Swigert, which analyzes the decision to convict. They show that the influence of prior record upon likelihood of conviction, both directly and through its influence on access to private counsel and to pretrial release (each of which also influences likelihood of conviction), perpetuates and amplifies whatever bias may have inhered in the creation of that prior record. Since they find evidence of independent bias in terms of race and class in the most recent set of decisions to convict, they reasonably conclude that such bias also affected earlier convictions. Thus even a "neutral" process—one that was not itself biased against minorities and lower class individuals—would treat them unequally, to the extent that it was influenced by prior record. Equality could only be achieved by inverse discrimination.

Gibson, finally, looks at sentencing decisions. He finds no institutional discrimination at the level of the court, although he acknowledges that it may be concealed in the influence of prior record on disposition, analogous to its influence on conviction demonstrated by Farrell and Swigert. But he does find very substantial discrimination by individual judges, whose pro- and anti-Black biases cancel out when the court is the unit of analysis. (It is revealing that judges biased against Blacks admitted relying more heavily on prior record in sentencing.)

These studies suggest several general conclusions. They confirm that the criminal process is influenced by considerations of race and class. The overrepresentation of minorities

https://doi.org/10.1017/S0023921600024385 Published online by Cambridge University Press

and lower class individuals at the end of the process and the greater severity of their punishment cannot be explained in whole, or even in significant part, by a propensity for crime. Bias seems to be relatively less extreme at the end of the process, in conviction and sentencing. But there, if institutional bias is concealed by approved procedures such as reliance on prior record—perhaps because the later stages of the criminal process are relatively visible—individual bias still persists. And to the extent that visibility imposes restraint at the end of the process bias must be that much greater at the earlier, less visible stages—apprehension, pretrial release, retention of counsel—in order to produce the observed results.

That last observation brings me back to my original point that there may be a relationship between efficacy and equality. Just as we saw a homeostatic relationship between crime and the criminal justice system so, in a society riven by inequality, it may be impossible to immunize the criminal justice system against its influence: reforms may just move bias from one decision point in the system to another. If so, it is important to bear in mind the potential for bias at each stage of the process so that we can estimate whether the reform will increase or decrease bias. The studies in this issue, read together, indicate that the decisions occurring later in the criminal process are both more visible and more constrained by factors such as prison capacity, whereas earlier decisions are both less visible and less constrained. These influences, though distinct, contribute cumulatively to the greater level of bias at the earlier stages. Given the relative inflexibility at the later stages, and the apparent lack of causal nexus between criminal justice activity at those stages and crime levels, attempts to make the criminal justice system more effective are likely to focus on the earlier stages, as illustrated by the recommendation of Wilson and Boland to increase the aggressiveness of patrol strategies. But, if the above analysis is correct, such reforms are likely to increase bias in the system. Indeed, the experiment in decriminalizing public intoxication offers evidence of this: one consequence of the reform in Washington, D.C., was to *increase* the disproportion in the number of black, older, lower class derelicts picked up in comparison to the number of middle class social drinkers.[3] This is at least a warning that an inevitable cost of improving the efficacy of the criminal justice system in a capitalist society may be increased race and class bias.

3. Increasing the level at which police ticket traffic violators, for instance by imposing a "quota," also appears to increase bias. See Lundman (1978).

https://doi.org/10.1017/S0023921600024385 Published online by Cambridge University Press

REFERENCES

BLANKENBURG, Erhard (1976) "The Selectivity of Legal Sanctions: An Empirical Investigation of Shoplifting," 11 *Law & Society Review* 109.

BLUMSTEIN, Alfred, Jacqueline COHEN and Daniel NAGIN (eds.) (1978) *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates.* Washington, D.C.: National Academy of Sciences.

CASPER, Jonathan D. (1978) "Having Their Day in Court: Defendant Evaluations of the Fairness of Their Treatment," 12 *Law & Society Review* 237.

CROWE, Patricia Ward (1978) "Complainant Reactions to the Massachusetts Commission against Discrimination," 12 *Law & Society Review* 217.

LUNDMAN, Richard J. (1978) "Organizational Norms and Police Discretion: An Observational Study of Police Work with Traffic Law Violators," *Criminology* (forthcoming).

SARAT, Austin (1977) "Studying American Legal Culture: An Assessment of Survey Evidence," 11 *Law & Society Review* 427.

https://doi.org/10.1017/S0023921600024385 Published online by Cambridge University Press