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DISAGREEMENTS ABOUT PENAL POLICY: BASIC SENTIMENTS AND PUBLIC ARGUMENT

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The nature of arguments about penal policy has shifted over time in ways that seem both erratic and bewildering. The historian of ideas can show in detail how in a particular country at a particular time one view of penal policy has slowly or rapidly replaced another, but it is much more difficult to discern any larger or more inclusive pattern that links together the variety of trends that emerge from any broad survey of a number of societies or historical periods. It is, however, particularly important to try to do so at the present time when everywhere there seems to be confusion and disenchantment concerning penal policy generally. "The crisis of the 1980s has been strongly stated by Antony E. Bottoms (1980 p. 1):

> "At the theoretical level, there is a serious likelihood of a vacuum in penal thought following the coming certain collapse of what I shall call the rehabilitative ideal".

This is not the first time that a major eclipse of a previously widely accepted view of penal policy has taken place. Gresham M. Sykes (1978 pp. 480-1) has written of a previous era:

> "In the decades after World War I, American criminology was apt to dismiss the punishment of criminals as a senseless relic of primitive societies. The old argument was that punishment was necessary as a 'just retribution' or requital of wickedness, said Sheldon Glueck in 1928. 'No thoughtful person today seriously holds this theory of sublimated social vengeance... official social institutions should not be predicated upon the destructive emotion of vengeance which is not only the expression of an infantile way of solving a problem, but unjust and destructive of the purpose of protecting society'. In an analysis of eleven well-known criminology textbooks published between 1941 and 1960, Jackson Toby found that most writers took the position that punishment has no place in an enlightened penology; non punitive and individualized methods of treatment such as probation, parole and psychotherapy would surely emerge as the humanitarian and rational means of dealing with the offender".

If we regard the ideology of rehabilitation as a transitory phenomenon, as an idea that became dominant for a time but is now going out of fashion, then Bottoms' thesis of a "vacuum" in penal thought seems both less likely and less threatening. In-

deed, Bottoms (1980 pp. 7-17) himself showed that other ideas about penal policy were likely to flow into the area left void by the decay of the rehabilitation thesis. Nonetheless the major shifts in the fundamental assumptions and concepts governing penal theory that have taken place are sufficiently large and apparently disordered to make any description of the evolution of penal policy appear confused and fragmented. The aim of our paper is to try to show that certain consistent patterns of both change and stability exist and that the dominant ideas in the field replace one another in essentially similar ways. In part, our argument will be inspired by Pareto's (see 1980 p. 204) distinction between **residues,** i.e. constant elements of the concrete phenomenon under consideration that reflect basic human sentiments and **derivations,** i.e. the diverse and multiplying theories, rationalizations and doctrines by which the constant elements are justified.

It is difficult to find a particular residue or class of residues in Pareto that fit our present purpose exactly, but several are relevant, notably in his fourth class, 'Residues of Sociability' (see Pareto 1980 p.210) under the heading 4 C **Pity and cruelty:**

> "Residue 4 C I **Self pity extented to others...** 'If I am unhappy it is the fault of society. We are companions in our misfortune and I feel the same indulgence for my companion as I feel for myself..."
> "Residue 4 C 2 **Instinctive repugnance to suffering.** This feeling has given rise to the proverb 'a soft-hearted doctor makes the wound gangrenous'. Such a feeling can often be observed in weak, cowardly people and those lacking in energy. But it happens that when they manage to overcome this feeling, they become extremely cruel."
> "Residue 4 C 3 **Reasoned repugnance to useless suffering.**"

In addition we may refer further to one of Pareto's (Pareto 1980 pp. 211-1) fifth class of residues, **'Integrity of the individual and his belongings'** viz "5 d **Restoration of the integrity of an individual by means of operations on the person or object which has attacked his integrity.** There is a feeling which makes animals or men who have been attacked, pay back the harm received. Until this happens the man whose integrity has been attacked feels at a disadvantage... Examples of these feelings are those which lead to duel or a vendetta".

Other examples from Pareto' s list of residues may also be cited and in any case Pareto never claimed that his classification was complete (see Homans and Curtis Jr. 1970). Our central argument is that there underlies most disputes about penal policy a fundamental dichotomy between two clusters of sentiments which we may loosely (see Homans and Curtis Jr. 1970 pp. 88-9) term residues. The dichotomy is between on the one hand mercy and forgiveness (Residue A) and on the other, vengeance and righteous indignation (Residue B).

If we employ these residues first of all in a relatively elementary and static way, we can treat penal theories and concepts as 'derivations' and arrange them accordingly in a systematic dichotomous way as shown in Table 1 below, where the 'derivations' are arranged in very rough historical order;-

TABLE 1

Residues	Residue A	Residue B
DERIVATIONS	Retribution Deterrence Just Desert Incapacitation	Reformation Rehabilitation Reparation decriminalisation

Retribution and reformation may be regarded as 'moralist' derivations corresponding to residues A and B respectively, whereas deterrence and rehabilitation and reformation is an emphasis on the moral guilt of offenders and of the disturbance to the moral order caused by their offence. Both approaches take a retrospective view of offenders in the light of what they have done. Where they diverge is in terms of the residue that they draw upon. Retribution lays stress upon the moral imbalance in society that has been brought about by the commission of an offence. The balance can only be symbolically restored by the punishment of the offender, i.e. by inflicting on him or her an equivalent degree of harm or suffering. According to the tradition of Kantian and Hegelian thought such punishment has no goal in the sense of producing a change in the future. Rather, wrong is defined as the negation of right and the punishment is the negation of that negation (it is as if two negative quantities were multiplied rather than added together) thus restoring the balance. The punishment is then an end in itself. The link between retribution and reformation is atonement, the idea that through suffering a penalty the offender is purged of his crime, is restored to a state of worthiness. In eschatological terms, retribution may be compared with the Christian doctrine of hell as damnation and torment without hope meted out to the worst sinners and reformation to the doctrine of purgatory where a similar but limited punishment prepares and cleanses a soul so that it may be restored to God (Addis, Arnold and Scannell 1918 pp. 402-7, 703-7). This analogy should not be pushed too far, for supporters of human retribution do not usually demand eternal penalties though the scale of penalties can culminate in the offender being cast into eternity.

A fairly direct link may be seen between such directly moralist concepts as retribution and reformation and the residues of vengeance and righteous indignation on the one hand and mercy and forgiveness on the other. The former has been summed up by James Fitzjames Stephen (1883):

> "The criminal law stands to the passion of revenge in the same relation as marriage to the sexual appetite".

Elsewhere, Stephen (1983) wrote:

> "I think it highly desirable that criminals should be hated and that punishments inflicted upon them should be so contrived as to give expression to that hatred

and to justify it so far as the public provisions of means for expressing and gratifying a healthy natural sentiment can justify and encourage it".

The same point was made by George Herbert Mead (1918) when he wrote:

"The law is the bulwark of our interests and the hostile procedure against the enemy arouses a feeling of attachment due to the means put at our disposal for satisfying the hostile impulse... The respect for the law is the observe side of our hatred for the criminal aggressor. Furthermore, the court procedure... emphasises this emotional attitude".

We are now some distance from the time when externally imposed penalties and suffering could be viewed unambiguously as being of moral value to the person on the receiving end, as analogous to the penances and self-mortification of religious institutions. Indeed, it is even difficult to discern the dimension of mercy and forgiveness built into the idea of purgatory or to understand such combinations as that described by St. Peter Damian (See Addis, Arnold and Scannell 1929 p.65) who 'tells the story of a man who by cruel flagellation and frequent recitations of the Psalter accomplished a hundred years of penance in six days'. We can no longer comprehend the world of 'penitents lying on sackcloth and ashes, of the unwashed body, the feeding on bread and water, the fasting and prayer, the grovelling at the feet of the presbyters and others who had a same for sancity, the groans and tears'. (Addis, Arnold and Scannell 1918 p. 651). What we can say is that this strange notion of reform through piety, suffering and repentance was by contrast with the harsh and retributive secular penalties an expression of mercy and forgiveness rooted in the basic religious traditions of society. The restoration of the moral balance is again a central theme but it occurred within the reformed individual who through imposed or voluntary ritual suffering wiped the slate clean. Reformation placed the individual at the centre of concern rather than mere abstract systems of justice and was an expression of humane residue B.

In contrast to the central concern with individual sin and guilt that underlay much of the traditional moralist view of crime and punishment, deterrence and rehabilitation may be said to stem from a causalist ethical perspective. Causalists are essentially short term, negative, consequentialist utilitarians (see Davies 1975 pp. 3-8) i.e. they are concerned to minimise harm, distress and suffering in the more or less immediate future. In a society where this mode of thinking prevails, notably in societies dominated by the impersonal forces of the market-place and or large bureaucratic institutions concerned with production or welfare (see Davies 1975 pp. 209-10), the sentiments of residue A are likely to be expressed through an assertion of the deterrent value of punishment while the sediments of residue B lead to an advocacy of rehabilitation as the appropriate aim of penal policy.

The theory of deterrence though of ancient origin, provides a mode of expressing the sentiments of residue A without recourse to the use of traditional moral rhetoric. In its pure form deterrence has been reduced to the impersonal economics of supply and demand:

"The deterrence theory of punishment is, after all, simply a special version of the general economic principle that raising the price of something will reduce the amount purchased". (McKenzie and Tullock 1978 p. 189).

Deterrence, like retribution, focuses on the criminal act not on the criminal. Rehabilitation by contrast is oriented to the criminal and can be seen as expressing the same residues as reform and indeed as growing out of the later liberal phase of reform when " 'reform' became 'rehabilitation' -that is, religious and moral impulses in reformation became secularised, psychologised, scientised" (Bottoms 1980 p. 1-2). Rehabilitation assumes that criminal behaviour is the result of antecedent causes which can be known and used in the design of a treatment programme of counselling, individual and group therapy, behaviour modification, etc. so as to transform the offender into a law-abiding citizen.

Both deterrence and rehabilitation as derivations of a utilitarian kind, depended of necessity on claims of efficacy that made them liable to disconfirmation by empirical research in contrast to their moralist equivalents. At the present time there exists considerable doubt as to whether rehabilitation and deterrence actually work on any kind of systematic basis (e.g. see Brody 1976; Advisory Council of the penal system 1977, Beyleveld 1979 and 1980, Trivizas 1980). Because of the current collapse of rehabilitation and the serious questioning of whether a policy of general deterrence can be designed to operate effectively in a democratic society, there has been a proliferation of new derivations some moralist and some causalist in character. One recurring causalist derivation from residue A is incapacitation, i.e. the view that offenders who are locked up are at least out of circulation and unable to commit further crimes so long as they are forcibly segregated from their potential victims. Incapacitation can be applied selectively, not according to the moral desert of the offender but in response to his or her dangerousness or likely frequency of offending. The problem that has arisen in relation to the doctrine of incapacitation is that it is difficult to decide whether it is cost-effective, i.e. if it were put into practice, would the extra costs (both financial and human) of locking more people up be outweighed by the decreased harm inflicted on potential victims? The problem is a particularly intractable one because of the difficulty of assessing which particular individuals are sufficiently dangerous or productive in an antisocial way to justify their being selected for incapacitation.

For convenience, we may at this point also list another causalist derivation from residue B, viz **decriminalisation**, i.e. the view that the criminal justice system has not only failed to tackle social problems by defining and punishing them as crimes, but has in itself become a source of new problems and that it is therefore necessary to restrict and reduce (in the extreme version to zero) the scope of the criminal justice system (Hulsman 1976, Hulsman and Celis 1982). In essence the problems created even by gross violent or dishonest individual behaviour are regarded by the decriminaliser in a causalist way i.e. their solution should be sought by utilising whatever methods will produce the least harm to those involved, regardless of individual moral desert or guilt. In many respects the criminal law would be replaced by civil law, along the

lines of the existing law of torts with the complainant extracting damages from the person who had injured him or her in some way. In such a system the state would act not as prosecutor or the upholder of the peace and good order of the realm, but as a mediator and an umpire applying the civil law test of reasonable probability rather than the criminal law test of proof beyond reasonable doubt. It is at once both a recent idea derived from the evolution of modern quasi-criminal administrative and regulatory law and an ancient notion that pre-dates the formation of centralised states with a monopoly of the use of legitimate force and of the administration of justice.

There are certain similarities between the idea of victims receiving damages as if in compensation for some non-deliberate harm inflicted on them and the increasingly popular (see Bottoms 1980 pp. 15-16) idea of **reparation**. However, whereas in principle an offender could presumably take out an insurance policy against having to pay compensation (much as even a careless motorist may take out comprehensive or third party insurance, albeit by paying a prohibitive premium if he or she is habitually careless, reckless or unlucky), reparation includes a strong moral element. The central idea is that offenders should be required "to do someting constructive to make up for the harm they have caused. In some cases personal restitution is possible. Otherwise the offender should make reparation to the community..." (Howard League for Penal Reform 1977 p. 5).

Once again the aim is to restore a moral balance not as in the case of retribution by inflicting an equal harm on the offender but rather by making the offender actually or symbolically undo the harm that he or/and she has caused and thus 'making amends' or 'making good'. Like decriminalisation, reparation is derived from residue B but it is predominantly moralist in character though some authors (e.g. see Wright 1982 p. 243) have also added further justification on utilitarian grounds.

As we shall show later in our dynamic analysis, the just deserts or justice model is by origin a derivation from residue B. However, it is difficult to make any coherent distinction between 'just desert' and 'retribution'. The central idea of the justice model, that people deserve what they get for past deeds (Siegel 1986 p. 134) is one that is bound to appeal to those whose residual sentiments are those of righteous indignation and delegated vengeance.

We have tried to categorise and to analyse the main theories and concepts of penal policy on the basis of Pareto's theory of residues and the distinction we have drawn between moralist and causalist modes of public argument. Our analysis is summed up in Diagram 2:

	Residue A (Righteous Indignation and delegated vengeance)	Residue B (Mercy, forgiveness)
MORALIST	RETRIBUTION JUST DESERTS	REFORMATION REPARATION
CAUSALIST	DETERRENCE INCAPACITATION	REHABILITATION DECRIMINALISATION

Inspection of Diagram 2 reveals a further consistent difference between penal policies and concepts that are the derivatives of Residue A (column 1) and Residue B (column 2) respectively. Retribution, just desert, deterrence and incapacitation all involve an emphasis on the **exclusion** of wrong-doers from society while reformation, reparation, rehabilitation and decriminalisation emphasise **inclusion,** i.e. the wrong-doer is either retained in the society or restored to it after a period of exclusion that makes re-inclusion possible. Reparation and decriminalisation are policies that seek to avoid the exclusion of the criminal from the society of the law-abiding and even to repair such separation as has already occurred by virtue of the initial offence against others and against the established norms of the society. Those aiming at reformation and rehabilitation often seek to use the power of the law to exclude only in order to provide a time in which to prepare the offender for re-inclusion. In theory, at least, the excluded are not told 'Abandon hope all ye who enter here', but rather of the day when there will be intense rejoicing that the lost sheep has rejoined the flock. In the case of the doctrines of the more radical decriminalisers who advocate delabelling and destigmatization, the boundaries of the social and moral order dissolve altogether and it is impossible to exclude deviants because there is nothing to exclude them from as well as nowhere to exclude them to (cf Martin 1981). A moderate statement of would -be boundary- blurring is to be found in the study 'Six Quakers look at Crime and Punishment' (1979 p. 43).

> "One of the difficulties of our present way of looking at things is that it establishes a clear but false dichotomy... between people who are 'good' and people who are 'bad'. The magistrate on the bench, the prison officer, all concerned with the administration of justice and indeed the ordinary citizen, are all seen as being on one side of the moral pale they are 'us', 'the good', while the offender is on the other. This is entirely false, and its effect is unjustifiably to degrade the offender

even further than the other procedures have degraded him. The fact that a person is in the dock even for the most serious offence is not necessarily evidence that 'we' on the right side of the law are any better than 'they' on the other... The existing dichotomy of 'the good' and 'the bad' makes for an insufferable and inexcusable self-righteousness on the part of 'us' further deepening the gulf between the offender and society instead of reducing it, and making it even more dificult to achieve our aim bringing him back into the community".

In contrast to the concern with inclusion and re-inclusion that characterises residue B derivations, those whose views are derivations from Residue A are either indifferent to the question of inclusion versus exclusion or are in favour of physical and /or moral exclusion. Physical exclusion may take the form of execution, exile or imprisonment so that the offender is forcibly removed from society. Moral exclusion can accompany any of these and indeed can accompany **any** penalty for even a nominal penalty may carry lasting disgrace and the memory of a person may be stigmatised by the deliberate ignominy involved in an execution. This aspect of judicial penalties has been strikingly described by George Herbert Mead (1918):

"There is another emotional content involved in this attitude of respect for the law as law, which is perhaps of like importance with the other. I refer to that accompanying stigma placed upon the criminal. The revulsions against criminality reveal themselves in a sense of being a citizen which on the one hand excludes those who have transgressed the law and on the other inhibits tendencies to criminal acts in the citizen himself. It is this emotional reaction against conduct which excludes from society that gives to the moral taboos of the group such impressiveness. The majesty of the law is that of the angel with the fiery sword at the gate who can cut one off from the world to which he belongs".

Thus far we have deliberately built our model of the differing approaches to penal policies in a static and ahistorical way for the sake of simplicity. We now propose to examine these same concepts and theories in a dymanic context to show how the links between residues and derivations can change depending on the prevailing views of the time and the choice of tactics that these impose on would-be reformers; the views of the latter have in general been derived from Residue B. We have so far classified deterrence (See p. 000) along with retribution as derived from Residue A and in the contemporary world this is a reasonable classification. However, if we look at the emergence of the theory of deterrence, we can see that it was at one time a derivative of Residue B posed in opposition to prevailing beliefs in retribution. Certainly this is the view of deterrence taken by contemporary criminologists and penologists looking back at the controversies of earlier times. Thus J. Eryl Hall Williams (1982 pp. 9-10) has written of the members of Classical School of criminal justice philosophy of the latter part of the 18th century that they argued that:

"The tariff of penalties should be adjusted so as to make the risk unacceptable but should not go further and extend to the infliction of unnecessary suffering. Beccaria advanced his theory in 1764 in his famous book **Dei delitti e delle pene,**

which was, as Jerome Hall put it, an avowed polemic written by an Italian nobleman philosopher who felt that the existing scale of penalties was too harsh, and pleaded for a rationalisation of the system of criminal justice and mitigation of the penalties. This was essentially a humanitarian cry of protest against the severity of the criminal law".

Similarly A. Keith Bottomley (1979 p. 124) has written:
"An outline of the various phases of the development of penal thought since the beginning of the eighteenth century typically sketches an early period based on **punishment as retribution** which gave way at the end of the century to the classical legal doctrines of the enlightenment thinkers (e.g. Bentham, Beccaria) centred around a **diminution of penalties** to be fixed according to their general **deterrent value**". (Italics in original).

The next significant historical stage in the evolution of penal policy, the rise of positivism, has been described in essentially the same terms, i.e. those reformers whose views were derived from Residue B sought to argue against existing contemporary theories and practices which they saw as far too harsh: As Conklin (1981 p. 447) has put it:

"The positivist school that gave birth to the rehabilitative rationale for punishment in the nineteenth century was one of 'optimism, faith and humanism'. The rehabilitative rationale was part of a movement to reduce the severity of penalties for criminal offenders and to improve the conditions of jails and prison".

The rehabilitators' ideas may seem to be unequivocably derivations from Residue B, yet their ideas too have in turn been represented as 'correctionalism', i.e. in effect, labelled derivations from Residue A by those own ideas were more stridently derivations from Residue B.

Cohen (1979 p. 17)'s account of the anti-positivist so-called 'new' criminology makes its genesis quite clear:

"The new sociologies of deviance of the sixties and the emergent radical/new/critical/Marxist criminologies of the seventies certainly followed the [i.e. Chekov's] injunction not to accuse or prosecute - or not (as we would have put it) to 'side with the agents of social control'. And the specific injunction to 'take the part even of guilty men' was exactly the principle articulated in the writers who shaped our ideas and whose quotes littered our lectures and publication: Polsky on the need to suspend conventional moral judgements, Becker' s '*Whose Side Are We On*? and -most eloquently and imaginatively- Matza' s advocacy of appreciation as against correctionalism".

The same point is made in a different way by David Downes and Paul Rock (1981 p. 242):

"Becker's own definition of the sociologists' role, whatever its limitations, made it clear at least that their sympathies should lie with the underdog, and no great difficulty was envisaged in bringing theory to bear upon the task of improving

their lot. Translating labelling theory into practice consisted of variations on the theme of 'delabelling': decriminalisation, destigmatisation and decarceration".

In the contemporary world, belief in the causalist doctrines of deterrence and rehabilitation has been undermined in two quite different ways. For those whose modes of thought were derivations from Residue B, disillusionment with deterrence and rehabilitation set in because these policies, which were accepted by pragmatic politicians as a means to the end of reducing crime, did not in practice provide the enhanced understanding of and leniency towards the offender which they had hoped for. Furthermore, the instrumental nature of both doctrines meant that they could also be employed by those whose views were derivations from Residue A or in ways that they could approve. For the latter harsher penalties mean greater deterrence and long sentences more time in which the subtly coercive straighteners and therapists (whole discretionary powers were suitably strengthened by indeterminate sentencing) could do their work. Since this work was therapy, not punishment, there were fewer moral and legal constraints on those in charge.

Deterrence is now largely the doctrine of those whose views are derivations from Residue A and far from being the antithesis of retribution is commingled with it. As Philip Bean (1981 p. 183) has put it:

> "So in the current debate on crime and the penal system deterrence and retribution are sometimes presented as if they constituted a single philosophy. It is not always clear from the various supporters of deterrence/retribution how they would implement new measures except that they would insist that more unpleasantness should be introduced and assert that criminals are responsible for their actions and not victims of circumstances... The first formal shift towards this approach was adopted in Britain in 1980 when selected detention centres were to be 'stiffened up' to 'act as a deterrent and be retributive for young violent offenders".

In principle there are no limits to the severity of penalty that may be employed in the pursuit of an effective policy of deterrence. If the threat or experience of moderate pain doesn't work, then why not employ more drastic penalties which might prove effective? Bentham's doctrine that "the punishment ought in no case to be more than what is necessary" is, after all, compatible with very high levels of punishment. Indeed, both psychologists' and economists' models of how punishment works, imply that more can mean better. In the language of the psychologists:

> "In principle,... punishment works; that is to say, if a connection has been established between action and aversive consequence, and if the aversive consequence is **adequately intense**, then barring confounding influences..... the action will be prevented or reduced in frequency". (Wilson and Herrnstein 1985 p. 494, Italics added).

The economists' model of deterrence has essentially similar implications:

> "Criminals are simply people who take opportunities for profit by violating the law. Under this hypothesis, changing the cost of crime -that is increasing the like-

lihood of being put in prison lengthening the period of imprisonment or making prisons less pleasant, would tend to reduce the amount of crime... the reasoning is simply that the criminals' demand for crime like their demands for other more demands for other morer normal goods and activities is downward sloping; the greater the cost or price, the lower the quantity demanded" (Mc Kenzie and Tullock 1978 p. 189).

Indeed, it may well be that deterrence has overtaked retribution in terms of harshness, leading as we shall see later to the paradox that retribution under the guise of 'just desert' became for a time a policy derivative of Residue B. James Q. Wilson and Richart J. Herrnstein (1985 p. 499) have noted that:

"If only incapacitation or special deterrence or moral education were issue, there would be no natural limits in punishment besides those depending on the state of the offender... An unreformed offender could be kept in prison indefinitely, no matter how trivial the crime... The special role of retribution is to govern the magnitude of punishment that a society can exact for given offences and still seem just".

Similarly the pursuit of the rehabilitative ideal may result in offenders being given **longer** sentences of imprisonment than they would otherwise have received and it is of little consolation to the incarcerated to be told that they are undergoing a longer therapeutic rather than a shorter retributive sentence. In Britain:

"it was argued in the early 1960s that any prison sentence should be **sufficiently long** to allow the prison authorities time to influence the offender's attitude and habits. This was the penological wisdom of the day, and sentencers were urged, at the early sentencing seminars and conferences, to adopt this approach". (Ashworth 1983 p. 125).

If offenders or, indeed, merely the accused are declared insane and not responsible for their actions, then they may well be detained indefinitely and subjected to drastic treatment. In a modern English case discussed by Kitrie (1971 p. 354), a 21 year old ice-cream salesman charged with larceny and obtaining property under false pretence, was sent to a mental hospital where he was diagnosed as a compulsive gambler and psychopath. The medical report recommended a leucotomy operation on his brain to cure him of his compulsion and the magistrate ordered that he be committed and operated on under the 1959 Mental Health Act. Only when the press took up the case was the order withdrawn.

An even more bizarre American case of 1958 involved Victor Rosario, a Puerto Rican, whose wife called the police and accused him of assault. In court he said in his defence that his wife was having an affair with the lodger and that the lodger to show off his virility, drank his own blood and wrote in blood on the walls of their apartment. Rosario was promptly declared unfit to plead and placed in a maximum security prison for the criminally insane. As the law stood in New York State he could have been kept there indefinitely without trial so long as the doctors declared he was

unfit to stand trial. Rosario spent four years in his hospital-prison writing in turn to all the lawyers in New York to get them to take up his case. Finally, one investigated the case and got a statement from the wife that her lover did, in fact, drink his own blood. The head of the prison hospital now said he was fit to stand trial and the assault charge was dismissed. Rosario was interviewed 17 times by 9 different psychiatrists all of whom thought the story about drinking blood proved he was a criminal lunatic. There was no other evidence to indicate that he was at all mentally unbalanced and at one point the doctors even offered to declare him sane if only he would admit that the story about the blood was a mere fantasy. (see Brandon and Davies 1973 pp. 231-2, Radin 1964).

This unleashing of therapeutic penalties on even those merely accused of a crime is an extreme case, but there are still unreconstructed therapists who "proceed with unabashed self-confidence with proposals to treat and cure crime as we do communicable diseases such as polio, or smallpox". (Colboth 1985 p. 1153).

In such a world it is not entirely surprising that a muddled version of retribution, the 'justice' or 'just deserts' model has emerged as a derivation of Residue B. Antony Bottoms (1979 p. 11) has written of the Committee for the Study of Incarceration statement **'Doing Justice'** that:

> "the Committee seem to be very half-hearted retributivists – in the introduction it is stated that their solution is 'one of despair not hope' and one of the signatories of the report the British criminologist Leslie Wilkins says that he endorses the report only 'without enthusiasm... it seems that we have rediscovered "sin" in the absence of a better alternative'... The only things that unite all adherants of the justice model are suspicion of the individual treatment model and the reduction or elimination of discretion by decision makers: beyond that there are real difficulties and confusions".

The confused retreat from rehabilitation and deterrence also reflects the publication of studies claiming that they don't work. Martinson's (1974) decisive comment about America that with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism, is matched by the conclusions of the British Serota report (Advisory Council on the penal system 1977 para. 8).

> "A steadily accumulating volume of research has shown that if reconviction rates are used to measure the success or failure of sentencing policy, there is virtually nothing to choose between different lengths of custodial sentence, different types of institutional regime, and even between custodial and non-custodial treatment".

The findings regarding the effectiveness of general deterrence are also predominately negative (see review of field by Beyleveld 1979 pp. 1-25). Likewise Ashworth (1983 p. 125) has noted:

> "the set of findings that the reconviction rates which follow longer terms of imprisonment are no better than those which follow short terms of imprisonment -

which seems to suggest that neither the reformative nor the individual deterrent effect of imprisonment increases with the length of incarceration".

Such findings in a sense pose less of a threat to those whose preferred policies are derived from Residue A, for whatever their prior views, they can always fall back on retribution, a policy that needs no utilitarian justification. However, those whose views are derivations of Residue B, have as indicated earlier, also moved in that direction to the position they have termed 'justice' or 'just desert'. For them it is mainly a defensive position -no one under the guise of rehabilitation or in search of deterrence should be punished more than they deserve. However, 'not more than' is justified by reference to 'desert' an essentially retributive notion. Retribution has long been a derivation from Residue A and it is clear that such upholders of retribution can easily take over the concepts of 'justice' and 'just desert' from their Residue B proponents. Indeed, the terms seem to be a mere attempt to employ retribution in a one-sided way, stressing that it is a limit on the harshness of penalties and playing down that it is also their justification. However, 'just desert' can set minimum as well as maximum limits to a penalty and Residue A retributionists debating on their home ground may well successfully urge the adoption of much higher maxima and minima. As Bottoms (1980 p. 11) has pointed out, they "have no difficulty with concepts of desert and of equal sentencing, but would insist on **long** fixed sentences rather than the short fixed sentences proposed by justice model adherants". For this reason it is unlikely that any substantial number of "Residue B's" will continue to try to occupy the "Residue A's" natural territory but will tend to move towards the other Residue B category of decriminalisation, decarceration, etc.

Thus far we have classified first in a static then in a dynamic way the connections between penal policies viewed as sets of derivations from the basic Residues A and B. It is finally necessary to address the question -'why are particular individuals or groups to be found consistently upholding one set of derivations rather than another?' A note of caution is needed prior to attempting to answer it, namely, to note that many people perhaps most may occupy an intermediary position, being animated by a mixture of these two basic yet antithetical clusters of sentiments. Nonetheless, in public controversies about penal policy, there are always those who press strongly for derivations rooted in residue B, who are clearly opposed by those espousing derivations from residue A, i.e. there are "A's" and "B's". But who are they and what makes them what they are?

One starting point for answering these questions is William James' (1907) contrast between the 'tender-minded' and the 'toughminded' where:

> "The tough think of the tender as sentimentalists and soft-heads. The tender feel the tough to be unrefined, callous and brutal".

In these capsules of abuse, we may recognise the negative image of each of the Paretian residues that we have discussed. These concepts have been developed and operationalised by Eysenck (1954 pp. 122-142) who has suggested that social attitudes are organised around two orthogonal dimensions, Radical versus Conservative

and Tough-minded versus Tender-minded. The sentiments associated with Residue A are to be found towards the tough-minded end and those associated with Residue B towards the tender-minded end of the spectrum. Since several of the questions in the questionnaire used by Eysenck to construct his map of social attitudes deal explicitly with penal policy issues this is not entirely surprising. What is more interesting are the social and psychological variables that he suggests may lie behind these differences in social attitudes. Eysenck (see 1954 pp. 262-3, 1958 p. 297 and 1973 p. 69) argues that persons who are difficult to condition develop tough-minded attitudes and extraverted patterns of behaviour, while persons who are easy to condition develop tender-minded attitudes and introverted behaviour patterns. The tough-minded, tender-minded dimenson, thus, to a large measure corresponds to a difference between extraverted and introverted people. Extraversion and introversion, according to Eysenck (1970), are phenotypes corresponding to a genotypical difference in the central nervous system depending on the balance of inhibitory and excitatory potential in the ascending reticular activating system.

Elsewhere, Eysenck (1954 pp. 137-9) finds tender-minded attitudes among the middle classes and tough-minded ones among the working classes, the former being presumably more thoroughly socialised to restrain their aggressive and sexual impulses (Eysenck 1954 pp. 134-5), the latter more willing to give vent to these, even at a distance by approving harsh and punitive measures taken against criminals.

Whilst Eysenck's thesis has coherence and plausibility, the questionnaires that he uses to establish tough versus tender mindedness are rather arbitrary. A high 'tough-minded' score would require an odd combination of scepticism about conventional religious beliefs, an impatience with social rules constraining sexual behaviour and a harshly punitive approach to criminals and children. This is to say the least a peculiar mixture and only corresponds to Eysenck's picture of a lack of control over basic impulses if a number of very crude cultural assumptions are made.

For Ranulf (1964 p. 1) the **disinterested** "disposition to assist in the punishment of criminals" is stronger in some societies and in some social classes than in others. In Ranulf's work strong punitive reactions are attributed to moral indignation, a quality he sees as particularly rooted in the lower middle classes whose members are subject to a high degree of constraint and self-discipline and are envious of those not so constrained. Where a lower middle class of small businessmen, artisans, clerks, petty officials, minor apparatchiks or Party members is influential, then in that society the disposition to inflict punishment will be strong. Ranulf (1964 p. 46) seeks "to show that the **desire** to see anybody punished **is** generally much more intensive in the lower than in the higher classes and that it is especially intensive in the lower middle class".

This punitive reaction is not the indignant response of those who have been injured by a crime, but "a disinterested disposition, since no direct personal advantage is achieved by the act of punishing another person who has injured a third party" (Ranulf 1964 p. 1). This is for Ranulf (1964 p. 198) a "distinctive characteristic of the lower middle class, that is of a social class living under conditions which force its

members to an extraordinarily high degree of self-restraint and subject them to much frustration of natural desires".

It is the same class who in Merton's (1968 pp. 198-9) model provide the only law-abiding response to the strain of anomie. Punitiveness is the response of a class trapped in the frustrations of ritualism, envious of the successful goal-achieving conformists and angry at the affront to their values offered by the innovators and retreatists.

In support of his own thesis, Ranulf has cited data from a wide variety of societies with differing social structures, religious traditions and forms of political order. The most remarkable part of his work is his study (Ranulf 1933-4) of the sudden emergence of criminal law in Athens in the fifth century B.C. which first led him to consider the conditions under which the legal system of a society expanded to include a comprehensive criminal code (see Lasswell p.ix.). Ranulf examined-

> "the traits which were imputed to the Gods by the Athenians. He finds that the Gods are depicted as jealous beings who frequently impose deprivations upon men who have done nothing to damage them. The act of punishment, awful as it might be, is disinterested in origin. The inference is that the Athenians of the time were particularly envious of the rich and powerful and that the moral indignation of the lesser middle classes was rooted in envy, which found partial expression in comprehensive and stringent codes". (Lasswell p.xi.)

Ranulf's account of the foundations of punitiveness is almost the opposite of Eysenck's. For Ranulf it is those who by reason of their position in the social order have the most strongly internalised controls over their impulses (in Eysenck's terms the tender-minded) who are the most intensely punitive. However, the comparative historical data on which he bases his analyses are as disputable as the contents of Eysenck's attitude questionnaires.

There are, of course, many other psychological and social structural approaches to the analysis of the basic residues we have described. Overall they are as contradictory and uncertain as the two we have discussed in detail and are often far more dogmatically reductionist.

There are, however, two common points we can derive from Ranulf and from Eysenck whose implications are worth stressing. The first is that even if the educated, securely middle-class reformers whose sentiments correspond to residue B are able to influence governments to put some at least of their ideas into practice, those whose task it is to run the criminal justice system at its lower routine levels of administration will be imbued with the sentiments of Residue A and this will to some extent result in the frustration of the reformers' intentions. This is not mere bloody-mindedness, but arises from the grid-like constraints that control their working (and often entire) lives in ways that reformers not so constrained by disciplined routine fail to comprehend. Also they are on the 'sharp-end';they have on an everyday basis to deal with disagreeable and even dangerous tasks and confrontations with others that detached reformers and those nearer the apex of the hierarchy of authority do not have to face. It is hardly surprising that they display the tough-mindedness which

Eysenck sees as characterising the uneducated lower classes and the envy, anger and punitive moral indignation ascribed by Ranulf to the lower middle class. Like the foreman, or the non-comissioned officer, they are recruited from the same class as those whom they control, yet they are dressed in a little brief authority. Their social origins and socialisation are those of Eysenck's tough-minded lower classes, but their present position of small authority and severe responsibility places them in the lower middle class as described by Ranulf. The second point to be noted is the lack of any simple relationship between the two clusters of potentially opposed sentiments we have identified as residues and the left-right or socialist - capitalist continuum on which political ideologies and parties are often ranked. We could no doubt make this point even more strongly were we to extend our analysis to include debates about penal policy taking place within the socialist societies of Eastern Europe or Asia.

In this article we have sought to bring some order to the confusing variety of competing and conflicting penal theories and concepts which are to be found today and which have replaced one another in the recent past. In particular we have sought to show how the various theories and concepts may be compactly organised and understood using two key dichotomies: (a) the neo-Paretian contrast between 'Residue A' and 'Residue B', a corollorary of which is the contrast between the social 'exclusion' and 'inclusion or re-inclusion' of the offender, and (b) the contrast between 'moralism' and 'causalism' that has elsewhere proved useful in the analysis of other aspects of social change as societies become larger, and more secular, impersonal and bureaucratic (see Davies and Trivizas 1986). The neo-Paretian dimension of our model may also be related to differences and changes in social structure but in more subtle and elusive ways. We have also sought to outline some of the links that may exist between position in the social order, personality type and the espousing of the contrasting clusters of sentiments, we have labelled 'A' and 'B', but we would stress that these latter are no more than tentative explorations of the possible. Even if we are proved right it will only explain why the members of certain groups are much more likely to espouse penal policies that are derivations of Residue A rather than Residue B and vice versa. However, we are convinced that further analysis of the origins of views regarding penal policy along these lines will yield modes of understanding that will clarify discourse about that policy.

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