being should be made to suffer if such suffering cannot be justified by a concomitant gain to society.

No rational assessment of the kinds of activity that should be punished can be undertaken without some analysis of the purposes of punishment. Those purposes most frequently mentioned are reformation, restraint, retribution, and deterrence (perhaps more easily remembered as the three "R"s and a "D" of punishment).

§ 1.02 Purposes of Punishment

A. REFORMATION

Without question, it is desirable for punishment to reform. Certainly, society gains and nobody loses if an individual who has transgressed against society's standards is rehabilitated.

There is, however, serious difference of opinion as to the relative importance of reformation. Some believe that since criminals represent the worst in society, it is unjust to take tax dollars from those they consider more worthy to finance the rehabilitation of those they deem less worthy. Others believe that reformation, while desirable, should be subordinated to other purposes, such as deterrence. See § 1.03A *infra*.

Generally speaking, however, reformation is regarded by criminologists as a worthwhile goal of punishment. The real objection to reformation is simply that it doesn't work. This observation can be supported by the high degree of recidivism among

those who have been imprisoned. Moreover, it can be persuasively argued that the very nature of the prison system runs counter to the goal of reformation. One doesn't break a criminal of criminal tendencies by requiring him to associate exclusively with other criminals.

Notwithstanding the above analysis, it would be unfair to dismiss the noble concept of reformation as a total failure. All of us are familiar with instances in which unskilled, uneducated and apparently incorrigible criminals have developed skills in prison which have transformed them into highly useful citizens. Perhaps the real tragedy of the penal system is that this happens so infrequently that when it does occur, we hear about it.

B. RESTRAINT

That some individuals need to be restrained is hardly a debatable proposition. Even the staunchest advocate of reformation would not contend that a convicted unreformed dangerous criminal ought to be without restraints while he is being reformed. As one court put it: "To permit a man of dangerous criminal tendencies to be in a position where he can give indulgence to such propensities would be a folly which no community should suffer itself to commit, any more than it should allow a wild animal to range at will in the city streets." C. v. Ritter, 13 Pa.D. & C. 285, 291 (Oyer and Terminer 1930).

Although the above quotation overstates the case for restraint (people are imprisoned for committing

crimes, not for having "dangerous criminal tendencies"), the thrust of the observation is beyond dispute. There is considerable dispute, however, as to who should be restrained and for how long. For example, a persuasive argument could be made that a community needs more protection from the town bully who constantly picks fights with members of the local citizenry than it needs from one who after years of frustration kills her unfaithful spouse and promptly confesses in a manner which indicates considerable remorse. Yet the odds are that the town bully, if jailed at all, will be at liberty much earlier than the spouse killer.

Whether (and for how long) imprisonment for restraint is necessary will depend on the dangerousness manifested by the defendant in perpetrating his crime. Society needs more physical protection from armed robbers than embezzlers. Another factor is the amenability *vel non* of the particular offender to a lesser restraint. For example, a thief who violates the terms of his probation or an intoxicated driver who continues to drive after the suspension of her driver's license may need to be incarcerated whereas a thief or driver who adheres to the terms of the original punishment needs no further restraint.

An argument against emphasizing restraint as a purpose of punishment is not directed towards restraint per se, but towards restraint without reformation. This argument suggests that unless restraint is either permanent (life imprisonment without possibility of parole) or coupled with a

meaningful rehabilitative program, imprisonment will not restrain criminal conduct, but will merely postpone it. Although there is some force to this argument, it cannot justify the total abolition of immediate restraint for the protection of society. It does, however, emphasize the societal value of effective reformation.

C. RETRIBUTION

Unlike restraint, there is some difference of opinion as to the propriety of considering retribution as a legitimate purpose of punishment. Opponents contend that it is barbaric and unfit for a civilized society. Proponents, however, maintain that it is morally right to hate criminals, and to inflict retribution upon them for their misdeeds. Less vigorous proponents of retribution note that in fact people think society should get even with those who commit crimes against it. Thus, regardless of whether retribution is or is not morally justifiable in an ideal world, it is demanded by the citizenry of this world. Furthermore, proponents contend that the availability of institutionalized retribution is necessary to prevent private or personal retribution.

A closely related, if not identical, purpose to retribution is expiation. Rather than focusing upon seeking revenge against the criminal, expiation aims at cleansing or purifying society by removing the criminal from its midst.

Whether or not one believes that retribution and/or expiation are morally justifiable, the evi-

dence seems to show that they are significant factors in allocating punishment. Cliches such as "the criminal owes a debt to society" and "make the punishment fit the crime" are essentially retributive in nature. Perhaps the most realistic hope for those opposed to retributive punishment is not that it be eliminated entirely, but that it not be allowed to become (or remain) the dominant force in punishment, subordinating other goals, such as reformation, to a secondary status.

D. DETERRENCE

(1) Individual Deterrence

The concept of individual deterrence, like reformation, aims at precluding further criminal activity by the particular defendant who is before the court. Unlike reformation, it emphasizes the negative. Specifically, it says to a convicted criminal: "This is what happens to you when you commit a crime. Remember that when you get out of prison." It can be argued that to some extent, this is at cross-purposes with reformation, inasmuch as poor prison conditions are conducive to individual deterrence, but inconsistent with a meaningful rehabilitative program. It is possible, of course, to run a prison which is sufficiently unpleasant to discourage return visits, but which nevertheless has a meaningful rehabilitative program.

(2) General Deterrence

The theory of general deterrence is that punitive sanctions which are imposed upon one convicted

criminal will deter others with similar propensities from engaging in such conduct.

Critics of this position maintain that most prospective criminal defendants are unaware of the sentences that courts in fact impose, and that even those that are aware do not tend to be the type of people who carefully calculate possible loss as well as potential gain. Furthermore, there is evidence that factors apart from the law, such as religious indoctrination or peer expectations tend to influence a person's behavior to a greater extent than the criminal law. Finally, opponents of the deterrent theory point to the actual crime rate to show how ineffective deterrence really is. The classic illustration from earlier times is the number of pickpockets who were said to have preyed upon people who had come to watch other pickpockets being hanged.

Proponents of the deterrence theory maintain that prospective criminals have at least a general idea as to how their crimes will be punished and that this knowledge does influence their thinking, at least to some degree. They further contend that the importance of non-legal factors in shaping a person's conduct does not negate the importance of the law but simply suggests that the law is not the only factor governing a person's conduct. Finally, they suggest that the efficacy of the deterrent theory can be measured not by the number of criminals it has failed to deter, but can be measured by the number it has in fact deterred. Specifically, the question is not how many pickpockets exist in spite

of the penalty against them, but how many more would there be without such a penalty.

It is unlikely that a clear resolution to the deterrent question can be found due to the absence of a control group. Simply stated, we are not willing to abolish the criminal law in order to ascertain its significance in deterring criminal conduct. The closest thing we have to such an experiment occurred during World War II in Denmark when the Germans arrested the entire Danish police force and substituted a far less effective policing system. There, the rate of at least some crimes increased tenfold. Other data indicate that certainty of punishment is more significant than severity in deterring crime. See Andenaes, *The General Preventive Effects of Punishment,* 114 U.Pa.L.Rev. 949 (1966).

In conclusion, it seems fair to say that the prospect of punishment does deter crime, at least to some degree. Obviously, the more that the crime is calculated, the greater the deterrent potential of punishment. Nevertheless, because of our unwillingness to create a meaningful control group, we cannot precisely calibrate the extent of this deterrent effect.

§ 1.03 Punishment in Practice (Some Hard Cases)

A. CONFLICTING PURPOSES

Occasionally a case will arise in which one purpose of punishment seems to suggest lengthy imprisonment, whereas another purpose suggests no imprisonment at all. The resolution of such a conflict will depend upon a judge's assessment of the relative efficacy of the competing purposes.

An illustrative case, R. v. Jones, 115 Can.Crim. Cas.Ann. 273 (Ont.App.1956), involved a thirty-five year old defendant who pleaded guilty to three counts of indecent assault against young girls. Psychiatric testimony suggested "that there [was] not much likelihood of a recurrence of the offence . . . and that a prison term [would] be definitely detrimental to the [defendants'] condition." *Id.* at 275. Thus, the court was forced to balance the value of reformation on the one hand with restraint, deterrence, and retribution on the other.

At least three possible alternatives suggest themselves:

First, the court could have imposed substantial sentences such as five years per offense, the sentences to run consecutively. This would have restrained him for fifteen years or until age fifty. Furthermore, to the extent that this type of crime is deterrable, such a sentence would have maximized this value, as well as expressing society's revulsion for this type of crime in the form of retribution or expiation. In fact, none of the judges opted for this alternative. Presumably, this was due to the societal revulsion against taking a man with a previously spotless record who from the evidence appears to be reformable, and turning him into a permanent par-