

Franklin E. Zimring  
Gordon J. Hawkins

# deterrence

With a Foreword *the legal threat*  
by James Vorenberg *in crime control*

STUDIES IN  
CRIME AND  
JUSTICE

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**DETERRENCE**

*The Legal Threat  
in Crime Control*

Franklin E. Zimring  
Gordon J. Hawkins

With a Foreword by  
James Vorenberg

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STUDIES IN CRIME AND JUSTICE

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To Norval Morris

*Grammaticus rhetor geometres pictor aliptes*  
*Augur schoenobates medicus magus, omnia novit.*

Juvenal

## Foreword

Deterring future misconduct is probably the principal aim of criminal sanctions. Yet decisions are made by legislators, sentencing judges, and parole boards with virtually no knowledge and little analysis about the future effects which their actions will have. The authors have taken an important step in beginning to fill this gap. Their book is an authoritative and stimulating analysis of deterrence in criminal law.

The first book in *Studies in Crime and Justice*, *Delinquency in a Birth Cohort*, by Wolfgang, Figlio, and Sellin, was a report of a major research study. The aim and approach of Zimring and Hawkins are different. Taking one of the most difficult and crucial issues in criminal administration, they sift and analyze such research and theoretical work as has been done in an unusually intelligent and straightforward way. They make a number of interesting and penetrating forays into theory on specific issues, but it is as an organizer of thought rather than as a developer of new theory that the book is particularly valuable. The result is a book which not only deepens knowledge and insights about crime and the criminal justice system but should challenge others in the field to go further.

It is consistent with the approach of the authors that they avoid becoming embroiled in the sterile, overgeneralized debate on whether the threat of punishment deters, but instead focus attention on the differential effects on compliance resulting from changes in particular sanctions. Consequently, the reader is rewarded not only with a clear picture of what the major issues are but also with an understanding of how varying resolutions of these issues, on the basis of research which the authors propose, would affect policy judgments about penal sanctions and criminal administration. For example, at a time when most jurisdictions are experimenting with the early diversion of offenders from the criminal justice system, and a few are closing down reformatories and prisons, clear thinking about the effects of deterrence is crucial.

One of the great strengths of the book is the chapter "The Strategy of Research," in which the authors analyze research methods that they believe would begin to shed further light on issues raised throughout the book. This chapter not only elucidates the issues relating to deterrence; it also provides an important model which should be followed in the growing literature in this field. It substitutes for the typical combination of pontification and hunch that characterizes much criminological writing an honest and thoughtful recognition of what we do not know and a careful plan to begin to acquire the data we need. Much of its strength is that it carefully explains the value and limitations of various research approaches. And the point that the lack of any one perfect method should not lead us either to total reliance on imperfection or to despair is important and well presented. Thus, like its predecessor in the present series, this book makes an important contribution to research methodology.

In sum, anyone working in the criminal field—including administrators, legislators, law revisers, and academics—should read and ponder this book. If we take seriously its warnings and advice it can help move criminal administration out of the dark.

JAMES VORENBERG

## Acknowledgments

In preparing this book we have freely availed ourselves of what Thomas Carlyle called "the indisputablest" of all the rights of man: the right of the ignorant to be guided by the wiser. In particular, we are deeply indebted to Johannes Andenaes, Dean of the Faculty of Law and Director of the Institute of Criminology and Criminal Law at the University of Oslo, who has been largely responsible for the current renewal of serious interest in the subject of deterrence.

Some part of that indebtedness will be immediately apparent to the reader. The frequency of reference to his writings, and the fact that in many places our discussion of topics is directly responsive to his treatment of them, make it sufficiently plain. In addition, we have had the benefit of lengthy discussions and correspondence with him, in the course of which he has subjected our ideas to searching criticism and refinement. He has been both our harshest and our most generous critic. In making our final revision of the manuscript, we were greatly helped by his detailed critique of it. His influence has been, in short, pervasive.

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FRANKLIN E. ZIMRING  
GORDON J. HAWKINS

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Belief in the deterrent efficacy of penal sanctions is as old as the criminal law itself. It has informed and does inform political, administrative, and judicial policy to so great a degree that deterrence has been described as a "primary and essential postulate"<sup>1</sup> of almost all criminal law systems.

The nature of that postulate as traditionally conceived is succinctly stated in earlier editions of C. S. Kenny's classic *Outlines of Criminal Law*. Kenny, who cites as authorities "the most generally accepted writers—as for instance Beccaria, Blackstone, Romilly, Paley, Feuerbach—"<sup>2</sup> defines "deterrence by punishment" as a "method of retrospective interference; by holding out threats that, whenever a wrong has been actually committed, the wrongdoer shall incur punishment."<sup>3</sup> The object is "to check an offence by thus associating with the idea of it a deterrent sense of terror. . . . The restraint of terror . . . is supplied by the criminal law very efficiently."<sup>4</sup>

1. Morris, "Impediments to Penal Reform" (1966) 33 *U. Chi. L. Rev.* 631.

2. Kenny, *Outlines of Criminal Law* (13th ed., 1929) 30.

3. *Ibid.* 29.

4. *Ibid.* 29-30.

Kenny's belief that the criminal law provided a very effective "restraint of terror" was, unlike that of many of his contemporaries, not entirely unsupported by evidence. In a footnote he said: "That the fear of punishment *can* deter is shown . . . vividly by its efficacy in the training of animals and even of fishes; a pike can be taught to swim amongst tench innocuously, or a flea to abstain from jumping."<sup>5</sup> Today, however, in the face of widespread skepticism about the whole institution of punishment, a pacific pike and a frightened flea can hardly hope to sustain so heavy an inferential burden.

Until quite recently, discussion of punishment in general and deterrence in particular has been in the main quite unscientific in character. The bulk of the literature consists of deductive argument. The level of dialectic subtlety is often high; the factual content is minimal. Matters of fact are passed over with candid confessions of ignorance, occasionally supplemented by random speculation. Discussion of what we are justified in doing not only takes precedence over, but even precludes consideration of, what in practice we can do.

Indeed, the theory of punishment as traditionally conceived is largely made up of recommendations or prescriptions; of rhetorical statements rather than propositions which could be evaluated on the basis of fact. As Professor H. L. A. Hart says:

. . . Theories of punishment are not theories in any normal sense. They are not, as scientific theories are, assertions or contentions as to what is or what is not the case; the atomic theory or the kinetic theory of gases is a theory of this sort. On the contrary, those major positions concerning punishment which are called deterrent or retributive or reformative "theories" of punishment are moral *claims* as to what justifies the practice of punishment—claims as to why, morally, it *should* or *may* be used.<sup>6</sup>

And clearly, insofar as this is true, such theories cannot be subjected to empirical investigation.

It is true that in recent years the need for empirical research has been emphasized even in philosophical literature. And deterrence has received an increasing amount of attention from

5. *Ibid.* 31 n. 1.

6. Hart, "Murder and the Principles of Punishment: England and the United States" (1957) 52 *Northwestern U. L. Rev.* 446-47.

scholars in a variety of fields. The volume of empirical studies of crime control policies has increased. Research relevant to deterrence in social psychology and other fields has grown impressively since World War II.

Nevertheless, the net effect of increasing attention and study is something less than a knowledge explosion. There are doubts about both the reliability and the relevance of much of the psychological experimentation that has been done. Lack of methodological rigor combined with extrapolative extravagance have in many studies produced counterfeit conclusions. There have been modest increments in understanding; but most results have been suggestive rather than definitive. Many questions remain unanswered, among them inevitably those as yet unformulated.

### *The Dialectics of Deterrence*

There are many reasons for this unsatisfactory state of affairs. We shall not attempt to list them here. One, however, needs to be mentioned at this stage. It relates to the nature of the evidence which is available for study in this area, and some conclusions which have been drawn from it. For while it is true that much of it is ambiguous and susceptible of various interpretations, there are also bodies of evidence which move observers to two clearly antithetical conclusions.

On the one hand, there is the potent, ubiquitous, seemingly irrefutable thesis that attaching unpleasant consequences to behavior will reduce the tendency of people to engage in that behavior. This proposition is so basic that it can rightfully claim to be the ancestor of such unimpeachable formulations as the first law of demand in economics and the principle of conditioning in psychology. Moreover, despite fashionable skepticism about the efficacy of legal controls there is in some areas impressive evidence of the effectiveness of criminal law enforcement as a means of social defense.

We will refer here to only one simple but striking example. It has been shown in a great many studies carried out in various countries that the imposition of speed limits has, in general, the effect of reducing speeds and accidents.<sup>7</sup> A dramatic

7. Great Britain, Department of Scientific and Industrial Research, Road Research Laboratory, *Research on Road Safety* (1963) 155-63.

instance of this may be found in an experiment conducted in Great Britain by the Ministry of Transport's Road Research Laboratory. The experiment dealt with increased police enforcement of a 30 m.p.h. speed limit on six roads in different parts of the country over the period of one year. It demonstrated clearly that the enforcement of speed limits on roads can substantially reduce speeding and consequent accidents and casualties. It was found not only that speeds were reduced on the experimental roads but also that injury accidents were reduced by 25 percent, and driver and passenger casualties were cut in half.<sup>8</sup>

On the other hand, there are areas in which attempts to control or suppress behavior by means of the threat of punishment seem, to many observers, to be hopeless failures. The American experience with the prohibition of the sale, manufacture, and transportation of alcoholic liquors during the fourteen years from 1920 to 1933 is not infrequently cited as evidence that "goodness cannot be legislated into men."<sup>9</sup> More recently the application of criminal enforcement and penal sanctions in the field of drug control is often said to have met with similar lack of success. Thus, the President's Crime Commission Task Force on Narcotics and Drug Abuse reported that despite the application of increasingly severe sanctions to marijuana "the use and traffic in that drug appear to be increasing."<sup>10</sup>

The existence of these two contrary types of evidence has meant that discussion of the deterrence issue has often taken a dialectic form. On one hand, evidence of the effectiveness of legal controls is adduced in support of an irrefutable theory of universal deterrence. It is irrefutable because any failure to achieve a deterrent effect is interpreted as an indication of the need for more severe and certain punishments.

On the other hand, there is an equally incontrovertible but antithetical theory of nondeterrence. As Enrico Ferri put it

8. Munden, *An Experiment in Enforcing the 30 mile/h Speed Limit* (Road Research Laboratory Report no. 24, 1966) 1.

9. Byse, "Alcoholic Beverage Control Before Repeal" (1940) 7 *Law and Contemp. Prob.* 569.

10. U.S. President's Commission on Law Enforcement and Administration of Justice Task Force Report, *Narcotics and Drug Abuse* (1967) 11.