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BOOK REVIEWS

REVIEW ARTICLES

ANDENAES AND THE THEORY OF DETERRENCE*

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For at least two reasons, American scholars engaged in an expanding area of criminal law related research cannot afford to ignore this book by the noted Norwegian criminologist and lawyer. First, Andenaes' pioneering work was initially critical of the then predominant theme in American criminology that treated the issue of deterrence as one unworthy of serious intellectual consideration.[1] Careful reading of his book will convince all but the diehard disbelievers that punishment and deterrence must once again assume a central role in scholarly discussion of the criminal law. Second, perhaps because of increasing skepticism of the efficacy of "treatment" as a justification for the law's control over the individual among lawyers, jurists, and the public, the time has arrived for the idea of deterrence, and thus for Andenaes' book. Scholars must now refine and address the problem of deterrence that has always been foremost in the public's mind in its view of the purposes of the criminal law.[2]

The major contribution of Andenaes' book, a collection of essays written over the past twenty years, is its coherent and analytical definition of deterrence. It is not surprising that some of the essays as previously published have already had substantial influence on criminal law-related scholarship.[3] The book's influence on public policy discussion may be dormant or emerge indirectly through the other scholarship that has been and will be inspired by its conceptual framework and research questions. Legislators, jurists, police officers, and sentencing and correctional officials are now debating the law's ability to deter certain conduct and the efficacy and legitimacy of punishment. It is hoped that those policy makers will eventually have some notion of Andenaes' concept of deterrence as an analytical starting point of their discussions.

On the assumption that various notions of deterrence will have enduring influence on public policy and scholarship, a reviewer has a special obligation to make both explanatory and critical judgments about such a complete exposition on the subject as Andenaes' book. That obligation will be fulfilled in two ways. The analytical definition of deterrence, carefully developed in the series of essays, will be described. As will be demonstrated, this definition is in fact an analytical perspective on the purposes and justification of the criminal law. Second, to demonstrate both the power and the limits of his analytical framework, I will utilize the book's concepts to illuminate issues often hidden in contemporary debates about the criminal law. I will use the examples of the debate over the efficacy of certain rules to deter police from certain kinds of behavior and the controversy over the "fairness" of Lieutenant William Calley's conviction, sentence, and parole for his participation in the My Lai Massacre during the war in Vietnam. This examination of the limits of the analysis is in

* A review article of PUNISHMENT AND DETERRENCE. By *Johannes Andenaes*. Ann Arbor: The University of Michigan Press, 1974. Pp. vi, 189. $9.00.

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[1] J. ANDENAES, PUNISHMENT AND DETERRENCE 1 (1974) [hereinafter cited as ANDENAES, PUNISHMENT].

[2] As Andenaes points out, a large portion of the public and public officials take the deterrence potential of the law very seriously.

[3] *See, e.g.*, H. PACKER, THE LIMITS OF THE CRIMINAL SANCTIONS 370 (1968); F. ZIMRING AND G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL (1973).

fact a tribute to Andenaes' intellectual powers since the questions his analysis cannot answer are enduring ones for those seriously engaged in criminal law scholarship.

Andenaes writes for an audience, American social scientists and academic lawyers, which he assumes is either disinclined towards any notion of deterrence or so oriented toward reform and rehabilitation that any notion of deterrence is almost foreign and certainly archaic.[4] The organization of the essays with the three accompanying appendices is designed to convince this skeptical audience of the soundness of Andenaes' position that punishment and deterrence should be a primary justification for the criminal law. First, he bridges the gap between his own perspective and that of his audience by translating and explaining the continental term, "General Prevention," into the more familiar terminology for American readers, "General Deterrence."[5] Second, he establishes the difference between special and general deterrence in clear terms. He then proceeds to demonstrate what claims can be made for special and general deterrence. It is the latter phenomenon that is Andenaes' primary concern in his first two essays.[6]

General deterrence is an inclusive term that means for Andenaes the ability of "the criminal law and its enforcement to make citizens law-abiding."[7] By use of this general concept that is focused upon the behavior of the citizenry rather than solely on those small numbers who violate the law and are apprehended, his concept of deterrence includes several distinct features. The general deterrence includes not only psychological dimensions of the threat or fear of punishment, but also the perceived risk of detection. In addition, the term includes the ability of the law to strengthen other inhibitions by performing a moralizing and educative function.[8] With such an all inclusive definition, the problem of general deterrence is not merely one of empiricism[9] for Andenaes, but one of values[10] and specification of conditions under which the law's general deterrence functions can be realized.

In any such attempted delineation of issues the distinction between the various aspects of the deterrent effect of the law and its effect upon the individual offender—special or individual deterrence—must be made. Most of American scholarship has focused generally on the problem of deterrence.[11] Once Andenaes is convinced that his reluctant reader is persuaded of the necessity to be more precise in any claims for or against general or specific deterrence, he illustrates the utility of the distinction in his third essay entitled, "Deterrence and Specific Offenses."[12] His fourth essay attempts to deal explicitly with the moral and educative aspects of deterrence.[13] While admittedly repetitious for readers already familiar with Andenaes' work, the message is clear that discussion of deterrence must become more precise.[14]

Andenaes, of course, believes that we know more about the general deterrence effect of the criminal law from common sense reasoning than most scholars have been willing to admit. He is not, however, insensitive to the ethical questions raised by the notion of general deterrence. The reluctance of scholars to give deterrence serious consideration in the past may have been due to their discomfort with the no-

[4] Since nearly all the essays appeared originally in American journals over the years, Andenaes's assumption about American academic audiences may not hold today. As American audiences grow more familiar with his work, his well-argued position for deterrence must become more analytical.

[5] ANDENAES, PUNISHMENT at 3–33, 173–74.

[6] ANDENAES, PUNISHMENT, Chapter I, "General Prevention-Illusion or Reality," 3–33; Chapter II, "The General—Preventive Effects of Punishment." 34–83.

[7] *Id.* at 7.

[8] *Id.*

[9] ANDENAES, PUNISHMENT.

[10] *Id.* at 77.

[11] While Andenaes may be correct that criminologists are "treatment oriented," one group of American social scientists, economists, are becoming aware of the law's deterrent potential. *See, e.g.,* Ehrlich, *The Deterrent Effect of Criminal Law Enforcement,* 1 J. LEGAL STUDIES 259 (1972).

[12] ANDENAES, PUNISHMENT at 84–107.

[13] ANDENAES, PUNISHMENT, Chapter IV, "The Moral of Educative Influence of Criminal Law," 110–28.

[14] It is also possible that Andenaes' classification of the various categories of offenses could be challenged. *Id.* at 86. I am particularly concerned with whether his distinction between what he calls "police regulations" and "economics crimes" hold law. This review is not the place to attempt to consider when, and under what circumstances Americans use legal regulation rather than criminal sanctions, and how the regulation and criminal sanction interact.

tion of using one individual as a means of keeping others law-abiding.[15] He addresses this ethical concern of scholars in his fifth essay, "The Morality of Deterrence."[16] It is in this essay that the reader is made acutely aware of how the ethical issues differ for legislators and sentencing officials.[17] The legislator must consider the general deterrence effect in enacting laws, but whether and under what conditions the sentencing officials should consider general deterrence is a more difficult ethical issue.[18] It is also in this essay that the more careful reader will have an inkling of Andenaes' more generalized theory or perspective on the criminal law.[19]

The final essay is "The Future of the Criminal Law."[20] The only essay that has not been previously published, it is essentially an exegesis of how central Andenaes thinks the concept of deterrence is to a host of problems in criminal law. For instance, in deciding whether there ought to be a move towards shorter or longer sentences, his analysis, which includes a critique of existing research, leads towards shorter sentences. His suggestion here ought to be given serious attention by researchers and policy makers. As with all good analytical work, all his essays, particularly those in the last appendix[21] are sprinkled with critical research questions which ought to be refined and addressed by American scholars.

Until Americans become at least as critical and precise as Andenaes in their use of the concept of deterrence, our public and scholarly debates will add very little to his pioneering theoretical work. Judicial and scholarly debate over the deterrent effect of the fourth amendment's exclusionary rule[22] is an excellent example of our present confusion about the concept of deterrence in general. Most participants in this debate fail to include in their discussion an explicit treatment of the issue of "punishment" of police officers.[23] Assuming that some aspect of visiting sanctions upon the wrongdoer is involved in the rule of exclusion, few participants question why the sanction should in fact fall on the prosecutor rather than the police. The jurists, as one would expect from Andenaes' analysis, are at least a bit more aware that they are considering the moralizing and educative function of the rule of exclusion on police officers who are part of the citizenry.[24] If it is the moralizing effect of law that is in question, a better analysis involves the value conflicts that jurists must make in deciding these cases, rather than on whether we can measure the number of "illegal searches" before and after the rule.[25] Andenaes' concept of deterrence is broad enough to

[15] *Id.* at 129.
[16] *Id.* at 129–51.
[17] *Id.* at 135.
[18] *Id.* at 135.
[19] Readers familiar with the debates in American criminal law will find Andenaes' discussion of risks of litigation inadequate. *Id.* at 78, 146. For instance, Andenaes does not discuss how the lack of review of sentence in most American jurisdictions creates a host of institutional problems. *See* note 29 *infra*. But the inadequacy here is well compensated by the richness of his insights from the Scandinavian experience.
[20] ANDENAES, PUNISHMENT at 152–72.
[21] *Id.* at 183–89. "The Relevance of Psychological Research for Deliverance Theory" has great relevance to questions of the permissibility of using scientific behavior control in prisons.

[22] *See, e.g.,* Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665, 670–72 (1970).
[23] The notion of condemning the police officer seems to arise when the jurists debate whether "good faith" or technical violations of the "illegal search and seizure" doctrine ought to lead to exclusion in a given case.
[24] Even an opponent of the exclusionary rule, Chief Justice Burger, appears to recognize the educative influences of the judicial rule. He has stated in the course of a critique of the rule:

> I do not propose, however, that we abandon the suppression doctrine until some meaningful alternative can be developed. In a sense our legal system has become the captive of its own creation. To overrule *Weeks* and *Mapp*, even assuming the Court was now prepared to take that step, could raise new problems. Obviously the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somewhere been removed—that an open season on "criminals" had been declared. I am concerned lest some such mistaken impression might be fostered by a flat overruling of the suppression doctrine cases. For years we have relied upon it as the exclusive remedy for unlawful official conduct; in a sense we are in a situation akin to the narcotics addict whose dependence on drugs precludes any drastic or immediate withdrawal of the supposed prop, regardless of how futile its continued use may be.

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 420–21 (1970) (Burger, C.J., dissenting).
[25] *See* note 22 *supra*.

be translated into an operational and conceptual framework for rethinking the issue of the use of law to control state officials from impermissible, although not criminal, conduct.[26]

Recent discussion of the "fairness" of infliction of sanctions on Lt. William Calley, especially among the "liberal minded and educated"[27] miss Andenaes' analytical distinctions in talking about deterrence. Those who claimed at one time that it was "unfair" to punish Calley because other wrongdoers are free,[28] failed to perceive that their opponents spoke explicitly about the moralizing and educative effect of the criminal law.[29]

With a clearer delineation of the issues, we might have had more cogent debate over whether the general deterrence effect can be achieved through an adjudication of Calley's crimes and a short sentence. In other words, is the need for general deterrence met by a short prison sentence in his case? While Andenaes' work cannot answer that question, his analysis would provide support for those seeking to justify punishment in terms of retribution or the need to deter Calley (special deterrence).

For criminologists, the book is probably the modern statement on the problem of deterrence. For lawyers concerned with cases[30] and legislation, the book must become a cornerstone in modern scholarship. For too long, Americans have let notions of "individualization" of the criminal law mask the difficult questions that general deterrence raises.[31] While the book is surely for scholars in terms of its depth, it is certainly well written enough for students in various disciplines, as well as for the lay reader. Ordinarily, I would prefer not to see things in print reprinted as books, but this collection of essays is well worth the effort of reprinting and adaptation since read together the essays form a coherent book. My only regret is that this is one of the few modern statements on deterrence. We desperately need more theoretical as well as empirical work in this area. For those already aware of Andenaes' work, the book breaks no new ground and adds no new theoretical insights. For those unfamiliar with his work, the collection presents his position in a coherent fashion.

[26] What is often implicit in Andenaes' book is the idea that other types of legal schemes other than criminal law ought to be examined in any discussion of the deterrent effect of the criminal law. *See, e.g.*, ANDENAES, PUNISHMENT at 76, 125. When dealing with deterring non-criminal conduct, it is apparent that jurists do not think of deterrence in a mechanical fashion. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1970). At some point the deterrent effect of mere regulation of such various activities as drugs and alcohol ought to be critically examined.

[27] ANDENAES, PUNISHMENT at 133.

[28] Marshall, *We Must End the War*, N.Y. Times, April 10, 1971, at 23, col. 3.

[29] Goldstein, *The Meaning of Calley*, 190 THE NEW REPUBLIC, May 8, 1971, at 13, 14.

[30] Furman v. Georgia, 408 U.S. 238 (1972) (White, J., concurring) (constitutionality of the death penalty).

[31] *See, generally*, Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972); Palmer, *A Model of Criminal Disposition: An Alternative to Official Discretion in Sentencing*, 62 GEO. L.J. 1 (1973).

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