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EQUITY AND THE LAW: THE EFFECT OF A HARMDOER'S "SUFFERING IN THE ACT" ON LIKING AND ASSIGNED PUNISHMENT[1]

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I. Introduction

Scholars have long been interested in questions of "justice," "fairness," and "equity." Aristotle was among the first to propose an "equity" theory of justice.

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He alluded to two forms of justice: (1) *Equal Justice* (rewards are distributed equally among men); (2) *Distributive Justice* (rewards are distributed in proportion to men's merit). The Aristotelian conception has been elaborated by such modern social psychologists as Homans (1961), Adams (1965), and Walster *et al.* (1973; in press).

In this paper we will briefly review equity theory,[2] speculate concerning its possible usefulness in illuminating the legal process, and present some preliminary research findings.

II. Theoretical Background: The Equity Formulation

Equity theory is a strikingly simple theory. Essentially it consists of four propositions:

Proposition I: Individuals will try to maximize their outcomes (where outcomes equals rewards minus costs).

Proposition II: Groups can maximize collective reward by evolving accepted systems for "equitably" apportioning rewards and costs among members. Thus, members will evolve such systems of equity and will attempt to induce members to accept and adhere to these systems.

The only way groups can induce members to equitably behave is by making it more profitable to behave equitably than inequitably. Thus, groups will generally reward members who treat others equitably and generally punish (increase the costs for) members who treat others inequitably.

Walster *et al.* define an "equitable relationship" to exist when the person scrutinizing the relationship (i.e., the scrutineer—who could be Participant A, Participant B, or an outside observer) perceives that all participants are receiving equal relative outcomes from the relationship, i.e.,

$$\frac{\text{Outcomes}_A - \text{Inputs}_A}{(|\text{Inputs}_A|)^k A} = \frac{\text{Outcomes}_B - \text{Inputs}_B}{(|\text{Inputs}_B|)^k B}$$

A. DEFINITION OF TERMS

Inputs (I) are defined as "the participant's contributions to the exchange, which are seen (by a scrutineer) as entitling him to rewards or costs." The inputs that a participant contributes to a relationship can be either assets (entitling him to rewards) or liabilities (entitling him to costs).[3]

[2] Readers who are familiar with the equity theory of Walster *et al.* (1973) should skip to Section III.

[3] The restriction of this formula is that Inputs cannot equal zero.

In different settings, different inputs are seen as entitling one to rewards or costs. In industrial settings, assets such as "capital" or "manual labor" are seen as relevant inputs—inputs that legitimately entitle the contributor to reward. In social settings, assets such as physical beauty or kindness are generally seen as assets entitling the possessor to social reward. Social liabilities such as boorishness or cruelty are seen as liabilities entitling one to costs. In accident cases, such inputs as "intent," "fault," and "negligence" may be of primary importance.

Outcomes (O) are defined as the positive and negative consequences that a scrutineer perceives a participant has incurred as a consequence of his relationship with another. Following Homans (1961), we shall refer to positive outcomes as "rewards" and negative outcomes as "costs." The participant's total outcomes in a relationship are equal to the rewards he obtains from the relationship minus the costs he incurs.

$$k_A = \text{sign}\,(I_A) \times \text{sign}\,(O_A - I_A)$$

$$k_B = \text{sign}\,(I_B) \times \text{sign}\,(O_B - I_B)$$

[The exponents k_A and k_B simply take on the value +1 or −1, depending on the sign of A and B's inputs and the sign of their gains (outcomes − inputs).][4]

B. WHO DECIDES WHETHER A RELATIONSHIP IS EQUITABLE?

In Proposition II, we argued that societies develop norms of equity and teach these systems to their members. Thus, within any society there will be a general consensus as to what constitutes an equitable relationship. However, the equity formulation makes it clear that ultimately, equity is in the eye of the beholder. An individual's perception of how equitable a relationship is will depend on *his* assessment of the value and relevance of the various participants' inputs and outcomes. Participants themselves, even after prolonged negotiation with one another, often do not agree completely as to the *value* and *relevance* of various inputs and outcomes. One person may feel that a distinguished family name is a relevant input, entitling him to positive outcomes. His partner might disagree.

If participants do calculate inputs and outcomes differently—and it is likely that they will—it is inevitable that they will differ in their perceptions of whether or not a given relationship is equitable. Moreover, "objective" outside observers are likely to evaluate the equity of a relationship quite differently than do participants.

[4] The exponent's effect is simply to change the way relative outcomes are computed. If $k = +1$, then we have $(O - I)/|I|$, but if $k = -1$, then we have $|I| \times (O - I)$. Without the exponent k, the formula would yield meaningless results when $I < O$ and $O - I > O$, or $I > O$ and $O - I < O$.

A simple example illustrates the application of the equity formula. Assume that an employer (Person A) and his accountant (Person B) have an equitable relationship. Assume, for example, that both their relative outcomes = +10:

$$\frac{\$100{,}000}{|\$10{,}000|} = \frac{\$10{,}000}{|\$1{,}000|}$$

If the accountant embezzles $10,000 from his employer, he creates a marked inequity:

$$\frac{\$100{,}000 - \$10{,}000}{|\$10{,}000|} \neq \frac{\$10{,}000 + \$10{,}000}{|\$1{,}000|}$$

By convention, equity theorists term an individual who intentionally takes larger relative outcomes than he deserves an *"exploiter"* or a "harmdoer." The member of the relationship whose outcomes are reduced is the *"victim."*

C. THE PSYCHOLOGICAL CONSEQUENCES OF INEQUITY

Proposition III: When individuals find themselves participating in inequitable relationships, they become distressed. The more inequitable the relationship, the more distress individuals feel.

According to equity theory, both the harmdoer and the victim experience distress after an exploitative encounter. (Evidence in support of this contention is reviewed in Austin and Walster, 1974). Theorists have labeled their distress reactions in various ways. The exploiter's distress may be labeled "guilt," "shame," "dissonance," "empathy," "conditioned anxiety," or "fear of retaliation." The victim's distress may be labeled "anger," "shame," "humiliation," "dissonance," or "conditioned anxiety." Most agree, however, that the distress felt by harmdoers and victims arises from two sources.

First, when children engage in inequitable relations, they are sometimes punished. Soon the performance of (or acquiescence in) unjust acts arouses conditioned anxiety. Such distress may have a cognitive component: The harmdoer may attribute his distress to a fear that the victim, the victim's sympathizers, legal agencies, or even God will retaliate against him. The victim may fear that his fellows will ridicule him or consider him a "pushover" and "fair game" for subsequent exploitation.[5] Discomfort emanating from these sources has been labeled *retaliation distress.*

Harmdoing may produce discomfort for a second reason. In our society there is an almost universally accepted (if not followed) moral code that one

[5] Data from Brown (1968) indicate that victims do indeed experience "retaliation distress." Brown found that when subjects were informed that others thought they had been "suckered," they were more likely to show face-saving behaviors. Brown interpreted his data as evidence of subjects' desire to bolster their self-esteem *and* to avoid future exploitation.

should be fair and equitable in his dealings with others. [See Fromm (1956) for an interesting discussion of the pervasiveness of the "fairness" principle.] In stating that "individuals accept a code of fairness" we do not mean that everyone internalizes exactly the same code, internalizes it to the same extent, or follows that code without deviation. Juvenile delinquents and confidence men, for example, often seem to behave as if the exploitation of others is completely consistent with their self-concept. However, evidence suggests that even deviants do internalize norms of fairness. It is true that they may repeatedly violate such norms for financial or social gain, but such violations do seem to cause some distress. Deviants evidently experience sufficient discomfort that they are motivated to try to convince others that their actions were equitable. For example, some deviants argue that the inputs of those they victimize are so negative that to exploit them is in fact to give them "what they deserve." Anecdotal evidence on these points comes from interviews with confidence men (Goffman, 1952; Roebuck, 1964) and delinquents (Sykes and Matza, 1957).

Participating in a profoundly inequitable relationship—"taking" others or being "taken"—threatens the self-concept of almost any individual. The tension that accompanies such inconsistent acts has been discussed in great detail by cognitive dissonance theorists (Bramel, Taub, & Blum, 1968). In addition, guilt theorists have extensively analyzed the reactions of harmdoers (Arnold, 1960; Maher, 1966). Researchers have only begun to study victims' cognitive and affective reactions (Austin and Walster, 1974). Discomfort emanating from these sources has been termed *self-concept distress.*

There is compelling evidence that individuals become distressed when they get too much as well as when they get too little. No one would argue that a given inequity is as distressing for the harmdoer as for the victim. Aesop acidly observed that, "The injuries we do and those we suffer are seldom weighted on the same scales." It is clear why a harmdoer would be less disturbed by an inequity than his victim. Although both participants must endure the discomfort of knowing they are in an inequitable relationship, the harmdoer can at least console himself that he is benefitting materially from his discomfort. His victim has no such consolation—he is losing in every way from the inequity. Abundant data support the assumption that an injustice is less disturbing to the beneficiaries of the injustice than their victims (see, e.g., Blumstein & Weinstein, 1969; Pritchard *et al.*, 1972; Austin & Walster, 1974).

Presumably, individuals are motivated by retaliation distress and self-concept distress to restore equity to their inequitable relationships.

Proposition IV: Individuals who discover they are in an inequitable relationship attempt to eliminate their distress by restoring equity. The greater the inequity that exists, the more distress they feel, and the harder they try to restore equity.

D. TECHNIQUES BY WHICH INDIVIDUALS REDUCE THEIR DISTRESS

1. Restoration of Actual Equity

One way participants can restore equity to their unjust relationship is by allowing the exploiter to compensate his victim. Many studies indicate that a harmdoer will often exert considerable effort to make restitution (see, e.g., Walster & Prestholdt, 1966; Berscheid & Walster, 1967; Schmitt & Marwell, 1972). Parallel evidence indicates that a victim's first response to exploitation is to seek restitution [Leventhal & Bergman, 1969; Marwell, Schmitt, & Shotola, 1971]. If the exploiter refuses to make restitution, the victim may settle for "getting even" by retaliating against the exploiter (Thibaut, 1950; Ross *et al.*, 1971).

2. Restoration of Psychological Equity

Participants can reduce their distress in a second way. They can distort reality and convince themselves (and perhaps others) that their ostensibly inequitable relationship is, in fact, perfectly fair. Individuals use several techniques to rationalize exploitation. A number of studies demonstrate that harmdoers may rationalize their harmdoing by derogating their victim, by denying responsibility for the act, or by minimizing the victim's suffering (Brock & Buss, 1962; Glass, 1964; Sykes & Matza, 1964). Cressey (1955) reports that embezzlers commonly insist that they merely "borrowed" the money (denial of responsibility) and that, in any case, the company "did not really miss it" (minimization of harmdoing). There is even some sparse experimental evidence (Austin & Walster, 1974; Leventhal & Bergman, 1969) that under the right circumstances, victims will even justify their own exploitation. Legal theorists have observed, with some puzzlement, that victims do tend to accept (if not justify) their own exploitation. [For example, Maurer (1940) notes that confidence men and perpetrators of assault can rarely be prosecuted; their victims simply refuse to sign complaints.]

3. Actual versus Psychological Equity Restoration

Obviously, now we must confront a crucial question. Can we specify when a person will try to restore actual equity to his relationship? When he will settle for restoring psychological equity instead? Equity theory states that a person follows a Cost-Benefit strategy when deciding how he should respond. Theoretically, two situational variables are crucial determinants of a person's response: (1) the adequacy of the possible techniques for restoring equity, and (2) the cost of the possible techniques for restoring equity. There is evidence that harmdoers and their victims prefer techniques that completely restore equity to ones that only partially restore equity (see, e.g., Berscheid & Walster, 1967; Berscheid, Walster, & Barclay, 1969). There is complementary evidence that they prefer

techniques with little material or psychological cost to techniques with greater cost (see, e.g., Weick & Nesset, 1968). Whether an individual responds to injustice by attempting to restore actual equity, by distorting reality, or by doing a little of both, will thus depend on the costs and benefits he thinks are associated with each strategy.

The preceding discussion has focused upon *participants'* equity behavior. Participants are not the only possible agents of equity restoration, however. The participants' friends, social workers, the courts, etc., may all observe inequity, become distressed by it, and intervene to right existing wrongs. Are there any data on how such impartial observers respond to inequity?

E. THE IMPARTIAL OBSERVER

According to equity theorists, impartial observers tend to react to injustice in much the same way that participants do—with one qualification: Observers react less passionately than do participants. The discovery that observers' reactions faintly echo participants' fiery ones should come as little surprise. Human beings are able to empathize with others. An observer who empathizes with a harmdoer may well share his embarrassment and rationalizations; the observer who empathizes with his victim may well share the victim's anger and indignation. If, as seems likely, the feelings we empathize with are less intense than the ones we experience, it is understandable that observers react less intensely to inequity than do actual participants.

Evidence that impartial observers react to injustice in much the same way as do participants comes from a wide variety of sources:

Restoration of actual equity. When participants are unable—or refuse—to restore equity, impartial observers often intervene and attempt to set things right (Lerner & Simmons, 1966; Lerner & Matthews, 1967; Baker, 1974). Indeed, social welfare and legal structures are designed, in part, to prod harmdoers into "paying their debt" to their victims and to society (Schafer, 1960).

Restoration of psychological equity. Complementary research documents that when "impartial" observers of injustice are powerless to reestablish actual equity, they too tend to settle for restoring psychological equity. For example, Lerner (1971) argues that even the most impartial of observers possesses an intense desire to continue to believe that people get what they deserve. In an impressive body of research, he documents observers' eagerness to convince themselves that people get what they deserve and deserve what they get (Lerner, 1965, 1970; Lerner & Simmons, 1966; Lerner & Matthews, 1967).

Chaiken and Darley (1973) provide impressive evidence that an observer's reaction to an event will depend on whether he identifies with the perpetrator or the victim of an inequity. The authors asked college students to watch a video-taped accident. These judges carefully observed a supervisor showing a

worker how to perform his job. When the worker finally finished his task, the supervisor stood up, remarking, "I guess that's it." As he pushed away from the workbench, it began to wobble; the worker's carefully completed project toppled over and was destroyed. As a consequence of this accident, the worker lost the bonus he expected. The authors predicted that if the observers expected to become supervisors themselves, their sympathies would be with the supervisor, and they would be motivated to perceive the event as an accident. Conversely, when they expected to be workers themselves, their sympathies would be with the worker, and they should severely condemn the supervisor for his carelessness. These predictions were confirmed.

On the basis of the existing evidence, we must conclude that although "impartial" observers can certainly evaluate the fairness of an interaction more objectively than can participants, even the most aloof of judges is personally motivated to right existing wrongs, and—failing that—at least to convince himself that this is a just world—a place where exploiters are somehow entitled to their excessive benefits and the deprived somehow deserve to suffer.

III. Equity Theory and the Law

There is no social psychological theory in existence that will give us a complete understanding of the American legal system . . . or even a complete understanding of even a tiny part of the legal system. Yet, even a superficial glance at equity theory makes it evident that the theory must have *some* relevance to the legal process. Equity theory deals with men's perceptions of fairness and justice. It seems reasonable to suppose that men's perceptions should have some impact on their judicial decisions.

Aristotle (1912 translation) was keenly aware of the key role equity principles played in judicial decision making. According to Aristotle, equity served as a corrective device for the "blind" and universal application of laws:

> Equity, though just, is not legal justice, but a rectification of legal justice. The reason for this is that law is always a general statement, yet there are cases which it is not possible to cover in a general statement. In matters, therefore, where, while it is necessary to speak in general terms, it is not possible to do so correctly, the law takes into consideration the majority of cases, although it is not unaware of the error this involves. And this does not make it a wrong law; for the error is not in the law or the lawgiver, but in the nature of the case: the material of conduct is essentially irregular. When therefore the law lays down a general rule, and thereafter an exception arises which is an exception to the rule, it is then right, where the lawgiver's pronouncement, because of its absoluteness, is defective and erroneous, to rectify the defect by deciding as the lawgiver would himself decide if he were present on the occasion, and would have enacted, if he had been cognizant of the case in question. (*Nicomachean Ethics*, 1137b)

The application of equity principles enables judges to consider mitigating circumstances (i.e., inputs) in handing down sentences (i.e., outcomes).

Modern-day equity theorists have considered the legal system from the perspective of the harmdoer, the victim, or an impartial observer.

A. THE HARMDOER'S PERSPECTIVE

Macaulay and Walster (1971) used an equity theory framework to examine the impact of the legal system on the harmdoer. They confronted two questions: To what extent do existing laws and informal legal procedures encourage restitution and reconciliation? To what extent do existing legal procedures foster self-justification, i.e., derogation, denial, and minimization? They concluded that:

> On its face, American law is consistent with the goal of supporting compensation. . . . For example, the common-law of torts consists of rules which say a wrong-doer must compensate his victim. In addition, the legal system in operation provides more avenues to restitution than are available in its formal rules. A wide variety of informal procedures encourage compensation. For example, criminal sanctions are sometimes used as leverage to induce restitution. A police officer may decide not to arrest a shoplifter if the wrong-doer is not a professional thief and if the stolen items are returned; a district attorney may decide not to prosecute if the amount embezzled is returned. (p. 179)

They also acknowledged, however, that other legal rules and procedures exist which dilute a harmdoer's incentive to restore equity. The legal necessity of determining who is at fault, the inevitable delays in securing judgments, the costs of litigation, and the existence of impersonal insurance systems, all tend to emphasize bargaining and to deemphasize exact equity restoration. They conclude:

> The tendency in the law, then, is not to support the ideal of having the wrong-doer make good the harm he has done, but to support the best balance of self-interest possible between harmdoer and victim, in light of bargaining skill and position. Rather than develop the harmdoer's best motives, the system tends to guard against his worst since the potential of litigation forces him to strike some bargain rather than to ignore totally the victim's claim. (p. 182)

The American legal system, then, exerts some pressure on wrongdoers to restore equitable relations with others, but this pressure must vie with competing pressures toward other competing goals.

B. THE VICTIM'S PERSPECTIVE

As yet, equity theorists have not scrutinized the legal system from the victim's perspective.

According to equity theory, the victim's assignment of the probable Costs and Benefits of possible courses of action should determine whether he demands restitution or justifies his own exploitation. For example, theorists argue that the oppressed will demand justice only if they are confident that legal or revolutionary action can be successful. Otherwise they will apathetically accept the status quo (Davies, 1969; Gurr, 1970; Ross *et al.*, 1971). Unfortunately, equity principles have not been applied in examining legal settings from the victim's viewpoint.

C. THE IMPARTIAL OBSERVER'S PERSPECTIVE

This paper will take the perspective of impartial observers–such as judges, jurors, and courtroom spectators.

Specifically, we will attempt to determine the extent to which a judge's or juror's discovery that a harmdoer has suffered will alter their liking for him and dampen their desire to punish him further.

Legal philosophers have never been able to agree on *why* we punish wrongdoers. Should we punish men to: Restore equity? Rehabilitate them? Protect society by isolating them? Set a harsh example for other potential harmdoers? They cannot agree. In spite of philosophers' disagreements, most observers seem to feel that to *some* extent, wrongdoers should expiate their crimes by suffering (Sharp & Otto, 1910; Rose & Prell, 1955; Fry, 1956). For example, Durkheim (1933) insists:

> And in truth, punishment has remained, at least in part, a work of vengeance. It is said that we do not make the culpable suffer in order to make him suffer; it is nonetheless true that we find it just that he suffer.
> . . .In supposing that punishment can really serve to protect us in the future, we think that it ought to be above all an *expiation* of the past. The proof of this lies in the minute precautions we take to proportion punishment as exactly as possible to the severity of the crime; they would be inexplicable if we did not believe that the culpable ought to suffer because he has done evil and in the same degree. (p. 88)

If we do punish wrongdoers, *at least in part,* to "set things right," a second question immediately arises. Is it possible for a defendant to "pay for" his crime–or convince the jury he has–before he ever comes to trial? Will judges and jurors perceive that the defendant has partially "paid for" his crime . . . if he reveals he suffered from intense remorse . . . if he was accidentally injured while committing the crime . . . if he volunteers financial restitution . . . if he was held in lengthy pretrial detention . . . if he suffered in ways in no way connected with his crime? We will explore these questions throughout the balance of the paper.

Many legal scholars have remarked that a criminal's suffering "weighs heavi-

ly" on the minds of judges and juries. The bank robber who is crippled when making a getaway may get an unusually light sentence. The mother whose child is killed when she runs a stop sign might be treated with similar leniency. Equity theory makes some intriguing predictions as to the effect that a defendant's suffering might have on a judge's and juror's liking for him and their eagerness to punish him.

1. The Harmdoer's Suffering: Its Impact on Liking and Sentencing

Let us consider a typical case: A trusted accountant embezzles $10,000 from his employer. The employer catches him. He is enraged at his accountant's exploitative behavior and complains to their mutual friends, clients, and, finally, to the police. Then the embezzler's troubles begin. His outside clients abandon him in droves, he suffers business losses, his wife divorces him, and he faces the threat of imprisonment.

How will such information affect jurors? How will they react if the embezzler's losses are described as negligible compared to his crime (i.e., say $10)? If they "balance out" his crime (say $10,000)? If they far exceed his crime (say $100,000)?

Equity theorists would predict that jurors will take information concerning the embezzler's suffering into account when deciding how much restitution he owes the victim and/or society. When the embezzler has lost only $10 as a consequence of his crime, he has made only the most token of atonements. When he has lost $10,000 or $100,000 as a result of his $10,000 embezzlement, however, he has, in a sense, completely "paid" for his theft. Thus, we would expect jurors to feel he had a more severe punishment "coming to him" when he has lost only $10 than when he's lost $10,000 or $100,000.

2. Contingency of Suffering

According to equity theory, "an equitable relationship exists when all participants are receiving equal relative outcomes *from the relationship.*" This statement suggests that the *context* in which a harmdoer suffers should be an important determinant of whether his suffering "counts" as atonement or whether it is judged to be irrelevant to his relationship with the victim. For example, if the jurors know that the irate employer ruined the embezzler's outside business in order to punish him for his theft, the embezzler's suffering is clearly a "consequence of his relationship with the victim." Under these conditions, the embezzler's suffering may well be considered partial atonement for his theft. If, on the other hand, the jurors learn that a playmate accidentally shot the embezzler when he was a child, his early suffering will probably not be seen as an outcome of his relationship with the employer, and it will probably not be considered to be partial atonement for his theft. It should not "count."

On the basis of this reasoning, we would predict that how relevant to the

harmdoer/victim relationship the harmdoer's suffering is, will determine whether or not the exploiter's suffering counts against the debt he owes the victim and/or society.

3. Harmdoer's Suffering and Liking

Clarence Darrow declared in 1933 that:

> Jurymen seldom convict a person they like, or acquit one they dislike. The main work of a trial lawyer is to make a jury like his client, or at least to feel sympathy for him; facts regarding the crime are relatively unimportant. (Sutherland, 1966, p. 442)

Kalven and Zeisel (1966) point out that jurors' liking and sympathy for the defendant and plaintiff have a dramatic impact on the way they evaluate evidence.

Thus the first thing equity theorists might ask is: Does a harmdoer's suffering affect the jurors' liking and sympathy for the defendant?

According to equity theorists, a person will evaluate another person differently depending on the *function* that he thinks his expressions of liking will have. They note that "expressions of liking" can serve to (1) compensate or punish another, (2) mirror one's justifications, or (3) simply to reflect one's mood.

1. *Expression of Liking as Compensation:* Sometimes, people are keenly aware that their expressions of regard for someone will have actual consequences for that person's life. We know that if we report that an acquaintance is a "dislikable, repulsive, filthy crook," our listeners will probably not be eager to invite him to dinner . . . or to offer him a job. If we say he is "likable, charming, and conscientious," he may well reap those social benefits.

In any case, if, when courtroom spectators, character witnesses, or jurors discuss the defendant's personality or character, they know that their answer may have practical consequences for the defendant; they cannot help but equate "expressions of liking" with "conferring reward or punishment."

Under conditions which make connections between "expressed liking" and "reward versus punishment" salient, equity theorists would expect a linear relationship between the harmdoer's suffering and the witnesses' expressed liking for him. When an embezzler has not paid sufficiently for his crime, spectators, witnesses, and jurors should be motivated to express disapproval and disliking, in the hope that he will be punished. When he has already suffered overmuch, they should express approval and liking, in an effort to compensate him for his suffering.

Previous research has documented the eagerness of impartial observers to reward the deprived with public praise and to punish the overbenefited with public condemnation (Walster *et al.*, 1966; Lincoln & Levinger, 1972).

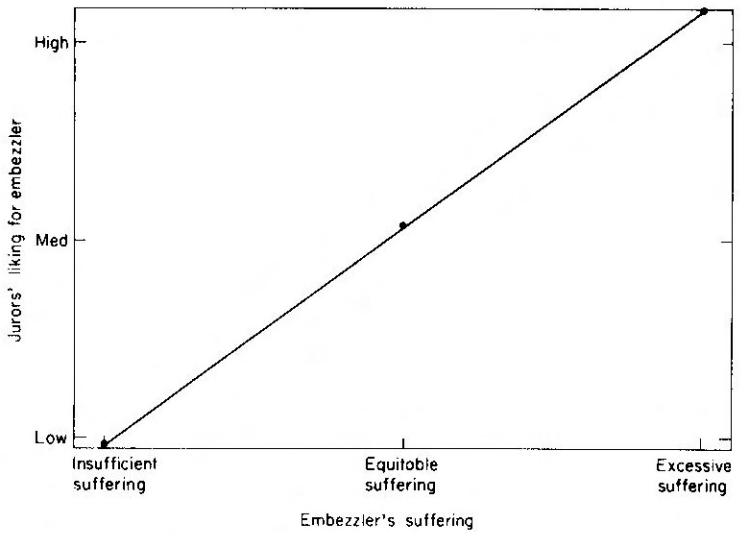

Fig. 1. The relationship predicted between the embezzler's suffering and jurors' liking for him: Expressions of liking as compensation.

2. *Expressions of Liking as Justification:* Sometimes, individuals know that they are powerless to right social wrongs. Nothing they can do—including praising another, gossiping about him, etc.—will have any conceivable effect on his fate. The lawbreaker may be so poor he can never make restitution to his victim; he may be so old he could never serve out an appropriate sentence. It also may be clear to the juror that the "guilty" defendant will be released on a technicality. In such cases, observers are left with only two options: they can acknowledge the irremediable inequity *or* they can justify its existence. They can convince themselves that the participant deserved his excessively lenient or excessively harsh treatment. In such cases, observers' "expressions of liking" may simply reflect their consoling justification of the status quo. For example, if the courtroom spectator or juror learns that the ubiquitous embezzler has gotten away with an excessively lenient punishment ($10), and he can do nothing to right this injustice, he might be motivated to convince himself that extenuating circumstances were such that the defendant only deserved that little punishment; that the defendant is a likable fellow who really did not deserve to suffer. On the other hand, when he learns that the embezzler has received an excessively harsh penalty ($100,000 worth), the observer might be motivated to convince himself that in fact the embezzler is a despicable fellow who deserved what he got. ("Probably this was not the first time he embezzled from his firm; only the first time he had been *caught.*")

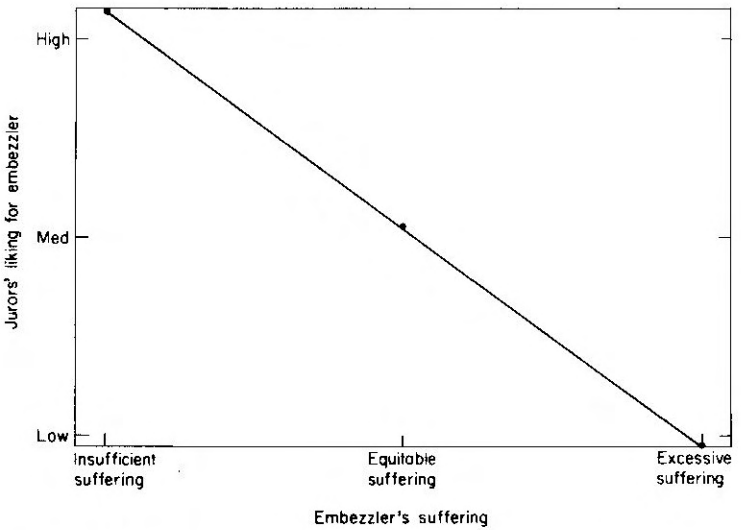

Fig. 2. The relationship predicted between the embezzler's suffering and jurors' liking for him: Expressions of liking as justification.

Previous theorists have documented that impartial observers' "expressions of liking" often reflect their intense desire to "derogate" or "aggrandize" another (Sykes & Matza, 1957; Davis & Jones, 1960; Berkowitz, 1962; Davidson, 1964; Glass, 1964; Walster & Prestholdt, 1966; Lincoln & Levinger, 1972; Katz *et al.*, 1973).

3. *Expressions of Liking as Emotion:* Sometimes individuals have reactions to others which have nothing to do with equity restoration–they simply feel what they feel even though it does not do them or anyone else a bit of good. As Homans (1961) points out, one tends to feel contented when he and his acquaintances are being treated equitably and to feel distressed when they are treated inequitably. Since people have a strong tendency to dislike those who are associated with unpleasantness and injustice (Berscheid & Walster, 1967), we might expect people to have a positive reaction to the defendant who has paid in full for his crime and a negative one to the defendant who has either escaped punishment or been overly punished. It is easy to acknowledge that we tend to dislike wrongdoers, in part because they confront us with the unsettling realization that injustice exists. It is harder to admit that one might feel some anger at the excessively tormented person because he reminds us of the same thing. Yet, psychologists have observed that we do feel some resentment toward anyone–harmdoer or victim alike–who threatens our comfortable world. To the extent that spectators' and jurors' expressions of "liking" simply reflect their "mood," we would expect the defendant's suffering and liking to be related as shown in Fig. 3.

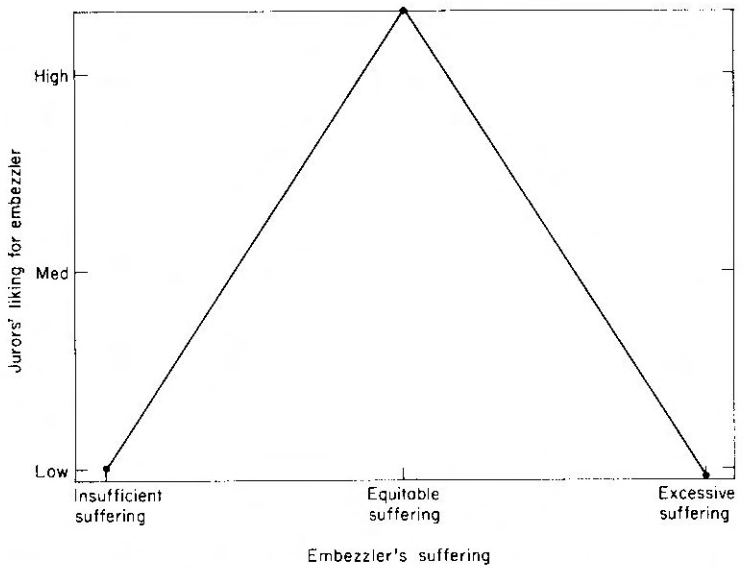

Fig. 3. The relationship predicted between the embezzler's suffering and jurors' liking for him: Expressions of liking as emotion.

It is apparent, then, that the expected relationship between a harmdoer's suffering and observer's liking for him is a complicated one. It should depend on the immediate situation. An inquirer may get quite different replies if the observer believes his expressions of liking can facilitate restitution or retaliation, only support his justifications, or strictly reflect his mood.

Suffering and liking: the evidence. Some theorists have long been aware that liking might serve as a compensation; others were aware that liking might serve as a justification; still others were aware that liking could reflect emotionality. Unfortunately, heretofore, no one ever put these observations together. No one realized "liking" might serve three distinct functions.

Thus, there is little information as to the conditions which motivate individuals to use expressions of liking in one or another way. For this reason, Utne (1974) attempted to determine whether or not, under appropriate circumstances, courtroom spectators may respond to the simple question: "How much do you like Defendant X?" in the three ways we have proposed.

Utne (1974) asked college students to act in the role of courtroom spectators. The criminal case she gave them was a completely fictional account of the circumstances surrounding an embezzlement. She explained:

> There is currently a great deal of interest in the contributions psychology can make to our understanding of the legal process. Unfortunately, most of the psychological principles used to answer questions about courtroom processes have not developed from the study of courtroom situations. Rather, theories have been

> "borrowed" from other research areas and 'stretched to fit' the legal applications. The study you are participating in today is an attempt to fill in some of the gaps in our understanding of the courtroom decision-making process. You will be asked to play the role of a courtroom spectator, and will answer questions about an actual court case as if you had just observed the case. (p. 12)

Then she asked them to read an "actual court case." Actually she gave them a fictionalized account of the circumstances surrounding an embezzlement. The summary brief was as follows:

> FACTS OF THE CASE
>
> (Names, places and dates have been changed to insure the anonymity of the people involved.)
>
> The defendant, Robert Brown, is a 32-year-old white male. He is a practicing accountant in Oakdale, a midwest city of approximately 250,000.
>
> Plaintiffs are Smith, owner of a drycleaning store, and Jones, owner of a carry-out food outlet. Plaintiffs also work and reside in Oakdale.
>
> In June of 1962, Smith and Jones opened their businesses. Defendant Brown, a certified public accountant, was retained at this time to manage their books and in general act as financial overseer for the businesses.
>
> Although initially in debt, by January 1, 1964, the businesses were prospering. The successful working association of Brown, Smith, and Jones continued.
>
> Two years later, winter of 1966, plaintiffs realized that although daily cash receipts had increased tremendously, their total profits had not increased accordingly. Both Smith and Jones were earning a modest, comfortable yearly income, but relative to the great expansion of their businesses, net income was too low.
>
> Aware that something was amiss, Smith and Jones hired another accountant to privately review their books and find the source of the discrepancies. After a careful and extensive investigation, this accountant reported gross irregularities in the books.
>
> Smith and Jones went immediately to their attorney for counsel, and on February 5, 1966, brought suit against Robert Brown for embezzlement under grounds as set forth in Ill. Stat. 277.04.
>
> During the trail Brown admitted embezzling almost $100,000 of Smith's and Jones' money over a two-year period. (pp. 13–14)

Immediately following this case description, mock spectators were told of the sentence given the defendant. All were told of the *possible* range of punishment:

> THE SENTENCE. The possible range of punishments Brown could have received according to the law varied from a minimum of $10,000 fine (no repayment of embezzled money) with a suspended sentence, to a maximum of $200,000 repayment–plus–fine, and 40 years in prison. (p. 14)

Manipulation of independent variables. The actual sentence given the defendant varied across experimental conditions:

Excessive punishment condition. Robert Brown was given the especially severe punishment of $100,000 repayment to Smith and Jones, plus $100,000 fine, and 40 years in prison without consideration for parole until 20 years had been served.

Equitable punishment condition. Robert Brown was given the moderate punishment of paying back all the money he had taken from Smith and Jones ($100,000), plus paying their expenses for trying to get their money back (legal, court costs). In addition, a deterrent punishment was given—2 years in prison with a chance for parole after 6 months.

Insufficient punishment condition. Robert Brown was given the especially light punishment of paying a $10,000 fine. He was not required to repay Smith and Jones. Brown was given no deterrent punishment such as a prison term, but rather received a suspended sentence. (p. 15)

After reading these facts of the case, students were told:

You have just read the details of Robert Brown's embezzlement, trial and sentencing. Now we are going to present a hypothetical situation, and ask you to role-play, to "put yourself in someone else's shoes" and respond as you think that person would respond, given the particular circumstances. Here's the situation.

The perceived effect of expressions of liking was manipulated by varying the role description:

1. Jurors in the *Compensation Condition* were led to believe their responses would have actual consequences for the defendant:

A current legal trend is to consider community standards in the assignment of criminal penalties. The recent Supreme Court pornography ruling, which declared that definitions of obscenity rest with local-level authorities, is an example of this principle. Your town is partaking in this trend by conducting an experimental court procedure. After a case has been tried and sentence determined, courtroom spectators from the community are asked to anonymously complete questionnaires asking about their feelings regarding the trail, the people involved, the verdict and the sentence. *The responses are read by the presiding judge, and he uses them as the primary factor in determining a new sentence when the defendant appeals his sentence.* This procedure worked extremely well in two recent appeals, where one sentence was made lighter, another heavier, on the basis of community responses to the original case.

You have just observed the trail of *Smith and Jones vs. Brown,* and are answering the 'community opinion' questionnaire. Thoughtfully and carefully consider the details of the case and the decision of the court when you answer the questions. Remember, your feelings about Robert Brown will be crucial in determining what his appealed and reconsidered punishment will be. (p. 16)

2. Subjects in the *Justification Condition* were told their responses would have no effect on the defendant's legal situation. Utne tried to stimulate justification by presenting a possible rationale for the defendant's sentence.

Subjects were expected to "pick up" on the one more appropriate to their particular punishment level.

> [*Discussion of trend of interest in community standards.*] Your town is partaking in this trend by conducting a survey of people's responses to local court decisions. After trial and sentencing of a case, courtroom spectators from the community are asked to anonymously complete questionnaires asking about their feelings regarding the trial, the people involved, the verdict and the sentence. *The responses will in no way affect the case or any other. In fact, the presiding judge has decided that he will not even read the responses.* He argues that as judge it is his duty to guide the public on the basis of his expert legal knowledge, and not to be influenced by the latest whimsy of public opinion. There are too many emotional factors operating in the atmosphere of a courtroom already, he feels. The questionnaires will be reviewed by a panel set up to assess public attitudes in general.
>
> You have just observed the trial of *Smith and Jones vs. Brown,* and are answering the "community opinion" questionnaire. Carefully and thoughtfully consider the details of the case and the decision of the court when you answer the questions. For example, you may feel like the jurors who commented that Robert Brown was a contemptible criminal, willing to take advantage of the trust placed in him by his friends. He was a man with no regard for morals or principles, these jurors said, and they felt he showed no remorse in his actions.
>
> Or you might feel as some of the jurors did that Robert Brown was a good, hardworking man who'd helped his friends and community for years, and unfortunately gave in to a very human temptation. In their view, the carelessness of his partners in ignoring their own financial matters made it especially easy for this basically good man to make a mistake.
>
> Whatever your feelings are about the case, please consider the facts carefully when answering the questions. Remember, Robert Brown has already been tried by a jury and his sentence determined by an experienced judge. Your responses will in no way affect the trial verdict or Brown's sentence. (pp. 17–18)

3. Finally, subjects in the *Emotion Condition* were encouraged to give a purely emotional expression of liking for the defendant.

> [*Discussion of trend of interest in community standards.*] Your town is partaking in this trend by conducting a survey of people's responses to local court cases and decisions. After trial and sentencing of a case, courtroom spectators from the community are asked to anonymously complete questionnaires asking about their feelings regarding the trial, the people involved, the verdict, and the sentence. The responses are not meant to affect the court or its decisions in any way. They are to be merely a gauge of the people's direct, emotional reactions to lawbreakers and lawbreaking.
>
> You have just observed the trial of *Smith and Jones vs. Brown* and are answering the "community opinion" questionnaire. A rational, analytical response is *not* what is wanted here. *Of primary importance in answering these questions is that you be in touch with your feelings, unafraid to say whatever comes into your mind.* There may be features of the case that just "ticked off" a response in you. For example, one of the jurors commented that any person in

Robert Brown's position, a defendant in a criminal proceeding, just naturally aroused feelings of warmth and sympathy which couldn't help but influence his decision. Another juror noted the opposite response in himself, that anyone on trial for lawbreaking like Robert Brown was made him experience feelings of disgust and contempt, feelings which also influenced his decision.

No matter what your feelings about Robert Brown and his case are, don't be afraid to express them. Give your first, immediate 'gut response' to the embezzler Robert Brown, and his trial.

Finally, the subjects were asked about their reactions to the case. Included in the questions was the critical question:

"How much do you like the defendant?"
1. Very greatly like
2. Moderately like
3. Slightly like
4. Slightly dislike
5. Moderately dislike
6. Very greatly dislike

Utne's data provide compelling support for equity theorists' contention that: (1) Expressions of liking *can* serve three different functions, and (2) the amount of punishment given a defendant ("too much," "just right," "not enough") does interact with the subject's motivation ("Compensation," "Justificaton," "Emotional expression") in determining his expressed liking for the defendant.

In the *Compensation Condition*, spectators knew that any expressions of liking/disliking could have practical consequences for the defendant. As pre-

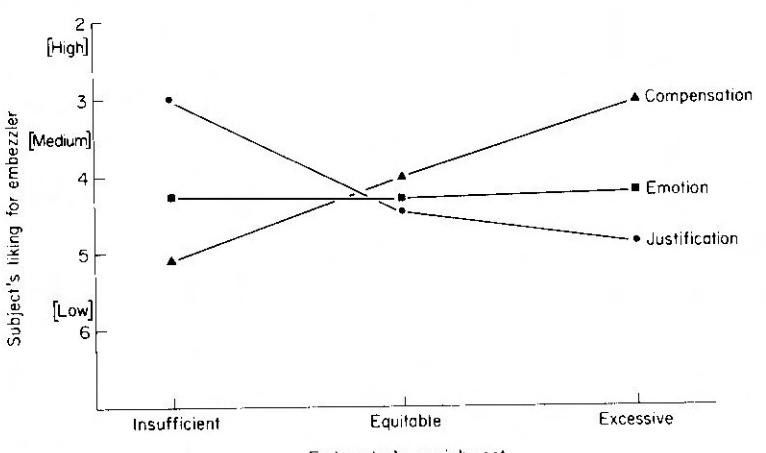

Fig. 4. The relationship secured between the embezzler's punishment and the *Ss* liking for him as a person.

dicted, under these conditions, observers expressed moderate dislike for the Insufficiently punished defendant ($\bar{M}$ = 5.10), slight dislike for the Equitably treated defendant ($\bar{M}$ = 4.05), and moderate liking for the Excessively punished one ($\bar{M}$ = 3.05). (These mean differences are significant, F = 33.67, 8/171 d.f., $p < .01$.)

In the *Justification Condition,* spectators knew that they were powerless to alter the defendant's prison sentence. Their expressions of liking were expected to reflect their acceptance of the status quo. As predicted, under these conditions, observers slightly liked the Insufficiently punished defendant ($\bar{M}$ = 3.00), slightly disliked the Equitably punished defendant ($\bar{M}$ = 4.45), and moderately disliked the Excessively punished one ($\bar{M}$ = 4.90). (F = 109.26, 8/171, d.f., $p <$ .01.)

In the *Emotion Condition,* spectators were encouraged to simply express their mood. They were expected to like the Equitably treated defendant most and the Inequitably treated defendants–i.e., the Insufficiently *and* Excessively punished defendants–least. This prediction was *not* confirmed. Regardless of whether the defendant had been Insufficiently punished, Equitably punished, or Excessively punished, *S*s slightly disliked him ($\bar{M}$ = 4.30, 4.25, and 4.20, respectively).[6] (F = .33, 8/171 d.f., n.s.).

We have, earlier in this section, noted Clarence Darrow's statement emphasizing the importance of liking for the legal process. Undoubtedly, Darrow's–and Kalvan and Zeisel's–observations are correct: Jurors' liking for the defendant and the plaintiff must have *some* impact on the way they process information and on their ultimate decisions. However, Utne's data suggest that the link between "liking" and the "processing of information" and "sentencing behavior" is not as simple as theorists have supposed. The legal process is just that–a process. Courtroom interactions are ongoing, dynamic processes. Jurors constantly receive new information about their own roles as jurors, about the defendant and the plaintiff, and about their ability to affect the situation, e.g., their freedom to set penalties, and so on. Nor is liking static. The opinions one forms of others are constantly being altered by the input of new information. One's affective orientations, in turn, filter incoming information, and shape one's critical decisions. For example, jurors might enter the courtroom, naively assuming that they will have the power to set things right. They will have the

[6] Utne reports that her *Emotional Liking* manipulation failed for many students. She cites the comments of a typical boy who complained that he was so "into" the study–so determined to be a good, rational, sensible respondent–that he was completely thrown when finally asked to spontaneously express liking for the defendant. "How can I be spontaneous," he wrote, "when I've got all these *facts* to think of?" Utne recommends that experimenters who wish to conceptually replicate her study should use another strategy to motivate *S*s to express "gut" reactions.

power to decide the defendant's guilt/innocence, and in a few instances, to give him an appropriate sentence.

During the course of the trial, the testimony might yield new information which arouses a *strong* emotional response in the jurors; their liking for the defendant might then be colored by those feelings.

When the judge issues his instructions, however, the jurors may discover that they have far less power than they had thought. The jury deliberation may further reinforce their feeling of powerlessness: They may discover that all the other jurors want to let the "guilty" defendant go . . . or they may discover that the defendant will be let off on a legal technicality in spite of the jury's unanimous decision that he is guilty. Under these conditions, the disenchanted jurors might resign themselves to the status quo.

Each of the preceding events should affect the juror's liking for the defendant and the victim—and their liking, in turn, should color their reaction to new information and affect their sentencing behavior. It is clear that the link between "liking" and sentencing behavior may be an indescribably complex one.

Initially, we proposed that there would be a link between the juror's perception of the defendant's suffering and his liking for him. Utne (1974) demonstrated that this suffering and liking *are* linked. Liking, in turn, presumably affects the juror's evaluation of evidence and his sentencing. This relationship has not been empirically tested, but has been noted by legal scholars.

Second, we proposed that there should be a link between the juror's perception of the defendant's suffering and his sentencing behavior. Since the liking/sentencing relationship may be so complex, and since we do not yet know how much of an impact liking has on sentencing, we might do well to turn directly to our second question. We might ask directly: What impact does a defendant's suffering have on the spectators' and jurors' desire to punish him further?

3. Harmdoer's Suffering and Sentencing

Many theorists and lawyers believe that jurors will be sympathetic toward defendants who claim they have endured great remorse or great personal and financial losses.

In two recent and highly publicized legal cases—the Watergate burglaries of the Democratic party headquarters and the resignation and conviction of ex-Vice President Spiro Agnew—the defendants used appeals to sympathy—with varying success.

(1) E. Howard Hunt was convicted of breaking into the Democratic party national headquarters during the 1972 Presidential election campaign. He was convicted of burglary and given a preliminary sentence of 6 to 20 years in prison. In his testimony during his trial, before a grand jury, and before a Senate

special investigation, Mr. Hunt pleaded for leniency on the basis of his suffering from the crimes he committed. During the Senate hearings he noted:

> Now I find myself confined under a sentence which may keep me in prison for the rest of my life. I have been incarcerated for six months. For a time I was in solitary confinement. I have been physically attacked and robbed in jail. I have suffered a stroke. I have been transferred from place to place, manacled and chained, hand and foot. I am isolated from my motherless children. The funds provided me and others who participated in the break-in have long since been exhausted. I am faced with an enormous financial burden in defending myself against criminal charges and numerous civil suits. (as reported by *UPI*, 1973)

Hunt's attempt to win sympathy and leniency has thus far failed to either reduce his prison sentence or to increase public support for his predicament.

(2) In ex-Vice President Agnew's case, Elliot Richardson, the United States Attorney General in the government investigation and prosecution of charges of bribery and tax fraud, called for leniency on the grounds that the Vice President had suffered substantially. Richardson stated:

> I am firmly convinced that in all the circumstances leniency is justified. I am keenly aware, first, of the historic magnitude of the penalties inherent in the vice president's resignation from his high office and his acceptance of a judgment of conviction for a felony.
>
> To propose that a man who has suffered these penalties should, in addition, be incarcerated in a penal institution, however briefly, is more than I as head of the government's prosecuting arm, can recommend or wish. (as reported by *AP*, 1973)

Agnew was fined only $10,000 and put on 3-year probation on only one charge of tax evasion. The prosecutors dropped all other charges.[7]

In their classic survey of jury trials, Kalven and Zeisel (1966) found evidence that jurors do take a harmdoer's suffering into account when deciding on a penalty. These authors found that when a defendant reports great remorse, suffers in the commission of the crime, endures lengthy pretrial detention, or even when he has suffered misfortunes unconnected to the crime, jurors tend to be lenient. Consider, for example, the presiding judges' descriptions of why jurors, in a potpourri of cases, were more lenient than they should have been:

Defendant suffers as a consequence of crime:

[7] At the time of this publication, it appears that the "ultimate" example of appeals to the redemptive value of a wrongdoer's suffering has occurred. President Ford justified his full and absolute pardon for former President Nixon by citing Nixon's, and the Nixon family's, profound suffering.

'YOUR HONOR, CAN WE JUST TAKE THE PARDON AND GO? . . . WE'VE SUFFERED ENOUGH ALREADY!'

While the Court sitting without a jury would have found him guilty, there was no difficulty for the Court to understand why a jury of laymen would find the defendant not guilty. The police chief and his witnesses were six-foot, one-inch men, weighing over 200 pounds, and the defendant was about five-foot seven, weighing about 118 pounds. . . The police. . .beat the defendant up before they got him into the car. (p. 237)

Defendant suffers remorse:

The authors report two cases in which the defendant's remorse is sufficiently marked to come to the judge's attention. One report read:

A young Negro who apparently was sorry for his act. (p. 205)

Defendant suffers pretrial detention:

The jury felt sorry for the defendant because he had been in jail for over two months and the lumber allegedly stolen was worth $2.50. I think the jury had a Jean Valjean complex. (p. 264)

. . . It is customary for the judge in sentencing to give the defendant credit for the time he has already spent in jail; the jury, however, would at times not only give him credit, but would set him free. (p. 303)

. . . The defendant is charged with the rape of his ten-year-old daughter and at the first trial of his case is found guilty and sentenced to life imprisonment. On appeal, a new trial is granted with a change of venue. At the second trial the jury hangs. The case is tried a third time, and it is for this third trial that we have the

> judge-jury report. At this trial it is disclosed that the defendant has at that point been in jail for thirteen months. The extraordinary reaction of this third and last jury, which acquits, is set forth by the judge as follows: They were out just 30 minutes. The jury took up a collection of $68 and gave it to the defendant after the case was over. (p. 304)

Defendant suffers–suffering unrelated to crime:

> Defendant did not testify but the evidence shows that, during the years in question, his home burned, he was seriously injured, and his son was killed. Later he lost his leg, his wife gave birth to a premature child which was both blind and spastic. These, however, are only a portion of the calamities the defendant suffered during the years he failed to file his income tax return. The jury cannot bring itself to add to the misfortune of the defendant. The judge gives full recognition to the point, adding: "This is a typical case of the jury exercising the power of pardon." (p. 305)

Kalven and Zeisel conclude, on the basis of these reports, that jurors' decisions are markedly influenced by whether or not the defendant has suffered–even if his suffering is unrelated to his crime.

In a study with grade school children, Austin *et al.* (1973) tested the notion that children would assign harmdoers who suffer insufficiently in the course of their act more punishment than harmdoers who suffer appropriately or excessively. Austin *et al.* asked the children to read a story describing two boys–Steve and Bob. Steve was described as the harmdoer; Bob was the victim. During recess, while the two boys were playing baseball, Steve deliberately tripped Bob. Bob fell down and sprained his ankle and cut his lip. Steve lost his balance and fell down *in the act* of tripping Bob. Steve's suffering was then systematically varied: In the *Insufficient Suffering* condition, his suffering was *slight* (he received "a few scratches on his hands"). In the *Moderate* condition, he received "some painful cuts on his hands and knees." In the *Excessive* condition, he "broke his arm and leg."

The story then reported that the school principal had appointed a student panel to decide how much punishment Steve should receive. "The principal tells the panel to decide how many hours Steve should have to stay after school. You are on the panel. How many hours would you say Steve should have to stay after school?" Students were asked to indicate their opinion on a "Punishment scale," which ranged from 0 to 7 hours.

Austin *et al.* found that students did assign Steve a harsher penalty when he had suffered insufficiently than when he suffered moderately or excessively.

Finally, Austin (personal communication) recently conducted two studies in an attempt to demonstrate that jurors do take a criminal's "suffering in the act" into account when settling on an appropriate sentence.

In both studies, Austin asked college students to read a synopsis of the proceedings of an actual trial. First, they read an eye-witness account of the crime: [In Study 1, the defendant's crime was a relatively minor one (purse snatching). In Study 2, the defendant's crime was a far more serious one. (He had not only snatched a purse, but he had severely beaten his female victim, causing her to be hospitalized for 10 days.)]

After allegedly committing his crime, the defendant attempted to escape from the scene (and from the police). In the process, Austin claimed, the purse-snatcher had suffered not at all, moderately, or excessively. [In Study 1, the defendant was said to have suffered not at all, moderately (i.e., receiving cuts and bruises and a broken arm), or excessively (paralyzed from the neck down). In Study 2, the defendant was said to have suffered not at all, moderately (i.e., suffering cracked ribs and a broken leg), or excessively (paralyzed from the neck down).]

Finally, students were told that, after deliberating for only ten minutes, a jury had convicted the defendant.

Students were asked to play the role of presiding judge. They were asked to carefully study the synopsis and then to recommend an "appropriate" sentence (within the minimum-maximum set by law).

In both studies, Austin found strong support for the "Suffering in the Act Hypothesis." The more the defendant was said to have suffered in the "get away," the smaller the prison sentence mock judges gave him (see Tables I and II).

TABLE I
NUMBER OF MONTHS ASSIGNED TO PRISON AS A FUNCTION OF A CRIMINAL'S SUFFERING AND SEX OF THE OBSERVER (AUSTIN) FOR LOW CRIME SEVERITY (PURSE SNATCHING)[a]

	Amount of criminal suffering			
	None	Moderate	Excessive	$\bar{M}$
Male observer	15.83	10.83	3.44	10.04
Female observer	22.72	14.39	7.89	15.00
$\bar{M}$	19.28	12.61	5.67	

[a]The range of the prison sentence set by the law was 0 (suspended sentence) to 60 months in prison.

TABLE II
NUMBER OF MONTHS ASSIGNED TO PRISON AS A FUNCTION OF SEX AND CRIMINAL'S SUFFERING FOR HIGH CRIME SEVERITY (AUSTIN: STUDY 2)[a]

	Amount of criminal's suffering			
	None	Moderate	Excessive	$\bar{M}$
Male observer	75.22	73.17	11.00	53.13
Female observer	78.33	73.33	21.00	57.56
$\bar{M}$	76.78	73.25	16.00	

[a]The range of the prison sentence set by the law was 0 (suspended sentence) to 180 months in prison.

In an ingenious set of laboratory experiments, Legant (1973a) tested the hypothesis that the length of time a defendant was detained between arrest and trial would effect the sentence jurors assigned him.

In one experiment, Legant asked student jurors to review a single case report. The report described the defendant and the circumstances surrounding his offense. For the sake of generality, several crimes of varying severity were presented. For example, in one set of case studies, the defendant stole items from a car. In one report, he removed the hubcaps alone from a car. In another case, he stole the hubcaps and tires. In a third report, the hubcaps, tires, and as many items as he could carry were stripped from the car. In a set of cases related to heroin offenses, the defendant merely possessed heroin, sold it to users on the street, or acted as a "wholesaler" for street pushers. In a set of cases involving purse-snatching incidents, the defendant grabbed the purse and fled, took it and pushed his victim down in the process, or took it and beat his victim up before retreating. Legant systematically varied how long the criminal had ostensibly been detained. Various reports stated that the criminal was held in pretrial detention a short time (2 days), a moderate amount of time (1 month), or a long period of time (1 year). In the second study, male registered voters watched a video tape of an "actual trial."

The scene of the tape was an actual courtroom of the New Haven Circuit Court. The *dramatis personae* included a court clerk, robed judge, and a stenographer, as well as a public defender, prosecutor, and the star of the show—the defendant. The clerk pounded his gavel to open court and the judge entered. The case was announced, the attorneys were introduced, and a brief blackout signalled the entrance of the jury. Then the public defender called his

client to the stand. Information about the defendant and his crime emerged during the questioning. The defendant was a 25-year-old high school dropout. At the time of his arrest, he was a packer in a factory. The defendant admitted that he had removed either the radio (low severity condition) or the radio, tires, radiator, battery, and tape deck (high severity condition) from a car. He claimed, however, that he assumed that the car was abandoned. In the course of his testimony, the defendant also revealed that he had been held in pretrial detention.

Legant emphasized the period of pretrial detention to mock jurors in the following way: The public defender asked the defendant if he had lost his job upon arrest. This question enraged the defendant. He complained that he "couldn't pay no $500 bail to get out," that he *had* lost his job, and had had to spend a short time (a week), a longer time (a month), or a long time (a year) in jail "without a trial." He continued to mutter briefly, while the prosecutor shouted, "Objection" twice and urged the judge to instruct the witness to confine his remarks to answering the questions. The judge did so.

Legant's results were startlingly negative. In neither study did pretrial detention affect the length of sentence observers suggested for the defendant—or their liking for him.

In summary, then, observational data and survey data (Sharp & Otto (1910a,b), Kalven & Zeisel, 1966) provide consistent support for the contention that jurors will take the harmdoer's suffering into account when calculating how severely he should be punished. Laboratory experiments provide inconsistent evidence in support of this contention.

Unfortunately, no one has yet tested the intriguing hypotheses that a harmdoer's suffering in the act will "count" more than will suffering unrelated to his criminal activity.

IV. Discussion

Legal theorists have never been able to agree on the nature of justice (Brandt, 1962; Rawls, 1971). Thus, judges and jurors are often forced to decide on its nature themselves. Let us consider an example.

Why Should the Defendant Be Punished? As we noted earlier, penal theorists have never been able to agree on *why* we punish wrongdoers; nor do legislators tell judges the objectives of punishing or what the punishment should be (Frankel, 1973). Since theorists cannot agree on why or how much society should punish wrongdoers, the problem of deciding falls to the judge and jury. Of course, judges' and jurors' decisions are subject to some legal restraints. For example, often judges must impose a minimum sentence if they are to impose any sentence at all. Yet, judges and jurors—by default and choice—still exercise enormous discretion (Gaudet *et al.*, 1933). In fact, some scholars have argued

that discretionary decision-making is the foremost aspect of the Western legal system (Davis, 1959). Discretion is deliberately written into the legal system. (The writing of minimum-maximum sentences by legislatures exemplifies this fact.) U.S. District Court Judge Marvin Frankel (1973) admitted that he was appalled by "the unbridled power of the sentencers [including himself] to be arbitrary and discriminatory." In addition, the dominant evolutionary trend in American judicial behavior seems to be toward a Realist decision-making style (Chambliss & Seidman, 1971)—a style which would increase judges' and jurors' discretion still further. Slogans such as, "Make the punishment fit the criminal, not the crime," press for even more discretion in sentencing behavior.

Since impartial observers possess so much discretion currently (and may possess even more in the future), jurors' informal perceptions as to the nature of justice and equity are likely to have an enormous impact on their judicial decisions.

This realization leads us to two conclusions:

What Is and What Should Be. Obviously, legal theorists must continue to try to hammer out an adequate theory of social justice. They should try to provide judges and jurors with some systematic guidelines as to how they *ought* to behave. Legislators should try to formulate precise across-the-board sentencing principles (Wasserstrom, 1961).

At the same time, social psychologists and lawyers should try to ascertain what *is.* They should try to ascertain what practices judges and jurors are following currently. For example, they should try to ascertain how important various potential extralegal factors are in determining conviction and sentencing. For example, do jurors presently follow equity dictates in making their decisions? Or, as is more likely, do they try to compromise between their desire for perfect equity and their conflicting desires to ignore laws they dislike, ignore "trivial" complaints, give young men a second chance, etc. Only research can tell us what informal "rules" judges and jurors are currently following.

Once we know how things ought to be, and how they are, we can begin to investigate the best way to induce jurors to behave as we think they should.

No existing social psychological theory (or collection of theories) can tell us very much about the legal system in action. Yet, in embarking on such an ambitious project as the one detailed above, the utilization of some social psychological theories such as equity theory has several potential advantages: (1) Such theories give us an orderly framework for analyzing the legal system in action; (2) they give us a framework for uncovering and categorizing factors which presently affect judicial decisions; (3) they remind us that unless decisions are *perceived* to be equitable, those who come into contact with the legal system will perceive the system to be unjust.