THE CORPORATE AND JUDICIAL DISPOSITION OF EMPLOYEE THIEVES

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How do corporate employers handle cases of employee dishonesty? Mr. Robin conducted a study of department store dispositions of employees who violated a financial trust by committing a crime. He reports on the employer's role in the handling of employee offenders and on the social factors that influence the sentencing patterns of judges. He concludes with some observations upon the integration of private and official conceptions of justice.

I. INTRODUCTION

The need to study sociological units of behavior rather than crime generally or specific legal categories of crime has been recognized by Gibbons and Garrity, Gibbs, Hall, Kay, Lemert, and others.[1] This need is best illustrated in Cressey's *Other People's Money.* Cressey's primary goal was to "account for the differential in behavior indicated by the fact that some persons in positions of financial trust violate that trust, whereas other persons, or even the same person at a different time, in identical or very similar positions do not so violate it."[2] In establishing criteria for inclusion within his sample, Cressey discarded the legal concept of embezzlement because it was unsatisfactory scientifically and sociologically. He substituted two criteria for inclusion of a case: (1) the person must have accepted a position of trust in good faith; and (2) the individual must have violated his trust by committing a crime.[3] He thus created the sociological concept of the *criminal violation of financial trust.*

This concept also guided the selection of cases in the present study. Three large, independent department store companies

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1 Gibbons & Garrity, *Definitions and Analysis of Certain Criminal Types,* 53 J. CRIM. L.C. & P.S. 27 (1962); Gibbs, *Needed: Analytical Typologies in Criminology,* 40 SW. SOC. SCI. Q. 321, 322-23 (1959-60); J. HALL, THEFT, LAW AND SOCIETY 289 (2d ed. 1952); Kay, *Female Criminality: A Specific Order of Crime,* 9 ALA. CORRECTIONAL J. 26 (1962); Lemert, *An Isolation and Closure Theory of Naive Check Forgery,* 44 J. CRIM. L.C. & P.S. 296 (1953); W. RECKLESS, THE CRIME PROBLEM 324-25 (3d ed. 1961); Lindesmith & Dunham, *Some Principles of Criminal Typology,* 19 SOC. FORCES 307 (1941); Lottier, *A Tension Theory of Criminal Behavior,* 7 AM. SOCIOLOGICAL REV. 840 (1942); Quinney, *Occupational Structure and Criminal Behavior: Prescription Violation by Retail Pharmacists,* 11 SOC. PROBLEMS 179 (1963).

2 D. CRESSEY, OTHER PEOPLE'S MONEY 12 (1953).

3 *Id.* at 20.

(hereafter referred to as Companies A, B, and C) provided the source data. The population examined consisted of the confidential security records of all employees who stole from their firms and who were apprehended (1) from 1959 through 1962 in Company A, (2) from 1949 through 1963 in Company B, and (3) from 1956 through 1963 in Company C.[4] The number of cases of such dishonest employees constituting the individual populations was 739, 584, and 358 in Companies A, B, and C respectively—a total of 1,681 dishonest employees.

Although there was no way of verifying through personal interviews whether the employees involved had accepted their positions in good faith, nothing in the employee files indicated otherwise. Moreover, given the modest pay scale of department store personnel and the limited amount of funds or property at their disposal, there was only a remote likelihood that an individual would accept such a position of trust to exploit it.

The requirement that the trust be violated by commission of a crime was one of the major criteria used in selecting cases in this study; those transgressions involving intellectual dishonesty, discount privilege abuses and other "irregular" behavior were therefore excluded from the population. Because a sociological definition of the universe was used, the crimes committed by the store employees cut across several legal categories, such as fraud, embezzlement, receiving stolen goods, and larceny by bailee. The largest single legal category of offenders consisted of embezzlers, and the trust violations involved both funds and property. Possible reluctance to conceive of department store employees who steal money and merchandise entrusted to them as embezzlers, stems from the strong popular association of embezzlement with the theft of large sums of money by bank employees and public officials. However, the rate of bank defalcations is probably lower than in most businesses.[5] More importantly, the defining characteristic of embezzlement is the conversion of an object already in one's possession legally, *i.e.*, the absence of "trespass" is crucial rather than the type of object stolen or its value.[6]

The present study offered an unusual opportunity to investigate empirically the role assumed by an organized private sector ("Big Business") in the treatment of offenders, to make some observa-

[4] The cases included within these time periods comprised the companies' entire recorded experience with apprehended dishonest employees that was available when the writer began collecting the data. Since the collection of data for Company A was begun in the latter part of 1963, it was impossible to include all of its 1963 employee cases in the study. Moreover, since many of Company A's 1963 dishonest employee records that were "available" were still being processed by the office staff and were therefore incomplete, it was decided to exclude them entirely.

[5] J. HALL, *supra* note 1, at 330.

[6] Allen, *Offenses Against Property*, 339 ANNALS 57, 69 (1962).

tions and inferences about the social factors that influence the sentencing behavior of judges, and to reflect upon the integration of private and official conceptions of justice and its implementation.

II. APPREHENSION OF EMPLOYEE THIEVES

The first and most important objective of the company when taking a dishonest employee into custody is obtaining his signed confession. In the process of doing this, other information is elicited with varying frequency, such as his reasons for stealing, whether others were involved, how he stole, how long he had been stealing, and the amount he stole. The embezzler's reaction to apprehension was known in 1,662 cases and unknown in 19. Eighty-five percent of those apprehended signed a confession, while another three percent verbally admitted their guilt but refused to sign a statement to that effect. Only 12 percent flatly denied stealing, although many of these admitted "violations of store policy." Ninety-three percent of the trust violators in Company A confessed their guilt (90 percent signing a statement), compared with 87 percent in Company B (86 percent signing a statement) and only 78 percent in Company C (75 percent signing a statement).

The initial response of most offenders during interrogation was some form of denial: anger, shock, indignation, silence. However, as the questioning continued and the case against them developed, they ultimately "broke down" and confessed their thefts, often becoming repentant and pleading, "I realize what a terrible thing I have done and it will never happen again." Such promises of atonement are unwittingly prophetic because the company generally will not give an apprehended employee an opportunity to repeat his mistake. Many embezzlers are visibly affected by discovery and confrontation with the fact of their criminal behavior. They apparently are more concerned with concealing their conduct from "relevant" others, more concerned with potential social degradation, than with possible prosecution and imprisonment per se. The following statements from apprehended employees illustrate this.

> I have been stealing merchandise for about two years, mainly from my department, while I worked as assistant buyer, but I have taken merchandise from various departments at different times. In the past six months, I have increased my tempo of stealing due to financial difficulties, mainly that I am expecting an increase in my family coupled with the increased cost of living; I do not wish to use this as an alibi. I realize that I have made a terrible mistake and ask forgiveness of the officials and my many friends who have given me my golden opportunity, mainly becoming a buyer for [Company B]. This honor I will always cherish, which I have foolishly thrown to the winds.

> Please give me two months to pay you all back. My parents don't know, so please don't tell them. I needed the money badly. Please, Oh please, don't have me put in jail. Please don't call up my house and let my mother know. Please ask the others to forgive me, and I am terribly sorry that I did a trick like this. I'll pay them back, I swear I will.
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> During the ten days I have worked in your store I took money for my use from sales I did not record properly. I realize of course that I have done wrong. However, I would like to ask one favor of you. That is, please do not inform my parents of this grave mistake. It would break their hearts. If at all possible, I would like very much to begin again at your store with a clean slate and do my best. Honestly, I like employment at your store and wish to stay there. Please consider this.
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> I admit I did a dreadful thing, but believe me, I certainly am paying for it. I haven't been able to eat or sleep or do anything since it happened. Let me repeat once again that I'm sorry for what happened, but as true as there is a God above, that was the first and only time. They say time heals all wounds, but I think if I live to be 100 I'll never get over this. I might be stupid but I am not a thief.

III. DISPOSITION BY THE COMPANY

The company has three courses of action available for finally disposing of the offender: dismissal of the employee without criminal prosecution, dismissal and criminal prosecution, or retention. Prosecution was carried out for 288 of the 1,681 trust violators in Companies A, B, and C (17 percent). Eight dishonest employees were retained, two in Company B who had been recommended for employment by a very high official in the organization and who were therefore given a second chance, and six in Company C for reasons unknown to the researcher. No employee was prosecuted *and* retained. Apprehension for department store trust violation, then, results in automatic discharge, but only infrequently in prosecution.

The overall prosecution rate of 17 percent conceals important differences in attitude toward the disposition of thieving employees by Companies B and C on the one hand, and Company A on the other: 2 percent of Company B's 584 offenders and 8 percent of Company C's 358 offenders were prosecuted, compared with a surprisingly large prosecution rate of 34 percent for Company A. In addition, 32 unprosecuted Company A employees were turned over to military or juvenile authorities, thus raising to almost two-fifths (38 percent) the proportion of offenders in Company A against whom some official action was taken. Differences this large are not fortuitous but reflect basic policy differences over prosecution between Companies B and C on the one hand and Company A on the other.

Companies B and C were much more interested in terminating dishonest employee cases as quickly as possible, and they were more sympathetic toward employees who had violated their trust. They felt that prosecution generally served no useful purpose and wished to avoid any further publicity in an admittedly sensitive area. By contrast, Company A's position was that criminal behavior by its workers—biting the hand that feeds them—should result in observable, punitive consequences extending beyond loss of employment whenever possible. Whereas management's philosophy in Companies B and C precluded prosecution a priori except in the most exceptional cases, the security department in Company A had to justify *not* prosecuting a dishonest employee. Of course, even in Company A nearly two-thirds of the trust violators were not prosecuted, but presumably this was primarily a matter of economics.[7]

The attitude of Company A toward prosecution is exceptional among department store organizations: Officials of six department store companies not part of the present study indicated in interviews that they prosecute 5 to 10 percent of their apprehended dishonest employees. Therefore, legal action against dishonest department store employees as an occupational group must be considered minimal, despite the unique attitude of Company A. For employee theft, as for white-collar crimes, the penal sanctions against criminal behavior have differential and selective implementation.[8] In Companies B and C combined, the proportion of trust violators prosecuted (4 percent) was almost identical with the proportion of black market cases of price, rationing, and rent violations in which criminal proceedings were initiated (6 percent).[9]

While informed students generally agree that, given sporadic law-enforcement, the major deterrent to trust violation is social degradation through exposure and fear of loss of position, the deterrent effect of prosecution is debatable. Hall guardedly suggests that Post Office Department experience, and to some extent that of banks, indicates that efficient enforcement of the law deters embezzlement.[10] Offenses committed by post office workers are invariably reported to the United States attorney, who is charged with deciding whether to prosecute. But at the least, every case is reported to the proper official and the Post Office Department's policy is to support prosecution[11]—unlike department stores in general, Companies B and C in particular, and to a lesser extent even Company A. At least 87 percent of the 2,017 offenders who embezzled or committed related defalcations in insured nonmember

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[7] *See* p. 693 *infra*.

[8] Aubert, *White Collar Crime and Social Structure*, 58 AM. J. SOCIOLOGY 265 (1952).

[9] M. CLINARD, THE BLACK MARKET 33, 237-38 (1952).

[10] J. HALL, *supra* note 1, at 333.

[11] *Id.* at 328-29.

banks from 1935 through 1950 were prosecuted.[12] By contrast, there was a virtual absence of law-enforcement in Companies B and C, and nonprosecution was not a rule but a reality in Company A in over half the cases. At the same time, the rate of apprehended dishonest postal employees is 1.4 per 1,000 workers,[13] compared with an annual rate of 4.8 employees in Companies A, B, and C. That the annual rate of apprehended department store offenders was more than three times that of postal thieves certainly supports Hall's position. However, the lower rate of trust violation may be attributable to factors quite unrelated to prosecution. Postal employees must pass certain standard civil service examinations, and they participate in various occupational, social, and personal advantages. Hall himself emphasizes that "the position provides security both in tenure and in retirement, and it carries the prestige of government employment." He also notes that "status, security, including pension, and perhaps a higher *esprit de corps* set off that vocation from many other comparable types of employment."[14]

IV. REASONS FOR INFREQUENT PROSECUTION OF DISHONEST EMPLOYEES

The public attitude has long opposed the behavior of the "ordinary" thief. Because these offenders have values that conflict with the community's values, there is no serious divergence of opinion among community members about the desirability of strict law-enforcement. In trust violation, however, there are important differences that, Hall believes,

> result from the wholesale violations among all strata of the community, aggravated by a consensus of opinion regarding the values involved, i.e., the embezzlers recognize that they are violating their own values. More important is the fact that when detected, they are treated sympathetically by those in control. Thus, in sum, embezzlement is wrong; everybody, including most embezzlers, recognize that, and there is no basic challenge to the rightness of the prevailing standards. But, far from rigorous law-enforcement by the "dominant class" when its property interests are criminally appropriated, we encounter condonation and wholesale avoidance of legal coercion. In sharp contrast to what we find regarding *known apprehended* thieves and criminal receivers (against whom there is ample evidence for conviction), in the case of the embezzlers, there is such lack of law-enforcement as practically to nullify the legal controls.[15]

Similarly, Cavan has posited a continuum of conformity and nonconformity for any type of criminal behavior. One of the elements

[12] *Id.* at 331. This is a minimal figure because not all of the 263 "not prosecuted" cases had been disposed of.

[13] This rate was calculated from figures in *id.* at 328.

[14] *Id.*

[15] *Id.* at 304.

of the continuum consists of public tolerance of the behavior involved. Cavan believes that theft from retail stores by staff or shoplifters is characterized by a relatively high degree of public tolerance, thus reducing the probability of official action. "Only when a crime of the tolerated type is large, damaging to the business involved, or made known to the public is it likely to lead to arrest, trial, and legal punishment."[16] Many employers are genuinely sorry for the individual who has succumbed to temptation, feel that dismissal is sufficient punishment, and, particularly if the offender's work history has been good prior to the offense, prefer to avoid the disgrace to the employee and his family resulting from prosecution.[17] From a more practical viewpoint, the employer may be concerned more with simply eliminating the cause of income loss than with revenge, especially if the defalcation is small, or if further investment of the time, money, and effort involved in prosecution is not economically justifiable, or both. In this connection, Hall has theorized that, in general, the rate of prosecution of known offenders is positively related to the advantage that the complainant will receive by such action. In embezzlement, for example, if prosecution will result in a recovery that cannot be obtained otherwise, then the tendency will be to prosecute. Or, if nothing will be lost by prosecuting or be gained by not prosecuting, the rate will increase.[18]

Perhaps one of the most important reasons for infrequently prosecuting thieving employees, and one related to the effect of public tolerance of various types of criminal behavior, is that the rate of prosecution will vary inversely with the extent of the public's psychological and social identification with the offender.[19] Such identification is possible in trust violation, more so than in other forms of theft and in other types of offenses—another way of emphasizing that the trust violator does not come within the popular conception of "criminal." While bankers and public officials who embezzle are taken as models of success, are accorded the greatest respect, and thus allow for the strongest identification and emulation, "the embezzler in shirt sleeves, the truckdriver and warehouse employee, though they do not evoke such wide imitation, are respected members of their group. All are distinguished from the prototype of the 'criminal' to whom otherness and malevolence are attributed."[20] The ambivalence of the employer's and the public's attitude toward trust violation and violators militates against prosecution. In addition, trust violation often reflects a serious personal problem, and the violator's motive

[16] Cavan, *Underworld, Conventional and Ideological Crime*, 55 J. CRIM. L.C. & P.S. 235 (1964).

[17] Gregory, *Why Workers Steal*, SATURDAY EVENING POST, Nov. 10, 1962, at 68, 71.

[18] J. HALL, *supra* note 1, at 318-19.

[19] *Id.* at 318.

[20] *Id.* at 306.

may be one with which it is difficult not to sympathize. This factor relates to and augments the preceding one: "In sum, it is easy to understand, to identify oneself with and, thus, to condone the conduct of persons who resemble us and who were sorely beset by difficulties that trouble many decent persons."[21]

Although the company's reason for not prosecuting is often stated to be fear of suit by the employee for false arrest or malicious prosecution, fear of reprisal is a minor influence in the decisional process. Its influence is negligible compared with much more potent considerations.[22] A much more direct influence is the employer's desire to avoid publicity about staff dishonesty, perhaps feeling that trust violators reflect upon his ability to select honest and loyal workers. The image of a business, particularly a sizable one, is hardly improved by leaving itself open to the charge of persecuting defenseless employees who, through circumstances beyond their control, found it necessary to steal from the boss. Indeed, if trust violation simply expressed financial need, the problem at least among department store workers, would be explaining not why those who were caught had stolen, but why 99.5 percent of the employee force did not violate their trust.

Finally, it should be noted that only large concerns and corporations apprehend dishonest employees in sufficient number to make their disposition a problem. Even firms with a few hundred workers may go for years without detecting an employee pilferer. It is precisely in the large corporation that the loss occasioned by trust violators is least personalized, as opposed to "ordinary" theft or theft from relatively small businesses, where the internalized meaning of "ownership" has not completely disappeared. Whether recovery is obtained or not, the enforcers of company policy and the management in large concerns continue to draw their weekly paychecks. Even when prosecution will not result in restitution for injury, a personal victim may prosecute in order to be "compensated" for his financial loss by the satisfaction of having the offender suffer just as the victim has—a kind of psychic restitution. The financial loss caused by dishonest employees of large companies is normally sustained by that nebulous entity, *the company*, rather than any *individual* within it.

V. DIFFERENTIALS IN DISPOSITION OF COMPANY OFFENDERS

While Companies A, B, and C combined prosecuted less than one employee in five, Company A prosecuted a much larger percentage than either Company B or C.[23] What factors influenced disposition of the trust violators? Upon what bases were offenders either discharged without further embarrassment to them or turned over to

21 *Id.* at 307.
22 *Id.* at 309.
23 *See* p. 688 *supra.*

the police for prosecution? Analysis is restricted to Company A because it was the only firm among the three that prosecuted a sufficiently large number of employees to permit a statistical investigation of disposition.[24]

The "size-of-theft" (the total value of merchandise and money embezzled by the employee during his employment) emerges as the single most important and decisive determinant of disposition. Of those who stole less than 100 dollars, 19 percent were prosecuted; of those who stole 100 dollars or more, 57 percent were prosecuted. Only 1 in every 10 dishonest employees embezzling less than 20 dollars was prosecuted, compared with 1 in 4 if the size-of-theft was 20 to 100 dollars. The average amount stolen by prosecuted employees (608 dollars) was three times as large as that of released offenders (194 dollars). Holding constant the amount stolen, more lower status employees (cleaners, servicemen, stock personnel) then higher status ones (executives, salespersons, white-collar workers) were prosecuted. A significantly larger proportion of the former (73 percent) than of the latter (50 percent) were prosecuted. Thus, the offenders with whom the enforcers can more easily identify are treated more sympathetically—and what better way to express such identification and empathy than by not exposing them publicly!

Further documentation of the significance of the amount stolen in disposition comes from an examination of the reasons given by Company A for not prosecuting, information that was recorded in 338 cases. The following chart shows Company A's reasons for not prosecuting.

REASONS FOR NOT PROSECUTING	PERCENTAGE	NUMBER
Insufficient Evidence	58.3	197
Amount Considered Trivial	13.3	45
"Other" Reasons	8.9	30
Personal or Family Considerations	7.4	25
District Attorney Recommended Against Prosecuting	6.2	21
Employee Turned Over to Military or Juvenile Authorities	3.3	11
Technical Legal Problems	2.1	7
Dishonesty Self-Confessed	.5	2
	100.0	338

[24] The disposition data of the three companies were not combined because each company is a completely independent, autonomous organization and because of the large a priori differences in disposition between Company A and Companies B and C. Moreover, since 86% of the offenders prosecuted by all three companies were Company A employees, the findings based upon Company A's prosecuted offenders could not have been appreciably altered had the 40 employees prosecuted by Companies B and C been included in the analysis.

The average amount embezzled by the 45 offenders whose cases where considered trivial was 26 dollars, less than one-twentieth of the mean size-of-theft of prosecuted employees. The average amount stolen by offenders not prosecuted because of insufficient evidence was 250 dollars, 10 times that of trivial cases but still less than half the average amount stolen by prosecuted offenders. Despite the company's explanation that it did not prosecute 197 dishonest employees (87 percent of whom had signed a confession) because of insufficient evidence to assure a conviction, it is doubtful that all 197 offenders would have been prosecuted even had there been sufficient evidence. Rather, it is more logical to assume that the rate of prosecution in these cases would have been similar to the rate for all cases and would have been based on the amount stolen. For example, 54 of the offenders who purportedly were released because of insufficient evidence stole less than 20 dollars. Company A, even with incontrovertible proof of the guilt of these 54 employees, would hardly have prosecuted all of them. Twenty-six dollars was the average amount stolen by offenders who were released because they took trivial sums but for whom sufficient evidence to prosecute existed; in addition, only 10 percent of all trust violators who embezzled under 20 dollars were prosecuted. Therefore, if it is assumed that the prosecution rate would have been the same as that for all offenders by amount stolen category, then approximately 62 of the 197 employees not prosecuted because of insufficient evidence *would have* been prosecuted. This would have increased Company A's overall prosecution rate to 42 percent and the proportion of offenders brought to official attention to 47 percent. By extending this reasoning, where applicable, to employees who were not prosecuted for other reasons, the logical inference is that Company A *would have* prosecuted 49 percent of its employees and *would have* brought 53 percent to official attention.

Recovery characteristics were investigated in relation to disposition in order to determine what effect, if any, they had upon the decision to prosecute. Virtually all of the amount stolen by the 45 released offenders who pilfered trivial sums was recovered compared with 85 percent of the total value embezzled by prosecuted trust violators. However, it cannot be inferred that trivial cases were not prosecuted *because* complete recovery was obtained in those cases. Rather, it is more plausible to maintain that almost regardless of the amount recovered in relation to size-of-theft, the probability of Company A prosecuting employees who stole less than 100 dollars was not more than one in four.

Company A rarely considered it worthwhile to become involved in court proceedings if the size-of-theft was below a certain value. On the other hand, it would seem that the average amount stolen by employees released because of insufficient evidence (250 dollars) was large enough to warrant prosecution in a substantial number

of cases, if other factors had been equal. Moreover, only 52 percent of the amount stolen by offenders released because of insufficient evidence was recovered, compared with 85 percent of the amount stolen by prosecuted employees. This suggests that had there been sufficient evidence, a certain number of them probably would have been prosecuted in order to obtain court-imposed restitution for their thefts or at least to punish them for their refusal to compensate the company for their defalcations. However, Company A obtained complete recovery of the amount embezzled from 153 employees—78 percent of the 197 cases. In other words, Company A maintained that, although it incurred no known loss from 153 released offenders, it would have prosecuted them had there been sufficient evidence to obtain a conviction. This raises two interesting and important questions: To what extent did Company A prosecute employees where complete recovery had been obtained *prior* to legal action, where court-ordered restitution could not have been an objective of prosecution? Why did it do so?

In 110 of the 136 cases of prosecuted offenders who were not ordered to make restitution by the court, (81 percent), complete recovery was obtained nonetheless. The courts did not order any of these 110 dishonest employees to make restitution nor did they specify restitution as a condition of their sentence. These dishonest employees had no reason to reimburse the company *after* they were prosecuted, convicted, and sentenced *as a result* of such legal action by the company. Therefore, in 110 cases (45 percent of the 248 cases prosecuted by Company A) the employee had made restitution or complete recovery had been obtained prior to, or independent of, prosecution. Almost half of the trust violators, then, were prosecuted strictly for punitive rather than for economic reasons. The company's purpose was punishment of the employee for violating his trust rather than simply correcting the financial injury by obtaining recovery.

Ninety-two percent of the amount stolen was recovered from among convicted employees who were ordered to make restitution by the court. This percentage was larger than that recovered from violators who were not ordered to make restitution (79 percent). In addition, complete recovery was had in 96 percent of the cases where the courts ordered the convicted trust violators to make restitution. In comparison, complete recovery occurred in 81 percent of the cases where the courts did not order the convicted offenders to make restitution. On the basis of these facts—the proportion of the *amount* stolen that was recovered and the proportion of *cases* where complete recovery was obtained—there was greater recovery from convicted offenders ordered to make restitution than from convicted offenders not ordered to make restitution. This suggests that a large number of the convicted employees were prosecuted for economic reasons, *i.e.*, to obtain restitution not forthcoming prior to prosecution. But since 45 percent of Company

A's employees were prosecuted for strictly punitive reasons, it is possible that had the remaining 55 percent of prosecuted offenders also made complete restitution prior to being brought to court, they would have been prosecuted in any event. The prosecution of the 112 offenders ordered to make restitution by the court may have been prompted by both punitive and economic considerations.

It may be concluded, therefore, that: (1) the recovery characteristics were much less important determinants of disposition than the absolute size-of-theft; (2) regardless of the proportion of the amount stolen that was recovered, if an employee stole at least 100 dollars and if Company A believed a conviction could be obtained, his chances of being prosecuted were better than even; and (3) assuming there was sufficient evidence, an employee's chances of being prosecuted increased directly with the amount pilfered, and he was virtually assured of prosecution when a large amount was stolen and complete reparation was not obtained.

VI. JUDICIAL DISPOSITION OF COMPANY OFFENDERS

Two hundred and fifty-six of the 259 prosecuted trust violators in Companies A, B, and C were convicted, 249 (96 percent) pleading guilty.[25] This near-perfect conviction record was a result of the

[25] Of the 288 cases of trust violation turned over to the authorities for prosecution, adjudication was completed in 259. Adjudication was not completed in 29 of the cases for a number of reasons, such as the trust violator's leaving town, for example.

Clinard found that a high rate of conviction among OPA criminal prosecutions was a result of careful consideration of a case before turning it over to the Department of Justice. Ninety-three percent of the 12,415 completed criminal cases from 1942 to 1947 resulted in conviction. M. CLINARD, *supra* note 9, at 239. *See also* Clinard, *Criminological Theories of Violations of Wartime Regulations*, 11 AM. SOCIOLOGICAL REV. 258, 263 (1946).

By contrast with the Clinard figures and those in the present study, the data in the Bureau of the Census' *Judicial Criminal Statistics* indicates that a higher proportion of offenders prosecuted for embezzlement and fraud were disposed of without conviction than were offenders prosecuted for most serious offenses. In Illinois, as revealed by the Illinois Crime Survey Statistics, a much larger proportion of embezzlement and fraud cases than any other crime was eliminated at the preliminary hearing, over 70% of such prosecutions in Chicago and Cook County being eliminated at this level. Additional evidence on the low rate of convictions that is directly comparable to the rates for "trust violators" in the present study comes from the annual reports of the New York City Police Department. These reports include statistics on violation of financial trust: from 1935 to 1947 inclusive, 4,059 of 7,938 "dishonest employees," or 51%, were convicted. Only 42% of the 1,754 offenders prosecuted for embezzlement and related defalcations in insured nonmember banks from 1935 through December 1950 resulted in conviction; all such cases are turned over to United States attorneys for disposition. It is clear that the greater selectivity and discretion exercised by private security personnel and company officials in department stores results in much more successful prosecution of the thieves they apprehend than of offenders handled by our more conventional agencies of social control. *See* J. HALL, *supra* note 1, at 320-22, 331.

companies' very careful selection of whom to prosecute and when. This care is further evidenced by Company A's declining to prosecute 172 violators who had admitted their dishonesty in signed statements; the company was not convinced that the evidence would sustain a conviction.

The judicial disposition of convicted offenders is an intrinsically interesting area and one that is highly significant because the court both molds and reflects public opinion. An examination of the sentences administered by the courts to the 256 convicted violators provides some objective indices of society's attitude toward dishonest employees of the type represented in this study. It also serves as a basis for offering some interpretations of this attitude.

The offender was fined in 73 of the 256 cases. The average fine imposed was 72 dollars for those receiving any fine and 20 dollars for all convicted offenders; one-quarter of the fines were 100 dollars or more. The offender was ordered to make restitution in 44 percent of the cases, the average amount being 637 dollars in this group and 286 dollars for all offenders. Among those ordered to make restitution, the amount was under 100 dollars in 27 percent of the cases and 500 dollars or more in 29 percent of the cases. The offender was both fined and ordered to make restitution in 27 percent of the cases. The offender's sentence was suspended in 55 percent of the 256 cases. Among those given any suspended sentence, the average length was 11 months, with two-thirds given less than 1 year and only 9 percent 3 years or more. Fifteen percent of the offenders were given a definite suspended sentence and ordered to make restitution only. The offender was put on probation in 46 percent of the 256 cases. The average length of probation was 17 months; one-third were placed on probation for more than 1 year. Almost one-quarter were given a suspended sentence and placed on probation only; one-third were either given a suspended sentence or placed on probation only;[26] and 30 percent were placed on probation and ordered to make restitution only.

The most significant and striking finding was that only 12 of the 256 convicted department store trust violators (less than 5 percent) were sentenced to and presumably served some time in prison. In 9 of these 12 cases the length of imprisonment was 6 months or less. The court avoided imposing punitive sentences in 95 percent of the cases. Moreover, the nonpunitive sentences imposed were not severe but were nominal, representing minimal judicial action. Two-thirds of those fined were fined 50 dollars or less, three-fifths of

[26] Between 1933 and 1944, and with the exception of persons convicted of auto theft and receiving stolen property, a larger proportion of offenders convicted of embezzlement or fraud were given a suspended sentence or placed on probation than were offenders convicted of any other serious crime. In 43% of the 741 cases of embezzlement or related defalcations in insured nonmember banks that resulted in conviction, probation or suspended sentence was imposed. *See* J. HALL, *supra* note 1, at 320, 331.

those receiving definite suspended sentences received them for 6 months or less, and two-thirds of those placed on probation were placed on it for one year or less (one-quarter for six months or less). Restitution, the most frequently imposed sentence, was in effect no more than a request by the court that the thief compensate the victim for his injury in direct proportion to that injury.

The leniency of the courts toward white-collar criminals has been emphasized elsewhere on the basis that *only* 26 percent of such offenders are imprisoned.[27] This rate is fully five times that for dishonest department store employees. Why were the courts so lenient with the department store offenders? This condition cannot be attributed to the idiosyncratic sentimentality of one or two judges since the convicted offenders were sentenced in 90 cities throughout the United States. If the courts are unwilling to impose severe sentences upon white-collar criminals because of the nature of their offense and the relative absence of criminal records among the violators, they are equally, if not more, unwilling to impose severe sentences on department store employees. Only two percent of Company A's trust violators had a prior record, considerably less than that among white-collar criminals.[28] If judges are reluctant to make criminals of reputable businessmen by sentencing them to prison,[29] they are certainly much more reluctant to make criminals of respectable, if not reputable, working men and women who steal from their employers. Hall is undoubtedly correct that courts desire to avoid punitive measures if restitution is made.[30]

Although the lenient attitude of judges toward dishonest employees may be very similar, though not identical, with their attitude toward white-collar criminals, the underlying reasons for such leniency are very different. One important reason for the virtual absence of punitive sentences imposed on the department store trust violators was perceptively raised by Hall in the form of a question in connection with embezzlement cases; but it is no less applicable to the department store offender. He cites the court's belief that the function of corrective treatment made possible by imprisonment would be extremely limited if not meaningless, since the offenders are normal, reasonably competent, respectable working class people, free of any association with criminals or criminal subcultures. To be sure, civil and criminal sanctions were occa-

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[27] Clinard, *supra* note 25, at 263; M. CLINARD, *supra* note 9, at 239-40. *See also* Hartung, *White-Collar Offenses in the Wholesale Meat Industry in Detroit*, 56 AM. J. SOCIOLOGY 25 (1950). Even among bank embezzlers, approximately one-quarter of those convicted are given punitive sentences. J. HALL, *supra* note 1, at 331.

[28] M. CLINARD, *supra* note 9, at 268; Levens, *101 White Collar Criminals*, NEW SOCIETY, March 26, 1964, at 7.

[29] M. CLINARD, *supra* note 9, at 243-44.

[30] *See* J. HALL, *supra* note 1, at 323.

sionally imposed on the dishonest employees: restitution, nominal fines, and short-term probation. However, the very absence of the deterrent that middle-class individuals fear most, imprisonment, and the substitution of largely financial measures, was tantamount to an admission by the court that it could do little *for* the offenders and that it chose to do nothing *to* them. Fines, restitution, and probation in a sense have their parallel in such white-collar civil sanctions as damages or warnings. The leniency of judges toward white-collar criminals has been related to the former's membership in the same social strata as the latter; thus judges are considerably influenced by the opinion and power of the defendants.[81] But the courts certainly do not fear the power of department store employees, do not identify with them, and probably feel more sympathy than respect for them. That five times as many white-collar criminals as department store trust violators were sentenced to prison may reflect the courts' great empathy with, and indulgence of, the transgressions of relatively powerless individuals who have so little and attempt to obtain a little more, albeit dishonestly. It may also reflect the courts' more critical attitude toward relatively powerful persons who already have so much and yet try for so much more illegally.

VII. THE PRIVATE ADMINISTRATION OF JUSTICE

Perhaps more than any other civil individual, an employer, or his corporate representative, is in a position where he must decide whether or not to report a known, apprehended offender to the law enforcement officials—a responsibility and power that has been largely ignored in the sociology of law. What effect does such discretion have upon the legal and moral order, upon the ethic of honesty that the law sustains, upon the offender and others like him? While any brief answer provided here must be less than definitive, at least some of the consequences of the private disposition of offenders can be explored. The ability of the employer to prosecute or release as many or as few trust violators as he chooses and to decide who will and will not be charged formally with a crime, must be analyzed within a trifold framework consisting of: (1) the effect of such power upon the offender and public; (2) the objectives of punishment, *i.e.*, prosecution and sentencing; and (3) the victim.

The victim of a crime today is, in some respects, in a less favorable position than in earlier time. "The number of victims may be assumed to have increased at the same rate as criminals, but there has been no improvement in the victim's lot to compare with the advances which have been made in criminology, and certainly not to compare with the amelioration of the lot of the criminal which

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[81] *See* M. CLINARD, *supra* note 9, at 245.

has taken place."[32] While the state attempts to protect society against crime, it generally has no effective remedy for the individual victim who suffers injury or loss. The only satisfaction the victim derives is from the punishment inflicted upon the criminal. As though in self-defense against this situation, the department store companies in the present study have attempted to find their own solution to employee dishonesty, a solution giving their own interests priority. Their success is indicated by their ability to obtain complete or considerable recovery in a majority of cases without the aid of the court. Even when the employer cannot obtain restitution without legal assistance, he probably prefers to avoid further investment of money and personnel in a dishonest employee's case. It has already resulted in financial loss to the company and, if carried further, could lead to a greater net loss. In a sense, the employer would be perpetuating his own victimization. Clearly, from the standpoint of the employer, his first responsibility is to himself. Moreover, what would be the function of prosecution? If it were simply to obtain restitution not otherwise obtainable—to have the court do for him what he could not do for himself—the criminal court would be cast into the role of a collection agency, no more and no less. This does not suggest that restitution has no place in penology. On the contrary, the offender makes restitution in order to atone for and correct his misconduct. As such, it may be viewed as the first step toward rehabilitation, as an admission by the offender that he has offended, that he is aware he has committed a crime, that he is willing to do something about it.

Since restitution requires effort by the offender, it may be particularly useful in strengthening his feelings of responsibility while at the same time benefiting the victim.[33] There is reason to believe that *rectification* or *making good* is a disciplinary technique that is as effective with grownup criminals as it is with children, preventing repetition of misconduct and generating little resentment.[34] Accordingly, restitution may be utilized as a penal and reformative technique "through which guilt can be felt, understood and alleviated."[35] The question still remains, of course, whether privately obtained restitution or court imposed restitution is more beneficial to the offender. The employer's privately obtained restitution may allow the offender to interpret his behavior as a civil injury that can be easily corrected by reimbursing the victim, in much the same way that an overdue bill is attended to. On the other hand, court ordered restitution may add a necessary punitive element that confirms beyond a doubt the criminal character of the employee's behavior. However, whether restitution is privately obtained or court ordered may be a subtle distinction having no dif-

32 S. SCHAFER, RESTITUTION TO VICTIMS OF CRIME 117 (1960).
33 *Id.* at 125.
34 *Id.* at 126.
35 *Id.*

ferential effect upon the offender. He may, under either circumstances, welcome restitution as an opportunity to "buy his way out" of criminal responsibility. Moreover, it is doubtful whether the court imposes restitution as part of a sound peno-correctional program or merely adopts most employers' point of view.

If the role of restitution does not vary appreciably with how it is obtained, and given the absence of punitive sentences administered to employee thieves, it may well be asked what is the function of prosecuting trust violators. It is arguable that the employer's power to prosecute often or infrequently and to select who shall be immune from contact with the law, is "the best one among practicable alternatives." Further, the practices and attitudes engendered by such a situation, and the consequences of these practices and attitudes, are "socially desirable." "[I]n effect, we have an enlightened private individualization of treatment which avoids the crudities of exposure and punishment and, in sum, is superior to official administration of the criminal law."[36] Not prosecuting trust violators is humane in that the individual does not become a man with a "record." The offenders' punishment is discharge—no small loss for middle-class persons since they then find it more difficult to obtain new employment. At the same time, they are given another chance at respectability. Whether prosecuted trust violators make better adjustments to their future employment situations and whether they are in general more law-abiding as a result of such public exposure and conviction than those not prosecuted is, unfortunately, unknown. In a majority of cases, apprehension and interrogation by detectives or company officials, followed by accusation, admission of dishonesty, and dismissal, may be a highly effective deterrent to further criminal behavior while still providing the offender an opportunity to salvage his future and to learn from his past mistake. If minimal sanctions can accomplish the same objective as more severe ones, one may again ask what is to be gained by prosecution.

It is possible that some released offenders may be in the early stages of a criminal career, that other employers may unknowingly expose themselves to similar victimization, or that releasing the offender may avoid rather than confront any deep, unresolved personal problems. Presumably, these conditions would be subject to more successful treatment if the individual were prosecuted. In addition, conviction would make it more difficult for trust violators to rationalize their behavior in order to continue thinking of themselves as respectable citizens. As officially convicted criminals, the immorality and illegality of their conduct would be forcefully impressed upon them as perhaps would otherwise not be the case. Hall has pointed out in support of the case for prosecution that rehabilitation is not the *only* objective of the criminal law and

[36] J. HALL, *supra* note 1, at 341.

penology. Assuming that conviction and correction (imprisonment) are not rehabilitative, or no more so than private disposition of the offender, being arrested and charged with a crime has important implications for the deterrence of other trust violators and, more crucially, for the reinforcement of the transgressed values.

> [A]n important, though certainly not exclusive, place in any adequate treatment program for embezzlers must be reserved for the moral instruction provided by just punishment. What is basic in this viewpoint is the importance of careful public evaluation of the offender's conduct—with congruent consequences. This implies that the punishment is deserved in the sense that the offender is a normal adult who could and should have controlled his criminal drives.[37]

Nevertheless, there are always discrepancies between the legal order, public attitudes, and law-enforcement practices. The inclination to take legal action against offenders to reaffirm values and have the offenders serve as examples is becoming less acceptable. Neither society, this writer, nor, based upon the disposition of the convicted department store offenders, the courts, would agree that every individual who commits a crime should be subject to official attention. The nature of the offense and the characteristics of the offender are legitimate factors to consider in disposing of the offender. Prosecuting *all* individuals who commit *any* crime may be less justifiable than the automatic release of all trust violators. How many would agree, for example, that employees taking their employer's stamps and stationery for personal use, which legally constitutes theft, should be reported to the authorities? If any sanction is imposed, reproach is generally considered adequate. The theft of merchandise and cash, considered much more serious, invariably meets with a more severe sanction—dismissal. To be sure, the private administration of justice even on a small scale does contain elements of injustice and is not being prescribed as a substitute for traditional legal structures. Perhaps more than anything else this discussion and dilemma highlights the fact that, in disposing of offenders, consideration of the victim, the objectives of punishment, and the power of the employer over trust violators are not all perfectly integrated but rather are characterized by conflict and ambivalence; yet, such strain among the parts is perhaps an inevitable, if not wholly desirable, reflection of our social system.

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[37] *Id.* at 334.