CRIME

AND

CAPITAL PUNISHMENT

WALTER BERNS

Department of Political Economy

University of Toronto

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INTRODUCTION

It must be one of the oldest jokes in circulation. In the dark of a wild night a ship strikes a rock and sinks, but one of its sailors clings desperately to a piece of wreckage and is eventually cast up exhausted on an unknown and deserted beach. In the morning he struggles to his feet and, rubbing his salt-encrusted eyes, looks around to learn where he is. The only human thing he sees is a gallows. "Thank God," he exclaims, "civilization." There cannot be many of us who have not heard this story or, when we first heard it, laughed at it. The sailor's reaction was, we think, absurd. Yet, however old the story, the fact is that the gallows has not even yet been abolished among us, and we count ourselves among the civilized peoples of the world. Moreover, the attempt to have it abolished by the Supreme Court may only have succeeded in strengthening its structure.

I do not know whether the intellectual world was surprised when, only two days prior to the nation's two hundredth birthday, the Supreme Court held that capital punishment is not, under all circumstances, a violation of the Eighth and Fourteenth Amendments. I do know, or at least have very good reason to believe, that the Court's decision came as a bitter blow, not only to the hundreds of persons on death row who now faced the very real prospect of being executed, but to the equally large number of persons who had devoted their time, talent, and, in some cases, their professional careers to the cause of abolishing this penalty.

They had been making progress toward this end. Only four years earlier, the Court had held that the manner in which death sentences were being imposed by judges and juries—discriminatorily or capriciously—constituted cruel and unusual punishment, and this decision seemed to be an inevitable step along the path described by still earlier decisions, a path that would lead ultimately, and sooner rather than later, to the goal of complete and final abolition. True, they were four dissenters in the 1972 cases; and Justice Douglas, one of the five justices in the majority, had since retired; but the abolitionists had reason to hope that some of the 1972 dissenters would reconsider their positions. The Chief Justice, for example, had indicated his sympathy for the abolition cause, saying that if he were a legislator making a political judgment, rather than a judge making a constitutional judgment, he would either vote to abolish the penalty altogether or restrict its use "to a small category of the most heinous crimes."* And in a poignant opinion, Justice Blackman had spoken of the "excruciating agony" of having to vote to uphold death sentences, and of the depth of his abhorrence of the penalty, "with all its aspects of physical distress and fear and of moral judgment exercised by finite minds."** Perhaps he could be prevailed upon to set aside his constitutional scruples; after all, one year later he had written the Court's opinion invalidating the abortion laws,*** and that opinion was at least as bold in its disregard of constitutional scruples as anything the abolitionists were asking of him.

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* Furman v. Georgia, 408 U.S. 238, 375 (1972). Dissenting opinion.

** Ibid., at 405. Dissenting opinion.

*** Roe v. Wade, 410 U.S. 113 (1973).

Besides, judges are not immune to popular opinion or able to isolate themselves completely from the trend of the times, and the trend was clearly in the direction of abolition. Juries seemed increasingly unwilling to impose the sentence of death, and this was true in other countries as well as in America. Whatever the case in the Soviet Union and Saudi Arabia, or other such barbarous places, civilized countries were abolishing the penalty, whether in practice, as in France, or by statute, as in Britain. Only a month or so before the Supreme Court held it to be not unconstitutional, the Canadian House of Commons had voted to abolish it for all crimes, thus bringing to a successful conclusion a campaign that had engaged the passions of many of that country's most dedicated intellectuals. Rather than to doubt the outcome, abolitionists had cause to wonder why it had taken — and in America was taking — so long. It must have seemed to them that every decent and thoughtful person supported their cause — Albert Camus, for example, and Arthur Koestler — and the public had long since demonstrated its opposition to punishments considered by them to be less barbarous than the death penalty. This generation of Americans, unlike their forbears would not support the branding of convicted criminals, or "ear-cropping." Public opinion was, as the Court had said as early as 1915, becoming more enlightened on these matters, and the cause of this enlightenment was a growing appreciation of "a humane justice."* This growing enlightenment had constitutional significance because the meaning of "cruel and unusual" varies with the times. As the Warren Court said in 1958, this Eighth Amendment term derives

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* Weems v. United States, 217 U.S. 349, 378 (1915).

"its meaning from the evolving standards of decency that mark the progress of a maturing society."* There was, therefore, good reason to believe, and certainly good reason to hope, that by 1976 society would have matured still further and that the Court would acknowledge this officially by declaring the death penalty to be "cruel and unusual" according to the standards then governing. It was this hope that was cruelly dashed by the decision in Gregg v. Georgia, the leading 1976 case.**

Perhaps the Court began to doubt its premise that a "maturing society" is an ever more gentle society; the evidence on this is surely not reassuring. The steady moderating of the criminal law has not been accompanied by a parallel moderating of the ways of criminals or by a steadily evolving decency in the conditions under which men around the world must live their lives. Within the short period of time in which this book was being written, two attempts were made on the life of the American President; a former president of the Teamsters' Union was abducted and probably murdered; a famous heiress was indicted, then convicted for her part in an armed bank robbery; two Turkish ambassadors were gunned down; a daughter of a former President, himself the victim of an assassin, narrowly escaped death from a bomb exploded in a London street; a Puerto Rican separatist group claimed credit for simultaneous bombings in New York, Washington and Chicago; a Dutch business man was held captive by IRA gunmen who threatened to chop off his head if the police made any attempt to rescue him; three or four other IRA gunmen held an innocent

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* Trop v. Dulles, 356 U.S. 86, 101 (1958).

** Gregg v. Georgia, 96 S.Ct. 2909 (1976).

husband and wife hostage in their London flat, while their associates tossed bombs into London restaurants; Portuguese mobs sacked the Spanish embassy; two American diplomats were kidnapped; Lebanese private armies fought a civil war in the streets of the formerly peaceful Beirut; the American ambassador to the country was murdered; the usual handful of political murders were committed in the Argentine, and the usual number of PLO bombs went off in Jerusalem; eleven persons lost their lives when a terrorist bomb exploded in La Guardia airport; South Moluccan terrorists took possession of a Dutch train and of the Indonesian embassy, shooting some of the many innocent hostages they held; and, to skip over a few months and more than a few similar outrages, the newly-appointed British Ambassador to Ireland was blown up and Palestinian terrorists seized an Air France plane and held its hundreds of passengers hostage at Kampala airport. A person could be excused for thinking not only that the world was becoming a more savage place, but that the Israeli raid on that airport and rescue of those hostages was almost the only happy event to make the news during this period. For once a liberal democracy was seen to possess the moral strength required to defend itself. That has not often happened lately, which is why it was so exhilarating.

And it is moral strength, or the strength that derives from the conviction that one's cause is just, that is required not only to mount operations against foreign terrorists, but to respond in an appropriate manner (which may mean severely) to domestic criminals. Those who lack it will capitulate -- in the one case by paying the ransom demanded and in the other by refusing to impose the punishments prescribed by the laws -- but concealing the fact of that capitulation behind a cloak of pious sentiments.

The most familiar of these goes by the name of "rehabilitating criminals." What the Warren court saw fit to praise as a "maturing society" is in fact a society whose institutions have lost their vitality. As I shall show, our criminal justice institutions impose punishment only as a last resort and with the greatest reluctance, as if they were embarrassed or ashamed, and they avoid executing even our Charles Mansons. It would appear that Albert Camus was right when he said that "our civilization has lost the only values that, in a certain way, can justify [the death] penalty."* What is beyond doubt is that our intellectuals are of this opinion. The idea that the presence of a gallows could indicate the presence of a civilized people is, as I indicated at the outset, a joke. I certainly thought so the first time I heard the story; it was only a few years ago that I began to suspect that that sailor may have been right. What led me to change my mind was the phenomenon of Simon Wiesenthal.

Like most Americans, my business did not require me to think about criminals or, more precisely, the punishment of criminals. In a vague way, I was aware that there was some disagreement concerning the purpose of punishment — deterrence, rehabilitation, or retribution — but I had no reason to decide which was right or to what extent they may all have been right. I did know that retribution was held in ill-repute among criminologists. Then, as I said, I began to reflect on the work of Simon Wiesenthal who, from that tiny, one-man office in Vienna, has devoted himself since 1945 exclusively to the task of hunting down the Nazis who survived the war and escaped into the world. Why did he hunt them, and what

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* Albert Camus, "Reflections on the Guillotine," in Resistence, Rebellion, and Death. Trans. Justin O'Brien (New York: Knopf, 1961), p. 220.

did he hope to accomplish by finding them? And why did I respect him for devoting his life to this singular cause? He says his conscience forces him "to bring the guilty ones to trial."* And if they are convicted, then what? Punish them, of course. But why? To rehabilitate them, to incapacitate them, to deter others from doing what they did? The answer— to me and, I suspect, everyone else who agrees that they should be punished -- was clear: to pay them back. And how do you pay back SS Obersturmführer Franz Stangl, SS Untersturmführer Wilhelm Rosenbaum, SS Obersturmbannführer Adolf Eichmann, or someday— who knows? — Reichsleiter Martin Bormann? As the world knows, Eichmann was executed, and I suspect that most of the decent, civilized world agrees that this was the only way he could be paid back.

This, then, is a book in support of capital punishment. It could be entitled "the morality of capital punishment" because, as I see it, the argument about it does not turn on the answer to the utilitarian question of whether the death penalty is a deterrent, but on whether justice permits or even requires it. I am aware that the death penalty is a terrible punishment, but there are terrible crimes. I am also aware that "retribution has been condemned by scholars for centuries," as Justice Marshall remarked in the 1972 death penalty cases, and that he also said, and said with some authority, that "punishment for the sake of retribution [is] not permissible under the Eighth Amendment";** but I am not persuaded.

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* Simon Wiesenthal, The Murderers Among Us. Edited and with an introductory profile by Joseph Wecksberg (New York: McGraw-Hill, 1967), p. 178.

** Furman v. Georgia, at 344, 345.

I am, finally, aware that genuinely honorable men have argued powerfully and passionately against capital punishment — the first chapter of this book presents a review of their arguments, and I have made every effort to present them honestly — but, obviously, I disagree with them. I should also point out that I learned soon enough that it was impossible to discuss capital crimes without discussing crime in general, or capital punishment without discussing punishment in general.

CHAPTER ONE

THE CASE AGAINST CAPITAL PUNISHMENT

1. The Biblical Argument

The first man and woman violated God's commandment and were banished from paradise. Their first-born son killed his brother, and God made him a fugitive and a wanderer upon the earth, forbidding the soil to yield up its fruits to him, and put a mark on him, "lest any finding him should kill him." Vengeance, said the Lord, is mine, and if anyone kills Cain, it shall be taken on him sevenfold. "And Cain went out from the presence of the Lord and dwelt in the land of Nod, on the east of Eden." Both homicide and its punishment are almost as old as history, and the disagreement over who shall impose the punishment, and what that punishment should be—death or banishment—followed immediately upon the first homicide.

Then Adam's wife bore him another son, Seth, to replace Abel slain by Cain, and the generations of Seth multiplied on the face of the earth. With them, however, went wickedness, making the earth corrupt in God's sight, until He resolved to destroy it, putting an end to all flesh. But Noah was a righteous man, "perfect in his generations," and God spared him and his family, and gave him dominion over every living creature, and made a covenant with him, promising never again to destroy the earth with a flood but, in exchange, requiring a reckoning of him. "Of every man's brother will I require the life of man," and "whoso sheddeth man's blood, by man shall his blood be shed; for in the image of God made he man." It would seem, then, that in the eyes of God murder is one of the worst of offenses because to kill a man is to kill a being fashioned after God.

From the three sons of Noah the nations spread abroad on the earth after

the flood, and, in time, to His favored nation God gave the law, and with it, again, the specific prohibition of murder: "Thou shalt not kill." God gave men the law, but, in fashioning them in His own image, He also made them aware of themselves and of their interests, and endowed them with reason, whereby they might know good and evil, and with passions--anger, for example, and envy--and thereby made it both possible and likely that they would break the law. Perhaps it would be more accurate to say that He endowed them with these qualities and therefore found it necessary to give them the law to guide and restrain them. But men have never ceased to kill their own kind. They have killed in war, they have killed in anger or out of envy for gain and they have enacted their own laws authorizing them to kill those who violate the laws of God or what they understand to be the laws of God. In doing these things--even, it is insisted, the last of them--they have violated God's law which forbids all killing of men, even that done under the authority of law. This is the first argument against capital punishment; it is first because if it is accepted there need be none other.

Of course, the Biblical texts leave some doubt as to this, to say the least. The question is whether in giving the law to Moses and the Jewish nation, God also gave them the authority to punish infractions of the law. God commands us not to kill, but the context suggests that this commandment, like the others forbidding theft and adultery, for example, and false testimony, is addressed to the individual person rather than to the legal community. God was addressing the legal community, or would appear to have been doing so, when He said (Leviticus 24:17), "And he that killeth any man shall surely be put to death," and most emphatically when He said (Numbers 35:31), "ye shall take no satisfaction [or ransom] for the life of a murderer, which is guilty of

death: but he shall be surely put to death." Even so, there have been those who argue that these passages are susceptible to other interpretations; the Genesis passage ("whoso sheddeth man's blood, by man shall his blood be shed") has been said to be a prediction, rather than an authorization to the legal community to impose the penalty of death on murderers, a prediction that acknowledges that men will frequently shed the blood of other men even though they are forbidden to do so. The other passages are more troublesome for the opponents of capital punishment, which may explain why one of them shifts the argument from what the Bible says to what Judaism or Jewish law said. Jewish law certainly provides for the death penalty. Whoever curses his father or mother is to be stoned, for example, and stoned to death if "he curses them by one of the special names (of God)"; and the law commands a Jew to mourn for deceased relatives, but no mourning is to be observed "for those who have been condemned to death by the court...."* But the argument is made that Jewish law placed so many restrictions on the trial of capital cases that it became "virtually impossible to enforce the death penalty."** But virtually impossible is not absolutely impossible. The state of Israel does not authorize capital punishment except — and the law was adopted with the consent of the religious parties — for the likes of Eichmann.

Some Christian writers point to Jesus' declaration that He had not come to abolish the law but to fulfill it (Matthew 5:17), and insist that He amplified His meaning when, in verses 21-2, He added that "whoever kills shall be liable to judgment." This, they say, includes the judgment of capital punishment. But the text does not say this. Besides, as opponents of the death penalty say, Christians should forgo quoting "this or that verse," and

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* The Code of Maimonides (Mishneh Torah) (New Haven: Yale University Press, 1949), Book XIV (The Books of Judges), pp. 150-151, 163.

** Israel J. Kazis, "Judaism and the Death Penalty," in Hugo Adam Bedau (ed.) The Death Penalty in America (Garden City, N.Y.: Doubleday and Co., 1967), p. 172.

examine the Bible, and especially the New Testament, for its "total message." Whoever does this cannot fail to see the call for love, for a compassionate concern with the lives of our fellow human beings. As Jesus said (Matthew 22:37-9): "Thou shalt love the Lord thy God with all they heart, and with all thy soul, and with all thy mind. This is the first and great commandment. And the second is like unto it, Thou shalt love thy neighbor as thyself." It is argued that the Christian who follows this commandment and models his life on the life of Jesus will purge his heart of all thoughts of vengeance and will ask himself, "What can be done, if anything, to redeem this man and to restore his maimed or brutalized humanity?" The Christian will know that "Cain as well as Abel is made in the image of God," and, rather than put them to death, Christian nations will design correctional institutions whose purpose is to reform or redeem the Cains among them.*

Yet, Christian churchmen, even in our own time, are divided on capital punishment. Asked by a British Royal Commission to express the views of the Church, Templeton, Archbishop of Canterbury, said Christians must oppose it, unless an overwhelming case can be made out for its power to deter the commission of murders, and this he doubted; but his successor, Dr. Fisher, said it was a question that each man must decide for himself; the Bible provided no answer.** Perhaps we must leave it at that, except to point out that, historically, Christian nations seem to have followed Matthew 18:6, 7, where Jesus said: "But whoso shall offend one of these little ones which believe in me, it were better for him that a millstone were hanged around his neck, and that

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*Charles S. Milligan, "A Protestant's View of the Death Penalty," in Bedau, ibid., pp. 177-8, 180.

**Sir Ernest Gowers, A Life for a Life? The Problem of Capital Punishment (London: Chatto and Windus, 1956), pp. 46, 48.

he were drowned in the depth of the sea." Then, in a passage that Lincoln was to quote in his Second Inaugural: "Woe unto the world because of offences! for it must needs be that offences come; but woe to that man by whom the offence cometh!" Christian nations have not hesitated to be the agents by which those who offend against those who believe in Him are hanged by the neck, burned at the stake, broken on a wheel or (although not so frequently) drowned in the depth of the sea. In fact, the first avowed and forthright argument against the death penalty was written by a man who was horrified by the legal practices of Christian nations. Opposition to capital punishment was born out of liberalism, and liberalism was born in the seventeenth century in reaction to the politics of nominally Christian Europe and, especially, nominally Christian Britain.

The civil war there began when Charles I and Archbishop Laud tried to force episcopacy and the Book of Common Prayer on the Scots; both Charles and Laud were to lose their heads when they lost the war they began, and the men who executed them were pious Christians. From among them, or representing only too well one aspect of their souls, came Titus Oates who told stories about Popish plots. They were false stories, but because he told them before public officials and was believed many a Roman Catholic was hanged. Within a few years he himself was to suffer horribly for his false testimony. Since his offense was not a felony in the eyes of the law but only a misdemeanor, Oates could not be sentenced to death; instead, he was pilloried, whipped from Aldgate to Newgate, then, after a two-day interval, whipped again--1700 times, according to someone who counted--from Newgate to Tyburn. Miraculously, he survived this and was imprisoned. Those who governed ~~in those times~~ at that time were ruled by terrible passions. Even the purest and most moderate of men became

their victims: Richard Baxter, for example. Baxter had been a chaplain in the Parliamentary Army, yet he concurred in the Restoration that brought Charles II to the throne; Charles even offered to make him a bishop. But he complained of the persecution suffered by the Dissenters, and for this he was brought to trial by James, Charles' brother and successor. To defend Dissenters who had been persecuted for not using the Prayer Book was itself a crime, a libel on the Church of England. He was tried before the Chief Justice, George Jeffreys by name, and denounced as a rogue, a schismatical knave, a hypocritical villain who hated the Liturgy and "would have nothing but long-winded cant without book." He was of course convicted. At the same time James's Scottish parliament enacted a law that punished with death anyone who "should preach a conventicle under a roof, or should attend, either as a preacher or as hearer, a conventicle in the open air." Men and women were put to death simply for refusing to renounce their religion and attend Episcopal services. Here is Macaulay's account of the deaths of two Scotswomen, Margaret Maclachlan and Margaret Wilson, the former an aged widow and the latter a girl of eighteen:

> They were offered their lives if they would consent to abjure the cause of the insurgent Covenanters, and to attend the Episcopal worship. They refused; and they were sentenced to be drowned. They were carried to a spot which the Solway overflows twice a day, and were fastened to stakes fixed in the sand, between high and low water mark. The elder sufferer was placed near to the advancing flood, in the hope that her last agonies might terrify the younger into submission. The sight was dreadful. But the courage of the survivor was sustained by an enthusiasm as lofty as any that is recorded in martyrology. She saw the sea draw nearer and nearer, but gave no sign of alarm. She prayed and sang verses of psalms till the waves choked her voice. When she had tasted the bitterness of death she was, by a cruel mercy, unbound and restored to life. When she came

> to herself, pitying friends and neighbours implored her to yield. "Dear Margaret, only say, God save the King!" The poor girl, true to her stern theology, gasped out, "May God save him, if it be God's will!" Her friends crowded round the presiding officer. "She has said it; indeed, Sir, she has said it." "Will she take the abjuration?" he demanded. "Never!" she exclaimed. "I am Christ's; let me go!" And the waters closed over her for the last time.*

This was in 1685, and in the same year Richard Rumbold, sentenced to be hanged and quartered for his part in the Earl of Argyle's rebellion against James, stood under the gibbet and, although too weak to stand unaided, summoned enough strength to denounce Popery and tyranny and to utter words that Jefferson would later make famous in America: "He was a friend, he said, to limited monarchy. But he never would believe that Providence had sent a few men into the world ready booted and spurred to ride, and millions ready saddled and bridled to be ridden"--to which Jefferson appended, "by the Grace of God."** Macaulay's summary statement on all this deserves to be quoted:

> From the commencement of the civil troubles of the seventeenth century down to the Revolution [of 1688], every victory gained by either party had been followed by a sanguinary proscription. When the Roundheads triumphed over the Cavaliers, when the Cavaliers triumphed over the Roundheads, when the fable of the Popish plot gave the ascendency to the Whigs, when the detection of the Rye House Plot transferred the ascendency to the Tories, blood, and more blood, and still more blood had flowed. Every great explosion and

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*Thomas Babington Macaulay, History of England, (Leipsig: Bernh. Tauchnitz, 1849) vol. 2, ch. 4.

**Ibid., Cf. Jefferson to Roger C. Weightman, June 24, 1826. Works (Federal ed.), vol. XII, p. 477.

> every great recoil of public feeling had been accompanied by severities which, at the time, the predominant faction loudly applauded, but which, on a calm review, history and posterity have condemned.*

It is not strange that Hobbes and Locke, who lived through much of this time, sought a new foundation for politics and found it in the rights of man, or that the first and most famous opponent of capital punishment was a Hobbist. Perhaps the most telling argument against a Biblical case for abolishing capital punishment is to be found in the actual practice of those countries that claimed to be governed by principles derived from the Bible; and it is not insignificant that the Biblical argument does not appear until these countries had been refounded on other principles, principles that are profoundly anti-Biblical. Opposition to capital punishment is a species of liberalism, but the original thrust of liberalism was liberty against theologically excessive regimes. Liberals were usually anti-Christian. There is, therefore, some reason to believe that those who rely on the Bible to make a case against capital punishment are persuaded of its illegality, impropriety or unnecessity mainly by other considerations.

2. The Natural Public Law Argument

The campaign to abolish the death penalty was begun only in 1764 by Cesare Beccaria in one chapter of his unusually influential book, On Crimes and Punishments, and with its publication, Beccaria achieved instant fame, being hailed throughout Europe, invited to Paris by the Abbé Morellet and praised by Voltaire as the first man to apply the principles of the new physical and moral sciences — the principles of the Enlightenment — to crime and its treatment.

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* Macaulay, op. cit., vol. 5, ch. 15.

His reforms required much more than a revision of a criminal code; they required a new order of state, a state founded on new principles and a state from which the church's influence would be excluded. There are three classes of virtue and vice according to Beccaria, the religious, which are derived from revelation; the natural, which are derived from natural law; and the political, or conventional, which are derived "from the expressed or tacit compacts of men."* They need not be in contradiction, he says, but what is derived from one need not be derived from another; and, more to the point he is about to make, what is enjoined by one is not necessarily enjoined by the others. His point is that the law should enjoin only what is derived from the third, "the expressed or tacit compacts of men," and he thinks that enlightened men will not make a tacit compact ratifying all the laws of Moses, for example. He makes an effort to conceal the implications of this, and thereby to avoid proscription by the Church, by disingenuously declaring that since he is going to speak only of the third class of virtues and vices, he cannot be said to adopt principles "contrary either to natural law or revelation";** but, of course, the Church was not deceived, and would have been unusually obtuse to have been deceived. In a later chapter Beccaria says the laws, and only the laws, form "the basis of human morality."*** Wise governments do not punish "wholly imaginary crimes," but neither do they tolerate "fanatical sermons" that disturb the public tranquility. Wise governments allow citizens to do anything "that is not contrary to the laws, without having to fear any other inconvenience than that which may result from the action itself"; the laws of a just state will be built on self-interest, the

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* Cesare Beccaria, On Crimes and Punishments (Indianapolis: The Library of Liberal Arts, 1963, Henry Paolucci trans.), p. 5.

** Ibid.

*** Ibid., p. 41.

only solid foundation, and not on false opinions or the false idea of utility that causes men to ignore present interests "in order to strengthen distant ones." In fact, the wise government will see to it that men will not be distracted by imaginary things, because the "more respect men have for things beyond the laws, the less can they have for the laws themselves." This, he says, is a principle from which the "wise administrator of public happiness may draw useful consequences"; and he adds coyly that he would expound them himself, except that this would take him "too far from [his] subject." But his meaning is clear enough without this further exposition; as he says in his penultimate chapter, the laws should not be concerned with "indifferent acts"--chief among which is heresy, which he disguises behind the label, "a particular kind of crime." The wise government will not punish its Margaret Maclachlans and Margaret Wilsons. By teaching its citizens to "fear the laws and fear nothing else," it will rid itself of those who would punish ~~them~~ these religious enthusiasts and, indeed, rid itself of the likes of them. In a word, On Crimes and Punishments calls for the liberal state, and the liberal state requires, to use the term made popular in our day, a massive decriminalization.* The Church put the book on the Index librorum prohibitorum.

In the preface, or epistle dedicatory, to the second edition of the book, Beccaria complains that a good part of Europe in the eighteenth century was still living under laws that were "the dregs of utterly barbarous centuries" and were unfit for the men of his time. They ought to avail themselves of the scientific discoveries that had recently been made, specifically of the discoveries made by the new political science, which is a science of sovereignty

*Ibid., pp. 78, 67, 88, 81, 84, 86, 94.

and the powers appropriate to it. The natural condition of men is one of complete liberty, but it is a liberty "rendered useless by the uncertainty of preserving it" in the state of nature, which, he says echoing Hobbes, is "a continual state of war."* To preserve as much of it as possible, men sacrifice a portion of their liberty to the sovereign power they create by their agreement one with another and endow this sovereign with powers, including the power to make laws and to punish their infractions.

He begins his chapter on the death penalty by denying that the sovereign is endowed with the power to impose the punishment of death, and here he departs radically from Hobbes.** "What manner of right," he asks, "can men attribute to themselves to slaughter their fellow beings?" None at all, he answers; certainly none that derives from the contract "from which sovereignty and the laws derive." From this contract, or the agreement each man makes with the others to yield a portion of his natural liberty, comes the general will, and the general will is nothing but the "aggregate of particular wills." And there never was a man "who can have wished to leave to other men the choice of killing him." Such a power was never handed over to the sovereign; it could not be handed over to the sovereign because no man has the power in the first place, he says. No man is entitled to take his own life; therefore, he cannot entitle another to take it from him, or for him.***

This legal, or natural public law,**** argument provoked a response by a famous

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*Beccaria, On Crimes and Punishments, p. 11.

**Hobbes, Leviathan, II, ch. 21. "And therefore it may, and doth often happen in commonwealths, that a subject may be put to death, by the command of the sovereign power. . . ."

***Beccaria, On Crimes and Punishments, p. 45.

****Natural public law is the doctrine according to which rights are assigned to the "sovereign" on the basis of natural law, and this assignment is understood to be valid or legitimate regardless of time or place. See Leo Strauss, Natural Right and History (Chicago: The University of Chicago Press, 1953), pp. 190-191.

public law philosopher, Kant, in the first part of his Metaphysic of Morals:

> . . .the Marquis of Beccaria, moved by sympathetic sentimentality and an affectation of humanitarianism, has asserted that all capital punishment is illegitimate. He argues that it could not be in the original civil contract, inasmuch as this would imply that every one of the people has agreed to forfeit his life if he murders another (of the people); but such an agreement would be impossible, for no one can dispose of his own life.*

But, Kant continues, no one suffers punishment because he has willed it; it is impossible to will to be punished because if what happens to someone is "willed" by him, it cannot be a punishment. What the criminal wills is the punishable action, that is, the crime he voluntarily commits. Beccaria confuses this person who, as subject, is punishable by the penal law, with the juridical person who, as a legislator, or "colegislator," is author of the penal law. These are two persons, Kant says, and Beccaria confuses them. The person who gives himself laws is not the same person who obeys them.

Still, if we ignore the Kantian perspective in which it is appropriate to speak of the two persons of man, and return to the Hobbean perspective in which Beccaria wrote, we must concede that Beccaria is not altogether wrong to insist that there is no right in the sovereign to take a citizen's life. If civil society is founded on the natural right of self-preservation, it can "hardly demand from the individual that he resign that right. . .by submitting to capital punishment," as Leo Strauss puts it.** Hobbes concedes as much when he says that a man who is justly and legally condemned to death nevertheless

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*The Metaphysical Elements of Justice (Library of Liberal Arts, 1965. Ladd trans.), pp. 104-5.

**Leo Strauss, Natural Right and History (Chicago: The University of Chicago Press, 1953), p. 197.

retains the right to defend himself; indeed, he retains the right to kill his guards or anyone else who would prevent him from escaping.* In conceding this, Hobbes admits that there is an insoluable conflict between the right of the sovereign (who represents the will of all) and the natural right of the individual to self-preservation. "This conflict," Strauss says, "was solved in the spirit, if against the letter, of Hobbes by Beccaria, who inferred from the absolute primacy of the right of self-preservation the necessity of abolishing capital punishment."** It was solved against the letter of Locke: "Political power, then, I take to be a right of making laws with penalties of death, and consequently all less penalties...."*** It was solved against the letter of Rousseau: "How can individuals, who have no right whatever to dispose of their own lives, yet convey this non-existent right to the sovereign?" He answers that the question "looks difficult only because it is badly put." His answer to the question correctly put is that the purpose of the social contract is the preservation of the contracting parties, and he "who wills this end wills the means also...."**** It was solved against the letter of Montesquieu, whom Beccaria acknowledges to be one of his teachers: "But in moderate

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* Hobbes, Leviathan, II, 21.

** Strauss, Natural Right and History, p. 197.

*** Locke, Second Treatise of Civil Government, ch. 1.

**** Rousseau, Social Contract, Book II, ch. 5. See also Book IV, ch. 8.

governments...no man is bereft of life till his very country has attacked him —an attack that is never made without leaving him all possible means of making his defence."* It was solved against the letter of even John Stuart Mill, one of the great names in the liberal tradition to which Beccaria belongs.** Indeed, no political philosopher before or after Beccaria, with the qualified exception of Bentham, *** has opposed the death penalty as such, although some have

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* Montesquieu, The Spirit of the Laws, Book VI, ch. 2. See also Book XI, ch. 6

** Mills's views on the death penalty are contained in a speech delivered in the House of Commons on April 21, 1868. Parliamentary Debates (House of Commons), 3rd series, vol. 191 (London: Cornelius Buck, 1868), columns 1047-1055.

*** Bentham wavered on the issue, finally coming out in opposition. See Jeremy Bentham, The Rationale of Punishment. The Works of Jeremy Bentham, ed. John Bowring (London: 1843), vol. 1, pp. 525-532.

opposed its imposition for some (in fact, for most) crimes.*

Rather than to rely on Biblical exegesis, Beccaria would abolish capital punishment by building a political order that does not recognize the relevance of the Bible and, not to speak periphrastically, derives from principles that are incompatible with the Bible. Like the man who established the tradition of which he is a part, Beccaria recognizes that life in the pre-liberal state, like life in the state of nature, is only too likely to be "solitary, poor, nasty, brutish and short." Whether paradoxical or only seemingly so, the politics of nominally Christian Europe was not one of peace, love or compassion; on the contrary, it was a politics of crusades, religious wars, religious civil wars; of persecution, proscription, banishment, hanging, drawing and quartering. It was a politics not of love--it made a mockery of Christ's admonition to love one's neighbors as oneself--but of hate; it bred not heroes but martyrs and, their complements, tyrants. In men like Titus Oates and George Jeffreys, who bragged that he had hanged more traitors than

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*Marc Ancel in "The Problem of the Death Penalty," in Sellin, Capital Punishment (New York: Harper & Row, 1967), p. 257, claims that Thomas More, in his Utopia, opposes the death penalty. He is mistaken. Utopia is a dialogue and, like those of Plato's on which it is modelled, it is made up of speeches by characters and in specific settings. The argument against the death penalty is advanced in Book I by the character, Raphael, to an English lawyer and in the presence of a cardinal of the church, the Archbishop of Canterbury. Without at all entering into More's meaning, it is enough to say that Raphael, a few pages later in Book I, praises the penal laws he observed in the country of the "Polyerits," and these laws imposed the death penalty for various crimes. In Book II, Raphael describes the laws and the "wise and good constitution" of the Utopians, among whom, he says, he lived for five years. Those laws prescribe, e.g., that those who are guilty of adultery and, having been pardoned by the Prince, relapse, "are punished with death." More's teaching cannot be understood from these speeches alone, but if Ancel refers to one speech, he is obliged to take account of the speeches that contradict that one.

all his judicial predecessors together, it inspired and used the meanest and ugliest of the passions. "Dost thou believe that there is a God?" Jeffreys asked Alice Lisle, "Dost thou believe in hell fire? . . . Show me a Presbyterian, and I'll show thee a lying knave. . . . Oh blessed Jesus! What a generation of vipers do we live among!" Let the prisoner be burned alive that very afternoon. All this from the bench; from the Chief Justice soon to become Lord Chancellor, the highest law officer of the realm. No wonder men were led to seek relief in a politics that made self-preservation the first of the rights of man. Professor Sellin recognizes the role played in this by Beccaria when he says that "since the publication of Crimes and Punishments, the struggle about [the death penalty] has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man. . . ."*

3. The Argument Respecting Dignity of Man

Beccaria deplored the impression caused by the spectacle that attended public executions; a barbaric practice, it could only provide an example of barbarity made more pernicious by clothing it in the formalities and solemnities of law. This was proved by the behavior of the mobs witnessing the spectacle, but nothing said by Beccaria in his thematic treatment of the subject approaches the description provided by Mandeville, writing in 1725, of the scene attending the progression of the condemned man from Newgate to Tyburn, the place of execution in London:

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*Thorsten Sellin, The Death Penalty (A Report for the Model Penal Code Project of the American Law Institute, Philadelphia, 1959), p. 15.

> At last, out they set; and with them a Torrent of Mob bursts through the Gate. Amongst the lower Rank, and working People, the idlest, and such as are most fond of making Holidays, with Prentices and Journeymen to the meanest Trades, are the most honourable Part of these floating Multitudes. All the rest are worse. The Days being known before-hand, they are a Summons to all Thieves and Pickpockets, of both Sexes, to meet. Great Mobs are a Safeguard to one another, which makes these Days Jubilees, on which old Offenders, and all who dare not shew their Heads on any other, venture out of their Holes; and they resemble Free Marts, where there is an Amnesty for all Outlaws. All the way, from Newgate to Tyburn, is one continued Fair, for Whores and Rogues of the meaner Sort. Here the most abandon'd Rakehells may light on Women as shameless: Here Trollops, all in Rags, may pick up Sweethearts of the same Politeness: And there are none so lewd, so vile, or so indigent, of either Sex, but at the Time and Place aforesaid, they may find a Paramour. . . . Now you see a Man, without Provocation, push his Companion in the Kennel; and two Minutes after, the Sufferer trip up the other's Heels, and the first Aggressor lies rolling in the more solid Mire: And he is the prettiest Fellow among them, who is the least shock'd at Nastiness, and the most boisterous in his Sports. *

Such a scene--and this is only a sample of Mandeville's description--is a travesty of the law and its putative purposes: the most debased citizens disporting themselves on the occasion of the killing of one of them, while he, fortified by liquor, strikes a pose of false courage, shaking their hands and joining in their revelry. It would be hard to imagine a more inhuman scene, or one so lacking in the dignity that ought to attend human affairs--and all this promoted by the offices of law. It is not by chance that in the course of time it became necessary to hide executions from the public's eye. Men

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* Bernard Mandeville, An Enquiry into the Causes of the Frequent Executions at Tyburn (London, 1725), p. 20.

cannot witness the lopping off of heads or the breaking or stretching of necks without becoming less human as a result. What, asks Beccaria, are the sentiments of each and every man about the death penalty? "Let us read them in the acts of indignation and contempt with which everyone regards the hangman. . . ."* It was an outraged public that, in our own time, finally succeeded in forcing the authorities to conceal the hangman and his work behind the forbidding walls of institutions; but the effect of this concealment was to prolong the practice of capital punishment.

Albert Camus makes much of this point. Not only do modern western societies conceal their executions behind walls, but they conceal the horror of executions behind the euphemisms employed to describe the practice and its victims. They speak of the "condemned paying his debt to society" and refer to him as the "patient" or the "interested party." In this way words are emptied of their meaning and the imagination allowed to sleep. "But if people are shown the machine [the guillotine], made to touch the wood and steel and hear the sound of a head falling, then public imagination, suddenly awakened, will repudiate both the vocabulary and the [death] penalty."** To the extent that this is possible, his words force us to touch that wood and steel and hear that sound. Consider:

> Instead of vaguely evoking a debt that someone this very morning paid society, would it not be a more effective example to remind each taxpayer in detail of what he may expect? Instead of saying: "If you kill, you will atone for it on the scaffold,"

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*Beccaria, On Crimes and Punishments, p. 50.

**Albert Camus, "Reflections on the Guillotine," in Resistance, Rebellion, and Death (New York: Alfred A. Knopf, 1961), p. 177. Translated from the French with an introduction by Justice O'Brien.

> wouldn't it be better to tell him, for purposes of example: "If you kill, you will be imprisoned for months or years, torn between an impossible despair and a constantly renewed terror, until one morning we shall slip into your cell after removing our shoes the better to take you by surprise while you are sound asleep after the night's anguish. We shall fall on you, tie your hands behind your back, cut with scissors your shirt collar and your hair if need be. Perfectionists that we are, we shall bind your arms with a strap so that you are forced to stoop and your neck will be more accessible. Then we shall carry you, an assistant on each side supporting you by the arm, with your feet dragging behind through the corridors. Then, under a night sky, one of the executioners will finally seize you by the seat of your pants and throw you horizontally on a board while another will steady your head in the lunette and a third will let fall from a height of seven feet a hundred-and-twenty-pound blade that will slice off your head like a razor."*

He then insists that we read the testimony of attending physicians as to the flow of blood, the contraction and fibrillation of the muscles and even the blinking of an eye in a severed head. His purpose is not to recreate the sort of debasement that characterized the executions at Tyburn, but rather, by appealing to our most humane sentiments, to cause us to blanch at the sight of cruelty, to see the penalty of death for what it is, and thereby to hasten the day of its abolition. He would have the French government erect the guillotine on a platform in the Place de la Concorde and invite the public as witnesses, and televize the ceremony for the benefit of those who cannot attend in person. Then the public, made more gentle by life under the liberal and liberalizing regimes that have governed Western men since the days of Tyburn, will demand abolition of the practice; then the public will reject the counsel of the "retentionists," whom Arthur Koestler calls the "hang-hards,"

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*Ibid., p. 182.

whose appeal is only to "ignorance, traditional prejudice and repressed cruelty."* Capital punishment, it is said, has always been associated with barbarism, and when it is exhibited to the civilized men of our time, they will abolish it as inconsistent with their ideas of "the sanctity of life, the dignity of man, and a humane criminal law."** They will, with Koestler, see the gallows as not merely a machine of death but "the oldest and most obscene symbol of that tendency in mankind which drives it towards moral self-destruction."***

It is necessary that the American Constitution forbid the infliction of cruel and unusual punishments; such a provision is required by the principles on the basis of which the country was built. Liberalism aimed at the relief of man's estate on this earth--not the estate of one man or the estates of a favored class, but of all men--and it required a greater respect for individual autonomy and, it is insisted, dignity. The establishment of the United States was a milestone in the growing civilization of the world; as the motto on its Great Seal still proclaims, it was a novus ordo seclorum, a new order of the ages, and, as such, it would, because it must, abolish all traces of the barbarism that in the past disgraced too many / lands. The barbaric punishments of the past--"punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like"****--are not only painful but, as Justice Brennan points out, to be condemned because "they

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*Reflections on Hanging (London: Victor Gollancz, Ltd., 1956), p. 164.

**Michael Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment (New York: William Morrow & Co., Inc., 1974), p. 181.

***Koestler, Reflections on Hanging, pp. 7-8.

****O'Neil v. Vermont, 144 U.S. 323, 339 (1892).

treat members of the human race as nonhumans, as objects to be toyed with and discarded." They are, therefore, cruel and unusual in the sense of the constitutional clause, because that clause recognizes "that even the vilest criminal remains a human being possessed of common human dignity."* It grants no leave to the terrible desire to inflict pain or to witness the torments suffered by other human beings; it forbids punishments that are degrading to the dignity of human beings, degrading both to those who suffer them and to those who inflict and witness them. And it is insisted that the penalty of death belongs in this category of forbidden punishments, for, whatever the method of execution, it degrades victim and executioner alike. What sort of a person is it who / willingly chooses to be the hangman? Who, in our day, willingly chooses to witness the performance of his grisly work?

Finally, who, in our day, opposes the death penalty? The answer given is eminent jurists, criminologists, theologians, academicians of a variety of disciplines, world famous men of letters, and the American Civil Liberties Union, the NAACP Legal Defense Fund, the American Society for the Abolition of Capital Punishment, and Citizens Against Legalized Murder, Inc.** Who, in our day, favors it? The answer given is the brutes, the ignorant and the fearful; to favor it is to reveal "doctrinaire, dogmatic, unempirical, and irrational convictions immune to any argument."*** This, it is said, is characteristic of the police who insist that, however harsh or even inhumane, it is the only punishment capable of deterring murder.

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*Furman v. Georgia, 408 U.S. 238, 272-3 (1972).

**See, e.g., Meltsner, Cruel and Unusual, p. 181.

***Hugo Adam Bedau, "Foreword," in William J. Bowers, Executions in America (Lexington, Mass.: D.C. Heath and Co., 1974), p. xx.

4. The Deterrence Argument

The purpose of punishment, according to Beccaria, "can only be to prevent the criminal from inflicting new injuries on . . . citizens and to deter others from similar acts."* Incapacitation and deterrence are the ends and, to the extent possible, mildness should characterize the means of achieving them. Severity--or as he puts it in the following chapter, "gradations of intensity" beyond what is needed "to deter men from committing crimes"--is unjust; and he is of the opinion that, on the whole, criminals can be deterred by the threat of punishments much milder than those being imposed. The death penalty was being imposed for a variety of crimes and, in his opinion, it was unnecessary, even for the most awful of them. A long prison sentence--if necessary, a "whole lifetime . . . spent in servitude and pain"--is sufficient to deter, and what is sufficient to deter and no more is just. Unable to prove that imprisonment is a sufficient deterrent--he was writing long before the time of empirical social science--he points to countries where, for a time, the death penalty was not imposed, and he was satisfied that the murder rate had not increased there. In this fashion, Beccaria originated the most frequently-used argument against the death penalty, namely, that it is unnecessary.

He did not begin with it--he began with the argument that civil society was not authorized to take human life--but he used it to buttress his case. In itself the argument is not compelling--a practice might be unnecessary and yet be innocuous--but when combined with the argument concerning the illegality of the death penalty, it acquires considerable force. Police are employed to prevent the commission of crimes and to catch criminals, and if prosecutors, criminal trials, prisons and executions are employed only to

*Beccaria, On Crimes and Punishments, p. 42.

prevent further offenses by those we catch up in this system and to deter others, and if these purposes can be as readily accomplished by prison terms as by executions, then the case for abolition would seem to have been made. So in our day the abolitionists do not begin with the deterrence argument, but resort to it in order to meet the assertion of the "retentionists" that death is the only penalty sufficient to deter heinous crimes, especially murder. If this can be shown not to be true, the case against abolition would seem to have been destroyed. The abolitionists have devoted a good deal of energy to the task of demonstrating that the death penalty is unnecessary, that, when weighed with the possible alternatives--for example, life imprisonment--it has no differential effect as a deterrent.

Most students of the question have been persuaded by social science studies that "the ineffectiveness of the death penalty as a deterrent to murder has been demonstrated convincingly."* The point is made that the rate of homicides varies from place to place and from time to time, but that the imposition of the death penalty rather than a long-term prison sentence is not a factor in these variations, or, at a minimum, has not been shown to be a factor. To this the abolitionists have testified in hearing after hearing, trial after trial, and investigation after investigation. In what is surely the most influential study of deterrence, a study cited favorably by a number of governmental commissions, here and abroad, Thorsten Sellin compares the homicide rates in contiguous states, some with and some without the death penalty, and finds no significant differences among them in the number of homicides per 100,000 population. He then examines the murder rate within

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*William Bailey, "Murder and the Death Penalty," The Journal of Criminal Law and Criminology, vol. 65 (September, 1974), p. 416.

single states before and after abolition of the death penalty, and again finds no difference. He concludes that "the death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crimes."* Other social scientists have found similar results. They have tested the retentionists' proposition that the death penalty is a superior deterrent to life imprisonment for criminal homicide, and, even if it cannot be said that the proposition has been disproved, it can be said that it has not been confirmed; in fact, one authority insists that it has been "disconfirmed" by the uniformity or consistency of the findings published.** This is sufficient to support their case for abolition: to deter criminal homicide it is not necessary to resort to this ancient and barbaric practice. Nevertheless it bears repeating that however much the modern debate on capital punishment has focussed on the deterrence issue, the abolitionists do not rest their case on their findings that show it has no differential deterrence capacity. Victor Gollancz makes this point as well as any of them:

> If I believed the opposite of what I do believe; if I believed it established, beyond the possibility of a doubt, that the death penalty is preventive of murder as nothing else could be; if--I am anxious to put my case in as extreme a form as possible, so that nobody can misunderstand me--if I felt certain that abolition would immediately be followed by a startling increase in the numbers of murders: I should still say, and say with undiminished conviction, that the most urgent of all tasks which confront us, or could

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*Thorsten Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute (Philadelphia, 1959), p. 63. His conclusions have been stated in a more guarded fashion elsewhere.

**Hugo Adam Bedau, "Deterrence and the Death Penalty: A Reconsideration," Journal of Criminal Law, Criminology and Police Science, vol. 61 (1970), pp. 546-7.

confront any people that had a care for religious or humane values, is the ending of capital punishment.*

5. The Constitutional Argument

We Americans have debated the morality and necessity of the death penalty throughout almost the entire period of our experience as a nation, and, until 1976 when the Supreme Court ruled in favor of its constitutionality,** it had been debated among us in constitutional terms, which is not true elsewhere. The Eighth Amendment clearly and expressly forbids the imposition of "cruel and unusual punishments," a prohibition that applies now to the states as well as to the national government, and, it was argued, the death penalty was such a punishment.

It is, of course, incontestable that the death penalty was not regarded as cruel and unusual by the men who wrote and ratified the Amendment. They may have forbidden cruel and unusual punishments but they acknowledged the legitimacy of capital punishment when, in the Fifth Amendment, they provided that no person "shall be held for a capital . . . crime, unless on a presentment or indictment of a Grand Jury," and when in the same amendment they provided that no one shall, for the same offense, "be twice put in jeopardy of life or limb," and when, in the Fifth as well as in the Fourteenth Amendment, they forbade, not the taking of life, but the taking of life "without due process of law." We also know that the same Congress which proposed the Eighth Amendment also provided for the death penalty in the first Crimes Act.*** Even

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*Victor Gollancz, Capital Punishment: The Heart of the Matter (London: Victor Gollancz, 1955), p. 7. Italics in original.

**Gregg v. Georgia, 96 S.Ct. 2909 (1976).

***"An Act for the Punishment of Certain Crimes Against the United States," 1 Statutes-at-Large 112 (April 30, 1790).

Jefferson favored the death penalty for murder and treason,* and Washington, despite powerful entreaties, could not be persuaded to commute the death sentence imposed on Major André, the British officer and spy involved in Benedict Arnold's treachery. So the death penalty can be held to be cruel and unusual in the constitutional sense only if it has somehow become so in the passage of time.

Until recently the Supreme Court had invalidated punishments under this clause only on the ground of inappropriateness: in 1910, the Court held it to be inappropriate and therefore cruel to sentence a man convicted of fraudulent practices to fifteen years imprisonment at hard labor and to be chained, wrist to ankle, during twelve years of this sentence, and to be permanently deprived of some of his civil rights.** In a sense, this means that the Eighth Amendment requires the punishment to fit the crime. But this is not the only respect in which a punishment may be cruel and unusual: some punishments are intrinsically so, irrespective of the crimes for which they are inflicted, and would have been so regarded by the authors of the Amendment. Drawing and quartering and disemboweling serve as examples of such punishments. But the fact that such punishments were once usual shows that opinions of cruel and unusual vary from place to place and time to time. A practice that was once acceptable even in America--ear-cropping comes to mind--is probably unacceptable today. In 1958 the Supreme Court recognized this when it held loss of citizenship to be a cruel and unusual punishment.*** Not only

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*Jefferson, "Outline of a Bill for Proportioning Crimes and Punishment," The Papers of Thomas Jefferson, ed. Boyd (Princeton: Princeton University Press, series in progress), vol. 2, pp. 663-4.

**Weems v. United States, 217 U.S. 349 (1910).

***Trop v. Dulles, 356 U.S. 44 (1958).

did it so hold, but it said that the meaning of cruel and unusual depends on "the evolving standards of decency that mark the progress of a maturing society." Surely, it is argued, hanging or electrocution or gassing are, in our day, regarded as equally cruel, if not more cruel than expatriation.* Is it not relevant that the American people have insisted that executions be carried out by more humane methods and that they not be carried out in public and that the penalty be imposed for fewer and fewer crimes, and that juries have shown a tendency to refuse to convict for capital crimes? In these ways the people are merely demonstrating what has been true for centuries, namely, that, when given the opportunity to act, the average man (as opposed to judges and vindictive politicians**) will refuse to be a party to legal murder.

One of the familiar facts about English juries during the period when the death sentence was mandatory for scores of felonies was their tendency to go to great lengths to avoid having to convict for a capital crime. If, for example, it was a capital crime to steal property valued at 40 or more shillings, many a jury solemnly and shamelessly set a value of 39 shillings on property worth much more. The willingness to accept a defense of insanity is merely one of the ways modern juries accomplish the same end. Perhaps the most interesting illustration of this uneasiness in the face of the death penalty is the ancient privilege of benefit of clergy. This privilege had a history in England that extended from the earliest time for which we have records up to the year 1827, when it was finally abolished by Act of Parliament.

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*Arthur J. Goldberg and Alan M. Dershowitz, "Declaring the Death Penalty Unconstitutional," Harvard Law Review, vol. 83 (June 1970), pp. 1787-8.

**Koestler, Reflections on Hanging, p. 27 and passim.

At the time it originated all felonies except petty larceny and mayhem carried the death penalty at common law, but clerics in orders could be tried only in ecclesiastical courts which were not authorized to impose the death penalty for any offense. In the course of centuries, not merely the clergy--the habitum et tonsuram clericalem--but their lay assistants and then anyone who could read and finally, in the eighteenth century, everyone, was eligible to claim the privilege. As might be expected, this development was paralleled by another according to which more and more offenses were made "non-clergyable"; still, throughout most of English history "benefit of clergy" served to moderate the common law's excessively sanguinary schedule of punishments.*

The fact of the matter, or so it is alleged, is that American juries have shown an increasing tendency to avoid imposing the death penalty except on a certain class of offender, who are distinguished not by their criminality but by their race or class. Justice Douglas emphasized this in his opinion in the 1972 capital punishment cases. "One searches our chronicles in vain for the execution of any members of the affluent strata of this society," he said. "The Leopolds and Loebs are given prison terms, not sentenced to death."** The facts in those cases seem to bear him out. William Furman entered a private house at about two a.m. intending to burglarize it. He was carrying a gun. When heard by the head of the household, William Micke, a father of five children, Furman attempted to flee the house. Unfortunately, he tripped over something on the back porch and his gun discharged, hitting Micke through a closed door and killing him. He was quickly apprehended, then tried and

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*See the account provided by Sir James FitzJames Stephen, A History of the Criminal Law of England, (London: 1883; New York: Burt Franklin, n.d.), vol. 1, pp. 458-478.

**Furman v. Georgia, 408 U.S. 238, 251-2 (1972).

convicted. The statute under which he was convicted authorized, but did not mandate, the death penalty when the killing occurred in the course of committing a felony; the jury, empowered to choose between death and life imprisonment, chose death. In the second case, Lucius Jackson, an escaped convict, entered the house of a 21-year-old woman after her husband had left for work; discovered by her hiding in her baby's closet, he threatened her with a scissors and demanded money. A struggle ensued which she lost. Holding the scissors to her throat, Jackson then raped her. Georgia law at this time, 1968, permitted the jury to choose between the death penalty, life imprisonment or "imprisonment and labor in the penitentiary for not less than one year nor more than 20 years." The jury chose death. In the third case, Elmer Branch, a 20-year-old Texan, entered the house of a 65-year-old widow while she was asleep; holding his arm against her throat, he raped her, then stole what little money he was able to find in the house. Texas law provided that a person convicted of rape should be punished by death or life imprisonment or imprisonment "for any term of years not less than five." Once again, the jury chose to impose the death penalty. Such are the facts in these three cases that reached the Supreme Court in 1972. In the light of the sentences imposed, however, the salient facts were these: all three offenders were black and all three victims were white. Death sentences are imposed not out of a hatred of the crimes committed, it is said, but out of a hatred of blacks. Of the 3859 persons executed in the United States in the period 1930-1967, 2066, or 54 percent were black.* More than half of the prisoners now under sentence of death are black. In short, the death penalty, we have been told, "may have served" to keep especially southern blacks "in a position of subjugation

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*Sourcebook of Criminal Justice Statistics - 1974, p. 516.

and subservience."* That in itself is unconstitutional.

6. Conclusion

In the 1972 cases only two of the nine justices of the Supreme Court argued that the death penalty as such, and regardless of the manner of its imposition, is a violation of the Eighth Amendment. Justice Brennan was persuaded by what he saw as the public's growing reluctance to impose it that the rejection of the death penalty "could hardly be more complete without becoming absolute."** Yet, on the basis of his own evidence it is clear that the American people have not been persuaded by the arguments against the death penalty and that they continue to support it for some criminals--so long as it is carried out privately and as painlessly as possible. At the very time he was writing there were more than 600 persons on whom Americans had imposed the sentence of death. He drew the conclusion that the American people had decided that capital punishment does not comport with human dignity and is therefore unconstitutional; but the facts he cited do not support this conclusion. This may explain why his colleague, Justice Marshall, felt obliged to take up the argument.

Marshall acknowledged that the public opinion polls show that, on the whole, capital punishment is supported by a majority of the American people,***

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*William J. Bowers, Executions in America (Lexington, Mass.: D.C. Heath and Co., 1974), p. 165.

**Furman v. Georgia, at p. 300.

***Various Gallup polls, conducted in 1936, 1966, 1969, and 1972, show support for capital punishment by 62, 42, 51 and, finally, 57% of the American people. A Harris poll conducted after Furman v. Georgia showed 59% to be in favor. See Neil Vidmar and Phoebe Ellsworth, "Public Opinion and the Death Penalty," Stanford Law Review, vol. 26 (June, 1974), pp. 1245-1270.

but he denied the validity--or the "utility"--of ascertaining opinion on this subject by simply polling the people. The polls ask the wrong question. It is not a question of whether the public accepts the death penalty, but whether the public, when "fully informed as to the purposes of the penalty and its liabilities would find [it] shocking, unjust, and unacceptable."

> In other words, the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.*

This information, he said, "would almost surely convince the average citizen that the death penalty was unwise. . . . "** He conceded that this citizen might nevertheless support it as a way of exacting retribution, but, in his view, the Eighth Amendment forbids "punishment for the sake of retribution;"*** besides, he said, no one has ever seriously defended capital punishment on retributive grounds. It has been defended only with "deterrent or other similar theories." From here he reached his conclusion that "the great mass of citizens" would decide that the death penalty is not merely unwise but also "immoral and therefore unconstitutional." They would do so if they knew what he knew, and what he knew was that retribution is illegitimate and unconstitutional and that the death penalty is excessive and unnecessary, being no more capable than life imprisonment of deterring the crimes for which it is imposed. He conceded that the evidence on the deterrence issue is not "convincing beyond all doubt, but it is persuasive," he said.**** Thus, the death penalty is cruel and unusual

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* Furman v. Georgia, at p. 362.

** Ibid., at p. 363.

*** Ibid., at pp. 343-4.

**** Ibid., at pp. 358-9.

punishment because the American people ought to think so. Shortly after this thirty-five states enacted new statutes authorizing the death penalty for certain crimes.

This public support for capital punishment is a puzzling fact, especially in our time. It is a policy that has almost no articulate supporters in the intellectual community. The subject has been vigorously debated and intensively investigated by state after state and country after country--California and Connecticut, Texas and Wisconsin, and many others; Britain and Canada, Ceylon and "Europe"; even the United Nations, and, of course, various committees of the Congress of the United States* --and, among those willing to testify and publish their views, the abolitionists outweigh the "retentionists" both in number and, with significant exceptions, in the kind of authority that is recognized in the worlds of science and letters. Yet the Harris poll reports 59 percent of the general population to be in favor of capital punishment, and that proportion is--at this time, at least--increasing.**

Such a phenomenon cannot be attributed to the structure of American society; indeed, there is good reason to believe that in those countries where capital punishment has been abolished by law or allowed to languish in practice, this has been done in the face of evidence that the majority of the people favors the penalty. In 1967, Canada, with a population so similar in the relevant respects to the American, suspended the death penalty for five (and in 1972 for another five) years, but this was done by a free vote in the House of Commons, so that no party could fairly be held responsible for the

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* These are all listed in the comprehensive bibliography printed in William J. Bowers, Executions in America, pp. 403-452.

** A recent Field poll, taken after capital punishment had been judicially abolished in California, found that the proportion of Californians favoring it had increased to 74 percent. (New York Times, March 26, 1975, p. 47.)

measure by the voters; and there was considerable public clamor for its reinstitution. It had been retained as a penalty for those convicted of killing policemen and prison guards, but, against the clear wishes of the public, the government has commuted the sentences of everyone guilty of these capital offenses. No one has been executed in Canada since 1962. In 1976, the Parliament adopted legislation abolishing the penalty for all crimes, yet the Solicitor General, the cabinet official in charge of the administration of justice, and who has said publicly more than once that he would resign rather than sign a death warrant, admitted that a ~~recent~~ contemporary study commissioned by his office disclosed that 80 percent of a national sample of the population favored capital punishment.* Britain abolished it provisionally in 1965 and unconditionally in 1970, but it was done in a private bill and at a time when 79 percent of the British people were in favor of retaining it or "expressed their uncertainty on the abolition question." The bill's sponsor had no illusions about acting with public support; he said that matters of life and death should not be decided on the basis of opinion expressed "on the street corner or in a club or pub."** Similarly, in Canada one of the Solicitor General's advisors on the issue insisted that "uninformed or irrational public opinion is not a justification for bringing back the noose," and he went on to characterize those who want to bring it back (which is to say, 80 percent of the population) as likely to be "insecure . . . severely brought up, and . . . maladjusted socially."***

These various publics seem to be unpersuaded by the deterrence argument,

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*Toronto Globe and Mail, April 1, 1976, p. 10.

**Solicitor General of Canada, Capital Punishment. . . . (Ottawa, 1972), p. 3.

***Toronto Globe and Mail, March 11, 1976, p. 9. Within a month the Solicitor General found it advisable to say publicly that the views of his advisor were not necessarily his views; and the advisor himself found it advisable to moderate his charges against public opinion. (Toronto Globe and Mail, April 8, 1976.)

or to regard it as irrelevant; they seem to be oblivious to the possibility that innocent people might be (and on occasion have been) executed;* they know nothing about the natural public law disagreement between Beccaria and Kant; they surely do not share the opinion that executions are contrary to God's commands; indeed, they seem to display the passions of many a Biblical character in their insistence that, quite apart from all these considerations, murderers should be paid back. In fact, the essential difference between the public and the abolitionists is almost never discussed in our time; it has to do with retribution: the public insists on it without using the word and the abolitionists condemn it whenever they mention it.

They condemn it because it springs from revenge, they say, and revenge is the ugliest passion in the human soul. They condemn it because it justifies punishment for the sake of punishment alone, and they are opposed to punishment that serves no purpose beyond inflicting pain on its victims. Strictly speaking, they are opposed to punishment. They may, like Beccaria, sometimes speak of life imprisonment as the alternative to executions, but they are not in fact advocates of life imprisonment and will not accept it.** Homicide can be deterred by much milder sentences, they say— or imply. The 1976 Canadian law calls for mandatory life sentences for first-degree murder, but not mandatory life imprisonment; there is the possibility of parole after 25 years. But that too was seen as too harsh; another section of the law allows the possibility of parole after 15 years.

They condemn retribution because they see it, rightly or wrongly, as the only basis on which the death penalty can be supported, and to kill an offender is not only unnecessary but precludes the possibility of reforming

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*See especially Charles L. Black, Jr., Capital Punishment: The Inevitability of Caprice and Mistake (New York: W.W. Norton & Co., Inc., 1974).

**The average time now served in the United States for first-degree murder is ten years. See Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment (New York: McGraw-Hill, 1976), p. 55 note. This is also the sentence recommended by the Task Force. Ibid., p. 57.

him, and reformation is the only civilized response to the criminal. Even murderers--indeed, especially murderers--are capable of being redeemed or of repenting their crimes. Camus tells the story of one Bernard Fallot, a member of a particularly vicious gang that worked for the Gestapo, who admitted having committed many terrible crimes.

> Public opinion and the opinion of his judges certainly classed him among the irremediable, and I should have been tempted to agree if I had not read a surprising testimony. This is what Fallot said . . . after declaring that he wanted to die courageously: "Shall I tell you my greatest regret? Well, it is not having known the Bible I now have here. I assure you that I wouldn't be where I now am."*

What is accomplished by killing this man? To kill him may satisfy the public's desire to wreak revenge on him, but no good and much harm is accomplished by giving vent to such passions. Besides, to kill him is to waste another valuable human life, a life that in the future would surely be devoted to good works. Not only should he not be killed, he should not be imprisoned. The elimination of capital punishment must be followed by the elimination of all punishment for the sake of punishment alone; only when the law is purged of the punitive spirit can we solve the crime problem.

> Though capital punishment was a contradiction to the chosen methods of nineteenth-century penology, which had revolted against violence, that penology still accepted the necessity of exacting retribution from criminals. Present-day penology, by contrast, puts its emphasis not on retribution, nor even on deterrence, but on rehabilitation. It combats crime

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* Camus, op. cit., pp. 221-2.

> by such reformative and essentially nonpunitive means as probation and psychiatric help in and out of prisons. It seeks eventually to replace the old concept of "the punishment to fit the crime" with a quite new notion: "the treatment to fit the criminal."*

Not even a murderer deserves to be punished.

The goal of the abolitionists is not merely the elimination of capital punishment but the reform or rehabilitation of the criminal, even if he is a murderer. The public that favors capital punishment is of the opinion that the murderer deserves to be punished, and does not deserve to be treated, even if by treatment he could be rehabilitated.

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*Giles Playfair, "Is the Death Penalty Necessary?" Atlantic Monthly, vol. 200 (September 1957), pp. 31-5; reprinted in Grant A. McClellan, Capital Punishment (New York: H.W. Wilson Co., 1961), p. 128.

CHAPTER II

THE DEATH PENALTY AND THE SPIRIT OF REFORM

Beccaria was the first criminologist, insofar as he was the first man to devote his attention exclusively to the study of crimes and punishments and their reform. He was the first criminologist to argue openly against retribution and to reduce punishment to deterrence, and is credited with being the first to argue that imprisonment is a proper mode of punishment.* It was Beccaria who promised with respect to crime and punishment in particular what the Enlightenment promised in general, a solution to a human problem based on the discoveries and techniques of modern science. As I indicated in the previous chapter, Thorsten Sellin, one of Beccaria's most distinguished successors in the field of criminology, acknowledged his significant contributions to the cause of reform when he said--and here I quote him in full--that since Beccaria

> the struggle about [the death penalty] has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries. If these newer trends of our thinking continue undisturbed the death penalty will disappear in all the countries of Western culture sooner or later.**

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*Richard R. Korn and Lloyd W. McCorkle, Criminology and Penology (1966), p. 405.

**Thorsten Sellin, The Death Penalty (A Report for the Model Penal Code Project of the American Law Institute, Philadelphia, 1959), p. 15.

Beccaria went to Paris and Paris was the acknowledged capital of the Enlightenment and, therefore, of reform; he knew Voltaire, Morellet (who immediately translated his book into French), Diderot, d'Alembert and Baron d'Holbach; a young deputy named Robespierre was to speak eloquently against the death penalty in the 1791 Constituent Assembly, quoting Beccaria time and again;* but, considering the fate of reform in the French Revolution (it suffices to recall the thousands sent to the newly-invented guillotine by Robespierre), it was not strange that America should be the place where the principles of the new science of crimes and punishments should first be applied. In a very real sense America was the first new nation. As Hamilton observed in the first of the Federalist Papers, it had been "frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force." The Constitution was ratified, in no small part due to Hamilton's efforts; and whether his doubts were stilled by the success of his advocacy is of no concern to us here: the experiment in self-government was launched, and launched on the principles of the rights of man; there would be no national religious establishment, and Jefferson and Madison especially acted to disestablish the state churches, thus going far to accomplish one condition of Beccaria's "decriminalization"; the Fifth Amendment forbade the use of torture, as well as providing other protections for those accused of crimes; and the country survived a difficult first decade

*Marcello Maestro, Cesare Beccaria and the Origins of Penal Reform (Philadelphia, Temple University Press, 1973), p. 153.

and the people prospered. It was only to be expected that the American people would set out to correct the wide variety of mistakes made--in many cases, innocently--by their less fortunate predecessors. This "new order of the ages" provided a setting congenial to reform movements and was characterized by great expectations. Americans had built their government itself on the solid foundation provided by the new science of politics, as Hamilton said--this time in the ninth Federalist--and some of them were confident that once they were rid of the prejudices, habits and "mistaken religious opinions" inherited from a less enlightened age (the phrase is Edward Livingston's, used in his proposed criminal code for Louisiana), they would build a society that would be a model for men everywhere. As David Brion Davis has pointed out,* the movement to reform the law of punishments and to abolish the death penalty was only one of the causes that captured the attention and engaged the passions of many Americans during their first years as a nation. Along with it were the antislavery, temperance and feminist movements, for example, and they were all to flourish and at least one of them to succeed.

1. The Invention of the Penitentiary

In the American colonies, as in England, prisons were not understood to be an "ordinary mechanism of correction," as David Rothman puts it;** the criminal codes of the eighteenth century provided for fines, whippings, "mechanisms of shame" (stocks, the pillory and public cages), banishment and, all too frequently, the gallows. In pre-revolutionary New York, for example,

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*David Brion Davis, "The Movement to Abolish Capital Punishment in America, 1787-1961," The American Historical Review, vol. 63 (October, 1957), p. 23.

**David J. Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic (1971), p. 46.

Boston: Little, Brown & Co.,

more than 20 percent of all sentences handed down by the Supreme Court were death sentences.* Like the English, Americans did not know what to do with their criminals, except to do what they had always done, but earlier than the English they set out to find a better way. A new nation, established on new principles, seemed to be the "ideal place for enacting Beccaria's principles," as William Bradford said in 1793, and he was not alone in thinking the death penalty to be unnecessary in America.**

The movement to abolish capital punishment in America and to reform the law of punishment was initiated by Dr. Benjamin Rush in Philadelphia in 1787 in a paper delivered in the house of Benjamin Franklin. The reform movement could have begun under more auspicious circumstances, or perhaps it would be more accurate to say, under more favorable auspices, only if it could have attracted the active support of the leading Founders; but these sober men held themselves aloof, perhaps because they thought the constitutional provisions met the case. Still, Rush himself was a signer of the Declaration of Independence, Philadelphia was the city in which the Constitution was written, 1787 was the year in which it was written, and it would be supererogatory to detail Franklin's various contributions to the nation's founding. (Franklin did not, however, favor abolition of the death penalty.***)

Philadelphia was also William Penn's "city of brotherly love," the home of the Quakers, inveterate reformers, who would not have supported the

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*Ibid., p. 51.

**William Bradford, An Enquiry how far the Punishment of Death is Necessary in Pennsylvania (Philadelphia: Dobson, 1793).

***~~Writings (Smyth ed.), vol. 9, pp. 291-9.~~ The Works of Benjamin Franklin, Jared Sparks ed. (Chicago: Townsend MacCoun, 1882), vol. 2, p. 481.

Constitution without the assurance--privately given*--that Congress possessed the authority (or after January 1, 1808, would possess the authority) to abolish slavery, and who made it a practice, beginning with the First Congress, to petition Congress to set about this business. The colony's first constitution, Penn's "Great Act" of 1682, had effected a significant reform of the criminal law by abolishing the death penalty for all crimes except premeditated murder, and it was only at the insistance of the Crown that, on the occasion of Penn's death in 1718, the "intolerant and sanguinary system of the common law of England"** was reimposed on the colony. Pennsylvania restored the reform in 1794, after independence, and in the spirit of Penn began the task of reforming the whole of the criminal law.

Rush's first call for abolition of the death penalty was part of "An Enquiry into the Effects of Public Punishments Upon Criminals and Upon Society." In this paper, and even more markedly in his 1794 paper devoted solely to capital punishment, Rush showed the influence of Beccaria. While he did not succeed in having the death penalty abolished for all crimes, his first paper led immediately to the founding of The Philadelphia Society for Alleviating the Miseries of Public Prisons and, in 1790, to the establishment of the world's first penitentiary. Here Beccaria's milder punishment would be inaugurated, and here prisoners would be housed in conditions that met the standards of John Howard, the great English prison reformer. In addition, it was to be a penitentiary, a "house of repentance," as Rush called it, a

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*See Walter Berns, "The Constitution and the Migration of Slaves," Yale Law Journal, vol. 78 (December, 1968), p. 203. Benjamin Rush made the same assumption.

**Edward Livingston, "The Code of Reform and Prison Discipline," in Complete Works of Edward Livingston on Criminal Jurisprudence (Montclair, N.J., Patterson Smith, 1968 ed.), vol. 1, p. 508.

place "for the cure of the diseases of the mind." With this, the reform movement took on a character that marks it to this day.

The penitentiary was seen as an alternative to the punishments imposed in Britain--death and banishment--as well as to the American practice of inflicting public punishments in the form of the whipping post, the pillory, the stocks and what Rush saw as degrading public labor. (His particular target was the so-called "wheelbarrow law" which required persons convicted of felonies to perform work on the streets of Philadelphia.) For reasons to be explained shortly, Rush saw the primary purpose of punishment to be reform of the criminal and, quite obviously, the penalty of death was least calculated to achieve this. For somewhat similar reasons, he rejected banishment; not only was it "next in degree, in folly and in cruelty, to the punishment of death," but it deprived society of the advantages that derive from a man's love of kindred and country, to Rush a natural passion that could be rekindled in the heart of every criminal. And public punishment, he said, is calculated to have a deleterious effect not only on those who suffer it but on those who observe it.

Reform of the criminal cannot be achieved by subjecting him to public display and disgrace. The infamy attached to it destroys his sense of shame and his reputation, and having lost these, he has nothing left to lose in society; the likely effect is to harden his criminal propensities and to instill in him a desire to revenge himself on the society whose laws subjected him to this treatment. Besides, being usually of short duration, a public punishment produces no changes in body or mind of the sort needed to reform the habits of vice. It is said that public punishment, by striking terror in the hearts of those who observe it, deters them from committing crimes. Not so, says Rush.

In the first place, it fosters fortitude in the criminal (and this is said to be especially true in the case of public executions*), who is then admired by the crowd, and it goes without saying — for Rush, at least — that criminals should not be admired. But this is only part of the story. The sight of the criminal's suffering is calculated to provoke sympathy for him; but, forbidden by the law (and their good character which has been developed by the law) to sympathize with criminals, this sympathy is "rendered abortive," insofar as it is deprived of an object to which it can attach itself. The effect of this — or so Rush maintains — is positively harmful to society. "The principle of sympathy after being often opposed by the law of the state, which forbids it to relieve the distress it commiserates, will cease to act altogether; and from this defect of action, and the habit arising out of it, will soon lose its place in the human breast." People will then come to view with indifference the misery of widows, orphans, the naked and the sick, as well as the misery of prisoners--"and what is worse than all, when [this] the sentinel of our moral faculty is removed, there is nothing to guard the mind from the inroads of every positive vice."** This natural sensibility, or natural moral sense, must be kindled and cherished; from it comes the obligation to love "the whole human race"; but the

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*See, e.g., Bernard Mandeville, An Enquiry into the Causes of the Frequent Executions at Tyburn (London: 1725). Mandeville suggested that much of the intrepidity displayed on the gallows was due to the liquor consumed by the condemned. The solution was to deprive him of this source of his seeming strength and also of all sustenance save bread and water. "When we had seen an half-starved Wretch, that look'd like Death, come shivering from his Prison, and hardly able to speak or stand, get with Difficulty on the slow uncomfortable Carriage; where, at the first Rumbling of it, he should begin to weep, and as he went, dissolve in Tears, and lose himself in incoherent Lamentations. . . " (P. 45). And so on. This would be likely, he suggested, to have a salutary effect on observers. Mandeville's favored solution was to carry out executions in private.

**Benjamin Rush, "An Enquiry . . . " in Two Essays (The Philadelphia Prison Society, 1954), p. 7.

sight of the criminal, instead of exciting pity, may excite indignation and contempt, and this will extinguish a portion of this universal love. And if the sight of the criminal does not provoke contempt--which may be the case with other criminals or with those who are too young or innocent to understand that the punishment follows a crime--his being punished will appear to be an arbitrary act of cruelty. This may lead the observers to commit such acts against their fellow citizens. The effect, then, is to remove "the natural obstacles to violence and murder in the human mind."

The same analysis of the moral sensibilities that condemned public punishments pointed to the solution, punishment inflicted in private:

> Let a large house, of a construction agreeable to its design be erected in a remote part of the state. Let the avenue to this house be rendered difficult and gloomy by mountains or morasses. Let its doors be of iron; and let the grating, occasioned by opening and shutting them, be encreased by an echo from a neighboring mountain, that shall extend and continue a sound that shall deeply pierce the soul. Let a guard constantly attend at a gate that shall lead to this place of punishment, to prevent strangers from entering it. Let all the officers of the house be strictly forbidden ever to discover any signs of mirth, or even levity, in the presence of the criminals. To encrease the horror of this abode of discipline and misery, let it be called by some name that shall import its design.*

Its remoteness, its forbidding secrecy, the unknown length of time to which criminals were to be confined in it, and the unknown character of the punishments to be inflicted within its walls, are best calculated to "diffuse terror thro' a community, and thereby to prevent crimes."

> Children will press upon the evening fire in listening to the tales that will be spread from

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*Ibid., p. 10.

> this abode of misery. Superstition will add to its horrors, and romance will find in it ample materials for fiction, which cannot fail of encreasing the terror of its punishments.

It came to be called the penitentiary. Established on the proper principles, it would make other forms of punishment unnecessary; it would not only deter crimes by striking terror in the hearts of the people, but it might also effect the reform of the criminal. Even the crime of murder has its "cure in moral and physical influence." Properly conceived, punishment would consist of "bodily pain, labour, watchfulness, solitude, and silence," in varying degrees appropriate to each class of criminal; but this would be combined with "regular instruction in the principles, and obligations of religion." Prisoners were to be penitents.

The spirit in which these reforms were proposed is nowhere better displayed than in the following sentences:

> If the invention of a machine for facilitating labour, has been repaid with the gratitude of a country, how much more will that man deserve, that shall invent the most speedy and effectual methods of restoring the vicious part of mankind to virtue and happiness, and of extirpating a portion of vice from the world? Happy condition of human affairs! When humanity, philosophy and christianity, shall unite their influence to teach men, that they are bretheren; and to prevent their preying any longer upon each other! Happy citizens of the United States, <u>whose governments permit them to adopt every discovery in the moral and intellectual world</u>, that leads to these benevolent purposes!*

In America, science and government were not enemies, but friends--it was not by chance that the Constitution empowers Congress to "promote the progress of science and useful arts"--and as friends they would extirpate at least

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*<u>Ibid.</u>, p. 13. Italics supplied.

"a portion of vice from the world."

Rush was a physician with a scientist's curiosity concerning diseases of the mind and the Enlightenment philosopher's confidence that the world stood on the threshold of discoveries that would transform the existence of man. His theories of punishment were derived directly from his reflections on the nature of what he called the moral faculty, which he first discussed in a paper, "An Enquiry into the Influence of Physical Causes upon the Moral Faculty," delivered before the American Philosophical Society in 1786, and published by the Society that same year. He defined the moral faculty as a power in the mind of distinguishing and choosing good and evil, virtue and vice, and likened it to a law-giver (in the sense that it performs the the office of a law-giver); the conscience, another power of the mind, he likened to a judge. The moral faculty is innate but is affected by physical causes, and it was one task of science to understand the relationship, and whether, for example, the physical causes acted upon the moral faculty through the medium of the senses, the passions, the memory or the imagination. He denied that his doctrine implied the materiality of the soul or, even if it did, that the doctrine of the immortality of the soul depends on its being immaterial. The important thing was to understand the physical causes of the moral faculty's disorders. This had not yet been done, which explained why "so few attempts [had] been made, to lessen or remove [the disorders] by physical as well as [by] rational and moral remedies."* He then sketched briefly fifteen factors that have, or seemed to have a capacity to produce effects on the moral faculty; of these, diet, idleness, bodily pain, solitude, silence and medicine were, as he understood them, of special concern to the

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*Benjamin Rush, Two Essays on the Mind. With an introduction by Eric T. Carlson. (New York: Brunner/Mazel, 1972), p. 15.

criminal law reformer. Idleness is the parent of every vice, he says, and "labor of all kinds, favors and facilitates the practice of virtue"; and he cites the prison reformer, John Howard, in support of his conclusion that labor is the most benevolent of punishments because it is one of the most suitable means of reformation.* Bodily pain has the effect of rousing and directing the moral faculty, and again he cites Howard's prison observations. Solitude removes bodies disposed to vice from the disquieting effects of society and renders them reformable, especially when solitude is combined with reflection and "instruction from books." Connected with solitude is silence. As to medicine, not much is known, but "may not the earth contain in its bowels, or upon its surface, antidotes to our moral, as well as to natural diseases?"** The quest for such medicines would be the task of future generations of scientists of the mind, or of the psyche; and this theory of the mind's faculties would, "when combined with the idea that each faculty was represented by a separate area in the brain,"*** give rise to phrenology, which was to flourish for a while during the nineteenth century and to have some effect on criminology. Rush is responsible, in America, for the role played by scientists in the cultivation of the moral faculty, which, he says, must not be the business only of "parents, schoolmasters and divines."**** If the scientists apply to this task the same industry and ingenuity that has produced the "triumphs of medicine over diseases and death," it is highly probable, he says, that vice might be banished from the earth.

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*Ibid., p. 21.

**Ibid., p. 27.

***Eric T. Carlson, "Introduction," in ibid., p. ix.

****Ibid., p. 36.

> I am not so sanguine as to suppose, that it is possible for man to acquire so much perfection from science, religion, liberty and good government, as to cease to be mortal; but I am fully persuaded, that from the combined action of causes, which operate at once upon the reason, the moral faculty, the passions, the senses, the brain, the nerves, the blood and the heart, it is possible to produce such a change in the moral character of man, as shall raise him to a resemblance of angels--nay more, to the likeness of God himself.*

Rush's portrait appears today on the seal of the American Psychiatric Association.

The first prison established in Philadelphia in 1790 did not embody all these principles; most significantly, the prisoners in it who worked together were contaminated by association, while those who were isolated one from another did not work. Beaumont and Tocqueville who came to America in 1831 to study the penitentiary system, drew the conclusion that up to this point it could not be said that America had a penitentiary system.

> If it be asked why this name was given to the system of imprisonment which had been established, we would answer, that then as well as now, the abolition of the punishment of death was confounded in America, with the penitentiary system. People said--<u>instead of killing the guilty, our laws put them in prison; hence we have a penitentiary system</u>.
>
> The conclusion was not correct. . . . the penitentiary system does not necessarily exist [until] the criminal whose life has been spared, be placed in a prison, whose discipline renders him better.**

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* <u>Ibid</u>., p. 37.

** Gustave de Beaumont and Alexis de Tocqueville, <u>On the Penitentiary System in the United States and Its Application in France</u>, trans. by Francis Lieber (Southern Illinois University Press ed., 1964), p. 38.

These faults were remedied in 1821 by the building of the Cherry Hill penitentiary, also in Philadelphia, as well as by the Auburn system inaugurated by the state of New York several years earlier.

The characteristic features of both systems, originally and as they existed during the visit of these two famous Frenchmen, were work, religious instruction and solitary confinement, the principle being that any communication among the prisoners would lead to further criminalization and thereby make repentance impossible. In Philadelphia's Cherry Hill penitentiary, this principle was applied without qualification, each prisoner living, working and eating in a cell of his own, exercising in a small yard adjoining his cell, and being visited by prison officials and almost nobody else. The Auburn system adopted the principle of isolation but modified it by requiring the prisoners to leave their solitary cells during the day in order to perform useful labor in the common workshops, but it obliged them to observe a rule of absolute silence during the period outside the cells. The prisoners would continue to reflect (and repent) in their isolation from one another, and the silence rule, enforced by the whip, would prevent their mutual criminalization, while the work in common would spare them the worst consequences of absolute isolation: severe depression, demoralization and, indeed, insanity. So they were daily marched from their cells, but in lock step and with heads bowed.

What was said about repentance was not a sham. The men who administered these new establishments were selected with great care and with scrupulous attention to the principles on which the institutions were founded. Beaumont and Tocqueville report that they were impressed by the importance attached to the selection of administrative personnel. The consequence was the conspicuous absence of the "vulgar jailer type," scarcely distinguishable from those put under his supervision, and the conspicuous presence of persons distinguished by their religiosity and genuine concern for the regeneration of the prisoners. "Moral and religious instruction forms . . . the whole basis of the system."* At Cherry Hill this was done by providing each prisoner with a Bible which he

*Ibid., p. 82.

was encouraged to read and reflect upon and by visitations by those carefully selected supervisory personnel who served as ministers and counsellors; at Auburn religious services were conducted, sermons carefully conceived and delivered, and the meals were preceded by the saying of prayers.

What is particularly striking about this early penitentiary system is the absolute confidence exhibited by its founders and supporters, not in the details of its administration--as to those there could be disagreement and doubt--but in its principles, and not only in its principles but in the right of society to punish and through punishment reform. Lest this be seen as an observation too obvious to make, the reader is asked to compare the attitude of some penologists--and amateur penologists--of our own day, for example, Ramsey Clark, Tom Wicker and Karl Menninger, to say nothing of Jessica Mitford.* Behind Cherry Hill and the Auburn system was an unquestioned conviction that the laws were just, that they must be obeyed, that criminals were malefactors or, quite simply, bad men, and that society, for its own good and for the good of the criminals, had every right as well as the duty to subject them to this treatment. The treatment itself was right because it derived from the discoveries of the new moral and physical sciences. Here is the judgment of Francis Lieber, the translator of Beaumont and Tocqueville's study and a man who has a claim to the title of America's first professional political scientist:

> The progress of mankind from physical force to the substitution of moral power in the art and science of government in general, is but very slow, but in none of its branches has this progress, which alone affords the standard by which we can judge of the civil development of a society, been more retarded than in the organization and discipline of prisons, probably for the simple reason that those for whom the prisons are

*See below, pp.

> established, are at the mercy of society, and therefore no mutual effort at amelioration, or struggle of different parties, can take place. At length the beginning has been made, and it is a matter of pride to every American, that the new penitentiary system has been first established and successfully practiced in his country. That community which first conceived the idea of abandoning the principle of mere physical force even in respect to prisons, and of treating their inmates as redeemable beings, who are subject to the same principles of action with the rest of mankind, though impelled by vitiated appetites and perverted desires; that community, which after a variety of unsuccessful trials, would nevertheless not give up the principle, but persevered in this novel experiment, until success has crowned its perseverance, must occupy an elevated place in the scale of political or social civilization. The American penitentiary system must be regarded as a new victory of mind over matter—the great and constant task of man.*

Such was the spirit of that age, and it is no wonder that the good men who characterized it and who addressed themselves to the problem of crime and punishment were convinced that the death penalty, which appeared to them as a vestige of a benighted past, had no place in the world they were creating. If Beaumont and Tocqueville had their doubts, and if, as a result, they were of the opinion that the penitentiary was not likely to render the death penalty obsolete or unnecessary (indeed, they considered it to be, in certain cases, "indispensable to the support of social order"),** this could be attributed to the fact that they were not Americans and, even more to the point, were not simply modern men, or reformers. They acknowledged the advantages of the American penitentiary system, especially when compared with the typical European prison, but they did so skeptically or reservedly, maintaining a critical distance from the enthusiastic reformers they encountered. As to these, they said there were in America as well as in Europe "estimable men whose minds feed upon philosophical

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* Translator's Preface, Beaumont and Tocqueville, On the Penitentiary System in America, pp. 5-6.

** Beaumont and Tocqueville, p. 197, note 34.

reveries, and whose extreme sensibility feels the want of some illusion.

> These men, for whom philanthropy has become a matter of necessity, find in the penitentiary system a nourishment for this generous passion. Starting from abstractions which deviate more or less from reality, they consider man, however far advanced in crime, as still susceptible of being brought back to virtue. They think that the most infamous being may yet recover the sentiment of honor; and pursuing consistently this opinion, they hope for an epoch when all criminals may be radically reformed, the prisons be entirely empty, and justice find no crimes to punish.*

Such men especially saw the penitentiary as a means of effecting a radical reformation, or of accomplishing a "complete regeneration" among an appreciable number of its criminal inmates, and Beaumont and Tocqueville denied this even as a possibility. Some "habits of order" could be instilled, they said, and if the typical prisoner on leaving these institutions were not in truth a better man, he might at least be more obedient to the laws, "and that is all . . . society has a right to demand." If the only goal of the pentitentiary were "radical reformation," they concluded, then it would be better to abandon it--"not because the aim is not an admirable one, but because it is too rarely obtained."**

But their reservations were as nothing when compared with the judgment of the next famous European visitor, Charles Dickens. Dickens visited Philadelphia and the Cherry Hill penitentiary in 1842, about ten years after Beaumont and Tocqueville, and whatever his opinion of the Auburn system, what he saw at Cherry Hill, or what he said he saw, appalled him. This, he assured his readers, was not due to a man of letter's disdain for social reformers or because he was prejudiced against Americans or, in particular, Philadelphians. In fact, he liked the city itself, although the regularity of its plan and the straightness

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*Ibid., p. 80.

**Ibid., p. 89.

of its streets distressed him--he would have given the world "for a crooked street"--and, within limits, he admired its Quaker inhabitants. But, as I said, he was appalled by the penitentiary system they had created. The benevolent intentions of the men who had devised it and were its directors he generously conceded, but he doubted that they knew "what it is they are doing." And what he said they were doing was inflicting "an immense amount of torture and agony" on those confined within its walls, and this with no discernible benefit. His account is one to which the adjective chilling may truly be applied:

> Standing at the central point, and looking down these dreary passages, the dull repose and quiet that prevails, is awful. Occasionally there is a drowsy sound from some lone weaver's shuttle, or shoemaker's last, but it is stifled by the thick walls and heavy dungeon-door, and only serves to make the general stillness more profound. Over the head and face of every prisoner who comes into this melancholy house, a black hood is drawn; and in this dark shroud, an emblem of the curtain dropped between him and the living world, he is led to the cell from which he never again comes forth, until his whole term of imprisonment has expired. He never hears of wife or children; home or friends; the life or death of any single creature. He sees the prison-officers, but with that exception, he never looks upon a human countenance, or hears a human voice. He is a man buried alive; to be dug out in the slow round of years; and in the meantime dead to everything but torturing anxieties and horrible despair.*

This wretched man or woman has a Bible, of course, and a slate and a pencil, and the tools with which he performs his "rehabilitating" labor, and water and a slop bucket, but his cell is closed off by two solid doors through which he passes only twice, upon the commencement and the termination of his sentence. There "he labours, sleeps and wakes, and counts the seasons as they change, and grows old."

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*Charles Dickens, American Notes for General Circulation, in Works (New York: G. Routledge, 1850[?]), vol. 11, pp. 284-5.

> There was a sailor who had been there upwards of eleven years, and who in a few month's time would be free. Eleven years of solitary confinement!
>
> "I am very glad to hear your time is nearly out." What does he say? Nothing. Why does he stare at his hands, and pick the flesh upon his fingers, and raise his eyes for an instant, every now and then, to those bare walls which have seen his head turn grey? It is a way he has sometimes [Dickens is told by his guide].
>
> Does he never look men in the face, and does he always pluck at those hands of his, as though he were bent on parting skin and bone? It is his humour: nothing more.*

To which Dickens adds on his own, it is also his humour to be a helpless, crushed, and broken man. Not only that but, as Dickens pointed out to the incredulous officials who regularly saw the prisoners and who had never noticed the phenomenon and who disbelieved it until Dickens has it confirmed by a demonstration, deaf. And why not? One would expect all the senses to be dulled and the bodily functions to be impaired; Dickens saw enough to conclude that this was typically the case.**

And what about their reformation? Dickens found no evidence that anyone had in fact repented. One man--"a very dexterous thief"--declared that he blessed the day he had been confined and that he would never "commit another robbery as long as he lived"; but his manner led Dickens to call this "unmitigated hypocrisy." As Beaumont and Tocqueville had observed ten years earlier, the convict "has an interest in showing to the chaplain . . . profound repentence for his crime, and a lively desire to return to virtue," which is a phenomenon

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*Ibid., p. 288.

**Dickens's account is said to be, in part, a product of his "fertile imagination," and was immediately challenged by friends of the system. See Negley K. Teeters and John D. Shearer, The Prison at Philadelphia: Cherry Hill (New York: Columbia University Press, 1957), pp. 113-132. But "friends of the system" are frequently inclined to take umbrage at criticism leveled against it.

the parole boards of our day have remarked; and the chaplain or other penitentiary official has an ardent wish to achieve the reformation of the criminal, and "easily gives credence to it,"* which, in turn, is a phenomenon remarked by those who in our day observe probation officers at work. (The administrative lesson to be drawn from this is that the evaluation of a reform program cannot be left in the hands of its friends, or in the hands of those hired by its friends.)

Perhaps it was not inevitable that the "house of repentance" become the sort of institution it is today — that the Auburn of the early nineteenth century New York become the Attica of the twentieth — but it was not reasonable to think that the typical prisoner could be led, by any system, to become a genuine penitent. Some surely, but to build a system for the many that is contrived to benefit only the few is politically irresponsible. That was the conclusion drawn by Beaumont and Tocqueville: "an institution is only political if it is founded on the interest of the mass; it loses its character if it only profits a small number."** And the penitentiary system profited — and still profits — only a small number. There are those who insist it profits nobody.

Benjamin Rush began with the scientist's confidence that every problem has its solution and every disease its cure. He said just that. Since crime was a disease, it remained only to find the "remedy or remedies" appropriate to each of its manifestations; this inevitably meant a search for the treatment appropriate to each criminal. Hence, "let no notice be taken, in the law, of the punishment that awaits any particular crime." To the contrary, punishments should always be varied in degree "according to the temper of criminals,

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* Beaumont and Tocqueville, On the Penitentiary System in America, p. 89.

** Ibid.

or the progress of their reformation."* In the event, it was not Rush's treatment that was established in the penitentiaries. Criminals were locked in solitary cells, made to work, importuned to repent, and at the outset, at least, there was a genuine attempt to classify them according to their crimes to the end of providing them with individualized treatment. But the administrative problems and costs of such a program were immense. A system of discrete treatments would have to wait upon the development of psychiatry (and beyond that) and the growth of the economy that is expected to pay for them. In the circumstances of the nineteenth century, the only variation in "treatment" was in the length of time presumed to be required to cause prisoners to repent, and in the course of time the penitentiaries ceased altogether to speak of repentance.

As early as the 1850's official commissions began to report the failure of the penitentiary system. Its object was to make the prisoner a better member of society, but this it did not succeed in doing, and very early it ceased to try. E.C. Wines and Theodore Dwight reported to the New York legislature in 1867 that there was not a state prison in the entire country that made the reformation of convicts the one supreme object of its discipline.** To say nothing of other reasons for this failure, the typical convict was functionally illiterate and therefore unable to read the Bible with which he was provided.

> As wardens looked more closely at the actual nature of the inmate population, they lost patience with the goals of reform; as they lessened their insistence on silence and separation, security became more of a problem. The result was that they gave still less attention to rehabilitation. In short order they were complacently administering a custodial operation.***

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*Rush, "An Enquiry into the Effects of Public Punishments. . . . ," p. 11.

**See Rothman, The Discovery of the Asylum, p. 240.

***Ibid., p. 249.

And custodial operations they remain to this day.

The early penitentiary officials were not wholly wrong to look upon criminal behavior as a manifestation of the sickness of the soul, and their remedy, religious instruction leading to repentance, was, in principle, appropriate to what they understood to be the "disease." (I am not here referring to the range of remedies that Rush might have thought to be appropriate cures of the disorders of the mind's moral faculty.) Yet they seemed never to have given sufficient thought to the problem. Even Rush, who made so careful an analysis of public punishments and their probable effects on sensibility--"the sentinel of our moral faculty"--and who went into such detail concerning the desired effect of the prison on the community of law-abiding citizens, failed altogether to provide a description of the mechanism by which the proposed treatment would effect the reformation of the prisoner. He proposed to inflict bodily pain, of a sort and to a degree and of a duration to be determined by the as yet undiscovered "principles of sensation [and] the sympathies which occur in the nervous system"; to this would be added "labour, watchfulness, solitude, and silence." Finally, as I mentioned earlier, and to "render these physical remedies more effectual," he proposed "regular instruction in the principles, and obligations of religion." Beyond this, all he said was that specific punishments must be prescribed for specific crimes; to discover them, "to find out the proper remedy or remedies for particular vices," was, he concluded, "the only difficulty." The difficulty was greater than he and, more to the point, the penitentiary officials, imagined.

To speak strictly, penitence requires one to acknowledge his transgression and to manifest the desire to be cleansed of it, as well as the willingness to pay the price required. It is similar to expiation insofar as the cleansing or the remission of the sin depends on the willingness of God to be appeased

and, therefore, to withhold His punishment, although expiation is the older phenomenon and is usually associated with more wrathful gods, gods who demand payment rather than permit it. It is likely that such a god will be appeased only by a severe punishment inflicted on the guilty person or a member of his family. Thus, according to Homer, when Agamemnon killed the stag sacred to Artemis, she responded by spreading a pestilence among the Greek army and calming the winds, thereby keeping the Greek fleet in port; and she was appeased only by Agamemnon's agreement to sacrifice his daughter, Iphigenia. And in a somewhat different example we read in Numbers XXXV, 33, that God said to Moses: "the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it." In Christian doctrine, however, God may be appeased by the transgressor's voluntary acceptance of punishment, the desire for the punishment being the condition of his being cleansed of his sin. Rather than insisting on or prescribing the punishment, God insists on the penance, or the contrition combined with the desire to make amendments; and the punishment serves only the secondary purpose of allowing the transgressor to demonstrate that he is truly penitent. The political significance of this consists in this: whereas God knows whether the transgressor is truly penitent, and knows it without the actual imposition of the punishment, a state's penal authorities, lacking the power to examine the human heart, will require a demonstration, and this can consist only in the voluntary acceptance of punishment. Stated otherwise, penitence requires the transgressor, the law-breaker, to punish himself rather than for the state to inflict punishment on him. The state makes punishment available to him as a kind of welfare service; if he accepts it willingly, he demonstrates that he is penitent — and also demonstrates the success of the penitentiary system. If he does not, he demonstrates that he is not penitent

and is not fit to be released. In the event, of course, it will appear that the state is inflicting the punishment on the offender, and in this way a penitential, or penitentiary, system is only too likely to resemble expiation, except that it is a wrathful state, rather than a god, that is being appeased. The French penologist, Gabriel Tarde, explained publicly-prescribed penitence in this way: "The penalty has thus become simply an external and social manifestation of remorse, remorse reinforced at the same time as it is attested by the visible and traditional form intelligible to all, with which it clothes itself."* The relevance of what might otherwise appear to be a digression should become clear in Tarde's next sentence: "Unfortunately, the penalty understood in this manner only prevails in ages of belief; it is exceedingly rare in our present time prisons [1890] and there is no hope that it will ever flourish in them again."

Benjamin Rush was a good man and the Pennsylvania Quakers were good men, justly famous for their good works; but the age in which Pennsylvania and New York established the first penitentiary systems was not a pious age. It is therefore not wonderful (to use that word in its older sense) that the penitentiaries did not succeed in making many, or even more than a few, of their inmates penitent. America's gods promise material rewards for hard work and do not have the temerity to threaten to spread pestilence or demand sacrifices: Americans can overcome pestilences, innoculate against plagues and cause their ships to sail without wind. All of which is to say that America, a country that began by subordinating religion and adopting a policy of indifference as to how or even whether its citizens worship,** has not provided a setting

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*Gabriel Tarde, Penal Philosophy (Boston: Little, Brown, & Co., 1912, Howell trans.), p. 486.

**See, e.g., Walter Berns, The First Amendment and the Future of American Democracy (New York: Basic Books, 1976), ch. 1.

congenial to repentance. Piety has not characterized American lives outside prison, and it was unreasonable to expect it to characterize the prisoners' lives inside. Moreover, as the First Amendment is presently being interpreted, a serious penitential program under state or federal auspices, involving compulsory religious instruction and prayers and whatever else is prescribed by those who are serious about the paying of penance, would run into probably insurmountable constitutional difficulties. Indeed, some reflection on what that Amendment signifies ought to have discouraged the founders of the "penitentiaries."

The legacy we acquired from Benjamin Rush and the other early reformers is, however, not so much Attica as it is the designation of the Atticas of America as "correctional" institutions--along with the whole correctional apparatus: indeterminate sentences, staff psychiatrists, parole boards, probation officers, "diversion," and, of course, "rehabilitation." All this and more derives from that first sentence of his 1787 paper, namely, that the first purpose of punishment is "to reform the person who suffers it." A system whose first purpose is to reform those persons submitted to its care and cure is, inevitably, a system governed by experts in caring and curing--scientists, in fact--and they sometimes display a zeal that causes them to overstep the proper limits of what may properly be done to--or even done for--citizens of a liberal democracy. There was a period--happily, it was a brief period--when the correctional apparatus in some states included surgeons to perform the relatively simple sterilization operations required to prevent the transmission of "defective" genes from one generation to the next--the seat of the criminal tendency, so to speak, then being thought to be located in the testes or ovaries rather than in the soul or the mind. It was a mistake, and leading scientists denounced the program and its premise, but it had its advocates and some of its

advocates occupied responsible political positions. The chief judge of Chicago's Municipal Court put the case for sexual sterilization in his 1923 presidential address to the 11th Annual Meeting of the Eugenics Research Association: "Mendel's Law of Heredity" points the way toward the solution of the problem of mental deficiency, and mental deficiency is the principal cause of crimes of violence and "lies equally at the bottom of all intrinsic crimes."* Thus, vasectomies for males, which can be performed in any physician's office, and salpingectomies for females, which, requiring abdominal incisions to get at those Fallopian tubes that have to be cut or tied, had better be done in hospitals. Promoted by the American Eugenics Society, whose model sterilization law proposed compulsory sterilization for a wide variety of "socially inadequate classes," including the "criminalistic," some 28 states adopted laws requiring the sterilization of inmates in state hospitals or, in some cases, convicted criminals in prisons.** The Supreme Court once upheld a Virginia law applied to mental defectives--"Three generations of imbeciles are enough," said Justice Holmes***--but Oklahoma's Habitual Criminal Sterilization Act was invalidated on equal protection grounds in 1942, and the effect was to write "finish" to this so-called "reform."**** But the correctional institutions are still with us, and with them the correctional spirit.

Born in the early nineteenth century out of the most generous of sentiments but exaggerated expectations, the penitentiary remains (and scores of the

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*Municipal Court of Chicago, Research Studies of Crime as Related to Heredity (1925), pp. 9, 25. For a general account of the eugenics movement in America, see Mark H. Haller, Eugenics: Hereditarian Attitudes in American Thought (New Brunswick: Rutgers University Press, 1963), and especially p. 40 ff. for an account of eugenics and criminal anthropology.

**For a comprehensive discussion of this sterilization program, see Walter Berns, "Buck v. Bell: Due Process of Law?" Western Political Quarterly, vol. VI (December, 1953), pp. 762-775.

***Buck v. Bell, 274 U.S. 200, 207 (1927).

****Skinner v. Oklahoma, 316 U.S. 535 (1942).

penitentiaries built in that period remain), even though it has failed abysmally to fulfill its principal purpose. One recent critic refers to it as the most "disastrous survivor of the Enlightenment still gasping at a death-like life."* It is fashionable and may even be correct to call it a crime factory, although the men and women who end up in a maximum security prison like Attica are more than likely to be incorrigible criminals before they begin their sentences.** Still, the men of the Enlightenment were surely not wrong about the mutually contaminating effect of putting criminals together in a setting where each criminal is merely one among many and, at a minimum, is able to derive some comfort from the awareness of being at home, so to speak, in the one environment where he need not be ashamed, and, at a maximum, is further brutalized by those worse than himself who, because of

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*Gary Wills in a review of Tom Wicker's, A Time to Die. The New York Review of Books (April 3, 1975), p. 3.

**According to Russell G. Oswald (Attica - My Story [New York: Doubleday & Co., Inc., 1972], p. 7), 89 percent of the Attica inmates at the time of the 1971 riot had previous adult criminal records, and 58 percent had previously served time in federal and state institutions.

In 1970, 11,060 persons were admitted to federal prisons of all types. Of these, well over half for whom information was reported had known prior commitments. The breakdown is as follows:

4779 with known prior commitments
3088 without known prior commitments
3193 not reported.

Of the 4779 who had been in prison before, 3909 had three or more prior commitments. (U.S. Department of Justice, Sourcebook of Criminal Justice Statistics - 1973, p. 373.

The former director of the federal prisons, James V. Bennett, says that 70 percent of the men sent to federal prisons have previous convictions. (I Chose Prison [New York: Alfred A. Knopf, 1970], p. 13.)

Daniel Glaser says nine-tenths of the inmates of federal and state prisons have a record of crime or juvenile delinquency before being convicted for the crime for which they are being incarcerated; half of them have been in prison before. The Effectiveness of a Prison and Parole System (Indianapolis: Bobbs-Merrill Co., 1964), p. 3.

that, will inevitably rule that society (or any society that has not learned to subordinate ruthless strength to rules of justice). Whether Dickens would be more appalled by today's Attica and Auburn than he was by the Cherry Hill of his time is, however, by no means obvious, although today's reformers appear to be of the opinion that nothing could be worse than what we now have. Gary Wills probably speaks for them when he says that

> Prisons teach crime, instill it, inure men to it, trap men in it as a way of life. How could they do otherwise? The criminal is sequestered with other criminals, in conditions exacerbating the lowest drives of lonely and stranded men, men deprived of loved ones, of dignifying work, of pacifying amenities. . . . Smuggling, bullying, theft, drug traffic, homosexual menace are ways of life. Guards, themselves brutalized by the experience of prison, have to ignore most of the crimes inflicted on inmates, even when they do not connive at them, or incite them. Breaking up smuggling, extortion, and sex rings is dangerous and probably futile; better look the other way and live to collect one's pension. The less contact with all but the most exploitable inmates, the better.*

Even if we do not doubt the accuracy of this portrait as it is meant to apply to Attica and some others, or quarrel with the judgment that they, and perhaps the typical penitentiary today,** like the Cherry Hill of Dickens' day, are inhuman places, it must be pointed out that there is a difference between them and Cherry Hill: with the exception of such places as the Cummins Prison Farm of Arkansas, the inhumanity of the Atticas is caused by

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*Wills, review of A Time to Die, p. 8.

**Prisons differ in some very important respects and it is a mistake to overlook these differences. The long-time Director of the Federal Bureau of Prisons, James V. Bennett, succeeded in making the federal system a model for the states to emulate. He himself was a model public official. See his I Chose Prison (New York: Alfred A. Knopf, 1970), esp. pp. 37, 45 and 197-229.

See also Austin MacCormick, "Adult Correctional Institutions in the United States," prepared for The President's Commission on Law Enforcement and the Administration of Justice (1967), p. 36 ff.

the inmates not the institutions. Both the guards and the inmates may be brutes, but, if so, the system is one in which the guards are brutalized by the prisoners, not the other way around. The typical prison may offer no dignifying work, but the typical prisoner did not engage in dignifying work on the outside; there may indeed be smuggling, bullying, theft, drug traffic and homosexual menace, but, except for the last, probably not much more than the typical prisoner was accustomed to before he became a prisoner--after all, the maximum security prison is the end of the punishment line, not the beginning, and to reach it the typical prisoner will have first been subjected to the milder punishments meted out by the criminal justice system. For example, 50 percent of all offenders are granted probation. As for the absence of "pacifying amenities," that all depends on what is meant, sports and books or heterosexual assignations. If Wills means the latter, he is right: the prisons do not provide them--at least, they do not as a policy provide them.

To take issue with the prison's critics is not to deny that the prisons are terrible places or to suggest that it is fruitless to hope that something can be done to improve them, and even the best of them. But what? The worst can be made to resemble the best, but then what? Even Gary Wills can only say that we must "do something, whatever we can." John Bartlow Martin said more than twenty years ago that the prisons should be abolished,* a cause more recently taken up by Jessica Mitford who says either they should be abolished completely or retained as places for "as few as possible," which she reckons to be all but 75, 80 or 90 percent of the present prison population, who "could be freed tomorrow without danger to the community or increase in the rate of crime. . . ."** (If this is so--and it is not so--it is somewhat

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*John Bartlow Martin, Break Down the Walls (New York: Ballatine Books, 1954).

**Jessica Mitford, Kind and Usual Punishment: The Prison Business (New York: Alfred A. Knopf, 1973), p. 285; cf. p. 273.

surprising that she does not also advocate the abolition of the police, or all but 75, 80 or 90 percent of them.) In a recent study, William G. Nagel agrees that prisons ought to be abolished, but recognizes that something must take their place: "The prison, after all, is a substitute for capital and corporal punishment."* Rather than return to them, he proposes a variety of substitutes for the substitute, and essentially an emphasis on rehabilitative programs. Ramsey Clark, Attorney General of the United States under Lyndon Johnson and a prototype of the modern reformer, says that rehabilitation "must be the goal of modern corrections," and he promises that if it is, if every other aspect of the criminal justice system is subordinated to it, recidivism can be reduced to half of what it now is; not only that, we can "prevent nearly all of the crime now suffered in America — if we care."** But Gary Wills says rehabilitation is "the last grisly excuse" put forward by the advocates of the prison system; and Governor Brown of California said recently that we face a real problem with prisons: "They don't rehabilitate, they don't deter, they don't punish, and they don't protect."*** As we shall see,**** he is mostly wrong: they do deter, they do protect and, unless Wills, Wicker, Mitford, et alia, are wholly mistaken in their observations, they do punish. He is right, however, when he says they do not rehabilitate. The failure of the nineteenth century penitentiary system finds its parallel in the failure, or failures, of the twentieth century rehabilitation programs, in America as well as elsewhere.

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* William J. Nagel, The New Red Barn: A Critical Look at the Modern American Prison (The American Foundation, Inc., Institute of Corrections, 1973), p. 148.

** Ramsey Clark, Crime in America: Observations on Its Nature, Causes, Prevention and Control (New York: Simon and Schuster, 1970), pp. 220, 215, 21. Italics in original.

*** Newsweek, Feb. 10, 1975, p. 36.

**** See below, pp.

2. Contemporary Rehabilitation

These programs are many and various. They feature vocational training and academic education, group counseling and individual psychotherapy; they involve juveniles and adults, men and women; they begin before incarceration among probationers and after incarceration among parolees; they take place inside the prisons and outside in the community, in a "milieu" that is carefully "supportive" or in one that is deliberately nonsupportive; they impose a close supervision or allow considerable freedom; they have been instituted in the United States, under both federal and state auspices, and in such other countries as Canada, Britain, New Zealand, Denmark and Sweden. Thus, when Ramsey Clark says we can solve the crime problem "if we care," and thereby suggests that criminologists and penologists have not yet cared, he is being grossly unfair to the thousands of skilled and devoted men and women who have designed and administered these programs and to the larger number of legislators who have voted the funds to support them. The problem is not that no one other than Ramsey Clark cares; the problem is that nothing works.

Most of these programs have been designed so as to permit them to be evaluated, which is to say, to determine whether they do work. For example, in one of the most celebrated of them, the California Youth Authority Community Treatment Project, youthful offenders are randomly assigned either to a control group that is incarcerated and in time released to the customary supervision, or to an experimental group whose members are put immediately on probation and, according to an assessment of what is required in individual cases, assigned to foster homes or to group therapy or to a program of individual psychotherapy, all of them in the experimental group receiving special counseling and tutoring and being observed by officers working with small case loads

(one officer per 9.5 offenders, compared with one per 55 in the control group). The success of the program is then evaluated by comparing the rates of favorable and unfavorable discharges of the two groups. The more typical method of evaluation is to compare the recidivism rates of the control group and the group subjected to rehabilitative treatment; thus, a recent Canadian study compared the rate at which Ontario offenders returned to crime either after serving their full prison sentences or after being paroled from prison to a special rehabilitation program. Still other programs are evaluated by judging adjustment to prison life, vocational success or, to mention one more criterion, adjustment to the general community, none of which is easy to measure. Indeed, even the recidivism rate is not that precise a measure, since in one study it may involve minor parole violations and, in another, actual arrests for the commission of crimes. At any rate, hundreds of programs have been instituted and evaluated in one way or another, and the resulting evaluative studies have recently been subjected to a scrupulous review by Robert Martinson, an American criminologist.

He and his colleagues were commissioned by the State of New York to "undertake a comprehensive survey of what was known about rehabilitation," with the view to assisting the state to replace its essentially custodial system of corrections with a program of rehabilitation that would work. Martinson searched the literature for all reports in the English language on "attempts at rehabilitation that had been made in our correction systems and those of other countries from 1945 through 1967." From the much larger number of these he selected 231 studies that were sufficiently clear and rigorous in their methodology to permit analysis and evaluation. What he had to report to New York is that nothing works: "these data, involving over two hundred studies and hundreds of thousands of individuals as they do, are the best available and

give us very little reason to hope that we have in fact found a sure way of reducing recidivism through rehabilitation."* This does not mean no criminals are ever rehabilitated--of course there are such cases--but that we have yet to find a program that will rehabilitate significant numbers of criminals. Martinson concedes that some treatment programs may be working "to some extent," but adds that we do not know it because the available research is incapable of finding them; and he concedes that some successful program may in the future be devised--although he doubts it--and, of course, he uncovered many programs that are said by their supporters to be successful but upon independent evaluation are found not to be so. For example, the success claimed for the California Youth Authority Community Treatment Project was found to be the result of the tendency of the probation officers to discriminate in favor of the experimental group and against the control group. In the case of the latter, parole was revoked for less serious offenses; and in the case of the former, its members "continued to commit offenses" but they were, nevertheless, "permitted to remain on probation." In fact, "the experimentals were actually committing more offenses than their controls."** What is involved here is the phenomenon observed by Beaumont and Tocqueville 150 years ago: the parole officer, like the Cherry Hill chaplain, has an ardent wish to achieve the

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*Robert Martinson, "What Works? - Questions and Answers about Prison Reform," The Public Interest (Spring, 1974), p. 49. This study is reported in much greater detail and at much greater length in Douglas S. Lipton, Robert Martinson and Judith Wilks, The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies (New York: Praeger, 1975).

**Ibid., p. 44. The same conclusions were drawn independently by James Robison and Gerald Smith, "The Effectiveness of Correctional Programs," Crime and Delinquency, vol. 17 (January, 1971), p. 69.

reformation (or, nowadays, the "rehabilitation") of the criminal and "easily gives credence to it."* The same phenomenon can manifest itself in the tendency on the part of administrators to select for the rehabilitative program those offenders who are better risks, or are conceived to be more rehabilitative. This accounted for the success claimed for the Ontario parole program.**

What is clear from all this, and clear to an increasing number of criminologists and penologists, is that we do not know how to rehabilitate criminals any more than the men of the early nineteenth century knew how to cause them to repent. Even Ramsey Clark now admits this.*** There continue to be reformers who look upon crime as a disease, but there is no agreement on what it is that is diseased and, therefore, must be treated and cured. Martinson reports on a Danish behavior modification program that was almost completely successful--it involved the castration of sex offenders, as the result of which their recidivism rate fell off to 3.5 percent, but not to zero (as Martinson comments, where there's a will there's apparently some sort of a way)--but the appropriate treatment for armed robbery or assault, to say nothing of grand larceny or conspiracy to obstruct justice, is not so readily identified. Where would the surgeon begin? What drug would the pharmacologist prescribe? What part of the body or what aspect of the psyche would be treated? These are intended to be simple questions for which, I think, there are no simple answers; yet there is a school of psychiatry that claims to possess the answers. More than a quarter of a century ago, Benjamin Karpman, then on the staff of St. Elizabeth's hospital in Washington, D.C., said flatly that

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*Beaumont and Tocqueville, On the Penitentiary System in America, p. 89.

**Irvin Waller, Men Released from Prison (Toronto: University of Toronto Press, 1974), p. 199.

***Citizens' Inquiry on Parole and Criminal Justice, Inc. (Ramsey Clark, Chairman), "Summary Report on New York Parole" (March, 1974), p. 5 and passim.

"criminality is without exception symptomatic of abnormal mental states and is an expression of them."* This being so, or said to be so, the conclusion is obvious and Karpman states it in a radical form:

> . . . imprisonment and punishment do not present themselves as the proper methods of dealing with criminals. We have to treat them physically as sick people, which in every respect they are. It is no more reasonable to punish these individuals for behavior over which they have no control than it is to punish an individual for breathing through his mouth because of enlarged adenoids. . . . In the future, it is the hope of the more progressive elements in psychopathology and criminology that the guard and the jailer will be replaced by the nurse, and the judge by the psychiatrist, whose sole attempt will be to treat and cure the individual instead of merely to punish him.**

There is absolutely no evidence to support these expectations, largely because, except in the case of organic diseases of the brain which can indeed lead to abnormalities of behavior, there is no scientific basis for the use of the term mental illness.*** "Hence," as Thomas Szasz says, "it is idle to ask whether our contemporary psychiatric practices are 'therapeutically' effective--when there is no disease for them to 'cure'. . . ."**** Again, there is no dispute concerning organic psychoses having known physiological causes; the problem arises with the much larger category of what are called functional psychoses. Karpman makes his case with examples of paranoid dementia praecox, hebephrenia, manic depression and senile dementia; and to the layman it would

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* Benjamin Karpman, "Criminality, Insanity and the Law," Journal of Criminal Law, Criminology and Police Science, vol. 39 (Jan.-Feb., 1949), p. 584.

** Ibid., p. 605.

*** Thomas S. Szasz, M.D., "The Sane Slave: Social Control and Legal Psychiatry," The American Criminal Law Review, vol. 10 (1972), p. 353.

**** Ibid., p. 355.

appear to be a persuasive case. For example, it would appear to be more reasonable to attribute repeated sexual attacks on small children to what he calls senile dementia than to an uncomplicated, straightforward desire for a "meaningful sexual relationship," as we say today. Then one comes to realize that the term senile dementia is no more specific in its vernacular than the term "meaningful" is in its. There is now an enormous body of professional literature showing how unrealiable are psychiatric evaluations (and predictions); what has provoked an interest in this literature is the prevalent practice of turning the question of mental institution commitments over to the exclusive determination of psychiatrists, but the findings are obviously relevant to the treatment of prisoners in correctional institutions. The literature has recently been reviewed by Bruce Ennis and Thomas Litwack (the one a lawyer and the other a psychiatrist), and they demonstrate that both the diagnoses and the predictions made by psychiatrists are unreliable and likely to be invalid. Specifically, with regard to schizophrenia, affective psychoses and paranoid states, each falling in the general category of functional psychoses, the chances of a second psychiatrist agreeing with the diagnosis of a first are barely better than 50-50, and sometimes no better than 40 percent. Which means that the experts cannot agree on what is allegedly wrong with a patient. Moreover, when a diagnosis takes the form of a prediction, which provides an opportunity to draw a conclusion as to its validity, the studies show it is likely to be wrong. (Predictions of dangerousness--made to determine whether a person may be released from an institution--are "'incredibly inaccurate.'") As to mental illness, Ennis and Litwack conclude that there "is no reason to believe that psychiatrists can determine who is 'mentally ill' or predict who requires involuntary care and treatment any more reliably and accurately than

they can make other diagnoses and predictions."* The same studies were reviewed independently by Harvard Law Professor Alan M. Dershowitz and a team of assistants, and, finding the same answers, he concluded that "no legal rule should ever be phrased in medical terms [and] no legal decision should ever be turned over to the psychiatrist."** Unfortunately, as Ennis and Litwack point out, judges and legislators are not aware of these things,*** which could explain Canada's recent decision to inaugurate a multi-million dollar program of psychiatric services in correctional institutions (at a "per patient" cost double the "per inmate" cost, not counting the cost of the physical facilities), except that the Solicitor General — the same reformer who, regardless of public opinion, was determined to abolish capital punishment — was not in fact unaware of the studies mentioned here.**** He preferred to listen to the psychiatrists who wrote the report, and they, like Karpman a quarter century earlier, insist that crime is, to a greater or lesser extent, a disease, amenable to their treatment, their "healing" arts. One of Karpman's examples was kleptomania, and in one sentence he said enough to destroy his case. "In kleptomaniacs," he said, " we have individuals who steal, but their stealing has a number of important differences from ordinary theft."***** Yes, indeed; and the criminal

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* Bruce J. Ennis and Thomas R. Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," California Law Review, vol. 62 (1974), pp. 701-2, 713, 748.

** Alan M. Dershowitz, "The Psychiatrist's Power in Civil Commitment: A Knife that Cuts Both Ways," Psychology Today, vol. 2 (1969), p. 47.

*** Ennis and Litwack, "Psychiatry and the Presumption of Expertise," p. 695.

**** See Richard V. Ericson, "Psychiatrists in Prisons: On Admitting Professional Tinkers in a Tinkers' Paradise," Chitty's Law Journal, vol. 22 (1974), pp. 29-33. The program is reported in Solicitor General of Canada, The General Program for the Development of Psychiatric Services in Federal Correctional Services in Canada (Ottawa, 1973).

***** Karpman, "Criminality, Insanity and the Law," p. 590.

law is--and solicitors general and others in charge of the administration of the criminal law ought to be--primarily concerned with ordinary theft, of which there is an enormous quantity; and if psychiatry is to be of significant assistance to the law enforcement and correctional officials, it will have to explain the etiology not merely of organic psychoses, or even a "neurosis" like kleptomania, but of ordinary shoplifting, burglary, bank robbery and the like (and, of course, come forward with the appropriate treatment). Until that time comes, there is every reason to accept Willie Sutton's simple explanation of why he robbed banks: "Because that's where the money is."

To the extent that rehabilitation programs do not involve psychiatric treatment or vocational training, they aim at "resocialization" or "adjustment" or the overcoming of "maladjustment"; and the reference group to which the convicted criminal is asked to adjust or with respect to which he is said to be badly adjusted is the general population which (for some reason) continues to be law-abiding. The difficulty in effecting a "cure" of the condition designated maladjustment can be glimpsed in the extent to which that general population is moved by the same desires as the criminals, principally the desire for material gain. The difference between them consists merely in the ways they go about achieving this: the one honestly and the other dishonestly. We need not decide whether the economists are wholly correct when they suggest that persons become criminals because, on the basis of a calculation of benefits and costs, the expected utility of crime exceeds that of honest business enterprise; many persons do become criminals and, in many cases, "not because their basic motivation differs from that of other persons."* Nor is it necessary to accept Freud's account of the development of the superego or conscience, which he depicts as the internalization of the dread of being discovered in

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*Gary S. Becker, "Crime and Punishment: An Economic Approach," in Becker and William M. Landes (eds.), Essays in the Economics of Crime and Punishment (New York: National Bureau of Economic Research, 1974), p. 9.

criminal or sinful acts and giving rise to a sense of guilt.* Whatever the mechanism, the law-abiding person is likely to be deterred from committing crimes by the fear of punishment and by the lessons he has been taught: that it is wrong to kill and steal and bear false witness and covet a neighbor's house, wife, manservant, maidservant and ox — or, in our day, his credit card. Whether or not he has been taught these salutary lessons, the criminal obviously has not been persuaded of the necessity to obey them. Sutherland and Cressey, in what is probably the most highly respected criminology textbook, appear both to recognize the problem and to minimize the difficulties in overcoming it when they say that a greater effort should be made to socialize the criminal. They demonstrate no awareness of the harsh measures that cohesive groups have traditionally relied on — corporal punishment, "scarlet letters", and ostracism come to mind. They simply say that we ought "to develop an attitude of appreciation of ["group"] values." This, they say, would be "much more efficient" than relying on the threat of punishment.** No doubt; and, as Madison said in the 51st Federalist, if men were angels, government itself would be unnecessary. But today especially, when so little opprobrium is attached to criminal activities, and when the overwhelming majority of crimes — indeed, when almost all crimes*** — go unpunished, the criminal is likely to compare himself not with the law-abiding group but with the other criminals, who, even in the unlikely event of being apprehended, are able to escape punishment; and that comparison is likely to persuade him that his trouble consists not in his maladjustment but in the bad luck or stupidity that led to his being caught and imprisoned. At any rate, there is no evidence that the typical prisoner is sick with any disease that can be cured by social worker, sociologist or psychiatrist; the theory that he is sick "overlooks — indeed,

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* Sigmund Freud, Civilization and Its Discontents. Translated by Joan Riviere (London: Hogarth Press, 1957) pp. 105-113.

** Edwin H. Sutherland and Donald R. Cressey, Principles of Criminology (Philadelphia and New York, J.P. Lippincott Co., 1966, 7th ed.), p. 370.

*** See below, p.

denies--both the normality of crime in society and the personal normality of a very large proportion of offenders. . . ."*

Recognition of the failure of reform, or of the utter inadequacy of what is called the "rehabilitative model" of penology, is the most striking aspect of contemporary criminology, and not merely in America. Misgivings that only a few years ago had to be expressed privately, are now stated openly at meetings, seminars, workshops and wherever crime and punishment are discussed by experts. It is no longer necessary in these circles to apologize for them. The point has been reached where even the Pennsylvania Quakers have begun to criticize their forbears for initiating the American penal reform movement. A recent report prepared for and published under the auspices of the American Friends Service Committee speaks of the "horror that is the American prison system [that] grew out of an eighteenth-century reform by Pennsylvania Quakers and others against the cruelty and futility of capital and corporal punishment."** This two-hundred-year old experiment, they say, has failed. Perhaps the best evidence of this new recognition of the failure of the rehabilitative model is to be found in the recent writings of Norval Morris, whose credentials as a leading criminologist will not be challenged by anyone. No criminal, he says emphatically, should ever be incarcerated for the purpose of treating him. The advocates of treatment have been led into serious error by their assumption that criminality is a disease in the same way that pneumonia is a disease; the analogy with physical medicine, he says, is false, and has for too long a time been allowed to dominate penology. Prisons should rehabilitate if they can; they should make rehabilitative facilities available to those

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*Martinson, "What Works?--Questions and Answers about Prison Reform," p. 49.

**American Friends Service Committee, Struggle for Justice (New York: Hill & Wang, 1971), p. v.

prisoners who voluntarily submit themselves for treatment; but the purpose of punishment or imprisonment is not to reform offenders. The purpose is "properly retributive, deterrent, and incapacitative."* That it is now possible to speak of the propriety of retribution, or subtitle an article in a highly respected journal, "Toward a Punitive Philosophy," or for another highly sophisticated group of professionals to write that "certain things are simply wrong and ought to be punished,"** is an index of this change that has occurred in our time.

3. Conclusion: Blaming Crime on Society

The penal reform movement began in the United States when Benjamin Rush, moved by compassion and a faith in science, said that the first purpose of punishment was reform of the criminal. Since the death penalty was the punishment least calculated to achieve that end, it was to be replaced by the penitentiaries where criminals would be caused to repent and to learn to live new lives. In the course of time, the agents of this reformation changed from priests to general medical practitioners to social workers and psychiatrists, during which repentance gave way to rehabilitation or adjustment, and cure.

In his characterization of the struggle over the death penalty since Beccaria's time, Thorsten Sellin, as I indicated earlier, spoke of the contending forces as the ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man."*** It is not by chance, however, that the reform penology has profoundly undemocratic consequences. Not only

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* Norval Morris, "The Future of Imprisonment: Toward a Punitive Philosophy," Michigan Law Review, vol. 72 (May 1974), pp. 1161, 1174.

** Andrew von Hirsch, Doing Justice: The Choice of Punishments, Report of the Committee for the Study of Incarceration (New York: Hill and Wang, 1976), p. xxxix.

*** Thorsten Sellin, The Death Penalty, p. 15.

does it subject prisoners to courses of treatment against their will—a fact that has caused it to be criticized by prisoners and criminologists alike—but it substitutes rule by the few for rule by the people. Whether a particular mode of punishment or treatment will effect the reform of the criminal is an issue on which the public may or may not have opinions, but it is not an issue in whose resolution the public's opinion should be given any weight, even in a democracy. It is not a question of justice but of medicine and, as such, should be turned over to the experts in medicine, the psychiatrists or whatever. Whether a particular criminal is in fact reformed is, of course, a question of fact, and should be answered by those who are alone qualified to answer it. They will determine when a criminal is cured and, therefore, they will determine the length of sentence. Hence, the public's notion of justice that is embodied in every schedule of punishment must be superseded by indeterminate sentences, and, in penology, democracy must be superseded by what might be called psychotocracy. The belief in the "personal value and dignity of the common man" does not include a belief in his capacity to decide questions of punishment. Common men serve on juries and mete out death sentences; uncommon men serve on the Supreme Court and set aside those sentences, accusing juries of being arbitrary, capricious, bigoted, cruel. Common men continue to be moved by the concern for the fitness that we call justice and that manifests itself in the rule that people should get what they deserve; our uncommon reformers insist that the issue is not one of justice but of medicine.

Having said this, I must immediately qualify it: there is a school of reformers that is very much concerned with what they understand to be justice. It is precisely their concern for justice that prevents them from following the trend in criminology away from the rehabilitative model and toward the

punitive model. They agree that reform and rehabilitation have failed; what sets them apart from Norval Morris, for example, is their insistence that punishment is unjust. And what sets them apart from the earlier reformers is their opinion that society is unjust and, because it is unjust, has no right either to punish or to treat criminals. In their view, criminology has been at fault because it looked for the causes of crime in the soul or body of the criminal, whereas they are actually to be found in society or in the "conditions." It follows that it is the "rotten" society or the "system" that must be reformed, not those whom it labels criminals.

Thus, as the American Friends Service Committee sees it, most crimes are committed by the "agencies of government," just as most murders have been committed by governments.* Thus, too, as Tom Wicker sees it, Rockefeller was the cause of the Attica prison uprising, not Rockefeller the Governor of New York, but the "other Rockefeller--all the Rockefellers of the world, the great owners and proprietors and investors and profit-makers." They had shaped the "society that had produced Attica."** It is the system that is "crime-breeding," insofar as anyone may be denominated a criminal or anything a crime. In fact, psychiatrist Karl Menninger suggests that the only crime in our midst is the one committed by those persons whom society perversely designates law-abiding:

> And there is one crime we all keep committing, over and over. I accuse the reader of this--and myself, too--and all the nonreaders. We commit the crime of damning some of our fellow citizens with the label "criminal." And having done this, we force them through an experience that is soul-searing and dehumanizing. In this way we exculpate ourselves from the guilt we feel and tell ourselves that we do it to "correct" the "criminal" and make us all safer from crime. We commit this crime every day that we retain our present stupid, futile, abominable practices against detected offenders.***

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*American Friends Service Committee, Struggle for Justice, p. 10.

**Tom Wicker, A Time to Die (New York: Quadrangle Books, 1975), p. 203.

***Karl Menninger, M.D. The Crime

We do this, he says, because we need crime: "The inescapable conclusion is that society secretly wants crime, needs crime, and gains definite satisfactions from the present mishandling of it!" We need it to "enjoy vicariously." We need criminals "to identify ourselves with"; they "represent our alter egos--our 'bad' selves." Criminals do for us the "illegal things we wish to do and, like scapegoats of old, they bear the burdens of our displaced guilt and punishment. . . ."* Them we can punish, he says, on them we can wreak our vengeance.**

It should be obvious that these are not the strictures of a Communist casting blame on the capitalist mode of production; this is the nonpartisan voice of what calls itself science. Menninger, recent winner of the Roscoe Pound Award for his outstanding work in "the field of criminal justice,"*** looks at the crime problem "from the standpoint of one whose life has been spent in scientific work." He claims, and not unreasonably one would have thought, that the scientific perspective is superior to "commonsense" when it comes to understanding the causes of crime and the disposition or handling of so-called criminals. The common man's commonsense says catch "criminals and lock them up; if they hit you, hit them back."**** And what does his science say? Do away with punishment, of course, and, to the extent necessary, replace it with a system of penalties. To wit:

> If a burglar takes my property, I would like to have it returned or paid for by him if possible, and the state ought to be reimbursed for its costs, too. This could be forcibly required to come from the burglar. This would be equitable; it would be just, and it would not be "punitive."*****

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*Ibid., p. 153. Italics in original.

**Ibid., p. 190.

***American Journal of Corrections, vol. 37 (July-August, 1975), p. 32. The award was announced by the 22d National Institute on Crime and Delinquency.

****Ibid., pp. 4, 5.

*****Ibid., p. 113.

That is, if the burglar is caught (but the chances of his being caught are statistically remote), do not punish him; "penalize" him by requiring him to return what he has stolen. "Scientific studies have shown that most punishment does not accomplish any of the purposes by which it is justified, but neither the law nor the public cares anything about that. The real justification for punishment is none of these rational 'purposes,' but an irrational zeal for inflicting pain upon one who has inflicted pain (or harm or loss)."* Our crime problem will not be solved until we reform ourselves, Menninger says time and again, and learn to love those we obdurately and mistakenly label criminals. "Love against Hate," is the revealing title of one chapter, in a book entitled The Crime of Punishment. The reform of the law of punishments can only be accomplished by abolishing punishment. Nietzsche (whose diagnosis may be accepted even though his cure must be rejected) had these reformers in mind when, almost a hundred years ago, he wrote the following:

> There is a point in the history of society when it becomes so pathologically soft and tender that among other things it sides even with those who harm it, criminals, and does this quite seriously and honestly. Punishing somehow seems unfair to it, and it is certain that imagining "punishment" and "being supposed to punish" hurts it, arouses fear in it. "Is it not enough to render him undangerous? Why still punish? Punishing itself is terrible."**

Benjamin Rush did not hate criminals, but neither did he love them or ask that they be loved. On the contrary, he disliked public executions because the sight of condemned men meeting their fate with fortitude was likely to

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*Ibid., p. 113.

**Nietzsche, Beyond Good and Evil, trans. Walter Kaufmann (New York: Vintage Books, 1966), Sec. 201. Italics in original.

cause them to be admired--and criminals were not to be admired--and the sight of their suffering was calculated to arouse the public's sympathy for them--and criminals were not to enjoy public sympathy. Hence, they were to be incarcerated in remote places (like Attica) where their punishment, and rumors or legends about their punishment, would "diffuse terror thro' [the] community, and thereby prevent crime." But he made reforming the criminal the first purpose of this punishment, and the solicitude required to effect this reform is not that far distant from the love we are now asked to display. And it is not by chance that Menninger's demand that we love criminals is balanced by his harsh strictures against the public that persists in hating criminals and demands that they be paid back for their evil deeds. Nor is it by chance that Menninger expresses no sympathy for the victims of the crimes. They belong to the society that causes crime and must be reformed.

Quaker Elizabeth Fry, the distinguished early nineteenth century English prison reformer, did not hate criminals, but she nevertheless insisted that prison reformers must maintain a dignified distance from them precisely because the reformers must provide an exemplary model for their emulation. She said it was not safe "in our intercourse with them to descend to familiarity--for there is a dignity in the Christian character which demands and will obtain respect." Our contemporary Quakers quote this passage and then denounce her advice as the sort of paternalism that has "infected" much penal reform.* The fault in our "correctional practice" has consisted in the attempt on the part of Elizabeth Fry and her successors to indoctrinate prisoners in "White Anglo-Saxon middle-class values."** This

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*American Friends Service Committee, Struggle for Justice, p. 18.

**Ibid., p. 43.

fault merely reflects the more basic fault in society's failure to encourage the creation of "morally autonomous" people.*

So say our present-day Quakers; and when even the Quakers begin to speak the idiom of the counter-culture, it is surely time to forget reforming criminals. However misguided were the reform efforts of the early Quakers, they at least possessed one quality that is a necessary condition of reform: the confidence that they were right and the criminals were wrong. Their descendants lack that confidence. They do not speak of "resocialization" or "adjustment" or "maladjustment," because they hate the society and will not ask anyone to adjust to it.

The reform movement that Benjamin Rush began in the late eighteenth century can be said to have culminated in a dramatic scene in Attica's D-yard during what may have been the worst and what was surely the most publicized prison revolt in American history. Here the pathologically soft reformer, in the person of an editor of the country's most powerful newspaper, appeared on the scene as a "neutral" observer. Beset with guilt, he ignored the hostages being held by the convicts, denounced the society that causes crime and builds Atticas, sobbed, he said, as he listened to the "authentic" eloquence of convicts' speeches, and finally threw his arms around the convict who had called out his name, hugging him to his breast. "'We gonna win, brother', Wicker says. 'We gonna win.' The boy smiled and nodded and Wicker walked on, thinking he was free at last free at last. . . ."**

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*Ibid., pp. 44-5.

**Tom Wicker, A Time to Die, pp. 248-9.

The reformer, and particularly those who are attached to the "rehabilitative ideal," are quick to blame the "system" for what the rest of us call crime, but, in fact, their responsibility for it cannot be ignored and should not be minimized. Criminal lawyers have pointed out, here in the words of Francis Allen, Dean of the University of Michigan Law School, that "the concentration of interest on the nature and needs of the criminal has resulted in a remarkable absence of interest in the nature of crime,"* but that is only part of the story. It has also resulted in a remarkable lack of interest in the crimes that have been committed, and this, in turn, has contributed to the remarkable sympathy for criminals manifested by criminologists, amateur and professional, as well as by some judges and politicians. Wicker embraces the criminal without knowing what crime he committed; Wicker has no interest in that. Camus devotes his remarkable rhetorical powers to put us in the criminal's place, to put our heads on the block, so to speak; but he ignores the criminal's victim. It is said to be a "butchery" to execute a convicted murderer, but in weighing the case for and against capital punishment we are supposed to ignore the butchery of the crimes these murderers commit. That is supposed to be irrelevant. In the recent Canadian debate on the bill to abolish capital punishment, the Prime Minister, Pierre Trudeau, went so far as to say to the opponents of the bill that if they succeeded, "some people are going to be hanged," and that the opponents of the bill could not "escape their personal share of responsibility for the hangings which will take place if the bill is defeated."**

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* Francis A. Allen, "The Rehabilitative Ideal," in Rudolph J. Gerber and Patrick D. McAnany (eds.), Contemporary Justice: Views, Explanations, and Justifications (Notre Dame, Ind.: University of Notre Dame Press, 1972), p. 211.

** Toronto Globe and Mail, June 16, 1976, p. 7.

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Think of the criminals, of the "people" who would die if the bill failed of passage, and do not think of the people who have already died at the hands of the murderers. No one replied: "Of course. That is the whole point of our opposition to this bill, that murderers ought to die." The bill passed by a margin of 133-125.

In prescribing punishments, it is a natural to look at the crime; in prescribing treatment, one looks at the patient (the criminal) and ignores his crime. The sight of crime and the criminal arouses anger, but the sight of someone suffering with a disease arouses compassion for him. Anger with crime is naturally combined with compassion for the victims of crimes, and this is as it should be: persons who are angry with crime and criminals and feel sorry for the victims of crime are likely to be law-abiding citizens. And the legal system that allows them to express that anger (or expresses it in their name) and to express that compassion is a legal system that is doing a proper job; it is teaching the lesson that a society of law must somehow teach. It is acting as a moral legal system when it blames immorality, or crime, and when it praises morality, or obedience to law. The system favored by the modern reformers is the opposite of a moral legal system. Like the unsophisticated citizen, our modern reformers are both compassionate and angry men, but their compassion is felt for the criminal and their anger is directed at society. Society is said to be responsible for the criminal's disease.

The effect of the "rehabilitative ideal" on crime and the criminal justice system has been pernicious. It has, as I shall argue in the next

chapter, made it more difficult to apprehend, convict, and punish criminals, and, therefore, contributed to the increase in the number of crimes, including murders, being committed.

CHAPTER III

THE DETERRENCE QUESTION

The progress of civilization, we are told and have reason to believe, has resulted in a vast change alike in the theory and in the method of punishment, and the changes in the method are related to the changes in the theory. In primitive societies, the right to punish was retained by the private party (or his family) that suffered the wrong, and punishment was likely to be vindictive or retributive, imposed in order to satisfy the desire to be avenged.* The legalizing or "socializing" of punishment did not immediately lead to the civilizing of the method of punishment, which continued to be characterized by vindictiveness. Offenders were burned at the stake, hanged and quartered, disemboweled or otherwise mutilated. A good deal of ingenuity was employed in devising painful punishments, and, if we are to judge by what was done, the purpose of pre-modern punishment was simply to cause pain. This is no longer the case. The purpose of modern punishment (to the extent that punishment is permitted) is, in principle, to instill fear. This change is the consequence of a change in the ends of civil society itself.

Criminal law reform began 200 years ago when Beccaria applied to crimes and punishments the liberal principles delineated by the philosophers of natural rights. These rights were possessed in the state of nature but they were not enjoyed there because the state of nature resembled too closely the state of war of every man against every man. To secure these rights, governments had to be instituted among men; to provide this security became the chief end of government, which is to say that peace,

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* Max Weber, On Law in Economy and Society, ed. Max Rheinstein (Cambridge: Harvard University Press, 1954), p. 50 ff.

so conspicuously absent both in the state of nature and in the pre-liberal state, became the chief end of government. This required a new kind of civil society.

His experience convinced Hobbes, the first of the natural rights philosophers,* that peace was endangered most of all by the seditious doctrine (which he called "one of the diseases of a commonwealth") according to which every private man is judge of good and evil actions and of the justice and injustice of the laws. This doctrine, so pernicious in its consequences, was fostered most of all by the clergy— Hobbes' "ghostly" or "spiritual" authority— and so long as the power of the clergy remained intact, men would continue to offer the sovereign only a conditional obedience because they would fear eternal damnation more than the sovereign's laws. This subjected the commonwealth to the continual and "great danger of civil war and dissolution."** Peace, then, required that men be rid of this unreasonable fear of "the power of spirits invisible";*** peace required enlightenment. The enlightened sovereign would subordinate the spiritual authority and, in Beccaria's words, "see to it that men fear the laws and fear nothing else."**** The true measure of crimes was not in their intrinsic character but in the "harm done to society." This palpable truth, so long obscured by the clergy working on "the timid credulity of men," would, as a consequence of the "present enlightenment,"***** soon be made evident to everyone. The fear of God would be superseded by the fear of the sovereign or the laws.

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* Hobbes, Leviathan, I, ch. 14

** Ibid., II, ch. 29. Italics in original

*** Ibid., I, ch. 15

**** Beccaria, On Crimes and Punishments (Indianapolis: The Library of Liberal Arts, 1963, trans. Henry Paolucci), p. 94.

***** Ibid., p. 65. Italics in original. See also pp. 96-97.

Liberated from the rule of the clergy, men would be less inclined to make war on the secular authority; unfortunately, they would also be more inclined to pursue their self-interest exclusively, because they would no longer be taught that it is wrong to do so. At least, the old moral teachings would lose the authority they formerly possessed. At this juncture, it would become essential to demonstrate to men that it is dangerous to pursue their interests in a manner forbidden by the laws. To convince them of this danger would be the function of punishment. With Hobbes, and even more explicitly with Beccaria, the purpose of punishment became the solid and prosaic necessity to make men obey the laws. Its purpose was not, said Hobbes, to exact revenge, but to instill "terror," to the end of correcting the offender and the others who might learn from the example.* Revenge looks to the past and is justified on the principle that the person on whom it is to be taken has done something for which he "deserves" to be punished. Strictly speaking, no one in the new liberal state would be punished because he had done something that merits punishment; he would be punished only to prevent future criminal behavior, either on his part or on the part of others. The penal law of the liberal state would, in a sense, have only prospective vision, looking not to the past but to the future. In short, the purpose of punishment would be to deter crimes and thereby ensure obedience to the laws. As Beccaria put it, its purpose was "only to prevent the criminal from inflicting new injuries on...citizens and to deter others from similar acts."** Punishment deters crimes, it was assumed, because it makes men afraid to commit

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* Hobbes, Leviathan, II, ch. 30.

** Beccaria, op. cit. p. 42.

them, and the laws depend on this fear. "What is the political intent of punishment?" he asked. "To instill fear in other men.*

Here, then, is the origin of the modern idea of deterrence. Here, in fact, is the origin of the idea of a civil society that would depend not on the word of God or the fear of God, but on the fear of punishment for its very existence. Unlike the system it was intended to replace, the liberal state would not depend on a moral education designed to teach men to love their neighbours as themselves; not only was such an education the cause of moral pretentions and, therefore, of civil disobedience and dissolution, but it did not in fact succeed in promoting concern for the well-being of others. It did not do so because, in Beccaria's words, it was opposed by a "force, similar to gravity, which impels us to seek our own well-being...."** That force can be "restrained in its operation only to the extent that obstacles are set up against it," and the only obstacle that can be relied on is punishment. Punishments "prevent the bad effect without destroying the impelling cause, which is that sensibility [self-interest or self-love] inseparable from man." The liberal legislator, instead of using a church united to the state whose purpose is to teach men to be good (it was precisely that sort of thing from which its citizens were to be liberated), would emulate the "able architect whose function it is to check the destructive tendencies of gravity and to align correctly those that contribute to the strength of the building." Instead of attempting to suppress self-interest, the liberal legislator would build on it and rely on the fear of punishment to check or restrain its anti-social tendencies. As I said at the beginning of this chapter, the purpose

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* Beccaria, op. cit., p. 30.

** Ibid., p. 63.

of modern punishment, or, more precisely now, the modern purpose of punishment, would be to instill fear and thereby deter crime.

This liberal "scheme" had its critics, of course; Burke called it a "barbarous philosophy" according to which "laws are to be supported only by their own terrors, and by the concern which each individual may find in them from his own private speculations, or can spare to them from his own private interests."* He portrayed the essence of it in this vivid and singularly appropriate figure: "In the groves of their academy, at the end of every vista, you see nothing but the gallows." But Beccaria was confident that the laws could be terrifying without resort to the gallows.

Throughout its long history as a legal penalty, capital punishment has been imposed because those in authority regarded it as the only penalty appropriate to or commensurate with the crime for which it was imposed or because they regarded it as the most awful penalty and had reason to believe (or simply believed) that most people so regarded it and would, therefore, seek to avoid it beyond all others. The abolitionists regard it as the most awful penalty ("an atavistic butchery"**) and, when referring to the public's unwillingness to witness executions or a jury's reluctance to impose death sentences, suggest that most people are of the same opinion. But they nevertheless insist that, although it is feared beyond all other sanctions, the death penalty is not a more effective deterrent than imprisonment. Whether they are entitled to hold this opinion is the subject of the section that follows.

1. The Argument Against Deterrence

The murder rate almost doubled in the United States in the last fifteen years, and the number of executions gradually declined until, in 1968,

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* Edmund Burke, Reflections on the Revolution in France. Works (London: C. and J. Rivington, 1826), vol. 5, p. 152.

** Anthony Amsterdam in oral argument in Gregg v. Georgia, Supreme Court of the United States, #74-6257. The New York Times, April,1, 1976, p. 1

it reached zero; but it does not follow that these trends are causally connected. Common sense would suggest that they are somehow and to some extent related, but common sense is often mistaken and gives way to science, occasionally even to social science. Unfortunately, in this case it is not easy for social science to provide a reliable answer.

There are a number of reasons for this, the most obvious being the difficulty in identifying the effect of one among many factors that probably affect the murder rate. Just as we have reason to believe that a soybean plant, to choose a simple illustration, requires more than sunlight to grow to its optimum height, we suspect that the murder rate depends on factors in addition to the severity and kinds of punishments imposed on murderers; in fact, we suspect that many more (and more obscure) factors are involved than in the case of soybean culture. We might speculate that the number of murders-by-poison depends to some extent on the availability of lethal poisons--whether they may be obtained without prescription and whether the drugstores selling them are distributed throughout the area being studied--as well as on their price and the ease with which they can be administered. We might also speculate that the number of murders-by-shooting depends on the number of handguns in the community, and whether a license is required to purchase and carry them, and on their cost. It is also possible that the murder rate is sensitive to the amount of violence shown on television, as well as to the amount of poverty and unemployment, or depends on the efficiency of the police, the state of medical science, the proportion of the population in a particular age group, and so on. To isolate the effect of any one of these factors--say, the rate of executions--it is necessary to hold constant all the others, which sounds simple but is not. As I pointed out in the first chapter, Thorsten Sellin attempted to solve this problem by studying the homicide rates in

contiguous states, some with and some without the death penalty, on the assumption that these states "are as alike as possible in . . . character of population, social and economic conditions, etc. . . ." His conclusion was that the death penalty has no effect on the murder rate,* and most criminologists were convinced by his study, even though Sellin did not succeed in overcoming all the difficulties involved in this kind of study.

In the first place, Sellin looked for correlations between the homicide rate and the legal status of the death penalty, rather than the number of executions actually carried out in the states where it was a legal punishment; but the number of executions is much more likely than the mere legal existence of the penalty to have an effect on potential killers. Then, although it may be true that contiguous states are similar with respect to the sociological factors that are thought to impinge on the homicide rate, it may also not be true; and without thorough investigation, which he did not undertake, Sellin had no way of knowing whether the states he assumed to be equal in all respects except in the punishments they authorized for homicide were, for one example, equally adept in apprehending and convicting those who committed it. All of which is to say that this sort of simple cross-state comparison, even a cross-contiguous-state comparison, does not and cannot adequately "control" for the other factors.

This difficulty can be avoided by studying the murder rate within a state that has abolished the death penalty and then (most conveniently for the social science researcher) reimposed it. Unfortunately, most of the states that abolished the death penalty did so many years ago (Michigan was the first in 1846) when the statistics are either unavailable or especially unreliable. On the basis of the information that is available, however, Professor Sellin reached the conclusion reported above. But again there is an obvious difficulty:

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*Thorsten Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute (Philadelphia, 1959), p. 63.

whereas a simple cross-state comparison cannot "control" for the factors that may differ from state to state, a simple cross-time comparison within one state cannot "control" for the factors that may differ from time to time.

Then there is the problem of distinguishing between incapacitation and deterrence. It is entirely possible that the death penalty prevents murders, but only because it prevents known murderers from committing additional murders and not because it "deters" potential murderers. The distinction is obviously of direct relevance to the deterrence issue, because known murderers can be incapacitated by imprisoning them (if we ignore the problem of the murders they commit in prison and the possibility that they might escape) as well as by executing them.

One other difficulty deserves mention. Whereas the plant scientist can assume that the height of a soybean plant may depend on the amount of sunlight it receives, his testing of this assumption is not complicated by the necessity to consider the possibility that the amount of sunlight may be affected by the height of his soybeans. The social scientist cannot ignore the equivalent assumption concerning executions and the murder rate. While executions may tend to produce a decline in the murder rate, it is entirely possible that both the number and rate of executions increase with the murder rate. The reason for this is that when the murder rate is high, or is perceived to be high, judges and juries may impose the death sentence on a larger proportion of convicted murderers than when it is low or is perceived to be low. Thus, the number of executions may be both cause and effect of the murder rate. One implication of this is that an increase in the number of executions "caused" by an increase in the murder rate may appear to be an increase in the murder rate "caused" by an increase in the number of executions. No simple technique can distinguish the two. Then, again, juries may be reluctant to convict under a statute that makes the death sentence mandatory for first-degree murder and, instead, bring

in verdicts of guilty of one degree or another of manslaughter. This would give the appearance of a case where the threat of capital punishment "causes" a decline in the murder rate.

Despite these technical difficulties, there have been a number of studies of deterrence in addition to those conducted by Professor Sellin, and, until recently, there was a uniformity and consistency in their findings. In the words of Norval Morris and Gordon Hawkins, the conclusion that emerges from these studies, "and from all the literature and research reports on the death penalty is, to the point of monotony: the existence or nonexistence of capital punishment is irrelevant to the murder, or attempted murder, rate." This, they say, "is as well established as any other proposition in social science."* Other researchers have denied this and, in the course of doing so, have suggested that the criminologists were convinced by the studies because they wanted to be convinced.

It has been said that the studies on which they rely were undertaken under the assumption that punishment in general does not deter crime in general.** Hugo Adam Bedau, perhaps the best known of America's abolitionists, lent some substance to this charge when he conceded that some criminologists were skeptical of the death penalty's capacity to deter because they doubted the capacity of any punishment to deter "crimes of personal violence."*** Such an opinion would appear to be extravagant (and Bedau does not share it), but it is held by reputable criminologists. As recently as 1967 Walter Reckless, in the fourth edition of his textbook, said flatly that punishment

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*/ Norval Morris and Gordon Hawkins, "From Murder and Violence, Good Lord, Deliver Us," Midway, vol. 10 (Summer, 1969), p. 85.

** Gordon Tullock, "Does Punishment Deter Crime?" The Public Interest, number 36 (Summer, 1974), p. 107.

*** Hugo Adam Bedau, "Deterrence and the Death Penalty: A Reconsideration," Journal of Criminal Law, Criminology and Police Science, vol. 61 (1970), p. 546.

"does not . . . prevent crime in others or prevent relapse into crime [on the part of those who are punished]";* and even in 1974, a leading opponent of the death penalty, William J. Bowers, claimed that recent research "casts serious doubt on the deterrent efficacy of imprisonment."** Of course, such assertions have not gone unchallenged. Paul W. Tappan, the author of a leading textbook, characterized them as "dogmatic" and "highly simplified," and the product of "loose thinking and naive criminological idealism."

> As an argument for the abolition of the deterrent doctrine, it is often maintained that neither the threat nor application of penalties does prevent crimes. This position reflects the simplistic notion, too commonly prevailing in matters of social action, that nothing has been achieved merely because not everything is accomplished that we should like. It is sometimes said that high crime rates prove that sanctions do not deter or that penalties actually invite the crimes of men who seek punishment to dissolve their feelings of guilt. With tiresome frequency the illustration is cited of the pickpockets who actively plied their trade in the shadows of the gallows from which their fellow knaves were strung. These assertions have a superficial relevance but they do not dispose of the issue by any means.***

It has also been charged that the social science studies of the death penalty were undertaken solely "to disprove the deterrent value claimed for that punishment,"**** and, even more seriously, that criminologists became "advocates

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*Walter Reckless, The Crime Problem (New York: Appleton-Century-Crofts, 4th ed., 1962), p. 508.

**Bowers, op. cit., p. 195.

***Paul W. Tappan, Crime, Justice and Correction (McGraw-Hill, 1960), p. 245. And see Maynard L. Erickson and Jack P. Gibbs, "The Deterrence Question: Some Alternative Methods of Analysis," Social Science Quarterly, vol. 54, #3 (December, 1973), pp. 534-51.

****Royal Commission on Capital Punishment (1949-1953), Report (London: H.M. Stationery Office, Cmd. 8932), p. 22.

and spokesmen for the treatment interest and the treatment ideology, and did everything in their power to ridicule the very idea of deterrence."* All this may or may not be true; what is beyond question, I think, is that most studies of deterrence were undertaken by criminologists who were inveterate opponents of capital punishment, and this, as the following examples are intended to show, may have influenced their work.

Canada's decision in 1967 to abolish capital punishment for a trial period of five years provided criminologists with a good opportunity to observe the consequences of this change in the penal law. Furthermore, in this case inquiry was facilitated by the availability of reliable statistics: Canada has a uniform national crime reporting system which, among other data, provides the researcher with accurate figures of the number of violent crimes committed each year, including criminal homicides and attempted murders. Working with these, Ezzat A. Fattah, in a study sponsored by the Solicitor General of Canada, found that the "slight" increase in criminal homicide in Canada in recent years cannot be attributed to the suspension of capital punishment."** He arrived at this conclusion by comparing the increase in the criminal homicide rate with the increase in the rates of other violent crimes (for which there had been no change in punishments), and, among other things, found it to be "the lowest among all crimes of violence studied." Something other than the abolition of the death penalty had caused this increase, he concluded. The figures are

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*Robert Martinson, "Letter to the Editor," Commentary, vol. 58 (October, 1974), p. 12.

**Ezzat A. Fattah, "The Canadian Experiment with Abolition of the Death Penalty," in William J. Bowers, Executions in America (Lexington, Mass.: D.C. Heath & Co., 1974), p. 133. This paper is a summary of his report to the Solicitor General. See, Fattah, A Study of the Deterrent Effect of Capital Punishment with Special Reference to the Canadian Situation (Ottawa: Department of the Solicitor General, 1972).

presented in the following table*:

CHANGES IN CRIMES OF VIOLENCE, 1962-1970

	Canada					
	1970		Percentage Change Over 1969		Percentage Change Over 1962	
Offense	Number	Rate per 100,000 Population 7 Years and over	Number	Rate	Number	Rate
Criminal Homicide (Murder and Manslaughter)	425	2.3	+10.1	+9.5	+60.4	+35.3
Attempted Murder	260	1.4	+20.4	+16.7	+213.3	+180.0
Wounding and Assaults	78,979	424.4	+7.1	+4.8	+171.6	+125.1
Rape	1,079	5.8	+5.9	+3.6	+85.4	+52.6
Robbery	11,630	62.5	+16.0	+13.4	+134.9	+94.7

The current Solicitor General relied on these findings to support his vigorous advocacy of complete and permanent abolition of the death penalty.

Yet, even a cursory examination of the table should make one pause. While the increase in the rate of criminal homicide is the lowest "among all crimes of violence studied," the increase in the rate of attempted murder is the highest of all the violent crime rates reported, a fact Fattah ignored. This increase may or may not be significant; before drawing conclusions one

*Ibid., p. 130.

would have to know, for example, whether it represents an actual increase or merely an increase attributable to changes in prosecutorial practices: many of the offenses now designated "attempted murder" may, in the past, have been prosecuted as aggravated assaults. Even the best of crime statistics are rendered unreliable to a degree by the discretion that police and prosecutors exercise, and, in the course of their work, must exercise. It is even possible (but not probable) that an advance in medical treatment during this period, or the speed with which it was made available, had the effect of saving lives that would have been lost in the past, thereby increasing the number of attempted murders while reducing (or subtracting from) the number of murders. Working with crime statistics is beset with difficulties.

Unfortunately, this is not the only place where Fattah was less than comprehensive in his reporting. The suspension of the death penalty in Canada did not extend to the crime of murdering policemen (and others, such as prison guards), and Fattah examined the number of these murders and claimed further support for his conclusion that the abolition of the death penalty did not cause an increase in the murder rate.

> If the increase in criminal homicide were due to the suspension of capital punishment, then the categories of murder for which this punishment has been retained should not show an increase. Since the murder of a policeman is still legally punishable by death, one would expect, if the increase in other types of homicide were due to the suspension of the death penalty, that this category would not be affected. Our data show that this is not true. The murder of policemen has been on the increase since the legal suspension of capital punishment in 1968 and despite the fact that it has been retained for this type of killing.*

This conclusion would be more acceptable were it not for the fact--and it is a

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*Ibid., p. 134.

fact well known to the public generally and to Fattah in particular -- that the "last execution in Canada took place in 1962."* The potential murderers of policemen, like the potential murderers of everyone else, had good reason to know that even if apprehended and convicted they would not be executed: the latter may not be put to death and the death sentences imposed on the former will be (and all have been) commuted to life imprisonment. In practice, then, there has been no difference in the punishments actually carried out, and Fattah's conclusion resting on the difference in the punishments that might have been carried out is not worth very much, to say the least. In effect, Canada has been without the death penalty since 1962 (and in 1976 abolished it by statute).

Another study, cited almost as frequently as Sellin's, is Karl Schuessler's 1952 time series analysis of execution and homicide data from various states. He, too, concluded "that the death penalty has little of anything to do with the relative occurrence of murder,"** but not all of his findings support this conclusion. He devised a test of deterrence that measured the relation between the risk of execution and the homicide rate in 41 death penalty states during the period 1937-1949. What he found was "a slight tendency for the homicide rate to diminish as the probability of execution increases."*** But the simple correlation coefficient between these two indices was a negative .26, and, in the circumstances, this was by no means insignificant.**** Then, as a check on

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*Ibid., p. 121.

**Karl F. Schuessler, "The Deterrent Influence of the Death Penalty," The Annals of the American Academy of Political and Social Science, vol. 284 (1952), p. 61.

***Ibid., p. 60.

****This negative association "turns out to be significant statistically at the five percent level for a one-tail test. . . ." (Isaac Ehrlich, "Deterrence: Evidence and Inference," Yale Law Journal, vol. 85 [December, 1975], p. 221, note 35.) What this means is that in random sampling from a population with a zero coefficient of simple correlation a value of -.26 or smaller would occur only five (or fewer) times out of a hundred due to pure chance.

the consistency of this trend, he computed the ratio of the (average) execution rate to the (average) homicide rate for four groupings of these states. The results are presented in this table:*

TABLE 5--AVERAGE HOMICIDE AND EXECUTION RATES IN 41 STATES GROUPED ACCORDING TO SIZE OF HOMICIDE RATE

Quartile by Homicide Rate	Average Homicide Rate (HR)	Average Execution Rate (ER)	$\frac{ER}{HR}$
Highest	15.4	.32	.21
Upper middle	7.8	.14	.18
Lower middle	4.2	.08	.19
Lowest	2.0	.05	.25

In the text accompanying the table, he said this "shows that the homicide rate does not consistently fall as the risk of execution increases."** True enough, and I doubt that anyone would be so bold as to assert that the homicide rate would consistently fall as the risk of execution increases. But the table also shows that the group of states with the highest ratio of the average execution rate to the average homicide rate ($\frac{ER}{HR} = .25$) had the lowest homicide rate (2.0),

*Schuessler, op. cit., p. 60.

**Ibid.

as is to be expected--if executions deter homicide.

One more example of a study that claims to show that the death penalty does not deter murder. William Bowers, outspoken opponent of capital punishment, did a study similar to Sellin's in which he compared the murder rates in nine sets of contiguous states in the eight years prior and subsequent to the moratorium on executions in the 1960's. He said he found "no evidence to suggest that the death penalty is a uniquely deterrent form of punishment."* The quality of this study is fairly indicated in this critical comment:

> . . . the plain fact is that none of the states in eight of the nine groups had a single execution throughout this period. And in the ninth group, Bowers creates a dubious distinction between New York, classified as abolitionist, and New Jersey and Pennsylvania, classified as retentionist, although New York ceased all executions in 1963--the same year as New Jersey and one year after Pennsylvania. That such comparisons are used as a basis for inference about the deterrent effect of capital punishment taxes one's imagination.**

Bowers ends with some sharp words about the proponents of capital punishment and accuses them of relying on arguments that "depend on alleged faults in the existing research. . . ."*** But enough has been said here to indicate that these allegations have some basis and that these various studies are not faultless. They surely do not justify the inferences drawn from them by their authors as well as by abolitionists outside the academic community. "Hanging is not a deterrent,"**** we are told with some frequency; but such statements derive from partisan commitment not science.

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*Bowers, op. cit., p. 145.

**Isaac Ehrlich, "Deterrence: Evidence and Inference," p. 223.

***Bowers, op. cit., p. 163.

****Editorial, Toronto Globe and Mail, February 26, 1976.

2. The Argument for Deterrence

Professor Bedau, much to his credit, was more modest in his assessment of what has been found by these various studies. He said the proposition that the death penalty is a superior deterrent to life imprisonment has not been disproved, nor has it been confirmed. He nevertheless insisted it had been "disconfirmed" by the uniformity or consistency of the findings published.* His conclusion took the form of a challenge to the proponents of capital punishment.

> The death penalty is a sufficiently momentous matter and of sufficient controversy that the admittedly imperfect evidence assembled over the past generation by those friendly to abolition should now be countered by evidence tending to support the opposite [pro-capital punishment] position. It remains a somewhat sad curiosity that nothing of the sort has happened; no one has ever published research tending to show, however inconclusively, that the death penalty after all is a deterrent and a superior deterrent to "life" imprisonment. Among scholars at least, if not among legislators and other politicians, the perennial appeal to burden of proof really ought to give way to offering of proof by those interested enough to argue the issue.**

This was written in 1970. In the spring of 1975, the Solicitor General of the United States, Robert H. Bork, in his amicus brief filed with the Supreme Court in Fowler v. North Carolina, a death-penalty murder case, referred to a new study that, he said, provided "important empirical support for the a priori logical belief that use of the death penalty decreases the number of murders."*** The cited study, copies of which he had filed with each of the nine justices, was written by Isaac Ehrlich, a University of Chicago econometrician. In the published version of this study, Ehrlich concluded that "on the

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*Hugo Adam Bedau, op. cit., pp. 546, 547.

**Ibid., p. 548.

***Fowler v. North Carolina, Supreme Court of the United States, #73-7031. Brief for the United States as Amicus Curiae, p. 36.

average the tradeoff between the execution of an offender and the lives of potential victims it might have saved was of the order of magnitude of 1 for 8 for the period 1933-67 in the United States,"* or, as this was reported in the press, "each execution may deter as many as eight murders."** Here, then, was the study Bedau had called for, but the response from the abolitionists was one of outrage. One of them immediately denounced it as "utter garbage."*** Bedau himself charged the Solicitor General with using the study as an attempt "to throw dust in our eyes," and then, choosing a figure of speech singularly inappropriate to his cause, announced that "the abolitionists are getting their hired guns out, too, to torpedo Ehrlich."**** But Ehrlich was not a hired gun (he has said that he opposes capital punishment) and his study is not garbage.

Instead of comparing the murder rate and the legal status of the death penalty from state to state or over time within single states, Ehrlich employed multiple regression analysis, a technique that is frequently used by econometricians to investigate the possible relationship between one of a number of possible "causes," or independent variables, and a particular "effect," or dependent variable. He constructed a mathematical model of a "murder supply function" and treated its elements as his fellow econometricians treat inflation or the bank discount rate or increases in the rate of the money supply. Just as they look to and gather economic data from the past to draw conclusions concerning the relative influence of a variety of factors on a described or measurable condition, and then offer advice as to how to achieve or avoid that

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*Isaac Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," The American Economic Review, vol. 65 (June, 1975), p. 398.

**Washington Post, April 13, 1975, p. A-1ff.

***Los Angeles Times, May 5, 1975, p. 1.

****Washington Post, April 13, 1975, p. A-1.

condition in the future, he assumed it might be possible to gather past criminal and other statistics to draw conclusions concerning the factors that influence the crime, and specifically in this case, the murder rate. (In an earlier study he purported to show that the crime rate is inversely related to the severity of the punishment imposed and positively related to the benefits to be gained, which is to say that punishment does indeed deter crime.*) It may or may not be the case that irrationality plays a greater role in criminal behavior than it does in economic, but Ehrlich assumed that at least some murders are committed by persons who expect to gain more from murdering than from not murdering and, before they act, calculate the probable costs as well as the probable gains. The gains appear in his model of the "murder supply function" in the form of annual statistics respecting the unemployment rate, the labor force participation rate and an estimate of real per capita income; which is to say, he made the assumption that the gains to be won by murder will be related to the economic factors expressed in these statistics. The former (the probable costs) appear as statistics, from the same years, respecting the probability of murderers being apprehended, then convicted and then executed. With these he included statistics of the percentage of the population in the age group 14-25 in each of the years studied, the assumption being (and it is a well-founded assumption) that this group has a higher propensity to commit murders. His hypothesis was that the murder rate is dependent on these eight variables in a particular relationship both to each other and to murder, and that these relationships can be expressed mathematically in a set of simultaneous equations. Appropriate estimation techniques were then used to obtain numerical values of the parameters in the model.

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*Isaac Ehrlich, "Participation in Illegitimate Activities: A Theoretical and Empirical Investigation," Journal of Political Economy, vol. 81 (May-June, 1973), pp. 521-65.

It is a complex technique. (Some idea of the complexities involved in this kind of study may be glimpsed in the fact that Ehrlich found it necessary to take acount of--which is to say, express mathematically--the possibility that the number of murders may have been diminished systematically over time due to a continual improvement in medical technology, with the result that what would have been a murder in an earlier year was--because the victim's life was saved--merely an attempted murder in a later year.*) But the complexity is a consequence of the attempt to avoid the shortcomings of the simpler studies, shortcomings that made their findings inconclusive. For example, Ehrlich hypothesized that an increase in executions would have two opposite effects: fewer murders, because of a perception of a greater probability of execution, and more murders, because of a perception of a smaller probability of conviction (due to the refusal of juries to convict when execution is the prescribed penalty). He was also able to deal with another problem left unresolved by the earlier studies, namely, the necessity to distinguish between a decline in murders attributable to incapacitation of the convicted murderer (an executed murderer is completely incapacitated) and a decline attributable to the deterrence of murders by others. The number of murders and the murder rate had risen dramatically in the period studied by Ehrlich, while the number of executions fell off to zero, but, because multiple regression analysis produces statistical relationships from which only tentative conclusions can be drawn, his conclusion was only that the one <u>may</u> have been a cause of the other. As he put it, "one cannot reject the hypothesis that punishment in general, and execution in particular, exert a unique deterrent effect on potential murderers."** Or, "an additional execution per year over the period

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*Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," p. 407.

**<u>Ibid.</u>, pp. 413-414.

in question may have resulted, on average, in 7 or 8 fewer murders."*

Ehrlich's study was described, in a Reply Brief quickly filed by counsel for the petitioner in the Fowler case, as one "riddled with theoretical and technical errors that render its conclusions meaningless. Despite the complicated array of mathematical symbols and econometric terminology, the [study] is a creation of mere arbitrary assumptions, misleading summarizations, and reckless inferences."** These are obviously serious charges and, even though made in a lawyer's brief, cannot be summarily dismissed, especially when the brief depends heavily on a paper written by two econometricians whose credentials are, in principle, the equal of Ehrlich's.*** Some of the criticism is directed against multiple regression analysis itself and some against Ehrlich's application of it. In the latter category are criticisms of the data he used, and of his failure to control for the length of prison sentences imposed on convicted murderers, and of his assumption that the relations among the posited eight independent variables and the murder rate remain unchanged throughout the country. (The answer to this is that if his assumptions were invalid that would affect the robustness of the statistical results.) In the former category, the critics, while conceding the superiority of multiple regression analysis in controlling for the factors that are thought to be statistically related to a described condition (e.g., the murder rate), it is, needless to

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*Ibid., p. 414.

**Fowler v. North Carolina, Supreme Court of the United States, #73-7031. Reply Brief for the Petitioner, Appendix C, p. 4.

***Peter Passell and John B. Taylor, "The Deterrent Effect of Capital Punishment: Another View," Columbia University Discussion Paper 74-7509 (March, 1975). This paper is printed as Appendix E to the Reply Brief for the Petitioner. See above, note .

say, incapable of controlling for a factor omitted from the model, and the fact of this omission can lead to serious misstatements. This is said to be especially likely when data are drawn from widely-separated points in time. One of his critics carried out a multivariate regression analysis on cross-section data for the census years 1950 and 1960 (instead of country-wide data for a number of years), and found executions to have no deterrent effect beyond that achieved by imprisonment.* He concluded that it could not be proved that executions deter murder; on the other hand (and this concession may be one consequence of Ehrlich's work), he said it cannot be proved that executions do not deter murder. "Proof is simply beyond the capacity of empirical social science."**

In a reply to his critics, Ehrlich emphasized that he never claimed that his research "settles the issue of the deterrent effect of capital punishment," but he defended his work as superior to any by his critics, either before or after his own. "The fact is that I have learned of no single error in either my theoretical analysis or the statistical methodology used to implement the theory."*** And, surely, some of the criticism leveled against him is ill-conceived, or petty to an extent not usually encountered in a scholarly journal. Baldus and Cole charge him with a failure to "focus on the relevant policy question."

> The precise question now facing the Supreme Court is whether capital punishment must be abolished, not whether its use should be increased or decreased assuming it is retained. For some purposes, it may be of interest to investigate the effects of increasing the number

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*Peter Passell, "The Deterrent Effect of the Death Penalty: A Statistical Test," Stanford Law Review, vol. 28 (November, 1975), pp. 79, 80.

**Ibid., p. 79.

***Isaac Ehrlich, "Deterrence: Evidence and Inference," Yale Law Journal, vol. 85 (December, 1975), pp. 227, 219.

> of executions in retentionist jurisdictions. But in the debate over abolition, the essential question is the effect of changing from a retentionist to an abolitionist jurisdiction. Sellin's approach is directly addressed to this policy choice, and Ehrlich's approach is not.*

But if Ehrlich is right, the effect of "changing from a retentionist to an abolitionist jurisdiction" may be a marked increase in the number of murders. He may be wrong but his findings are certainly not irrelevant.

The issue may not be resolved, but this at least can be said: Ehrlich (who has supporters as well as critics**) succeeded in reopening the question. Despite the intemperate character of the immediate responses to it, his study was rightly regarded as deserving the most careful consideration in the most reputable of scholarly journals. (The Yale Law Journal, for example, devoted a good deal of space to it in two consecutive issues.***) No one who has studied his work and the exchanges provoked by it may now say what was regularly said earlier, namely, that it is known

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* David C. Baldus and James W.L. Cole, "A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment," Yale Law Journal, vol. 85 (December, 1975), pp. 186, 174.

** See James A. Yunker, "The Deterrent Effect of Capital Punishment: Comment," an unpublished paper filed by Solicitor General Bork with his Brief for the United States as Amicus Curiae in Gregg v. Georgia, Supreme Court of the United States, #74-6257. See also Morris Silver, "Punishment, Deterrence, and Police Effectiveness: A Survey and Critical Interpretation of the Recent Econometric Literature," a report prepared for the Crime Deterrence and Offender Career project (New York, 1974).

*** Yale Law Journal, vol. 85 (December 1975, and January 1976).

that the death penalty is not a more effective deterrent. At least, no one may properly say that.

In the 1976 Canadian debates, Prime Minister Trudeau said to the House of Commons that if the bill to abolish the death penalty were defeated, "some people will certainly hang," and he threatened the opponents of the bill with responsibility for those deaths. Yet if Ehrlich is right -- and he may be right -- abolition of capital punishment may result in the deaths of as many as eight persons for every murderer who is not executed. The question posed is this: whose life should be saved, that of the Quebec cabinet minister Pierre Laporte or those of the F.L.Q. (Front de Libération du Québec) terrorists who garrotted him with baling wire and stuffed his body in an automobile trunk? Or for an American example, the life of Henry Jarrette or the lives of his future victims?* If the death penalty is permitted,

*Jarrette was a double murderer, but he was not executed. Instead, he was given a long-term prison sentence and then allowed to leave the prison in order to attend the state convention of the Junior Chamber of Commerce in Raleigh. (Jarrette was a duly elected officer of the prison chapter of the state Jaycees, so why shouldn't he attend the convention?). While in Raleigh, he eluded his guard and escaped. Two days later he seized a sixteen-year-old black girl, bound her hands behind her back, threw her in a car he had stolen, drove off to a secluded place in the woods, raped her, threw her back in the car, and drove back to town; there he stabbed and killed a sixteen-year-old white boy who had the misfortune to be sitting at the wheel of another car to which Jarrette took a fancy. (State of North Carolina v. Jarrette, 284 N.C. 670 [1974]. See Fowler v. North Carolina, Supreme Court of the United States, number 73-7031, Brief for Respondent, p. 47).

"some people will certainly [or will probably] hang"; if they are not hanged, and if Ehrlich is right, a larger number of people -- and in this case, innocent people -- will be murdered.

3. Crimes Without Punishment

One of the frequently-used arguments against the death penalty is that murder is a crime that cannot be deterred. It is insisted that, beyond all others, murder is a crime of passion, a crime committed by wife against husband, or husband against wife, or under the influence of alcohol by friend against erstwhile friend, and, on the whole, the statistics bear this out. Whereas persons tend overwhelmingly to commit their armed robberies against strangers, they tend to murder their friends, lovers and acquaintances and to do so in the familiar surroundings of the home.* Acting in a fit of passion, murderers are incapable of a rational calculation of costs and benefits, and, therefore, it is argued, incapable of being deterred by the threat of capital punishment.

But the same argument leads to the conclusion that they are incapable of being deterred by the threat of any punishment; and if deterrence is the only purpose of punishment, and if no punishment can deter the typical murderer, then it would seem that the law is wasting its time and our money when it punishes him. Rehabilitation (even if it were possible) is irrelevant here: a murderer is the least likely of criminals to repeat his crime -- Henry Jarrette is an exception to the rule -- so nothing is accomplished by incapacitating him, either by executing him or imprisoning him. The

* Sourcebook of Criminal Justice Statistics - 1974, pp. 246, 247.

conclusion to which this argument leads is not merely that murderers ought not to be executed, but that they ought not even be imprisoned, or, for that matter, arrested. In fact, murder ought not to be considered a criminal offense.

In addition to leading to conclusions that no sane man will accept, this argument fails to prove what it sets out to prove. The fact that murder tends to be a crime of passion does not prove that murder cannot be deterred by the threat of severe punishment. It is possible that precisely because of the severe punishments prescribed, murders tend to be committed, on the whole, only by those unable to weigh the possible costs against the probable benefits. Others, even those who stand to gain by murdering (and most of us are in this category), are deterred by the costs, or may be deterred by them. At least, the crime of passion argument does nothing to cast doubt on the possibility that we are deterred by the threat of punishment. Who would be so bold as to predict that the murder rate would not rise if murderers were not punished in any way? Besides, we know as a fact that the number of murders tends to rise with the crime rate in general — and not only in America — which suggests that a significant number of murders are being committed "in cold blood" by persons other than jealous husbands or forsaken lovers. Interestingly enough, this proves to be true.

In 1966, 16.3 percent of all murders were what the FBI refers to as "Spouse-spouse" murders; this proportion dropped steadily until, in 1974, it reached 12.1 percent. More or less the same thing happened respecting the proportions of murders committed by parents, "other relatives," and by those involved in "romantic triangles and lovers quarrels." The proportion of killings arising out of "other arguments" (a category that probably includes

bar room brawls) remained essentially unchanged (40.9 percent in 1966 and 43.2 percent in 1974). The one category that showed a marked increase is "known felony murders." These constituted 14.8 percent of the total in 1966 and 22.2 percent in 1974.* More murders and a greater proportion of murders are being committed by professional criminals in "cold blood" in the course of committing other felonies. In New York City, 1,645 homicides were committed in 1975, and more than a third of these were classified as "stranger murders," the highest rate in the country. Such murder cases are more difficult to solve, and we can expect that as the proportion of them rises, the proportion of cases "cleared" or solved will drop and that the proportion of murderers punished will also drop. New York police managed to make arrests in only 64.5 percent of its homicide cases in 1975, which was the lowest "clearance" rate among the large American cities.** My point is a simple one: if crime in general could be deterred more effectively, murder in particular might also be deterred more effectively. Crime in general is not now being deterred because, compared to the amount of crime, almost no one is being punished, and almost no one is being punished partly because our judges do not believe in punishment. They still believe in rehabilitation.

It is no longer fashionable to deny that the crime rate is increasing and doing so at a rate that, however grudgingly, draws acknowledgment from persons formerly disposed to deny it. We know about the crime rate from the FBI's Uniform Crime Reports, and while these annual reports are less reliable than we would like them to be, they are no less reliable this year

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* Uniform Crime Reports, 1972 (p. 9) and 1974 (p. 19).

** The New York Sunday Times, June 13, 1976 pp. 1 and 60.

than last, nor were they less reliable last year than the year before. It is also true that an appreciable part of the increase is attributable to the disproportionate growth in the younger age group which, we know as a fact, commits a disproportionate part of the crime. Still, deriving all the comfort we can from such factors, the amount of crime and the rate of crime are increasing, and almost everyone (except, of course, Jessica Mitford) admits it.

There were, for example, 10,192 index crimes known to have been committed in the United States during the year 1974,* an increase of 203 percent over 1960; in this same period, the per capita crime rate (crimes per 100,000 population) jumped from 1875.8 to 4821.4, an increase of 157 percent. Of particular interest here is the number of murders: 20,600 in 1974 and 9,060 in 1960. This is an increase of 127 percent, and an increase in the murder rate of 90 percent. In this same period, the rate of forcible rapes increased 175 percent; robberies, 248 percent; aggravated assaults, 151 percent; burglaries, 183 percent; larcenies, 147 percent; and motor vehicle thefts, 153 percent.**

Thus, the public's perception that crime is a worsening problem is borne out by the statistics; so too is the public's perception that not much is being done about it. The police manage to make an arrest in approximately 20 percent of the cases, but only a small portion of those arrested are actually convicted in the courts, and a still smaller portion punished. The

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* Index crimes (the category is the FBI's) comprise (1) murder and nonnegligent manslaughter, (2) forcible rape, (3) robbery, (4) aggravated assault, (5) burglary, (6) larceny-theft, and (7) motor vehicle thefts.

** Uniform Crime Reports, 1974, p. 55.

figures are as follows (per 100 index crimes committed):*

Arrests	19.4
Persons charged	17.5
Persons guilty as charged	5.0
Persons guilty of lesser offense	0.8
Persons acquitted or dismissed	2.4
Juveniles referred to juvenile courts	5.8

Thus, for every 100 index crimes reported to the police there are 5.8 convictions, not counting the convictions in the juvenile courts. The number of these is not reported, but if we assume that these courts convict half the offenders referred to them, the total conviction rate is 8.7 percent; which is to say, that for every one hundred index crimes known to have been committed there are 8.7 convictions. This means that an estimated 91.3 percent of the reported crimes go unpunished. But the situation is actually worse because most crimes are not reported.

This fact had long been suspected and now, thanks to the victimization surveys conducted by the Census Bureau for the Law Enforcement Assistance Administration, it has been verified. Information in these victimization reports is obtained from twice-yearly interviews with a national representative sample of 60,000 households and 15,000 businesses, who are asked to report the specific crimes committed against them during the period covered. Except that murder is not included, the crimes surveyed are roughly equivalent to the FBI's index crimes. What we learn, among other things is that there is a marked disparity between the number of crimes reported to the police (and recorded by the FBI) and the number of crimes committed.

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* Ibid., p. 176. These statistics, the only ones available, are drawn from the reports of 1496 cities. I am assuming that the same rates apply in the country as a whole.

Thus, for example, in 1973 the FBI reported the rate of forcible rape to be 24.3 per 100,000, and the National Crime Survey reported it to be 100, or four times greater; and the robbery rate as recorded by the FBI was 198.4 and, as reported by the victims, 690*. In a press release of April 15, 1974, the LEAA Administrator at that time, Donald E. Santarelli, indicated that only 37 percent of the crimes suffered by Detroiters were reported to the police, and this figure was not out of line with the survey results in other cities covered in the report.** (The figures mentioned were 36 percent [Chicago], 34 percent [Los Angeles], 47 percent [New York] and 20 percent [Philadelphia].) These data suggest, then, that the true amount of crime is in the order of three times greater than what is reported by the FBI. If so, the total of index crimes actually committed in 1974 was 30,576,000. This means that if there are 8.7 convictions for every one hundred recorded index crimes, there are only 2.9 convictions for every one hundred crimes committed, which is to say that 97.1 percent of the crimes committed go unpunished (assuming, for the moment, that everyone convicted is punished).

This raises the question of what is meant by punishment. In Gallup polls the public was asked whether, in general, the courts "deal too harshly, or not harshly enough with criminals," and the responses are reported in the following table.***

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* U.S. Department of Justice (Law Enforcement Assistance Administration), Criminal Victimization in the United States, 1973 Advance Report, p. 12.

An index of the accuracy of this survey information is to be found in the similarity of the figures for motor vehicle thefts, a crime that is reported (and recorded) because insurance companies will otherwise refuse to pay a claim. In one jurisdiction, the police reported 20,522 auto thefts and the LEAA survey counted 22,500, and the difference is in the expected direction

** Detroit Free Press, April 15, 1974, P. 10-A

*** U.S. Department of Justice, Law Enforcement Assistance Administration, Sourcebook of Criminal Justice Statistics - 1974, p. 204.

	Too Harshly	Not Enough	About Right	No Opinion
1965: April	2	48	34	16
1968: February	2	63	19	16
1969: January	2	75	13	10

A Harris poll, asking a similar question in 1970, reported that 64 percent of the respondents thought that the courts were "too lenient" in dealing with criminals. This is surely one of those areas where the public has merely a vague perception of the facts as to which it is asked to make a pronouncement — who knows what "too harshly" means, or "about right", and how many persons are in possession of the facts concerning sentencing? — yet the perception may be accurate for all that. In 1973, for example, a total of 34,983 persons were sentenced by the federal courts, and of this total, 15,025, or 43 percent were put on probation and 1866, or 5.3 percent, were fined. In addition, 2,883, or 8.2 percent, were given what in federal law is called a "split sentence," which means a sentence of six months or less in a "jail-type institution" followed by a term of probation.* So far as I have been able to determine, this pattern of sentencing prevails in the state courts as well; according to one recent study, "over half of all convicted offenders in the United States are placed on probation,"** and a decade ago California reported that 48.9 percent of all felony defendants were so treated.*** Nor was probation confined to

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*Ibid., p. 396.

**Ronald L. Goldfarb and Linda R. Singer, After Conviction (New York: Simon and Shuster, 1973), p. 209.

***California, Board of Corrections, "Probation, supervision and training, 1964," p. 5).

relatively minor offenses. Of those convicted of the seven index crimes (or their equivalents in federal law), 2874, or 37 percent, were placed on probation by federal courts in 1971.* These figures gain additional significance when viewed with those concerning defendants who have prior criminal records. This information was available for 23,390 of the 32,103 persons convicted in federal courts in 1971, the last year for which we have the statistics, and of these 14,489, or 62 percent, had prior criminals records.** The probability is strong that probation is being granted to a significant number of defendants with prior criminal records. Indeed, in particular jurisdictions where this has been studied in detail, this has been proved to be the case.

> For example, Martin A. Levin of Brandeis University found in a study of the Pittsburgh Common Pleas Court in 1966 that well over one-half the white males convicted of burglary, grand larceny, indecent assault, or possession of narcotics, and who had a prior record, were placed on probation; nearly one-half of the two-time losers convicted of aggravated assault were also placed on probation, as were more than one-fourth of those convicted of robbery. In Wisconsin, Dean V. Babst and John W. Mannering found that 63 per cent of the adult males convicted of a felony during 1954-1959 who had previously been convicted of another felony were placed on probation, and 41 per cent of those with two or more felony convictions were given probation for the subsequent offense. In Los Angeles, only 6 per cent of those charged with burglary, who had a serious prior record, were sent to prison; only 12 per cent of those charged with burglary who had already been in prison were sent back.***

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* Sourcebook of Criminal Justice Statistics, 1974, p. 396.

** Ibid., p. 405.

*** James Q. Wilson, Thinking About Crime (New York: Basic Books, Inc., 1975), p. 165. The studies cited by Wilson are Martin A. Levin, "Urban Politics and Policy Outcomes: The Criminal Courts," in Criminal Justice, ed. George F. Cole (No. Scituate, Mass.: Duxbury Press, 1972), p. 335; Dean V. Babst and John W. Mannering, "Probation Versus Imprisonment for Similar Types of Offenders," Journal of Research in Crime and Delinquency 2 (July 1965): 61 ff.; and Peter W. Greenwood et al., Prosecution of Adult Felony Defendants in Los Angeles County: A Policy Perspective, Report No. R-1127-DOJ (Santa Monica: Rand Corporation, 1973), p. 109.

But perhaps the most revealing information is to be found in prisoner statistics. Despite the fact that the number of index crimes known to the police increased from 3,363,700 in 1960 to 8,666,200 in 1973, an increase of 158 percent, the total number of persons in federal and state prisons actually declined.* There are many more criminals, but they are not in prison. If we exclude probation from the category of punishment, we arrive at this conclusion: 2.9 convictions for every one hundred crimes committed, and half of those convicted are punished. Hence, 98.5 percent of the crimes committed go unpunished. This, surely, is a situation that Hobbes and Beccaria did not foresee when they first advanced the proposition that the purpose of punishment is to instill fear of the sovereign's laws. Rather than fearing the laws, American criminals have good reason to regard them with contempt.

Judges are reluctant to punish because the idea of punishment fell into disrepute in prestigious legal circles. Part of a lawyer's, and especially a judge's, education has been that the use of punishment should be avoided. The American Law Institute's Model Penal Code (which is one of the most influential legal documents of the past few decades) instructs judges to avoid imprisoning a convicted criminal except (i) to incapacitate him, (ii) to rehabilitate him, or (iii) when necessary to avoid depreciation of the seriousness of his offense. Thus, withholding a sentence of imprisonment is to be the rule and imprisonment is to be the exception, and from the sentencing section itself one might conclude that no one should

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* Ibid., pp. 471, 434. There were 212,953 prisoners in 1960 and 204,349 in 1973.

be imprisoned in order to deter others from committing similar offenses.* The same principle animated the Council of Judges of the National Council on Crime and Delinquency when, even in the second edition of their Model Sentencing Act (published in 1972), they provided that, except for dangerous offenders, "persons convicted of crime shall be dealt with in accordance with their potential for rehabilitation, considering their individual characteristics, circumstances and needs." In the comment accompanying this article, they acknowledge that while "some persons, including a few members of the Council of Judges, maintain that punishment per se has a proper place in a sentence, the consensus is that the term "punishment" standing alone is vague."** (This sentence is itself vague, but its implication seems clear enough: the Council of Judges is persuaded that criminals ought not to be punished.)

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* The American Law Institute, Model Penal Code, Proposed Final Draft (Philadelphia, July 30, 1962), p. 106. The relevant section reads as follows:

> Section 7.01 Criteria for Withholding Sentence of Imprisonment and for Placing Defendant on Probation.
>
> (1) The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because
>
> (a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or
>
> (b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
>
> (c) a lesser sentence will depreciate the seriousness of the defendant's crime.

** Model Sentencing Act, Article I. This is published in full, with accompanying comments, in Crime and Delinquency, vol. 18 (1972), pp. 335-370. The quoted statements are both found on p. 344.

The sentencing practices of judges have recently been subjected to a powerful and informed attack by a federal trial judge, who refers to the unchecked and sweeping powers given to judges as "terrifying and intolerable for a society that professes devotion to the rule of law";* but even in the course of demonstrating the injustices of the sentencing system, he, too, reveals his attachment to the sentiment that underlies it. He is firmly convinced, he says, that not only are too many persons sentenced to prison terms that are far too long (an opinion that can be supported with persuasive evidence), but that "too many people" are being imprisoned.** Hence, he, too, even as he complains of statutes providing for indeterminate sentences, calls for "creative thought" to be given to rehabilitation programs involving "probation, work release, halfway houses", and the like, as if there were some reason (but he knows there is none***) to believe that rehabilitation works.

Admittedly, there are gross disparities in sentencing, but the evidence reviewed above suggests that for every "hanging judge" who imposes excessively severe sentences, there are several whose illusions or softness cause them to err in the opposite direction. The fact is that a "shockingly large number [of criminals] go unpunished", as a recent task force report puts it, and that this has "seriously affected the deterrent value of criminal sanctions."**** How could it be otherwise

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* Marvin E. Frankel, Criminal Sentences: Law Without Order (New York: Hill and Wang, 1973), p. 5.

** Ibid., p. 58.

*** Ibid., p. 89 and passim.

**** Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment (New York: McGraw-Hill, 1976), pp. vii and 33.

when, as I calculate it, 98.5 percent of the serious crimes go unpunished? In this situation, the question is not why so many persons commit crimes but why so many persons do not commit crimes, when, from a certain point of view, it is obviously in their interest to do so. They are laboring under an illusion if they are being restrained by the fear of punishment. The possibility of being punished is altogether remote; it is remote not only because of the difficulty of catching criminals, but because of the unwillingness of the courts to punish them when caught and convicted, and also because of the difficulty of convicting them.*

4. The Court Problem

From the beginning criminology has asserted that if punishment has any capacity to deter crimes (and in the beginning there was no doubt about this), it consisted in its certainty and in the promptness of its imposition. Beccaria made these two arguments in consecutive chapters of his treatise. "One of the greatest curbs on crime", he said, "is not the cruelty of punishments, but their infallibility", and the "more promptly and the more closely punishment follows upon the commission of a crime, the more just and useful it will be." He therefore, in true Hobbean fashion, urged magistrates to be more vigilant and judges "inexorable". But in the United States today, punishment is neither infallible nor prompt, which is why the criminal justice system is described even by sympathetic observers as a failure "unable to protect the community from crime."**

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* I have no doubt that the prospect of being arrested alone is sufficient to deter the typical law-abiding citizen. He regards that as shameful.

** Lewis Katz (with Lawrence Litwin and Richard Bamberger), Justice is the Crime: Pretrial Delay in Felony Cases (Cleveland and London: The Press of Case Western Reserve University, 1972), p. 2.

The system is characterized by delay, and what appears to be unnecessary delay, at every one of its stages. The average British defendant is brought to trial within 12.1 weeks, if he is not in custody, and within 8.3 weeks, if he is in custody, and the British complain that this period is excessively long, much longer than fifteen years earlier;* yet the President's Commission on Law Enforcement and Administration of Justice, in one of its task force reports in 1967, set these times as targets to be achieved by American courts. In actuality, the waiting periods are much longer. The task force saw no reason why a criminal case could not be disposed of within three months, but a recent study by Professor Lewis Katz found that the average urban court in America requires nine months to dispose of a case.** In another study, Macklin Fleming, a justice of the California Court of Appeals, provided the following example of the law's delay in what he described as a routine California criminal case*** The defendant

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* Lord Chancellor's Department, Statistics on Judicial Administration (London: H.M. Stationery Office, 1973), pp. 38, 6.

** Katz, Justice is the Crime, pp. 36-37.

*** People v. Esparza (1971), Cal. 2d Crim. No. 18326.

was apprehended in the act of burglary--caught red-handed, as the saying goes--on December 7, 1968, after which the following proceedings took place:*

1968

30 December. Information filed charging sundry robberies, burglaries, rapes, kidnapping, and sexual offenses.

1969

6 January. Defendant arraigned and pleaded not guilty.

3 February. Information amended to charge prior offenses. Trial continued to 4 March.

4 February. Arraignment and plea continued to 10 February.

10 February. Arraignment and plea continued to 13 February.

13 February. Defendant arraigned and pleaded not guilty. Trial date remained 4 March.

28 February. On defendant's motion trial continued to 2 April.

2 April. On defendant's motion trial continued to 24 April.

24 April. On defendant's motion that his counsel was elsewhere engaged, trial continued to 1 May.

1 May. On defendant's motion trial continued to 9 May.

9 May. On defendant's motion that his counsel was elsewhere engaged, trial continued to 14 May.

14 May. On defendant's motion that counsel was elsewhere engaged, trial continued to 15 May.

15 May. On defendant's motion trial continued to 20 May.

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*Macklin Fleming, The Price of Perfect Justice: The Adverse Consequences of Current Legal Doctrine on the American Courtroom (New York: Basic Books, Inc., 1974), pp. 67-9.

20 May. Defendant pleaded guilty to three counts of the information. Probation and sentence set for 13 June.

13 June. Mentally disordered sex offender proceedings initiated, and proceedings continued to 10 July.

10 July. Defendant's motion to withdraw guilty plea granted, and not-guilty plea reinstated. Cause continued to 18 July for trial setting.

18 July. On motion of defendant, cause continued to 1 August for trial setting.

1 August. On motion of defendant, cause continued to 8 August for trial setting.

8 August. On motion of defendant, cause continued to 29 August.

29 August. Prosecution moves to vacate order reinstating defendant's not-guilty plea. On motion of defendant cause continued to 5 September.

5 September. By stipulation cause continued to 1 October.

1 October. Prosecution's motion to vacate order reinstating not-guilty plea denied. Cause continued to 8 October for trial setting.

8 October. Trial set for 2 December.

13 November. Hearing on defendant's discovery motion; motion granted in part.

26 November. Defendant's motion to dismiss two kidnapping counts granted as to one. Trial date of 2 December vacated, and cause continued to 3 December for trial setting.

3 December. Cause set for trial on 21 January 1970.

1970

21 January. Defendant's motion to relieve deputy public defender is denied. Defendant's motion to suppress evidence continued to 22 January.

22 January. Cause continued to 23 January.

23 January. Hearing on motion to suppress evidence continued to 26 January.

26 January. Motion to suppress evidence in part. Hearing held on motion to dismiss lineup evidence. Later, motion is denied. Trial continued to 27 January.

27 January. Trial begins.

9 February. Jury returned verdicts of guilty.

4 March. Judgment and sentence.

Defendants (even, apparently, those in custody) favor delay because it enhances their chances of having the charges against them reduced or even dropped: witnesses may disappear, become discouraged, forget, or even die. Defense attorneys favor delay because it serves as a means to enable them to collect their fees (Katz reports that this is a common practice*), because it enables them to accept more cases than they could, under a more rigid calendar, handle, and because, when acting as court-appointed attorneys, the fee structure discourages going to trial.** But the law-abiding community is penalized by delays; unfortunately, as Katz says, this community is simply not adequately represented in the courts, and the courts permit delay. "Between defendants and lawyers—and it must be kept in mind that judges and prosecutors are lawyers too—the procedures are being neatly emasculated to ensure that only their respective interests are protected."***(Katz himself is a lawyer.) There is a need for more judges and other court personnel, and a good deal of effort is being exerted to make the courts more efficient: computers to assist in record keeping and scheduling, for example, and new management

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*Katz, Justice is the Crime, pp. 42, 76-77.

**They are paid more for a case that is tried, but the differential is not enough to justify the necessity to accept fewer cases. Trials are time-consuming. See Katz, Justice is the Crime, pp. 71-72.

***Ibid., p. 69.

techniques; but the problem is not simply one of inefficiency and will not be solved unless the use of new techniques and devices is combined with a change of attitude on the part of judges. "Simply stated, the public has the right to demand that courts function in the interest of society and not as a private club for lawyers."* The aphorism, justice delayed is justice denied, would appear to have been coined with the innocent defendant in mind; with respect to the guilty, justice delayed has the effect of diminishing the chances of conviction and of punishment and, therefore, of deterring crime.

But trial judges are not solely responsible for the inefficiency of our criminal justice system. Some cases are tried— and tried and tried— but final judgment does not typically follow immediately upon the conclusion of the trial. When a case begins with a search or arrest warrant, or a wire-tap, or when it depends on a confession, and when the defendant enjoys the assistance of assiduous or pertinacious counsel, the opportunities for avoiding final judgment are almost limitless. Fleming says such a defendant may be able to "postpone the day of final judgment to Armageddon,"** and for this he blames the Supreme Court, and particularly the Court under Chief Justice Warren.

A defendant about to be tried in a state court may begin by asking a federal court to enjoin the state prosecution on the ground that the statute under which he is to be tried is unconstitutional on its face or is one whose enforcement would have a "chilling" effect on the exercise

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* Ibid., p. 79.

** Fleming, The Price of Perfect Justice, p. 27.

of a claimed constitutional right.* Or he may file a motion in which he claims that evidence to be used against him was improperly seized or, for another example, that an arrest warrant was issued without probable cause, and, if his motion is denied by the trial judge, he may launch a collateral attack by asking another court to issue a writ of prohibition and, if he fails to get it, appeal that judgment to a still higher court. Fleming calls these techniques "preconviction shuttles."

If the defendant is nevertheless finally convicted, he can begin the postconviction relief journey through the state's appellate system and then to the Supreme Court of the United States. Even if he loses in each of these courts and is finally imprisoned, he is not yet without remedy. The next step is one made more readily available by the Supreme Court some twenty years ago when it affirmed the right of a state defendant, whose conviction has already been affirmed on direct appeal, to apply to a federal district court for habeas corpus. If this is denied, he can then appeal the denial to the federal Court of Appeals and, finally, to the Supreme Court of the United States again. The number of habeas corpus petitions filed annually by state prisoners now exceeds 12,000, some 2,000 of which reach the Supreme Court.**

It is inevitable that procedures so solicitous of a defendant's interests will produce cases that make criminal justice appear ridiculous, and Fleming provides an example of one:

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* Dombrowski v. Pfister, 380 U.S. 479 (1965). This was limited in Younger v. Harris, 401 U.S. 37 (1971).

** In the 1973-74 term, 2,118 in forma pauperis cases (most of them involving prisoners) were docketed, and the Court had not dealt with 467 from the previous term. 94 S.Ct. 218.

Six persons died as a result of the throwing by Bates and Chavez of five gallons of gasoline and lighted matches into the Mecca Bar in Los Angeles on the night of 4 April 1957. Bates, Chavez, and others had been denied service at the bar and ejected for creating a disturbance. Swearing to get even, they purchased five gallons of gasoline in an open bucket, returned to the bar, threw the gasoline on the floor, and then threw a book of lighted matches on the gasoline. In the resulting flash fire five persons were killed by carbon monoxide, and a sixth was killed by asphyxia and burns. A jury convicted Bates and Chavez of six counts of murder and one count of arson, and death sentences were imposed. The judgments were affirmed in 1958 by the California Supreme Court, and hearings were denied in 1959 by the United States Supreme Court.

Collateral review immediately began in the federal courts with the filing by Bates and Chavez in 1959 of petitions for habeas corpus. Their petitions were denied by the district court, but in June 1960 the federal court of appeals ordered the district court to consider two issues--whether the written transcripts of orally recorded statements of the defendants were, as claimed, grossly inaccurate, and whether the photographs of the bodies of the victims were, as claimed, so excessively gruesome that their use amounted to prejudicial error.

> Thereafter the district court found that the transcripts were substantially accurate and that the photographs were not excessively gruesome and denied the petitions for habeas corpus. This denial was affirmed by the federal court of appeals in 1962, and a hearing was denied by the United States Supreme Court.
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> In 1963, after an unsuccessful petition for a writ of habeas corpus in the California Supreme Court, Bates and Chavez filed new petitions for habeas corpus in the federal district court. Hearings on those petitions were held during 1964, and in June 1966 the petitions were denied.
>
> Meanwhile the Governor of California commuted Bates' sentence to life imprisonment without possibility of parole and commuted Chavez's sentence to life imprisonment.
>
> In 1967 the federal court of appeals affirmed the district court's denial of habeas corpus. But in 1968 the United States Supreme Court vacated the decision of the court of appeals and remanded the case for further consideration in the light of two recent Supreme Court decisions: Burgett v. Texas, a 1967 ruling that a defendant's earlier conviction while unrepresented by counsel cannot be used to support guilt or to enhance punishment, and Bruton v. United States, a 1968 holding that the admission of incriminating extrajudicial statements of a codefendant violates the defendant's right to cross-examination even though the jury has been instructed to disregard the statements with respect to the defendant himself.
>
> In November 1971 the federal district court, in which the case had made its home for more than a decade, determined that neither the use of prior convictions to impeach the veracity of Bates' testimony nor the use of statements of codefendants in the cause amounted to prejudicial error, and the court again denied the petitions for habeas corpus. In 1973 an appeal from this denial was pending in the federal court of appeals.*

Since Fleming wrote, the federal Court of Appeals upheld the denial of the petition and Chavez (for some reason, not Bates) appealed to the Supreme Court, which also ruled against him.** There, perhaps, after seventeen years, the matter

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*Fleming, op. cit., pp. 28-9.

**Bates and Chavez v. Nelson, 485 F 2d 90 (1973); Chavez v. McCarthy, 94 S. Ct. 877 (1974).

will come to rest, although not necessarily. It is always possible (although, since the advent of the Burger court, not likely) that the Supreme Court will announce a new constitutional rule of criminal procedure and then apply the rule retroactively, thus making it possible for Bates and Chavez to have a new trial and, assuming the witnesses are still available to testify and the evidence has not been destroyed, if they are again convicted, to begin the appeals process once again. The retroactive application of the rule of Gideon v. Wainwright* (according to which every indigent felony defendant in the state courts is, as a matter of federal constitutional law, entitled to the assistance of court-appointed counsel) had consequences that serve to illustrate the point. Over 6,000 prisoners in Florida alone (where the case originated) filed postconviction motions,** which led either to new trials or the release of the prisoners. It is possible that Bates and Chavez will benefit from some such decision in the future. On sixteen occasions (as I count them) the state and federal courts examined this trial and, finally, pronounced it a fair one at the time it took place, but it is not impossible that in the future it will be found to be unfair according to some standard still to be set. Yet, as Fleming says, it has never been controverted "that Bates threw the gasoline on the floor of the Mecca Bar, that Chavez threw a book of lighted matches on the gasoline, and that six persons died in the ensuing holocaust."*** Punishment in America, even after conviction, is neither infallible nor prompt.

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* Gideon v. Wainwright, 372 U.S. 335 (1963).

** Fleming, op. cit., p. 15.

*** Ibid., p. 29.

In our present situation, it is easy to find fault with our manner of conducting criminal trials and to overlook the faults in other systems. It is, for example, deplorable that so much time is spent impaneling an American jury (five weeks in the trial of the notorious Charles Manson and "family"), and it is easy to envy the British and Canadians who manage to impanel a jury in a matter of minutes or hours. But there is another side to this, as a recent Canadian example serves to illustrate. In the province of Manitoba the names of prospective jurors are taken at random from the voters' lists and the jurors are not routinely questioned before appearing for duty. Nor are defense counsel permitted to interrogate them in order, ostensibly at least, to discover whether they have opinions on the case. Fair enough, one is inclined to say: much more efficient than allowing all those peremptory challenges and evidentiary hearings on the composition of juries, with their allegations of discrimination of one sort or another. Unfortunately, a recent attempted-murder trial in Manitoba ended in a mistrial when, after three days of testimony, it was discovered that two of the jurors could not understand English and a third was so deaf that by his own admission he was able to hear only about half of what had been said in the trial.* That, at least, is not likely to happen in an American trial.

One must also avoid minimizing the evils the various Warren-Court sponsored rules were designed to correct. Other free countries manage to

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* Toronto Globe and Mail, February 12, 1976, p. 1.

live without the exclusionary rule, for example, according to which evidence obtained illegally is inadmissible in the trial,* or the somewhat similar Miranda rule ** respecting the inadmissibility of confessions obtained without informing the suspect that he may remain silent and is entitled to have counsel present, and so on; but these other countries also have more effective methods of preventing police misbehavior. No federal official in the United States has an authority over local police equivalent to that enjoyed by the British Home Secretary, for example. The Supreme Court made the exclusionary rule into a rule of constitutional law only because there seemed to be no other way of getting the police to behave properly.

Yet, the rule has been of no use in this regard. As even Leonard Levy admits (and Levy is one of the Warren Court's strongest supporters), the impact of the rule "misses the police and falls upon prosecutors." The police can continue their illegal searches, seizures, and interrogations without suffering any penalty deriving from the exclusionary rule (the prosecutors suffer the penalty); indeed, the rule cannot conceivably reach those cases where a remedy is most evidently needed: illegal searches involving innocent persons. In such cases, no evidence is seized and, therefore, none can be excluded.*** The consequence is we have a rule of constitutional law that does a good deal of harm -- making it more difficult to obtain convictions, delaying the progress of trials, and proliferating appeals -- without doing any good.

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* Mapp v. Ohio, 367 U.S. 643 (1961).

** Miranda v. Arizona, 384 U.S. 436 (1966).

*** Leonard W. Levy, Against the Law: The Nixon Court and Criminal Justice (New York: Harper and Row, 1974), pp. 70-71.

The same criticism can be made of the generosity with which we allow appeals in criminal cases -- from the state courts to the Supreme Court of the United States, then from the lower federal courts to the Supreme Court again. Yet, as Fleming demonstrates, the proponents of these federal postconviction remedies have not been able to uncover a single innocent person saved by their use.* There can be no quarrel with the proposition that there must be procedures designed to supervise trials to the end of protecting the innocent and guaranteeing the rights of even the guilty defendant; the disagreement arises on the question of how much supervision we can afford without jeopardizing the criminal justice system. After all, there is a difference between the rights of a defendant and his interest. His rights are described in the Constitution and in the rules of criminal procedure; his interests is to escape punishment.

Justice Brennan once said, in a case concerning the availability of federal postconviction remedies, that "conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."** It is instructive to calculate how often this occurs. Liberty is at stake in every case in which the accused has been found guilty and sentenced to a term of imprisonment; allegations of infringement of a constitutional right are made in almost all cases appealed. How many cases are appealed? Leaving aside the cases tried in state courts (for which the relevant statistics are unavailable), in 1974 a total of 36,229 persons were found guilty in the United States District

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* Fleming, The Price of Perfect Justice, pp. 31-36.

** Sanders v. United States, 373 U.S. 1, 8(1963).

Courts. Of these, 29,843 entered a plea of guilty and 6386 were convicted after trial before judge or jury. Of this latter group, 4067, or 64 percent, filed appeals in the United States Courts of Appeals.* Justice Brennan's statement means, then, that conventional notions of finality of litigation have no place in the typical or "conventional" federal criminal case.

Presumably the British are as determined as we are to prevent illegal imprisonments and convictions of innocent persons, but they nevertheless have designed a judicial system in which, by our standards, appeals are rarely taken. In 1974, a total of 374,918 persons were found guilty of indictable offenses in the courts of England and Wales; there is no way of knowing from what has been published how many of these entered pleas of guilty and how many were found guilty after trial, but of the total, only 4481 applied for leave to appeal, or approximately 1.2 percent**. The parallel American figure is 11.2 percent, or about ten times greater. If the British courts were suddenly to adopt rules of procedure that had the effect of increasing the number of appeals tenfold, the results would surely be the collapse of their criminal

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* Annual Report of the Director of the Administrative Office of the United States Courts - 1974 (Washington: U.S. Government Printing Office, 1975), pp. 189-289.

** Criminal Statistics, England and Wales - 1974 (London: H.M. Stationery Office, 1975. Cmnd. 6168), pp. 227 and 234.

justice system; and we ought not be surprised that a gradual imposition of these rules in the United States has contributed to the impairment of the capacity of our criminal courts to perform the primary function for which they were created: to determine the guilty and bring them to justice.* This, however, was not how the Warren Court viewed the primary function of the criminal courts.

No judge better characterized the Warren Court and the spirit guiding its criminal procedure cases than William O. Douglas, who once said that any doubt that arises in a criminal case should be resolved in favor of the liberty of the citizen. We have become so accustomed to such statements that they appear unexceptionable, as simply stating the justice of the matter in a

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* Leonard Levy admits that the criminal justice system is "grinding to a halt and is in danger of massive breakdown," but refuses to blame the Warren Court -- even though its decisions "tended to make convictions more difficult to get, verdicts of guilty [more] difficult to stick, and sentences more difficult to execute." He attributes the imminent breakdown to the "staggering rise in the number of crimes and the resultant congestion of prosecutorial case loads and court dockets." (Levy, Against the Law, p. 4).

free country. But the statement embodies a pernicious principle. Before agreeing that any doubt should be resolved in the defendant's favor, it is useful to examine the case in which Douglas made the statement. A person named Downum and three others were charged with mail theft and with forging (and "uttering") checks stolen from the mails. The three co-defendants pleaded guilty, but Downum elected to stand trial. The case was called and both sides announced they were ready to proceed. The jury was selected, sworn and then immediately instructed to return at 2.00 p.m. the same afternoon. During the recess, the prosecutor learned that he had been misinformed, that his key witness was not in fact present; he informed the judge of this during the recess and, when the court reconvened, he immediately asked that the jury be discharged. His motion was granted. Two days later, a second jury was impaneled and Downum, after complaining of double jeopardy, was convicted. The Court of Appeals affirmed, but the Supreme Court reversed and Downum was set free.*

Now the Fifth Amendment provides that no person should be subject for the same offense "to be twice put in jeopardy of life or limb", and it does so in order to prevent the harassment of an accused by successive prosecutions, or to prevent declarations of a mistrial so as to afford the prosecution a more favorable opportunity to convict in a subsequent trial. Douglas made these points. But he also admitted that the established law of double jeopardy did not forbid all discontinuances of a trial necessitated by the absence of witnesses. Each case must be judged on its facts, he said. What were the facts in Downum? Downum was not formally arraigned in the presence of the first jury, no evidence was presented for or against him,

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* Downum v. United States, 372 U.S. 734 (1963).

nor was he required to make any part of a defense. Since the trial went forward within forty-eight hours, he was not subjected to additional expenses of any magnitude (if, indeed, he was paying for his own defense) or to any embarrassment. In fact, a reasonable man would surely conclude that he was not being harassed, that the prosecutor was innocent of any evil design against him, and that, therefore, it was a gross miscarriage of justice to allow this harmless technical error to set him free. Rather than to resolve any doubt in favor of the defendant, a reasonable person would more likely contend that in this case there was little if any doubt to resolve. A Court capable of the Downum decision is not one that believes that the primary function of a criminal trial is to determine the guilty and bring him to justice.

Consider another example from the Warren Court era. Harrison confessed to the crime of felony murder. At the trial, in order to overcome the effect of the confessions he had made to the police during interrogation, Harrison took the stand, which he was not required to do, and his own testimony placed him at the scene of the crime. He was convicted, but the Court of Appeals held his confessions inadmissible and ordered him to be retried. At his new trial, his previous oral testimony placing him at the scene of the crime was admitted, and again he was convicted. This time the Court of Appeals affirmed. But the Supreme Court reversed, holding that his oral testimony in the first trial was inadmissible in the second. The Court acknowledged that the established rule allowed testimony in a former trial to be admitted in subsequent proceedings, but insisted that the rule did not apply here because his testimony was not really voluntary; it had been "impelled" by the necessity to counteract the confessions which were

later held to be inadmissible. That is to say, he had been forced to take the stand and implicate himself, just as witnesses had once been tortured in order to extract their confessions. In each case, this is self-incrimination, which the Fifth Amendment forbids; this is compelling a person to be a witness against himself.* This is also going to excessive lengths to avoid authorizing punishment of a confessed murderer.

5. Conclusion

The Supreme Court is not final because it is infallible, as Justice Jackson once said in an important criminal case,**it is infallible because it is final and because, in these criminal cases, it speaks in the name of the Constitution, the supreme law of the land. The manner in which it interprets that law determines the scope of a criminal defendant's rights and therefore affects every criminal trial in the country. Thanks to the Warren Court, a criminal trial now takes, on the average, twice as long as it did in 1960, and this does not include the time consumed in appeals. The court systems, by which I mean the number of judges, prosecutors, court reporters, bailiffs, clerks and the courtrooms themselves, were designed with the expectation that only ten percent of the defendants would plead not guilty and would, therefore, stand trial. But the proportion of guilty and nolo contendere pleas in the federal district courts was only 78.7 percent in 1964 and has fallen steadily since then, until in 1971, it reached 61.7 percent.*** (And there is every reason to believe

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* Harrison v. United States, 392 U.S. 219 (1968).

** Brown v. Allen, 344 U.S. 443, 540 (1953).

*** Sourcebook of Criminal Justice Statistics - 1974, p. 380.

that the same thing is happening in the state courts as well.) Not surprisingly, the rate of convictions has declined proportionately. In a reference to this situation, Chief Justice Burger, shortly after his appointment, said to the American Bar Association that "if ever the law is to have a genuine deterrent effect on criminal conduct, we must make some drastic changes."* The only change he recommended on that occasion was the appointment of additional court personnel, but he has been instrumental in effecting others. Downum, for example, has not been directly overruled, but its stature as a precedent was considerably reduced in 1973 when the Court, over the objections of four holdovers from the Warren Court era, refused to uphold a claim of double jeopardy in a case where, after the jury had been impaneled and sworn but before any evidence had been presented, the trial judge discovered a defect in the indictment that could not be cured by amendment and declared a mistrial. The Court held that jeopardy had not yet attached and upheld the defendant's conviction in a subsequent trial.** It has consistently refused to extend (and its critics insist that it has undermined) the Miranda rule concerning a suspect's right to remain silent. Harris v. New York involved a statement made to the police by a suspect who had not been told of his rights to counsel and to remain silent. It was, therefore, inadmissible as evidence, but, because it was trustworthy according to prevailing legal standards, the Court permitted the prosecution to use it for impeachment

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* Chief Justice Warren C. Burger, "State of the Federal Judiciary," August 10, 1970. 91 S. Ct. 7 (advance sheets).

** Illinois v. Somerville, 410 U.S. 458 (1973).

purposes to attack the credibility of the defendant's trial testimony.* Perhaps most significantly, the Burger Court has acted to cut down the number of frivolous appeals filed by both state and federal prisoners. In one federal case, the prisoner petitioned for habeas corpus two years after his conviction and asked for a free transcript of his trial, which transcript, he alleged, would show that he had not had the assistance of effective counsel. A federal statute provides for free transcripts if the trial judge certifies that the asserted claim is not frivolous. The petitioner objected to this provision, and the Court of Appeal agreed with him, but the Supreme Court reversed.** It is not impossible that these and other recent decisions might make it easier for the criminal courts of the country to perform their primary function.

The Supreme Court, however, has the power to do more than prescribe the law; because of the esteem in which it is held, it has the power to influence profoundly what it is intellectually respectable to think about the problems that arise in the law. Thanks to the Burger Court, the day may come when it is once again respectable for judges and lawyers, as well as for criminologists, to advocate that convicted criminals be punished, and to admit that punishment has the capacity to deter crime.

Whether this will have the desired effect on the crime and murder rates depends on factors still to be considered.

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*Harris v. New York, 401 U.S. 222 (1971). See also Michigan v. Tucker, 417 U.S. 433 (1974); Michigan v. Moseley, 96 S.Ct. 321 (1975); Beckwith v. United States, 96 S.Ct. 1612 (1976); United States v. Mandujano, 96 S. Ct.1768 (1976).

** United States v. MacCollom, 96 S. Ct. 2086 (1976). See also Francis v. Henderson, 96 S. Ct. 1708 (1976).

CHAPTER FOUR

DETERRENCE AND THE MORALITY OF LAW

1. The Limits of Deterrence

The first sentence of the most recent book on the deterrence question reads as follows: "This book reflects the author's suspicion that many social scientists have dismissed the deterrence doctrine prematurely."* Then, in some 200 pages, the author, Jack P. Gibbs, specifies in detail what has to be done by researchers in order to restate the doctrine as a systematic and researchable theory. Only when this correctly designed research is completed, he suggests, will social science be in a position to say whether punishment deters crime. But we do not have to wait upon social science for the answers to all our questions about deterrence. We know, for example, that there are fearless men and that some of them become criminals.

> Orlov [who, Dostoevsky informs us, had murdered many old people and children in cold blood] was unmistakably the case of a complete triumph over the flesh. It was evident that the man's power of control was unlimited, that he despised every sort of punishment and torture, and was afraid of nothing in the world....I imagine there was no creature in the world who could have worked upon him simply by authority ....To my questions he answered frankly that he was only waiting to recover in order to get through the remainder of his punishment as quickly as possible, that he had been afraid beforehand that he would not survive it; "but now", he added, winking at me, "it's as good as over. I shall walk through the remainder of the blows and set off at once with the party to Nerchinsk, and on the way I'll escape. I shall certainly escape! If only my back would make haste and heal!"**

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* Jack P. Gibbs, Crime, Punishment and Deterrence (New York: Elsevier, 1975), p. ix.

** Fydor Dostoevsky, The House of the Dead. Translated from the Russian by Constance Garnett. (New York: Grove Press, 1957), p. 52.

We can take it for granted, I think, that such men will not be deterred by the fear of punishment.

We also know that the threat of punishment will be ineffective with another type of man. The idea of deterrence assumes that men will act on the basis of their self-interest and, with the threat of punishment, can be made to see that a criminal act is not in their interest. But some men are not capable of a rational calculation of their interests and of acting accordingly.

> Men like Petrov are only ruled by reason till they have some strong desire. Then there is no obstacle on earth that can hinder them.... I wondered sometimes how it was that a man who had murdered his officer for a blow could lie down under a flogging with such resignation. He was sometimes flogged when he was caught smuggling vodka....But he lay down to be flogged, as it were with his own consent, that is, as though acknowledging that he deserved it; except for that, nothing would have induced him to lie down, he would have been killed first. I wondered at him, too, when he stole from me in spite of his unmistakable devotion....It was he who stole my Bible when I asked him to carry it from one place to another. He had only a few steps to go, but he succeeded in finding a purchaser on the way, sold it, and spent the proceeds on drink. Evidently he wanted very much to drink, and anything he wanted very much he had to do. That is the sort of man who will murder a man for sixpence to get a bottle of vodka, though another time he would let a man pass with ten thousand pounds on him.*

We know that such men still exist and we ought to know that the fear of punishment, even severe punishment swiftly and inexorably imposed, will not deter them from doing what they want to do. "Do you want to prevent crimes?" Beccaria asked. "See to it that enlightenment accompanies liberty."** But men like Petrov

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* Ibid., p. 97. Italics in original.

** Cesare Beccaria, On Crimes and Punishments (Indianapolis: The Library of Liberal Arts, 1963. Henry Paolucci trans.), p. 95.

are beyond the reach of even enlightened rulers, because they are incapable of enlightenment. The idea of deterrence cannot be dismissed as misguided, however, simply because it is calculated to fail with the Orlovs and Petrovs of this world.

How do you prevent the others, the great mass of men, from committing crimes? See to it that the laws are "clear and simple" and thereby readily understood; permit no part of the nation to oppose them; see to it "that men fear the laws and nothing else";* and enforce the laws with a scale of punishments "relative to the state of the nation itself." This will vary—and therefore the severity of punishment will vary—with the degree of enlightenment or, to say the same thing, the degree of civilization. A nation that has just emerged from the "savage state," or one that counts an Orlov or Petrov as a typical citizen, will require harsher punishments than those that have been "softened in the social state."*** Commerce (or business) is a great softener.

In the commercial society, men will not be enjoined to pursue (indeed, they will be discouraged from pursuing) the "imaginary" or the sacred, in the pursuit of which their every disagreement gives rise to civil strife and wars, but they will be encouraged to pursue their material self-interests. Macaulay, that keen-eyed Englishman of the nineteenth century, was describing an aspect of this when he said that the aim of the pre-modern philosophy was to raise men far above their vulgar wants and was noble, whereas the aim of the modern philosophy was to supply their vulgar wants and was attainable.*** Enlightened men, taught by Beccaria and his precursors, would build their cities with

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* Ibid., p. 94.

** Ibid., p. 44.

*** Thomas Babington Macaulay, Critical and Historical Essays (London: Everyman's, 1951), vol. 2, p. 373.

an eye to business, not with an eye to heaven, and business (and the material wealth it creates) is a condition of the promised peace. This would give rise to more office buildings and fewer cathedrals, multinational corporations instead of crusades. "Commerce and private property are not an end of the social contract," Beccaria said, "but they may be a means for attaining such an end."* Commerce, as is sometimes said, would become a substitute for morality. The end was peace, and Beccaria's purpose was to show that in the enlightened commercial society crimes would be fewer and of a less violent character, and that the punishments could be proportionately milder. Torture for example, would be unnecessary because the acts and thoughts (or "words") with which it had traditionally been associated would cease to be regarded as crimes. In time, they would cease to concern men. Men would be of a milder disposition because their passions, instead of being inflamed in one great cause or another, would be directed to commerce and the acquisition of wealth, the conditions of peace and therefore of self-preservation. Such men would be softer and less inclined to vengefulness. Instead of dreaming of revenge, modern men would take out insurance policies and get on with their work. Whatever criminal tendencies they would conceal within their breasts could be easily controlled by the threat of punishment. Deterrence would work with them. They would be liberated from the engines of the old morality, but enlightened liberty would pave the way to peace. Crime would not be a problem.

"Do you want to prevent crimes?" Beccaria asked again. "See to it that enlightenment accompanies liberty." With knowledge, men would see that what appears to be an incompatibility of their interests is more apparent than real. "Knowledge, by facilitating comparisons and by multiplying points of

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* Beccaria, op. cit., p. 77, note 40.

view, brings on a mutual modification of conflicting feelings, especially when it appears that others hold the same views and face the same difficulties.''

> The vigorous force of the laws, meanwhile, remains immovable, for no enlightened person can fail to approve of the clear and useful public compacts of mutual security when he compares the inconsiderable portion of useless liberty he himself has sacrificed [on leaving the state of nature] with the sum total of liberties sacrificed by other men, which, except for the laws, might have been turned against him. Any person of sensibility, glancing over a code of well-made laws and observing that he has lost only a baneful liberty to injure others, will feel constrained to bless the throne and its occupant.*

This is Beccaria's formulation of a teaching whose original author was Hobbes. Enlightenment would remind men of the terrors of the state of nature and of the considerable material advantages of peace, and, in this fashion, teach them the necessity to obey the sovereign's laws. It might fail with the Orlovs and Petrovs, but so did the system it replaced, and, besides, in the new commercial society there would be fewer Orlovs and Petrovs. Men would be liberated from the traditional moral authority, but an enlightened self-interest would bring peace and safety.

Would it work? Exactly one hundred years later Dostoevsky ridiculed the very idea of it.

> But these are all golden dreams. Oh, tell me, who was it first announced, who was it first proclaimed, that man only does nasty things because he does not know his own interests; and that if he were enlightened, if his eyes were open to his real normal interests, man would at once cease to do nasty things, would at once become good and noble because, being enlightened and understanding his real advantage, he would see his own advantage in the good and nothing else, and we all know that not one man can, consciously, act against his own interests, consequently, so to say, through necessity, he would begin doing good? Oh, the babe! Oh, the pure innocent child!**

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* Ibid., p. 95.

** Fyodor Dostoevsky, Notes from Underground, in Notes from Underground, Poor People, and The Friend of the Family. Translated from the Russian by Constance Garnett (New York: Dell Publishing Company, 1969), p. 41.

Why, indeed, should a person of sensibility, after "glancing over a code of well-made laws and observing that he has lost only a baneful liberty to injure others," then feel constrained "to bless the throne and its occupant"—in short, why should he obey the sovereign's laws? Beccaria's answer is that it is in his interest to do so, and not simply because it is in his interest to avoid punishment. The alternative to men's obeying the laws is the return to the state of nature wherein no man's rights are secure; and men can be taught to understand that. No "enlightened person" can fail to see how useful is the compact that provides "mutual security" and how necessary it is that he, and everyone else, obey the laws made possible by the compact. He will then be constrained to act with others as he wants others to act with him, not because he has been taught this as a moral duty, but because the law has so commanded him and because it is in his interest to obey the law. Traditionally men had been taught that they lived under a moral law that not only forbade them to rob and assault travellers on the road from Jerusalem to Jericho but required them to follow the example of the good Samaritan and lend assistance to anyone who had been robbed and assaulted. The familiar rule, do unto others as you would have others do unto you, summed it up. Hobbes' reformulation of this expresses the difference between traditional Christian politics, or policy, and the new natural rights politics: "Do not do that to another, which thou wouldest not have done to thyself."* Under this regime, no one is taught that he must go to the assistance of travellers on the road to Jericho; one is only taught that it will not be in his self-interest to be a thief or murderer. Beccaria, like Hobbes, was confident that this system would work.

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* Hobbes, Leviathan, I, ch. 15. Italics in original.

But is it not likely that some men — some wicked men — will see immediately that their interests could best be advanced if others obey the maxim while they disobey it? Rousseau thought so, which is why he, long before Dostoevsky, objected to this Hobbean (and soon to become Beccarian) system. He said that the wicked man would profit from the just man's probity and his own injustice. In fact, the wicked man will be delighted if everyone, except himself, obeys the law.* Rousseau's point was that the Golden Rule, and especially Hobbes's version of it, would not be obeyed if it were to be supported only by self-interest. While it is true that the wicked man, along with everyone who thinks about it, will want to avoid a return to the lawlessness of the state of nature, he will know that his disobedience alone will not cause such a return. The conclusion from all this is that the fear of punishment will not work with the fearless (Orlov), the irrational (Petrov), or the rational and wicked (whose names we are not likely to know).

Some proportion — and perhaps a considerable proportion — of this last group might be deterred by the threat of truly ruthless punishment summarily imposed. For example, the incidence of shoplifting would probably show a marked decline if supermarket check-out clerks were authorized summarily (perhaps with small scale guillotines conveniently located next to their cash registers) to chop off the hands of everyone apprehended in the act of stealing from the store. That is, it would show a marked decline if the management could find check-out clerks who would inflict the penalty. Whatever may be the case in Saudi Arabia, that is not likely to be possible in America. We can be fairly certain that such a punishment could not be

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* Rousseau, Émile, Book IV. Oeuvres Complètes (Dijon: Pléiades, 1969), tome 4, p. 523 note.

imposed among us even, or especially, after a due process trial: American juries, civilized or softened by their life in the commercial or bourgeois society, would simply refuse to convict anyone of shoplifting if the crime carried a mandatory punishment of this order of severity. It was because he saw the possibility of this that Beccaria was opposed to capital punishment.

Having begun his chapter on the death penalty by demonstrating (to his own satisfaction, at least) that the sovereign has no right to impose the sentence of death on any citizen, Beccaria immediately contradicted himself by suggesting that the issue was not whether the sovereign had a right to execute for crimes but whether there were circumstances in which it was necessary to do so, and he conceded that there were.

> There are only two possible motives for believing that the death of a citizen is necessary. The first: when it is evident that even if deprived of liberty he still has connections and power such as endanger the security of the nation — when, that is, his existence can produce a dangerous revolution in the established form of government. The death of a citizen thus becomes necessary when a nation is recovering or losing its liberty or, in times of anarchy, when disorders themselves take the place of laws. But while the laws reign tranquilly, in a form of government enjoying the consent of the entire nation, well defended externally and internally by force, and by opinion, which is perhaps even more efficacious than force, where executive power is lodged with the true sovereign alone, where riches purchase pleasures and not authority, I see no necessity for destroying a citizen, except if his death were the only real way of restraining others from committing crimes; this is the second motive for believing that the death penalty may be just and necessary.*

Thus, he was not opposed in principle to the death penalty and saw its necessity under some circumstances; but he then went on to argue that in most circumstances it was relatively ineffective because it succeeded in making only a momentary impression on those who

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* Beccaria, On Crimes and Punishments, p. 46.

witnessed it. Far superior in this respect was penal servitude. It provided a "long and painful example of a man deprived of liberty, who, having become a beast of burden, recompenses with his labors the society he has offended." Other men will profit by witnessing the criminal spending "a whole lifetime... in servitude and pain."* Thus, the question of the death penalty did not turn on whether the sovereign had a right to impose it, and it was not governed by any moral considerations, or by the necessity, arising out of a sense of justice, of making the punishment fit the crime; the question was one of utility. What form of punishment was most fearful and, therefore, was best calculated to effect obedience to the laws? The answer to this question turned on the sentiments of the population:

> The death penalty becomes for the majority a spectacle and for some others an object of compassion mixed with disdain; these two sentiments rather than the salutary fear which the laws pretend to inspire occupy the spirits of the spectators. But in moderate and prolonged punishments the dominant sentiment is the latter, because it is the only one. The limit which the legislator ought to fix on the rigor of punishments would seem to be determined by the sentiment of compassion itself, when it begins to prevail over every other in the hearts of those who are the witnesses of punishment, inflicted for their sake rather than for the criminal's.**

Punishment must fit the sentiments of the law-abiding population rather than the crime. It must be rigorous enough to strike fear in the hearts of that population, but not so rigorous that that population sympathizes with the criminal. It must be rigorous enough to deter, but not so rigorous that the people refuse to allow it to be imposed. This allows us to see that,

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* Ibid., pp. 47, 49.

** Ibid., p. 47.

except in barbaric places, shoplifting cannot in fact be deterred by a threat to chop off the hands of those who are caught. It also allows us to see why the death penalty may be regarded as the most dreadful penalty and, at the same time, why it may not deter the crimes for which it is prescribed. Precisely because it is so dreadful, juries, their compassion aroused by the sight of the offender who faces death if convicted, may refuse to bring in verdicts of guilty in cases for which death is the mandatory punishment. Thus, to generalize, an excessively severe punishment will not serve to deter Orlov, Petrov, or anyone else, because it will not be imposed.

But there is another aspect to this subject as to which Beccaria was silent, perhaps because it is an aspect that can find no place in the deterrence theory of punishment. Whether juries will in fact refuse to bring in verdicts of guilty in such circumstances depends not merely on their view of the penalty; it depends as well on their attitude toward the crime committed by the offender. The more heinous the crime, the less likely they are to feel compassion for the offender and the more likely they are to vote for the most severe penalty permitted under the law. What this means is that in imposing punishments the people will be guided not simply, or perhaps not even at all, by considerations of what is required to strike fear in the hearts of the nonoffenders, but rather by their notions of what is deserved. The worse the crime, the heavier the penalty. This, of course, is the principle of just deserts, and among unsophisticated people there seems to be what might be described as a natural tendency to adopt it. At any rate, a jury will naturally look back at the crime rather than forward to the effect of the punishment; when looking back at the crime, it is likely to feel compassion for its victims rather than for its perpetrator.

In a murder case especially (so long as murder is seen as a terrible offense), it is likely to feel compassion for the family and friends of the victim (as well as for the victim himself) and to want to assist them, even to the extent of satisfying their desire for retribution. In short, the jury that is permitted to look back at the crime is likely to become angry, both at the crime and the criminal— unless, of course, it has been taught to do otherwise. Beccaria's hope was that they could be taught to do otherwise.

It should be clear from his words on the subject that the principle of deterrence is incompatible with the principle of just deserts. This does not mean that punishments inflicted because the criminals deserve them may not serve to deter others from committing similar offenses; nor does it mean that a schedule of punishments devised in order to deter may not happen to correspond to one devised to make punishments fit the crimes. But deserved punishment is for the "sake" of the crime and not for the sake of the "witnesses", as Beccaria put it, or the nonoffenders. As such, it requires a looking back at the crime to determine what it deserves, rather than a looking forward to determine whether it will deter others. It requires calculations that cannot be made by someone who holds that the purpose of punishment is only to prevent the criminal from inflicting new injuries and "to deter others from similar acts."* The deterrence theorist will not recognize the victim of crimes or his anger; indeed, he calls this anger a desire for revenge and his purpose is to offer no place in a schedule of punishments for the desire for revenge, even if it goes by the name of retribution. Compassion for the victim does not enter his calculations; the

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* Ibid., p. 42.

only compassion he recognizes is that likely to be felt for the criminal. He is not (at least in principle) an angry man, and his purpose is now, as it was with Beccaria, to teach the law — and the judges and juries that administer the law — not to be angry. Yet, a focus on deterrence instead of on the crime may have the paradoxical consequence of undermining deterrence, or of limiting its effectiveness, not with the Orlovs and Petrovs — they are, in a sense, beyond the reach of the law — but with the great bulk of the population who are amenable to instruction by the law. This is likely to be the consequence because the population will lose sight of the immorality of crime.

The modern purpose of punishment is not to teach men that it is immoral to commit a crime, even the crime of murder, but that it is contrary to their interests to do so. Hobbes is explicit on this point. The sovereign may kill the subject, and the subject, whether guilty or innocent, may, to preserve himself, kill the sovereign — or the sovereign's agents: jailer, executioner, or whoever aids them and thereby threatens his life.* The sovereign acts with a view to his interest and the subject acts with a view to his interest, and neither may impute blame to the other for so doing; and each, when he perceives his self-interest to require it, may kill the other. It might be said that a subject is wrong to kill, because when he entered into the contract organizing civil society he agreed not to kill, but he agreed not to kill only because others also agreed and he calculated that this was the most efficacious way to keep himself from being killed. But if the law then decrees that he must die, he is absolved of his

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* Hobbes, Leviathan, II, ch. 21.

contractual obligation not to kill. Self-preservation is prior to, in the sense of taking precedence over, all obligations. Locke, one of the acknowledged founders of modern liberalism, put this bluntly: "Everyone, as he is bound to preserve himself and not to quit his station wilfully, so by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind...."* Not even murder is intrinsically immoral. It should be prevented, and it is the function of penal laws to prevent it by demonstrating to everyone that it is not in his interest to murder; but, quite obviously, when the sovereign shows every intention of executing a man, it is in the interest of that man to kill his guards and escape.

The question is, what is the effect of a system of law that says only that it is not in the interest of a man to commit a crime? Of a law that designs punishments with a view only to demonstrating to everyone that it is not in his interest to commit a crime? Or, once again, of a law that does not impute blame to the crime committed by a man acting in what he perceives to be his own interests? The answer is, there will be more crime because once people are no longer governed by their morals-manners, as Rousseau put it, "they will soon enough discover the secret of how to evade the laws."** In short, deterrence will work only if the threat of punishment is combined with the conviction that the forbidden acts are not only illegal and therefore punishable but immoral. In the absence of that conviction, the easily frightened will not break the law, but the fearless will break the law, the irrational will break the law, and all the others will break the law, and the clever ones among them will do so with impunity.

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* Locke, Second Treatise of Civil Government, ch. 2, sec. 6. Italics not in original.

** Rousseau, Narcisse, ou L'Amant de Lui-Même (Préface). Oeuvres Complètes (Dijon: Pléiades, 1961), tome 2, p. 971.

2. The Morality of Punishment

Hobbes recognized that the natural right of each man to preserve his own life required him to enter a civil society whose purpose was to secure and enforce peace, the condition of self-preservation. Civil peace was endangered most of all, he argued, by what he called the "seditious" doctrine according to which "every man is judge of good and evil actions", and, in the circumstances of seventeenth century Britain, it was to be expected that he also argued that the principal source of men's "private [moral] judgments" was in the teachings of the theologians, or as he said, "the spiritual power."* He, therefore, became the first political philosopher forthrightly to advocate the subordination of religion,** or what we have come to speak of as the separation of church and state. Men had to be taught that there is no morality outside the law.

The Hobbean-Beccarian theory of punishment rests on this proposition. "By a good law," Hobbes said, "I mean not a just law: for no law can be unjust." The law is made by the sovereign power, "and all that is done by such power, is warranted, and owned by every one of the people; and that which every man will have so, no man can say is unjust."*** Beccaria said the same thing when he wrote that the laws, and only the laws, form "the basis of human morality";**** and the source of the laws for both men is the "expressed or tacit compacts of men", and the consideration that leads men

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* Hobbes, Leviathan, II, ch. 29.

** Walter Berns, The First Amendment and the Future of American Democracy (New York: Basic Books, 1976), ch. 1.

*** Hobbes, Leviathan, II, ch. 30. Locke's views were similar: "For the private judgment of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation." A Letter Concerning Toleration, Works (1812 ed.), vol. VI, p. 43.

**** Beccaria, On Crimes and Punishments, p. 41.

to enter into these compacts is self-interest defined as self-preservation. In their somewhat different ways, both Hobbes and Beccaria did their best to persuade men, when entering these compacts, not to agree to the translation of what traditionally had been understood as the moral law into the positive law that would be enforced in the new civil societies; in doing this, they originated the project of separating law and morality, as we say today.

Beccaria, for example, in another of his crime prevention proposals, advised a program of decriminalization or, to adopt another contemporary usage, getting rid of victimless crimes. He said that for "one motive that drives men to commit a real crime there are a thousand that drive them to commit those indifferent acts which are called crimes by bad laws...."* A real crime was one that disturbed the peace by, for example, harming another person; the so-called "indifferent acts" of particular concern to him were the taking of the Lord's name in vain or the worshipping of graven images, by which I mean, of course, refusing to subscribe to what were understood to be the true articles of faith. In our own day we have seen his list grow to comprise prostitution, adultery, incest, abortion, obscenity, indecent exposure, indecent speech, and drug use, to name merely some of what are held by Beccaria's successors to be "indifferent acts." John Stuart Mill stated the principle by which the law should distinguish them from "real crimes" when he wrote in his famous On Liberty that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection." Political power — which is to say, the laws — may be used "to prevent harm to others"

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* Ibid., p. 94.

but not to promote what is thought to be a person's "own good, either physical or moral."* Whether anyone commits an act that has no victim (other than himself, of course) is a matter of indifference to the law, however immoral it might once have been considered: so far as the law is concerned, a man may indulge himself to his heart's content -- provided he does not indulge himself at the expense of others. (If his daughter is willing, there is no reason for the father to deprive himself of her favors,**) But how do you teach a man, especially a man set free by the law, not to indulge himself at the expense of others?

The Hobbean-Beccarian answer to this question was to use the fear of punishment; the implicit answer of the liberal states founded on principles that originated with Hobbes has been to rely on private institutions to provide the moral education that the law itself may not provide. The liberal state may not preach or teach morality, but it may (or, until recently, it did) support those private institutions that preach, teach, or somehow inculcate those decent habits needed to make liberal government possible. It was in this context that Tocqueville said that when "any religion has struck its roots deep into a democracy, beware that you do not disturb it; but watch it carefully, as the most precious bequest of aristocratic ages."*** Liberal

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* John Stuart Mill, On Liberty, ch. 1, "Introductory."

** This is the conclusion drawn by law professor Walter Barnett. See his Sexual Freedom and the Constitution: An Inquiry into the Constitutionality of Repressive Sex Law (Albuquerque: The University of New Mexico Press, 1973), pp. 12-13.

*** Tocqueville, Democracy in America (New York: Vintage Books, 1945), vol. 2, pp. 154-155.

government must preserve what it cannot itself generate, and it must do this without jeopardizing the private realm.

I shall not repeat here what I have discussed in precise detail elsewhere; it is sufficient to point out that the necessity to preserve the moral habits of the people by supporting the institutions that inculcated them was recognized by the Founder of the United States as well as by the statesmen who followed them. The First Amendment, for example, was written in such a way that, while religious liberty was guaranteedand an official church forbidden, nondiscriminatory aid to religious institutions was permitted. Horace Mann, who gained fame as a champion of public and nonsectarian education, also insisted that the schools provide moral instruction, in fact, religious instruction, to the "extremest verge to which it can be carried without invading [the] rights of conscience...." School children were taught to read and spell with the famous Readers and Spellers written by the pious Reverend William McGuffey; over the course of the years from 1836 to 1920, 122,000,000 copies of his books were sold. Obscene materials were banned as a matter of course; indeed, through at least 1932 the federal law that banned them from the mails was understood not even to raise a First Amendment problem. State laws forbade indecent speech and behavior. The laws, even federal laws, supported the monogamous family, because it was understood that the family performed an essential public service in teaching children to care for others, to respect the rights of others, and to moderate the self-interest that is embodied in the rights to secure which "governments are instituted among men." In these and numerous other ways American governments sought to preserve what they were not permitted to generate, and they did so because there was a general agreement that a free self-governing society—<u>especially</u> a free, self-governing society—

depended upon citizens who were not simply self-interested men.* The responsibility for providing such citizens was consigned, and by liberal principles had to be consigned, to the private sector, but this private sector could depend on some support from the laws.

It was a policy whose success was problematic because of the strong possibility that this legal support would languish in time and also because there would be those who would challenge its constitutionality. These challenges have come with increasing frequency recently, and the Supreme Court has, on the whole, tended to uphold them. Prayers may not be recited under public school auspices; this prohibition also extends to the reading of Bible verses; government aid may not be extended to religious schools to the extent to which they are religious; obscene speech may be proscribed by law, but for a period of about seven years, the Court ruled that nothing was obscene, and the consequences of these decisions for the institution of marriage, and, therefore, for the family, may prove to have been decisive; profane and what was once considered very indecent speech is now considered part of that "expression" protected by the First Amendment; the states may not require schoolchildren to salute the flag, and the Court

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* On the intent of the religious provisions of the First Amendment, see Berns, The First Amendment and the Future of American Democracy, ch. 1; on the issue of religious education in the public schools, see chapter two; on obscenity and related issues, chapter five, which also includes a discussion of the family's role. The obscenity case referred to is United States v. Limehouse, 285 U.S. 424 (1932).

has struck down every flag-desecration statute to come before it.* The dubious reasoning that led to these decisions is not my concern here; what is relevant is that the burden of providing or promoting the moral or civil training we need must now be borne by other institutions. One of these is the criminal law and its administration. It must somehow teach men that, while self-indulgence is permissible, it is wrong to indulge themselves at the expense of others.

Criminology refers to this educational capacity of the criminal law as general prevention,and under this label it is associated preeminently with the name of Johannes Andenaes, a Norwegian criminal lawyer. By general prevention he means the capacity of the criminal law and its enforcement to promote obedience to law not by instilling a fear of punishment, but rather by inculcating law-abiding habits. "The idea is that punishment as a concrete expression of society's disapproval of an act helps to form and to strengthen the public's moral code and thereby creates conscious and unconscious inhibitions against committing crimes."** Because he regarded this function of punishment to be more significant than its capacity to instill fear, and because so little was known of the mechanisms by which it worked, if it worked at all, he called for an

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*Engel v. Vitale, 370 U.S. 421 (1962); Abington School District v. Schempp, 374 U.S. 203 (1963); Meek v. Pittinger, 95 S.Ct. 1753 (1975); A Book...v. Attorney General, 383 U.S. 413 (1966); Cohen v. California, 403 U.S. 15 (1971), Rosenfeld v. New Jersey, 408 U.S. 901 (1972), Papish v. Board of Curators, 410 U.S. 667 (1973); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Street v. New York, 394 U.S. 576 (1969), Smith v. Goguen, 94 S.Ct. 1242 (1974), Spence v. Washington, 94 S.Ct. 2727 (1974).

**Johs Andenaes, "General Prevention — Illusion or Reality?" Journal of Criminal Law, Criminology and Police Science, vol: 43 (July-August, 1952), p. 179.

"empirical study of the psychology of obedience to law."* But the question of how punishment of criminals works to inculcate habits of law-abidingness in others is not the sort of question to which "empirical study" is particularly well adapted. Yet, it is possible that some part of that question can be answered.

In the first place, it seems clear that a system of so-called punishment, by which I mean punishment designed to rehabilitate the offender, is not likely to produce the desired result. As I pointed out at the end of the second chapter, this system has the pernicious effect of causing sympathy for the criminal. The same objection can be made to a system of punishments designed solely to deter others from committing crime; this, too, as I said earlier in this chapter, distracts our attention from the crime, and this distraction makes it altogether too easy to feel compassion for the criminal. What Andenaes wants to promote are habits by law-abidingness or habits of acting justly, and the means by which that might be done must somehow incorporate or recognize the justness of what is being done when we punish. The questions to be answered by the criminal justice system must be questions of justice, or of right and wrong, and questions of whether a particular penalty will deter or whether a particular treatment will cure are not questions of justice. As C.S. Lewis has pointed out, "there is no sense in talking about a 'just deterrent' or a 'just cure'".** If punishment is to perform this educative function, then, it must be a punishment of just deserts or retribution. Still another criminal lawyer and law editor, A.L. Goodhart, stated this very well, and in doing so came closer than Andenaes to identifying the mechanism by which it works:

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* Ibid., p. 197.

** C.S. Lewis, God in the Dock: Essays on Theology and Ethics, ed. Walter Hooper (Grand Rapids, Michigan: William B. Eerdmans Publishing Co., 1970), p. 288.

> It must be remembered [he wrote in 1953] that criminal law does not function in a vacuum, and that it cannot ignore the human beings with whom it has to deal. There seems to be an instinctive feeling in most ordinary men that a person who has done an injury to others should be punished for it....It has, therefore, been pointed out that if the criminal law refuses to recognize retributive punishment then there is a danger that people will take the law into their own hands. A far greater danger, to my mind, is that without a sense of retribution we may lose our sense of wrong. Retribution in punishment is an expression of the community's disapproval of crime, and if this retribution is not given recognition then the disapproval may also disappear. A community which is too ready to forgive the wrongdoer may end by condoning the crime.*

We have become accustomed to thinking of deterrence and retribution as independent or unrelated theories of punishment, but Andenaes and Goodhart (and, of course, other "old fashioned" writers whom I have not mentioned) are suggesting in this notion of general prevention that there is a point where they come together. We can recognise that point of convergence by adopting a very old manner of speaking, and say that the law works by praising as well as by blaming. The law blames when it prescribes punishment for certain acts and when it subjects those who commit those acts to punishment. We see that easily enough. We tend to ignore, however, the fact that in punishing the guilty and thereby blaming the deeds they commit, the law praises those who do not commit those deeds. The mechanism by which this praise is bestowed on the law-abiding takes the form of satisfying some demand that springs from an aspect of their souls. What is satisfied is their anger.

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* A.L. Goodhart, English Law and the Moral Law (London: Stevens and Sons, 1953), pp. 92-93.

"Many sorrows shall be to the wicked: but he that trusteth in the Lord, mercy shall compass him about. Be glad in the Lord, and rejoice, ye righteous: and shout for joy, all ye that are upright in heart!" (Psalms XXXII, 10-11). What is said here about the Lord must also be said about the law, and as belief in divine reward and punishment declines, it must be said more emphatically about the law: we must trust in the law, and those who do will be rewarded. The law must respond to the deeds of the wicked, and the righteous must have confidence that the law will respond, and do so in an appropriate manner. It must punish the wicked because the righteous or law-abiding citizens make this demand of it. They are angered by the sight or presence of crime, and anger is not merely a selfish passion.

Roosevelt Grier, the former New York Giants defensive linesman, and the other friends of Robert Kennedy see him shot down before their eyes. They are shocked, then grief stricken, then angry; but California law cannot permit them to discharge that anger on its cause, Kennedy's assassin; they must be restrained, and the appropriate way of restraining them is to assure them that it, the law, will respond to this crime. The law must assuage that anger by satisfying it, but not, as Goodhart correctly says, simply to prevent them from taking the law into their own hands.

Consider another example. A few years ago, a seven-year-old-boy was brutally murdered on the lower East Side of Manhatten. The next day, in a nearby neighbourhood, a twenty-eight-year old girl was stabbed to death in the doorway to her apartment. The police caught the man suspected of doing it, and had a hard time protecting him from an angry crowd of local

residents. A week later a thirty-one-year-old man was stabbed to death by a burglar in his Ninth Avenue apartment (one of the increasing number of felony murders), this before the eyes of his wife. The Times account continues as follows:

> On the lower East Side, most residents seemed to agree with the police that the next time a murder suspect is identified, Tuesday's mob scene is very likely to be repeated. There is a widespread feeling that the police, the courts, the entire criminal justice system simply acts out a sort of charade, and that it is up to the community to demand that justice is done. "When the police find him, they'll just say he's a sick man and send him to a hospital for two years", said ...a Delancey Street shopkeeper. "Then he'll be right back on the street. The only thing to do is to kill this man right away, quickly and quietly."*

The law must not allow that to happen, and not merely because the criminal may indeed be sick; it must provide the forms of justice in order to fulfill its educative function.

Robert Kennedy's friends were angry; that East Side mob was angry; and it is not only right that they be angry (for murder is a terrible crime), but punishment depends on it and punishment is a way of promoting justice. Without anger, or as Andenaes says in an essay written eighteen years after his original discussion of "general prevention," without moral indignation, "punishment is inflicted only reluctantly."** Indeed, if a society is truly indifferent to crime, punishment will not be inflicted at all. But a just society is one where everyone gets what he deserves, and the wicked deserve to be punished — they deserve "many sorrows", as the Psalmist says — and the

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* The New York Times, Sunday, August 26, 1973 ("News of the Week"), p. 6.

** Johannes Andenaes, Punishment and Deterrence. With a Foreword by Norval Morris (Ann Arbor: The University of Michigan Press, 1974), p. 133.

righteous deserve to be joyous. Punishment serves both these ends: it makes the criminal unhappy and it makes the law-abiding person happy. It rewards the law-abiding by satisfying the anger he feels at the sight of crime. It rewards, and by rewarding teaches, law-abidingness.

Adam Smith said we feel cheated if a criminal should die of a fever before he is brought to justice.* "Cheat" is, of course, the very verb we use to describe this sort of thing, and while it is fashionable in liberal circles to deplore the usage and condemn the passion that gives rise to the sentiment, neither is reprehensible. We are deprived of something very valuable when a criminal escapes punishment, even if he does so by dying.

I think, in fact, the ordinary person tends to react in the same manner if a criminal is punished before he is convicted. Consider the case of Adolf Eichmann. As much as he was hated by the Israelis, and, for that matter, by all decent men, they would have felt cheated if, when he was run down, he had simply been gunned down. He had to be brought to justice, and that could be done only by bringing him to trial, at considerable expense and not without risk. Justice requires not only punishment, it requires the forms of justice; and the reason for this is that while the law might blame the crime by summarily punishing the criminal, it cannot praise the law-abiding without providing the solemnities of a trial. There must be a trial, and it must be attended by all the dignity, majesty, and righteousness of the law, in order to place an indelible stamp of justice on what is being done; only such a trial can fully justify the anger that demands punishment of the criminal. Punishment justly imposed on the criminal strengthens the habit of law-abidingness among the people.

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*Adam Smith, The Theory of Moral Sentiments (New York: A.M. Kelley, 1966), p. 95.

The law praises as well as blames, or praises as it blames, and, therefore, performs an educative purpose even for a liberal society. Such a society is forbidden to teach righteousness as this is understood by any church or sect, but it may certainly use the offices of the criminal law to praise the opposite of what it may blame; that is, by recognizing the right of the people to pay back those who rob, assault, or murder, for example, or defraud, combine to restrain trade, file false tax returns, or conspire to obstruct justice, for other examples, it may teach the rightness of not committing these "real crimes." The trial plays a necessary role in this educative function: in addition to justifying the people's anger, it guarantees -- or seeks to guarantee -- that the people's anger is directed at the reprehensible act instead of the unpopular actor. This, too, is a lesson that needs to be taught.

3. Conclusion

In addition to advocating that penalties not be prescribed for "imaginary crimes" but only for "real crimes," Hobbes and Beccaria also argued that the scale of punishments be determined solely with a view to deterring the commission of these "real crimes." Punishment was to be utilitarian in a very narrow sense. The question to be answered was not, what punishment is appropriate to this crime, or what punishment does this criminal deserve, but rather what degree of severity will deter others from committing the same crime. The effect of this was, as I have argued above, to distract our attention from the crime and the immorality of crime, to make it easy to forget the victims of crime, and to sympathize with the

criminal. Paradoxically, it also makes it more difficult for punishment to do what it set out to do -- namely, to deter crimes. Only under tyrannical conditions will the fear of punishment alone serve to prevent men from committing criminal acts. Punishment will promote law-abidingness, or serve the purpose of "general prevention," only if it is seen to be deserved, and it can be seen to be deserved only by a people that is capable of moral indignation at the sight of crime.

I think the ordinary American is still capable of being morally indignant at the sight of crime and criminals, but he has derived no support for this from the intellectual community. On the contrary, the effort of criminologists, judges, "law reformers," and the so-called intellectual press has been to deprive him of this anger by making him ashamed of it. In their book, he is supposed to feel compassion for the criminal and to punish him only with the greatest reluctance — in the extreme case, to clasp him to his breast. This sentiment is not confined to America. Andenaes quotes a Norwegian judge as saying that "our grandfathers punished, and they did so with a clear conscience [and] we punish too, but we do it with a bad conscience."* But one can have a bad conscience for punishing bad men only if one is corrupt, only if one has lost all confidence in the justice of the laws or the country, or, as I said in the Introduction with reference to the Israeli raid on the Entebbe airport, only if one has been deprived of moral strength. But the ordinary American is not ashamed

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* Andenaes, Punishment and Deterrence, p. 133.

of his country and is therefore not ashamed to punish those who break its laws; and neither the puerile asininities of a Tom Wicker nor the perverted judgments of a Jessica Mitford ought to make him ashamed. Unfortunately, he gets no support for his moral judgments from the influential press.*

To conclude: there is no point in being angry with the Orlovs and Petrovs among us. They have to be imprisoned, but I doubt that anything beyond their incapacitation is accomplished by imprisoning them. The law-abiding person can derive little pleasure from seeing them punished. The law can reward, and thereby teach, law-abidingness as it punishes crime only when those who commit the crime can be held responsible for it and, therefore, can be held to deserve the punishment. And the Orlovs and Petrovs are, to a large degree, irresponsible. Fortunately, most criminals are not Orlovs or Petrovs, and some good might come from giving them what they deserve.

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* See, e.g., the reviews in The New York Review of Books and The New York Times. On the Wicker book, the New York Review of Books, April 3, 1975; New York Times, March 6, 1975 and March 9, 1975. On the Mitford book, New York Times, September 9, 1973, September 19, 1973, December 2, 1973, p. 74, and November 10, 1974, p. 41.

CHAPTER FIVE

THE MORALITY OF CAPITAL PUNISHMENT

1. The Immorality of Abolition

In his celebrated history of the criminal law of England, Sir James Fitzjames Stephen says that "criminals should be hated [and] that the punishments inflicted upon them should be so contrived as to give expression to that hatred." It is a "healthy natural sentiment," he says, and, like the sexual passion, is deeply rooted in human nature. The execution of criminal justice is the most emphatic of the forms in which "deliberate and righteous disapprobation" is expressed, and stands "to the one set of passions in the same relation in which marriage stands to the other."* Which is to say, these conventional institutions turn these natural passions to socially useful ends. Gabriel Tarde, the French jurist who wrote on criminal matters at the turn of the twentieth century, was speaking to the same end in the following passage:

> Now so long as man has absolute need of hating something, would it not be a good thing for him to turn his hatred against crime and the criminal? What better can hatred accomplish than to take itself for its own object and its own sustenance? Is not the execution of an assassin in a way but to feel a hatred of hatred?**

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* Sir James Fitzjames Stephen, A History of the Criminal Law of England (London: 1883; New York: Burt Franklin, n.d.), vol. 2, p. 82.

** Gabriel Tarde, Penal Philosophy, Rapalje Howell, trans. (Boston: Little, Brown, 1912; Patterson Smith, 1968), p. 37.

But both men recognize, here in Stephen's words, that hatred and the desire for revenge are "peculiarly liable to abuse." Not only can hatred become excessive, but it can be directed at objects that do not deserve to be hated.

Men hated Presbyterian Convenantors and tied Margaret Maclachlan and Margaret Wilson to those stakes in the tidewaters of the Solway; they hated the other political party and sliced off Rumbold's head and displayed it on a pike at the gates of Edinburgh. When both Hobbes and Beccaria argued that vengeance should play no role in a proper system of punishments, they did so because they recognized only too well the terrible things that can be done by men who hate — and who hate because they love. They attempted to solve the problem by detaching men from the objects of their love.

One of these objects was God or the church of God. Anglo-Catholics hated Scotch Covenantors because they loved the Anglo-Catholic church of God; they may have prayed for the "whole state of Christ's Church," but they denied that the Covenantors were members of Christ's Church. Hobbes's solution, which became the modern solution, was to persuade men to worry about their bodies more than their souls, in fact, to worry about their bodies because that is all they were. Men who devote themselves to preserving their bodies and leading comfortable lives are much less likely to love — and hate.

Men can also love their countries and, to the extent that they do, hate foreigners. This provides a fertile ground for wars in which glory may be won but in which bodies may be killed. But the rights of man, first discovered by Hobbes, know no national boundaries, and find their

ultimate home in the League of Nations and then the United Nations, whose job it is to preserve peace. Love of country is to be superseded by the Universal Declaration of Human Rights.

Men can also love themselves and hate those who do not recognize their merit which is easily transformed in their own minds into their superiority; but Hobbes teaches that this pride or vanity is illusory, that all men are equally contemptible, that what all men seek is nothing but power, that their anger is simply selfish, that "the worth of a man, is as of all other things, his price,"* and that the Leviathan (the "King over all the children of pride" [Job, XLI, 34]) should keep them in their places, by making them fear death more than they love glory or superiority.

Hobbes also taught men actively to seek the goods of the body, which are less likely than what are thought to be the goods of the soul to give rise to love and hate; or, at least, are less likely to do so once the problem of scarcity is overcome. Then all men can share in the goods produced by an ever-expanding Gross National Product. His successors in this respect, John Locke and Adam Smith, showed how it could be solved; they showed how the GNP (originally called The Wealth of Nations) could be multiplied by a factor of ten, a hundred, a thousand, or even, as Locke finally leaves it, to such an extent as to make nature's original bequest appear "almost worthless."** They were, as we have every reason to know, right; and they and Hobbes were essentially right in the consequences of this emphasis on the goods of the body: men who pursue their material self-interest

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*Leviathan, I, ch. 10.

**Locke, Second Treatise of Civil Government, sections 37, 40, 41, 43.

exclusively will be less likely to be loving and hating men. The relations among them can be expressed contractually and measured in money.

Rather than seek vengeance or fight duels for injuries suffered or insults received, men will now file suits asking for compensation for contracts breached or reputations defamed. The primary contract — the contract that makes possible all others — is, of course, the social contract, according to which men agree to yield their natural freedom to the sovereign in exchange for his promise to keep the peace, and it is not strange that in time it would occur to people to make the sovereign pay for his nonperformance too. Hence, we now have compensation or insurance schemes embodied in statutes whereby the state, being unable to keep the peace by punishing criminals, agrees to compensate its contractual partners for the injuries they suffer at the hands of the criminal, injuries the police are unable to prevent. The insurance policy takes the place of law enforcement and the posse comitatus, and John Wayne and Gary Cooper give way to Mutual of Omaha. In principle, the worth of a man being his price, there is no reason why coverage cannot be extended to the losses incurred in a murder.

It is an almost perfect solution to the crime problem. A people that has been deprived of its moral indignation cannot deter crime through punishment, but a people that is fully covered by insurance has no need to deter crime. We can expect crime to increase, of course, and this will cause an increase in the premiums we pay, directly or in the form of taxes; but it will no longer be necessary to apprehend, try and imprison criminals, which is now costing us more than a billion dollars a month (excluding the

cost of the federal government's criminal justice activities),* and one can buy a lot of insurance for a billion dollars a month. Only one thing prevents this from being a perfect or final solution to the crime problem: there continue to be people who look upon criminals as immoral and deserving of punishment; people who continue to hate because they continue to love, or to have attachments that cannot be measured in money; passionate people who must be the despair of the Menningers and Wickers; unsophisticated people who favor capital punishment, not necessarily because they think it serves to deter murder, for example, but because they hate murderers and think they have forfeited the right to live.

Perhaps what best characterizes such people (and they probably constitute a majority of Americans, even today) is their opinion that their relations one with another are governed by a law in addition to the laws that are inscribed in the statute books, or that together they constitute some sort of a community that cannot be described adequately in terms only of contractual partnerships. It is this belief in the reality of a moral law that, when this law is violated, gives rise to moral indignation. To such men, crime is more than crime, more than an event coverable by insurance; crime is a denial or a violation of that which constitutes a community among men and distinguishes them from all other creatures. The simply legal society may compensate its members for losses suffered at the hands of criminals, but it is the moral legal

*The total state and local bill was $536,355,000 in 1970, $631,414,000 in 1971, and $704,377,000 in 1972. Sourcebook of Criminal Justice Statistics — 1974, p. 42.

community that demands punishment — by segregating criminals in prison or shaming them in stocks; it is the men who inhabit the moral community by obeying its laws who are indignant with or outraged by those who disobey its laws. And it is from the moral community that the perpetrators of terrible crimes are banished — if necessary, by being executed. This is what the death penalty means to the unsophisticated person: a form of banishment from the moral community, imposed on those who have violated what the community understands to be the most solemn and awful of its commandments. Albert Camus, perhaps the most thoughtful of the abolitionists, understood this very well, and called for the abolition of the death penalty precisely because he denied the possibility of the moral community, the only community that might justly impose it on anyone. His most celebrated novel, L'Étranger (variously translated as The Stranger or The Outsider), is a brilliant portrayal of what constitutes heroism in a purposeless world, a world deprived of God, as he puts it.* L'Étranger is a modern masterpiece, and is generally acknowledged to be so, and its hero, Meursault (who, interestingly enough, is a murderer), is widely acknowledged to be a hero; but L'Étranger is also a very immoral book.

Meursault is the stranger or outsider because he neither loves nor hates, nor understands what other people mean when they speak of love or seek to attach themselves to other human beings. His mother's death and funeral, which open the novel, leave him unmoved. Whatever he does, he does, like any other animal, out of natural necessity: he eats, but

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* Albert Camus, Carnets - II, Janvier 1942-Mars 1951 (Paris: Gallimard, 1964), p. 31.

standing up and without savoring his food; he has an apartment, but only because he needs shelter of some sort (and he moves all the items necessary to his existence into one room to save the trouble of cleaning the others); he takes a woman the same way he takes a meal, and just as he must shop for his food, he is willing to marry the woman if she insists on this ceremony — in fact, as he concedes, he is willing to marry anyone whose body satisfies his body's needs. Marriage is not a serious matter, he says. Nothing is serious. The world he inhabits is differentiated by night and day, heat and cold (and he enjoys swimming when the weather is hot), but is otherwise altogether homogeneous: no nations, no classes, no beauty or ugliness, justice or injustice, war or peace. He is indifferent to human artifacts, and his life is unadorned by them: the only exception is an advertisement for a laxative which he comes upon while idly glancing through a newspaper and which he idly clips and pastes in an album. He has, willy-nilly, acquaintances among those with whom he works and dwells, but no friends; like an animal or a god he is self-sufficient: he never once frowns, smiles or laughs. He accepts an invitation to a meal, but only to be spared the trouble of preparing his own. Utterly without imagination or ambition, he will live in Paris, if his employer sends him there, or remain in Algiers; like marriage, where he lives makes no difference to him. He is equally indifferent to a kindness shown him or a cruelty inflicted, whether by a neighbor on a dog or by another neighbor on a mistress; in the same spirit he is willing to share in the cruelty inflicted on two men who seek to revenge a wrong committed on the sister of one of them. He ends up killing one of them, not because he hates or needs or profits

or for any other human reason, but because of the sun ("à cause du soleil"). As he later tells the examining magistrate, he does not regret the murder; rather than regretting it, he is somewhat annoyed or bored by the business (plutôt que du regret véritable, j'éprouvais un certain ennui). He then says that he thinks the magistrate did not understand him.

Up to this point, Camus' is a terrible indictment brilliantly achieved, an indictment of Hobbean man seen not in the state of nature or upon his first bursting onto the stage of history-- Meursault is neither brute nor the vulgar "bourgeois gentleman" of Molière's play-- but seen at the end of history, so to speak. Here he is body-preserving man deprived not only of his dreams of heaven and glory, friendship and justice, but even of his avarice; he is the man who wants nothing and, as we shall see soon enough, fears only death. One can understand why his sometimes friend, Jean-Paul Sartre, likened Camus to the French moralists of the seventeenth century. Then abruptly, Camus' perspective changes, or he makes us see what perhaps we ought to have seen all along: Meursault is an "outsider" not because he is an inhuman man in a human world, but because he is the only honest man in a world of hypocrites. He alone understands that the universe provides no support for what men in their ignorance persist in regarding as the human things, say, love and justice. And in the end Camus asks the reader (and apparently succeeds with most) to identify with that man. As he wrote in his notebook in answer to a critical review of the book, "there is no other life possible for a man deprived of God, and all men are in that position."*

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* Ibid.

Meursault is jailed and spends some months awaiting trial, during which time he is frequently interrogated by his lawyer and the examining magistrate. There is no question of his guilt, and he feels no remorse and refuses to pretend to any, but his lawyer wants to establish extenuating circumstances — for example, that, because of his mother's death, he had not been himself when he shot the man. What sort of a man was he when he was himself? That becomes an issue in the trial and much is made of the fact that he had not shed a tear at his mother's funeral. He cannot understand why so much — indeed, why anything — is made of his behavior on that occasion. The various people he encounters in the course of his incarceration are repelled by him at first, or pretend to be, but in time he manages to get on well enough with them; he also manages to accommodate himself to his confinement. He learns to sleep sixteen to eighteen hours a day. He tells us that he had often thought that he could learn to live in the trunk of a dead tree, with nothing to do but doze and gaze at the drifting clouds— an idyll to be interrupted by a bit of coupling with Marie (or anyone else) on Sundays. It is only after he is convicted and is sentenced to death that he experiences, apparently for the first time in his life, hope: he hopes somehow to avoid death. To the question of why he wants to live, or what he wants to do if he lives, Meursault has no answer.

Meursault's only moment of passion comes at the end of the novel when he denounces a priest who, almost in despair, is exhorting him to acknowledge his sin and repent. He had killed a man without anger — à cause du soleil — but the priest he seizes by the scruff of the neck

in the only fit of anger he ever displays. And what had the priest done to arouse him? He had asked him to acknowledge that life had some meaning. This from a priest who, because he was celibate, could not even be sure he was alive. (Copulo ergo sum.) Sadly the priest leaves the cell and Meursault becomes calm, realizing that this one burst of anger had served a purpose: it had washed him clean of his one (so-called) human quality, his hope to avoid death. Now he was able to accept the truth by which he had lived: that the universe is "benignly indifferent" to how he or anyone else lives. Of course, the law is not indifferent to how he lived— for example, the law forbade him to commit murder— but the law is simply a collection of arbitrary conceits; other people were not indifferent to how he lived— for example, they expressed dismay at his lack of attachment to his mother— but other people are hypocrites.

The author of this anti-morality tale was, nevertheless, one of the genuine heroes of his time, a wartime hero of the French Resistance who edited the underground anti-Nazi paper, Combat, and a post-war hero as well: unlike Jean-Paul Sartre, with whom he broke on the issue, Camus refused to condone Stalinism. One might say that his life was dedicated to finding a basis for the way he himself lived (and Meursault did not live). As he wrote in his notebook, "Society needs people who weep at their mothers' funerals."* On the occasion of their break, Sartre wrote this of him and to him:

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*Ibid., p. 30.

> It was in 1945: we discovered you, Camus, the Resistant, as we had already discovered Camus, the author of L'Étranger. And when we compared the editor of the clandestine Combat with that Meursault who carried his honesty to the point of refusing to say that he loved his mother and his mistress, and whom our society condemned to death, and when we knew above all that you had never ceased to be both the one and the other, this apparent contradiction helped us to understand ourselves and the world.*

But what was to Sartre an "apparent contradiction" was to Camus a contradiction simply, but a contradiction he tried to hide.

He was a passionate opponent of capital punishment. He denounced it because, among other reasons, it deprived a man of the opportunity to repent and to make amends. Even Bernard Fallot, who committed horrible deeds for the Gestapo, was remediable; it was Fallot, Camus tells us, who said that his greatest regret was that he had come to know the Bible only while awaiting his execution. Had he known it earlier, he would not have been a criminal and would not have been on death row.** Poor Fallot. Poor Fallot? Meursault would have flung that Bible in the face of any priest who deigned to offer it to him.

Camus denounced capital punishment mainly because, as he saw it, "our civilization has lost the only values that, in a certain way, can justify that penalty....[the existance of] a truth or a principle that is superior to man."*** Whatever Meursault's judges thought they were doing,

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* Jean-Paul Sartre, "Réponse à Albert Camus," Les Temps Modernes, vol. 8 (August, 1952), p. 345.

** See above p.

*** Albert Camus, "Reflections on the Guillotine," in Resistance, Rebellion, and Death. Trans. Justin O'Brien (New York: Knopf, 1961), pp. 220, 222.

or whatever other unsophisticated men think they are doing when they call for the death penalty, "all thinking members of our society" know that nothing is superior to man and, therefore, nothing can justify this terrible penalty. There is no moral law; therefore, no one, not even a murderer, can break it.

But this raises an awkward question: if the universe if "benignly indifferent" to how we live, how can it care whether we, in our naiveté, execute Fallot, Meursault, or anyone else for what we, in our innocence, call their immoral and illegal acts? If there is no basis for anyone else's moral indignation, what is the basis for Camus'? In fact, he assiduously sought such a basis, principally in his essay on "man in revolt," which he entitled, L'Homme Révolté, or The Rebel,* and which was the cause of the break with Sartre and other French intellectuals who supported the Soviet Union. It is not necessary for me to judge whether he succeeded in this most human of undertakings; I need only point to the answer he gave in his impassioned attack on the death penalty. There he said that the only thing that binds men together is their "solidarity against death," and a judgment of capital punishment "upsets" that solidarity.** The purpose of human life is to stay alive. When the opponents of the death penalty speak of it as an affront to the dignity of man, this is what they mean.

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* Albert Camus, The Rebel, trans. Anthony Bower (New York: Knopf, 1971).

** Albert Camus, "Reflections on the Guillotine," p. 222.

CONTINUED

2 OF 3

A conspicuous case in point is Justice Brennan of the Supreme Court of the United States who, in his dissent in the 1976 death penalty cases, cites Camus as his authority.* In his separate opinion in the 1972 cases (from which, on the whole, he was content to quote in his 1976 opinion), Brennan built his argument on the premise that the Eighth Amendment forbidding cruel and unusual punishments requires all punishments to "comport with human dignity." This is reasonable enough. The cruelty that is forbidden can, after all, only be measured or assessed in relation to human beings and what is appropriate and inappropriate to them; and a practice that is acceptable (to most of us, at least) when applied to other and, as we used to say, lower animals -- for example, the vivisection of dogs and the injection of carcinogenic substances into rats -- may not be acceptable (indeed, in the case of the examples cited, are regarded as enormities) when applied to human beings. This reminds us that the dignity of man is a meaningful term only if man's special and exalted status in the order of living beings is recognized.** Men are not to be treated as if they were beasts precisely because of that which distinguishes them from and raises them above beasts. The Eighth Amendment recognizes this special status of man and is designed to protect it. But it does more than that; it protects the dignity of man <u>from other men</u>, and by doing so reminds us of the uniquely human capacity to be cruel, to

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* <u>Gregg</u> v. <u>Georgia</u>, 96 S.Ct. 2909 (1976).

**"Then God said, 'Let us make man in our image, after our likeness, and let them have dominion over the fish of the sea, and over the birds of the air, and over the cattle, and over all the earth, and over every creeping thing that creeps upon the earth.'" Genesis I, 26. And see Pico Della Mirandola, <u>Oration on the Dignity of Man</u>, A. Robert Caponigri, trans. (Chicago: Henry Regnery, 1956).

be inhumane, as we say, or to act in a manner that does not "comport with human dignity." This is what Aristotle meant when he said that man is the best of all animals when perfected but "the worst of all when sundered from law and justice.*

One measurement of the cruelty of a punishment is whether it is appropriate in a particular case, and appropriateness requires an assessment of whether the person on whom it is inflicted has himself acted in a dignified manner, which can only mean, as a man ought to act. Is it, for example, inappropriate and therefore cruel to sentence a man convicted of fraudulent practices to fifteen years imprisonment at hard labor and to be chained, wrist to ankle, during twelve years of this sentence, and to be permanently deprived of some of his civil liberties? In 1910 the Supreme Court held this to be cruel, by which it meant inappropriate.** The punishment must fit the crime, we say, and there is a schedule of punishments in a criminal code because there are degrees of human offenses, ranging from the petty to the heinous, shoplifting to the murders and desecrations committed by Charles Manson and his followers. But we can measure degrees of culpability only by the standard of what we are here calling human dignity. It follows that rather than being incompatible with human dignity, a schedule of punishments and the idea of punishment itself recognize and are dependent upon it. Punishment is necessitated (or is justified) by the failure of those we call criminals to act in conformity with the idea of human dignity,

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* Aristotle, Politics, I, 1253a32-34.

** Weems v. United States, 217 U.S. 349 (1910).

or with the laws governing a moral community. The question is whether men can ever act in a manner that falls so far short of how they ought to act as to make their execution an appropriate punishment. Brennan manages to answer this question without raising it.

A punishment does not "comport with human dignity," he says, if it is "degrading to the dignity of human beings," and it is degrading if it is too severe or if it treats men as if they were "objects to be toyed with and discarded," if it is imposed arbitrarily, if it is not acceptable to "contemporary society," and if it is excessive, by which he means "unnecessary." The death penalty fails each of these four tests, he concludes. (1) It is too severe because it causes death, and death is "final" and "irrevocable," and finality precludes relief; unlike those punished in other ways, an executed person is even deprived of the "right of access to the courts."* All of which is certainly true, but its being true did not prevent the men who wrote the Constitution from advocating the death penalty. (2) It is imposed so rarely in our time that the conclusion is "virtually inescapable" that it is being inflicted arbitrarily,** as to which I shall have something to say in due course. (3) He finds it to be unacceptable to contemporary society, which requires no further comment from me. (4) It is unnecessary because there is no evidence known to him (and in the 1976 opinion he denied the validity of Ehrlich's findings) that

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* Furman v. Georgia, at p. 290. This argument seems to have originated in the influential and frequently-cited article by Arthur J. Goldberg and Alan M. Dershowitz, "Declaring the Death Penalty Unconstitutional" (Harvard Law Review, vol. 83 [June 1970], p. 1788). Starting from the idea that citizenship embodies the right to have rights, they point out that to execute a criminal deprives him of the right to have a new trial when the first trial is found not to adhere to subsequently-defined elements of due process.

** Furman v. Georgia, at p. 293.

the death penalty is a more effective deterrent than, say, life imprisonment. For all these reasons, then, the death penalty for whatever crime imposed does not "comport with human dignity." No matter what crimes a man commits, he may not be put to death. No matter how much he violates the idea of human dignity or the laws of a moral community, he may not be put to death. To put him to death is to deprive him of his human dignity. What, then, is human dignity or in what does it consist? Although his 1972 opinion is some 49 pages in length, he never answers this question. The closest he comes is in the following statement, which he quoted in 1976 (a statement that speaks volumes even as it speaks nonsense): "The fatal constitutional infirmity in the punishment of death is that it treats 'members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the [cruel and unusual punishment] clause that even the vilest criminal remains a human being possessed of common human dignity.'"* Here we have it: "common human dignity" is something that is possessed by "even the vilest criminal." Everybody is dignified, or, as Hobbes put it, there is no such thing as human dignity.**

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* Gregg v. Georgia, at 1972, quoting from his separate opinion in Furman v. Georgia, 408 U.S. 238, 272-3 (1972).

** See above,

2. The Moral Necessity of Capital Punishment

Like Meursault, Macbeth was a murderer, and like L'Étranger, Shakespeare's Macbeth is the story of a murderer; but there the similarity ends. As Lincoln said, "nothing equals Macbeth." He was comparing it with the other Shakespearian plays he knew, the plays he had "gone over perhaps as frequently as any unprofessional reader....Lear, Richard Third, Henry Eighth, Hamlet"; but I think he meant to say more than to imply merely that none of them equaled Macbeth. I think he meant that no other literary work equaled it. "It is wonderful," he said.* It is wonderful because it tells an awful truth, and tells it as it can only be told, and as only Shakespeare among our poets can tell it.

Macbeth's murder of Duncan the king was no senseless or mean act; Macbeth wanted to be king and, on the basis of merit alone, deserved to be king, much more so than Duncan. Duncan, in fact; was somewhat foolish. Although he was not witness to the alleged treachery and had to rely on the unsubstantiated word of another, he nevertheless summarily condemned the Thane of Cawdor to death; he then bestowed Cawdor's title on Macbeth and went on, unnecessarily, to settle the succession to the throne on his own eldest son, even though he recognized Macbeth as the worthiest of his subjects; and, finally, he capped these acts by putting himself in Macbeth's power by agreeing to be his houseguest. Yet, however disappointed in his hopes and in spite of the opportunity the king foolishly afforded him, Macbeth

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* Lincoln to James H. Hackett, August 17, 1863. The Collected Works of Abraham Lincoln, Roy P. Basler, ed. (New Brunswick: Rutgers University Press, 1953), vol. 6, p. 393.

held back. He respected the laws and conventions that stood between him and the throne, including those that forbade the act that would bring him to it. Duncan was not only king by grace of God ("the Lord's annointed," as Macduff referred to him); he was Macbeth's kinsman and, at the time of the murder, his guest.

> ...He's here in double trust:
> First, as I am his kinsman and his subject,
> Strong both against the dead; then as his host,
> Who should against his murderer shut the door,
> Not bear the knife myself.

But he was driven by such a force that he had, nevertheless, to contemplate the act, even knowing that he would risk eternal damnation. He would, he said, risk "the life to come," except that Scotland, too, had laws, laws that he could ignore only at his immediate peril. "We still have judgment here," he admitted, and other men would not hesitate to enforce it if they could. Duncan's virtues may have been modest, but they were appreciated, and they would "plead like angels, trumpet-tongued" against his murderer. As a just man, Macbeth could not complain about that: it is a characteristic of justice to be "even-handed" and, therefore to commend "th' ingredients of our poison'd chalice to our own lips."

Against all this was only his "vaulting ambition," and the knowledge, that Lincoln must have appreciated because he knew it of himself,* that

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* It would take me too far afield to attempt to demonstrate that Lincoln, contrary to the legend that he himself helped to write, was the uncommonest of men; and, besides, that demonstration has already been made, and made with a clarity and wisdom that I could not hope to match. (See Harry V. Jaffa The Crisis of the House Divided [Garden City, N.Y.: Doubleday, 1959], ch. 9) I shall merely say that according to his law partner of many years, Herndon,

that ambition was not vain or pretentious. Macbeth was a great man, and he contended for the place for which he was by nature suited. He sought to rule. In what other place can a man be fully a man; in what other place can he exercise all the virtues of a man? Aristotle argued this point thematically, and Winston Churchill acknowledged its truth when in May, 1940 he was finally made Prime Minister. (Even though the world was collapsing around him, he was, Churchill said, conscious of a profound sense of relief. "At last I had the authority to give direction over the whole scene."*) It was his greatness, and more precisely, his capacity for moral greatness, that lay behind Macbeth's vaulting ambition and led him to at least consider committing the crime required of him to satisfy it; but it was even so a moral weakness that, finally, led him to act. He would, he explained, "dare do all that may become a man [and he] who dares do more is none." And what "beast" was it, asks his wife, who first proposed this enterprise to her? "When you durst do it, then you were a man." This charge of cowardice resolved him.

Lincoln's ambition "was a little engine that knew no rest," and that Lincoln understood ambition, especially ambition pushed "to its utmost stretch." In one of his greatest speeches, delivered when he was not yet twenty-nine years old, he warned of the "towering genius" whose ambition could not be satisfied by a seat in Congress, or a governorship, or even the presidency. Such places, he said, were not for those who belong "to the family of the lion, or the tribe of the eagle. What! think you these places would satisfy an Alexander, a Caesar, or a Napoleon? Never! Towering genius disdains a beaten path....It sees no distinction in adding story to story, upon the monuments of fame, erected to the memory of others. It denies that it is glory enough to serve under any chief....It thirsts and burns for distinction...." (Speech to the Young Men's Lyceum of Springfield, Illinois, January 27, 1838 The Collected Works of Abraham Lincoln, vol. 1, p. 114) Edmund Wilson was one of the few who understood that Lincoln was capable of projecting himself "into the role against which he [was] warning." But, as Jaffa demonstrates, he was also capable of projecting himself into a role "transcending that of Caesar and opposed to Caesar." At any rate, this was the Lincoln who could say of the play Macbeth: "It is wonderful."

* Winston S. Churchill, The Second World War: The Gathering Storm (Boston: Houghton Mifflin, 1948), p. 667.

So he murdered: Duncan the king; then the guards whom he first accused of killing the king; then Banquo, the only man he feared (and not, but only through a mishap, Banquo's son); then Macduff's wife and family, all of them.

The consequences were terrible, worse even than he feared. The world in which he and his victims lived was not "benignly indifferent" to how they lived; it was constituted by laws divine as well as human, and Macbeth violated those laws. As a result, he suffered the torments of the great and the damned. He had known glory and had deserved the respect and affection of king, countryman, army, friends, and wife; and he lost it all. He was reduced to saying that life "is a tale, told by an idiot, full of sound and fury, signifying nothing." In fact, however, he had allowed himself to become the vilest of criminals, to use Justice Brennan's term; he became worse than a "beast" and Shakespeare, who knew rather more about "the dignity of man" than Justice Brennan does, has him killed. What else could he have done with Macbeth?

Turn him over to a psychiatrist, as if his crimes were the result of some petty mental disturbance? The doctor who, in the last act, had been brought in to observe Lady Macbeth's terrible sleep-walking and to hear the outpourings of her anguished soul, said all that need be said as to that: "this disease is beyond my practice." Then: "more needs she the divine than the physician."

Well, if not a psychiatrist, then a long-term prison sentence as in Canada, with no parole except after twenty-five years (except, again, in some cases, after fifteen years)? Would this be a proper "medicine" for

Macduff's grief? ("All my pretty ones? Did you say all? - Oh hell-kite! All? What, all my pretty chickens and their dam at one fell swoop?") Shakespeare has Macbeth killed by the just Macduff, and it could not have been otherwise. Even Macbeth knew that:

> Will all great Neptune's ocean wash this blood
> Clean from my hand? No; this my hand will rather
> The multitudinous sea incarnadine,
> Making the green — one red.

What the oceans themselves could not wash clean could not be expiated in any prison, or paid back with any prison sentence, however long. Macbeth had to die; better, he had to be killed. Justice not only permitted it; justice required it. The dramatic necessity of Macbeth's death rested on its moral necessity.

There is a sense in which punishment may be likened to dramatic poetry, or the purpose of punishment to one of the intentions of a great dramatic poet (and Shakespeare is clearly the greatest in our language). The plots of Shakespeare's tragedies involve political men — Caesar the emperor, Coriolanus the general, Lear the king, Hamlet the son of a king, and others, including, of course, Macbeth who would be king — and this is not fortuitous, any more than it represents the prejudices of a poet who lived in an aristocratic age. He chose to write about such men because the moral problems can be made fully intelligible only in what they do or do not do and in the consequences of what they do or do not do. Dramatic poetry depicts men's actions because men are revealed in, or make themselves known through, their actions; and the essence of a human action consists in its being virtuous or vicious.* Only a ruler or a contender for rule can act with the freedom and

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* Aristotle, Poetics 1448a-1.

and on a scale that allows the virtuousness or viciousness of human deeds to be fully displayed. Macbeth was such a man, and in his fall, brought about by his own acts, and in the consequent suffering he endured, is revealed the meaning of morality. In Macbeth the majesty of the moral law is demonstrated to us by the fact that even a great man cannot prevail against it. In a similar fashion, the punishments imposed by the legal order remind us of the reign of the moral order; not only do they remind us of it, but by enforcing its prescriptions, they enhance the dignity of the legal order in the eyes of moral men. That is especially important in a self-governing community, a community that gives laws to itself.

That the American legal order must, in the eyes of its citizens, have this dignity is the substance of Madison's argument in the 49th Federalist. In it he was responding to Jefferson's suggestion that there be conventions of the people whenever "any two of the three branches of government," by extraordinary majorities, shall concur in the opinion that the Constitution should be amended. Madison opposed this suggestion; he saw that these appeals, especially if they were to be frequent, would "deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability." Government rests on opinion, he went on, and the strength of opinion in each individual depends in part on the extent to which he supposes others to share it and in part on its venerableness. Such factors would not matter in a "nation of philosophers"; among such a people a "reverence for the laws would be inculcated by the voice of enlightened reason." But

there can be no nation of philosophers, or even one governed by philosophers, and any real government, even "the most rational" government, "will not find it a superfluous advantage to have the prejudices of the community on its side."

I can illustrate Madison's point, and show its relevance to capital punishment, by saying first that if the laws were understood to be divinely inspired or, in the extreme case, divinely given, they would enjoy all the dignity that the opinions of men can attach to anything and all the dignity they require to insure their obedience by most of the men living under them. Like Duncan in the opinion of Macduff, they would be "the Lord's annointed," and they would be obeyed even as Macduff obeyed the laws of the Scottish kingdom. Only a Macbeth would challenge them, and only a Meursault would ignore them. But the laws of the United States are not of this description; in fact, among the proposed amendments that became the Bill of Rights was one declaring, not that all power comes from God, but rather "that all power is originally vested in, and consequently derives from the people"; and this proposal was dropped only because it was thought to be redundant: the Constitution's Preamble said essentially the same thing and what we know as the Tenth Amendment reiterated it.* So Madison proposed to make the Constitution venerable in the minds of the people, and Lincoln, in the Lyceum speech referred to above,** went so far as to say that a "political religion" should be made of it. They did this not because the Constitution and the laws made pursuant to it could not be supported by "enlightened reason,"

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* Annals of Congress, vol. 1, pp. 451-and 790.

** See note, p.

but because they feared enlightened reason would be in short supply; they therefore sought to augment it. The laws of the United States would be obeyed by some men because they could hear and understand "the voice of enlightened reason," and by other men because they would regard the laws with that "veneration which time bestows on everything."

But, as our history attests, this is only conditionally true. The Constitution is surely regarded with veneration by us — so much so that Supreme Court justices have occasionally complained of our habit of making "constitutionality synonymous with wisdom,"* or wisdom synonymous with constitutionality — but the extent to which it is venerated and its authority accepted depends on the compatibility of its rules with our moral sensibilities; for the Constitution, despite its venerable character, is not the only source of these moral sensibilities. There was even a period before slavery was abolished by the Thirteenth Amendment when the Constitution was regarded by some very moral men as an abomination: Garrison called it "a covenant with death and an agreement with Hell," and there were honorable men holding important political offices and judicial appointments who refused to enforce the Fugitive Slave Law even though its constitutionality had been affirmed.** In time this opinion spread far beyond the ranks of the original Abolitionists until those who held it comprised a constitutional majority of the people, and slavery was abolished. But Lincoln knew that more than amendments were required to make the Constitution once more

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* West Virginia State Board of Education v. Barnette, 319 U.S. 624, 670 (1943). Dissenting opinion.

** Ableman v. Booth, 21 Howard 506 (1859).

worthy of the veneration of moral men. This is why, in the Gettysburg address, he made the principle of the Constitution an inheritance from "our fathers," and asked the living generation to dedicate themselves to the cause that the Gettysburg dead had left "unfinished", so that generations yet unborn might enjoy a "new birth of freedom." For the same reason, in his second Inaugural he called upon the nation to see in the Civil War the expiation demanded by a just God for the sin of slavery. As Professor Jaffa has shown,* the Constitution had not only to be cleansed of its aspects of slavery, but, if it were once again to be an object of veneration, it would have to be exalted, its dignity enhanced. This Lincoln sought to do and this, I think, he accomplished. That it should be so esteemed is, as I said before, especially important in a self-governing nation that gives laws to itself, because it is only a short step from the principle that the laws are merely a product of one's own will to the opinion that anything that takes this form of law is truly lawful; and this opinion is only one remove from lawlessness.

Capital punishment, like Shakespeare's dramatic and Lincoln's political poetry (and it is surely that, and was understood by him to be that) serves to remind us of the majesty of the moral order that is embodied in our law, and of the terrible consequences of its breach. The law must not be understood to be merely statute that we enact or repeal at our will, and obey or disobey at our convenience; especially not the criminal law. Wherever law is regarded as merely statutory, men will soon enough disobey it, and learn how to do so without any inconvenience to themselves. The

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* Jaffa, Crisis of the House Divided, ch. 9, and esp. pp. 225-232.

criminal law must possess a dignity far beyond that possessed by mere statutory enactment; and the most powerful means we have to give it that dignity is to authorize it to impose the ultimate penalty. It must be made awful. Only the death penalty can serve so well to remind us of the moral order embodied in the criminal law and make that law "worthy of, or commanding, profound respect or reverential fear."

Abolitionists sometimes complain that to impose the death penalty, or, to decide the issue of life or death, is to usurp the prerogative of God. It is indeed a godlike judgment— that is its justification— but, as I showed in the first chapter, there is no text we recognize that indicates that God regards it as a usurpation of His powers; and there are many texts that indicate that in His opinion men like Macbeth and Meursault, Eichmann and Manson, have deprived themselves of the right to live in the community of men.

3. The Constitutionality of Capital Punishment

We know from the care taken by the Founders to isolate judges from the people that the federal judiciary, headed by the Supreme Court, was not intended to supply a democratic element to American government. Federal judges are appointed to office, not elected by the people, and they "hold their offices during good behavior," a provision whose importance can be seen in the fact that no justice of the Supreme Court has ever been found to have misbehaved in the constitutional sense. Although it has been a matter of occasional and sometimes bitter dispute, I also think it is clear that the Founders intended the judges to exercise the

power of judicial review, which is the power to declare unconstitutional the acts of governors and Presidents, state legislatures and Congress; and since these are the more "popular" branches of government where the majority is more likely to rule, judicial review is "a counter-majoritarian force in our system."* The significance of this varies, depending to an extent on the character of the minority that is being protected, which changes from time to time. In the years prior to the Court Crisis of 1937, it was business enterprise that, having lost in the legislatures, gained access to and then won in the courts; more recently it has been racial minorities and, to some extent, what might be described as the intellectual community. This change reflects a change in the legal profession and in the judges.

The legal profession was understood by the Founders to be a conservative and stabilizing force, looking, as it does (or did) to the past for its principles and rules of decision; it was the representatives of the people, "whenever a momentary inclination happens to lay hold of a majority of their constituents,"** that the Founders saw as a threat to stability and constitutional principle. In our time, however, the opposite has been closer to the truth: the legal profession and especially the lawyers on the Supreme Court have been"innovative," and the representatives of the people (and behind them, the people) have been conservative. That is why the advocates of today's intellectually fashionable causes— abortion is the best example— have been litigants in the courts rather than lobbyists before the legislatures. They tend to lose in the legislatures and, on the whole, to win in the courts. Depending on the point of view adopted, one could say

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* Alexander M. Bickel, The Least Dangerous Branch (Indianapolis: Bobbs-Merrill, 1962), p. 16.

** Federalist 78.

that the Supreme Court became a refuge for the embattled American intellectual or a bastion from which he waged his war on the American people. In any case, the opponents of capital punishment surely had good reason to believe that they, too, would win there, and there is no doubt as to who, in their minds, constituted their opposition. With Arthur Koestler they saw public opinion as the "strongest passive support of the hang-hards," and they attributed this opinion to "ignorance, traditional prejudice and repressed cruelty."* It is, therefore, somewhat ironic that the net effect of the 1976 death penalty decisions, decisions that may well mark the end of an era in Supreme Court history, ~~was~~ is to sanction the public's opinion of capital offenses and capital offenders.

It was precisely this sanctioning of the public's opinion that concerned Justice Marshall, one of the two dissenters. The plurality opinion had explicitly approved of the "community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death," and it then cited approvingly Lord Justice Denning's testimony before a 1949 British Royal Commission on capital punishment:

> Punishment is the way in which society expresses its denunciation of wrong doing: and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else.... The truth is

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* Arthur Koestler, Reflections on Hanging (London: Victor Gollancz, 1956), p. 164.

> that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.*

Marshall was, I think, altogether justified in seeing this as the most significant aspect of the 1976 decisions. The Court seemed to have embraced a "purely retributive justification for the death penalty," and he insisted that this was forbidden by the Eighth Amendment.** It was forbidden because, he said, such punishment serves no purpose other than to satisfy the public demand that criminals be paid back; and to take a human life solely for this reason is totally to deny "the wrong-doer's dignity and worth."*** With all due respect to Justice Marshall, I must say that the most heartening aspect of the 1976 decisions consists in this willingness of the Court to respect this public demand, and it is my respect for human dignity that leads me to say this.

The public is surely right in thinking that some criminals have forfeited the right to live in the moral community, and in believing, however intuitively, that the moral order in that community is enhanced by removing them from it. Now that the Court has forbidden banishment or expatriation, execution is the only means available to Americans to indicate the awfulness of some crimes and, thereby, the awesomeness of the laws by which most of them want to live.

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* As quoted in Gregg v. Georgia, 96 S.Ct. 2909, 2930 (1976). Plurality opinion.

** Gregg v. Georgia, at 2976, 2977. Dissenting opinion.

*** Ibid., at 2977.

Banishment was once considered the equal to the death penalty in severity. Cain was not sentenced to death — in fact, God forbade men to kill Cain— but a mark was put upon him and he was banished "from the presence of the Lord" to become a "fugitive and vagabond" on the earth. And he cried out that his punishment was greater than he could bear. (Socrates took the hemlock rather than accept the clearly implied offer of exile from Athens.) And even in our own day the Soviets were clever enough to realize that Solzhenitsyn was such a man, with such a notion of belonging with his people, that he would look upon banishment rather as Cain and Socrates had looked upon it. That is why the Soviets banished him (and why they refuse to allow others to leave). But this is a special case. Traditionally, it was the moral legal order that punished what it saw as its gravest offenders by excluding them, either by executing them or by banishing them from what was understood to be the only place in the profoundly heterogeneous world of nations where life could be savored by any of its people. The law-abiding citizens regarded this as a truly awful punishment. We can learn a good deal about our modern condition (and why a man like Meursault would regard banishment as no punishment at all) from the fact that Beccaria devotes the chapter following the chapter on the death penalty to "Banishment and Confiscations," and in the course of it says that the "loss of possessions is a punishment greater than that of banishment."* If being banished from one's country is not regarded as especially painful, then, clearly, it cannot serve as an alternative to capital punishment.

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* Cesare Beccari, On Crimes and Punishments, Henry Paolucci, trans. (Indianapolis: Bobbs-Merrill, 1963), p. 53.

In what I have no doubt would be described as its ignorance, or, at best, its naive notions concerning citizenship, Congress did not look upon banishment in this light. It associated citizenship with patriotism when it provided for the loss of citizenship for anyone who served in the armed forces of another country and acquired thereby the nationality of that country, or anyone convicted of treason against the United States, or, for one more example, anyone who deserted from the armed forces during wartime and was, upon conviction thereof, discharged from the armed forces.* It was the Warren Court that found this to be unacceptable, and what is of interest are the reasons it gave. Banishment (or expatriation**) is not permitted in the United States not because it is painless and, therefore, useless, but when imposed as a punishment it is cruel and unusual. When imposed as a punishment for wartime desertion, it is even crueler or, perhaps, more unusual (the Court was not clear on this) than the death penalty.*** Chief Justice Warren acknowledged that citizenship imposed duties, duties whose breach might be severely punished, but insisted, reasonably enough, that "citizenship is not lost every time a duty of citizenship is shirked."**** However, he then went on to characterize citizenship as "the right to have rights," and the cruelty of expatriation

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* The statute is the Nationality Act of 1940, as amended by the Immigration and Nationality Act of 1952. See 8 U.S.C. 1481

** The terms are not exactly equivalent. Expatriation means loss of citizenship, and not necessarily expulsion from the country.

*** Trop v. Dulles, 356 U.S. 86, 99 (1958). This was a poor case to test the principle involved because Trop had not deserted in the heat of, or on the eve of, battle; he had deserted from an army stockade in Casablanca where he was being held for a previous offence.

**** Ibid., at 92.

***** Ibid., at 102. This statement is repeated from Warren's dissent in Perez v. Brownell, 356 U.S. 44, 64 (1958).

was said to consist not in being deprived of American citizenship, but in being put in a position where one has no citizenship. Like Cain, the stateless person has been made a fugitive, or at least a "vagabond on the earth," and, although God obviously disagreed,the "civilized nations of the world" have condemned this, virtually unanimously, Warren said.* By 1967, the right to have rights proved to be a right that Congress may not remove from anyone; it simply lacks the power to deprive anyone of citizenship. A person may voluntarily renounce it — he has a right to do this — but Congress may not even set down rules for determining, in the absence of that renunciation, whether certain acts constitute an implicit renunciation,** and it may not use expatriation as a punishment. Just as everyone, no matter what he does, possesses human dignity, so every American, no matter what he does, is entitled to retain his citizenship. Not only Tom Paine's "summer soldier and the sunshine patriot," but even the traitor who levies war against the United States is entitled to remain a citizen of the United States if, for some reason (perhaps because he is unsure who is going to win that war), he wishes to do so. The essence of American citizenship consists in the right to keep one's options open, so to speak.

Given this understanding of what it means to be an American, the Court's decisions were right, but not for the reasons it gave. A country that asks so little of its citizens is a country in which no dereliction can constitute

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* Ibid.

** The precise holding was this: "We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this nation against a congressional forcible destruction of his citizenship...." (Afroyim v. Rusk, 387 U.S. 253, 268 [1967]).

a disqualification for membership in it, and being banished from it would signify nothing at all. Such a country can put the mark of Cain on no one. Nor can such a country have any legitimate reason to execute its criminals; their incapacitation in prison would serve its purposes just as well.

But the United States is in fact not yet such a country, and Justice Frankfurter was probably speaking for the majority of Americans when, in his dissent in one of the expatriation cases, he spoke of "the communion of our citizens."* Most of us, I suspect, can appreciate the sense in which this must be true. We want to live among people who do not think exclusively or even primarily of their own rights, people whom we can depend on even as they exercise their rights, and whom we can trust, which is to say, people who, even in the absence of a policeman, will not assault our bodies or steal our possessions and might even come to our assistance when we need it. We want to live among people with whom we have an affinity beyond that denoted by the mere legal possession of rights in common. We want citizenship to mean more than that. We want it to be an association constituted by a common understanding of what is right and wrong, worthy and unworthy; we want the United States to be a moral as well as a legal order, and to be understood as such. This is why we support the death penalty for those who commit terrible crimes -- which are crimes against the moral order as well as against their particular victims -- and why the Constitution permits us to impose it for such crimes.

The power to execute criminals is an awesome power and should be used sparingly; it was, therefore, altogether proper that the Court invalidate

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* Trop v. Dulles, at 122. Dissenting opinion.

the North Carolina and Louisiana statutes that made death the mandatory sentence for first-degree murder.* Not all first-degree murders are equally terrible; we all know this. For example, we could accept a Jack Ruby being imprisoned for a term of years and then once again living in the Dallas community, or even going on television reciting pieties after the fashion of Charles Colson or covering national party conventions with John Dean; but we could not, I think, accept any of this for Lee Harvey Oswald. Nor, I think, could we permit John Wilkes Booth, Lincoln's assassin, to be "cured" by psychiatrists and then to rejoin our community promising never to do it again. Juries know this difference between one murder and another, and even one first-degree murder and another, and it is right that they should be able to act upon this knowledge when they impose sentences. It is indeed an awesome power, having to distinguish among offenses that are all grave and among offenders all guilty of grave offenses, and both juries and judges have abused it in the past by using it capriciously, freakishly, or even wantonly. This is why the Court set aside the convictions in the 1972 case. This is also why the statutes upheld in 1976 were so carefully drafted.** All three, and especially the Georgia law, embody procedures intended to impress on judges and juries the gravity of the judgment they are asked to make in capital cases; for example, all three require the sentencing decision to be separated from the decision respecting guilt or innocence; and, in one way or another, all three imply

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* Woodson v. North Carolina, 96 S.Ct. 2978; Roberts v. Louisiana, 96 S.Ct. 3001 (1976).

** Gregg v. Georgia, 96 S.Ct. 2909; Jurek v. Texas, 96 S.Ct. 2950; and Proffitt v. Florida, 96 S.Ct. 2960 (1976).

that the death sentence is not to be looked upon as ordinary. Thus, the Georgia law requires (except in cases of treason and aircraft hijacking) a finding beyond a reasonable doubt of the presence of at least one of the aggravating circumstances specified in the statute, and requires the judge or, as the case might be, the jury to specify the circumstance found; and Texas requires the jury, during the sentencing proceeding, to answer affirmatively three questions: whether the evidence established beyond a reasonable doubt that the murder was committed deliberately, whether the evidence established beyond a reasonable doubt that there was a probability that the defendant would commit criminal acts of violence in the future, and, when relevant, whether the defendant's conduct was an unreasonable response to any provocation by the deceased; and the Florida statute requires a weighing of aggravating and mitigating circumstances, which are listed in the statute. Finally, all three statutes permit or require an expedited appeal to or review by their respective supreme courts, which are authorized to set aside a death sentence in order to ensure, for example, that similar results are reached in similar cases. (That this review is not perfunctory is indicated in the fact that the Florida Supreme Court had, at the time of the United States Supreme Court decisions, vacated eight of the twenty-one sentences to come before it under the new law.*)

It is an awesome power that is also abused when it is used discriminatorily, and Justice Douglas voted to vacate the sentences in the 1972 cases because it appeared obvious to him that death sentences have

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* Proffitt v. Florida, at 2967.

traditionally been imposed and carried out disproportionately "on the poor, the Negro, and the members of unpopular groups."* There is surely some truth in this, and the Chief Justice acknowledged it in his dissent in 1972 when he said that "statistics suggest, at least as a historical matter, that Negroes have been sentenced to death with greater frequency than whites in several states, particularly for the crime of interracial rape."** That, of course, is one reason why the Court has insisted that Negroes no longer be systematically excluded from jury service; and that is also why, in its new statute, Georgia authorized its supreme court to set aside any death sentence that appeared to be the result of passion or prejudice on the part of trial judge or jury. This could prove to be an indication of an important change where it is most needed, because, in the period from 1930 through 1974, Georgia executed 366 of the 3,859 persons executed in the entire country, more than any other state, and of the Georgia total, 298 were blacks.*** In themselves these statistics indicate only that the number of blacks executed is disproportionate to the number of blacks in the population and not to the number of crimes committed by blacks. (It is an unhappy fact that they commit a disproportionate

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* Furman v. Georgia, 408 U.S. 238, 249 (1972). He was quoting the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967), p. 143.

** Ibid., at pp. 389-390, note 12.

*** National Prisoner Statistics Bulletin (No. SD-NPS-CP-3), Capital Punishment - 1974, pp. 20-21.

number of crimes, including capital crimes. In 1974, a typical year, 57 percent of the persons arrested for murder were blacks -- and 50 percent of homicide victims were also black,* which serves to remind us that the losses suffered as a result of this crime, as well as a result of so many others, are disproportionately and very cruelly distributed among us.) But that Georgia record cannot be explained in this fashion; it is disproportionate to anything except white prejudice. One swallow does not make a summer, but it may be significant that while there were twenty persons under sentence of death in Georgia at the end of 1974, thirteen of them were white and only seven black.**

Nevertheless, the possibility of racially prejudiced sentences is greater than the possibility of executing an innocent person, which possibility has long served as an argument against capital punishment. No one can assert that this has never happened, and no one can guarantee that it will not happen in the future; yet Hugo Adam Bedau, probably the best known of America's abolitionists, calls it "false sentimentality to argue that the death penalty ought to be abolished because of the abstract possibility that an innocent person might be executed, when the record fails to disclose that such cases occur."*** But, even though the record is not equally clean of racially discriminatory sentencing, it is also false sentimentality to argue against the execution of anyone

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* Uniform Crime Reports - 1974, p. 19.

** Capital Punishment - 1974, p. 45.

*** Hugo Adam Bedau, "The Death Penalty in America," Federal Probation, vol. 35 (June 1971), p. 36. The record, as he shows, does disclose that innocent persons have been convicted of capital crimes; they were however, sentenced to prison.

because half of those executed will turn out to be blacks. Most black people, like most white people, are not criminals, a fact Tom Wicker forgets when he embraces Attica's black convicts; and it would be a cruel victory indeed if, having struggled so long and so hard, and finally, so successfully, against the injustices imposed on them by the white community, they were now to be exposed to preventable black crime because of the reluctance of white liberals to allow the punishment of black criminals. A country that does not punish its grave offenses severely thereby indicates that it does not regard them as grave offenses; and a country that does not punish severely its black murderers thereby indicates that it does not regard murder a grave offense when it is committed in the black community. That is what it amounts to, as the statistic on the proportion of black victims implies. This is simply another version of the familiar southern practice of sentencing the black rapist of a white woman to death and the black rapist of a black woman to a short term in prison. We have had too much of this sort of thing.

It is, finally, an awesome power that is abused when it is used too often, and historically it has been used too often, not only by religious states against opposing religious sectarians, but also by states that apparently knew no other way to deal with their criminal elements. The record is sprinkled with statements to the effect that no man's property will be safe unless death be the penalty for stealing it, even if the property is no more than that which is carried in the pocket and the theft is accomplished by doing no more than picking that pocket. But,

except for the most awful crimes,* the death penalty is unjust. Justice requires the punishment to fit the crime, which requires a schedule of punishments, ranging from the most lenient through various degrees of severity to the most awful, death, because the moral sentiments of a just people recognize that crimes range from the most petty through various degrees of gravity to the most awful, the taking of a human life. The law cannot reinforce those moral sentiments (and its purpose is to do just that) if it executes the pickpocket or the shoplifter as well as the murderer; to do that is to equate petty theft with murder, and petty amounts of property with a human life. The law that does that will lose the respect it must enjoy among the people, who will neither obey it nor, when serving on juries, enforce it. The movement to abolish capital punishment was ill-conceived because its purpose was to prevent the people from expressing their moral opinion of the punishment deserved by terrible criminals; for the same reason, a mandatory death sentence statute is also ill-conceived. Such a statute will either not be enforced among us or, if somehow it were to be enforced /against the opinion of the people, the effect would be to arouse their compassion for the person executed, and that compassion would not be offset by the sense that he deserved what he got. Which is to say that in the moral sense of the people are to be found both the upper and the lower limits on the number of executions; but that moral sense has to be carefully cultivated by the law.

That moral sense gives rise to anger at the sight of crime, and anger can be an ugly passion; when it is extreme, it deforms or misshapes

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* My own view is that the death penalty is deserved by some murderers as well as by traitors and men guilty of some especially horrible rapes.

the countenance, making it ugly. Whatever its object, anger is always self-righteous. (And who among us is truly righteous?) It expresses itself in the desire to punish those who threaten, or appear to threaten, what is conceived to be one's own: one's own people, one's own country, one's own family, one's own team, in short, whatever is held to be an extension of oneself. It is the cause of many terrible acts, lynchings, for example. Yet is also the cause of many heroic acts committed in the best and noblest of causes, which should serve to remind us that the objects or causes that provoke or inspire it are not alike. There is a moral difference between a lynch mob and a John Brown; but just as John Brown's cause required an Abraham Lincoln to bring it to a just conclusion, so the lynch mob's cause requires the offices of the law to tame it. The moral sense that should describe the upper limits on the number of executions must not be that which manifests itself in the initial anger.

As I said in the previous chapter, it is the function of the law to tame the people's anger by satisfying it and thereby justifying it. The anger felt on behalf of the victims of crime, as well as on behalf of the moral order constituting the community, is not, as I argued, simply selfish and is not reprehensible. But that anger has to be tamed also in the sense of being calmed, or moderated. A proper criminal trial achieves this by forcing the jury to determine beyond a reasonable doubt that the accused is guilty as charged, and the new death penalty statutes go further by impressing upon the jury that death is not the ordinary punishment even for those convicted of a capital crime. In order further to calm that anger, I think it proper to insist that executions be public. That, I think,

would ensure that only the worst criminals would be executed, and that could also enhance the moral order that is embodied in the law. It could be a truly awe inspiring occasion, which is what it should be if it is to serve its legitimate purpose.

There are obvious objections to public executions, even when they are not the sort of spectacle that Mandeville was describing in the eighteenth century.* No one can be required to witness them, and it would be better if some people not be permitted to witness them — children, for example, and the sort of person who would, if permitted, happily join a lynch mob. Yet they must be witnessed, and witnessed by the public. The solution to this problem is to be found where the Framers of the Constitution found part of the solution to the problem of democracy, namely, in the principle of representation. Executions should be witnessed by representatives of the people, not specially selected for this purpose — for the process of selecting them could not be controlled sufficiently to ensure that decorum attend every aspect of this ceremony (and I use that word advisedly) — but by those, or a part of those, already elected to the legislatures. They represent the people when they enact the statutes prescribing or permitting the penalty of death, and they can represent the people when they witness its carrying out. As Madison said in the Tenth Federalist, they are a "chosen body of citizens" who can be expected to "refine and enlarge the public views," and they can also be expected to refine the public's moral indignation.

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* See above, pp.

There will be fewer executions, but only a few executions are needed to enhance the dignity of the law. The other purposes of the criminal law can be accomplished by a more rigorous enforcement of the other criminal statutes.

4. Conclusion

When abolitionists speak of the barbarity of capital punishment and when Supreme Court justices denounce expatriation in almost identical language, they ought to be reminded that men whose moral sensitivity they would not question have supported both punishments. Lincoln, for example, albeit with the greatest reluctance, allowed some deserters to be shot and ordered the "Copperhead" Clement L. Vallandigham banished; and it was Shakespeare's sensitivity to the moral issue that required him to have Macbeth killed. They should also be given some pause by the knowledge that the man who originated the opposition to both capital and exilic punishment, Cesare Beccaria, was a man who argued that there was no morality outside the positive law and that it is reasonable to love one's property more than one's country. There is nothing exalted in those opinions, and there is nothing exalted in the versions of them that appear in today's judicial opinions. Capital punishment is said to be a denial of human dignity, but in order to reach this conclusion Justice Brennan had to reduce human dignity to the point where it became, literally, meaningless, being possessed by "even the vilest criminal." Expatriation is said to deprive a man of his right to have rights, and everyone, no matter what

he does, is entitled to the right to have rights. In order to appreciate the severity of these punishments to the point where they could be called cruel and unusual, it was necessary to lower the standards against which human actions are to be judged, and the consequence of this is a depreciation of the gravity of the offenses for which these punishments are imposed.

To say that Macbeth does not deserve to be killed is implicitly to say that his crimes were not terrible; and that judgment can rest only on a debased standard of right and wrong, a standard commensurate with the proposition that Macbeth still possessed human dignity. Shakespeare disagreed.

To say that Meursault does not deserve to be executed is to reveal a corrupted moral judgment, and the jacket of the Penguin edition of The Outsider provides an illuminating example of such a judgment:

> But he [Meursault] has a glaring fault in the eyes of society — he seems to lack the basic emotions and reactions (including hypocrisy) that are required of him. He observes the facts of life, death, and sex from the outside. Even when he is involved in a personal tragedy which results in a frightening and unjust trial, he considers his own feelings and actions of others with a calm and almost ironic truthfulness.

What is referred to here as a "personal tragedy" was, of course, a senseless murder, and what is called a "frightening and unjust trial" was in fact a trial fair by any decent standard. That the author of this statement (some anonymous editor, no doubt) should not see this shows the corrupting influence of the book. Camus's art causes him to sympathize with Meursault, who murdered a man and who admitted that he had murdered a man. But he also admitted that he felt no remorse for having murdered a man, and this

little bit of honesty earns him this editor's respect. To him, Meursault is transformed into a certain kind of hero, an anti-hero but a hero nevertheless, and, as a consequence, his antagonists, the officers of the law, must be transformed into villains who subject poor Meursault to a "frightening and unjust trial." Thus, Meursault acquires a kind of dignity; according to Camus himself, he acquires the only kind of dignity our world has to offer. But it is not a dignity we can live with, and Camus admitted that too. "Society," he said, "needs people who weep at their mothers' funerals."

Such people hold life in awe; they respect it; they believe that the universe is not benignly indifferent to how they live; and they do not regard it a contradiction to demand the death penalty for those who take human life. They are right, but, unfortunately, in our time they have derived almost no support from the intellectual world. Koestler calls them "hang-hards," and makes no attempt to conceal his contempt for them. He reminds us that he himself had spent three months under sentence of death during the Spanish Civil War, suspected by the Franco forces of being a spy. He had made "the acquaintance of the condemned cell [because of his] hopeful belief in the salvation of mankind by a world revolution,"* a belief that, to his credit, he subsequently renounced. In saying this he also reminds us that the real horrors of our time have not issued from the belief that life is somehow sacred; they have issued from what calls itself science, a so-called racial science and, still very much with us, a so-called science of history that permits millions to be slaughtered in its name. Why should insignificant human lives, even millions, literally millions of them, be allowed to stand in the way of history?

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*Koestler, Reflections on Hanging, p. 7.

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