

JUSTIFIED ANGER: JUST RETRIBUTION

by Dr. Walter Berns

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Between 1966 and 1971 the U. S. murder rate increased by 52%, and the crime rate as a whole by 74%, as reported in *Crime in the United States: Uniform Crime Reports, 1971*. Crimes of violence (murder, forcible rape, robbery and aggravated assault) went up 80%. In 1971 there were 5,995,200 index crimes (crimes catalogued by the FBI) reported to the police, and everyone knows that a large number of crimes are never reported to the police. The proportion of arrests to crimes reported was only 19%, persons charged 17%, persons convicted as charged 5%, and persons convicted of lesser offenses .9%. All of which means that punishment was meted out in only 5.7% of the known cases of crime.

The conclusion is inescapable: *crime pays*. Moreover, some authorities insist that most crimes are not reported to the police and that only 1½% of all crimes are unpunished, which is to say that 98½% of the crimes committed go unpunished. There is good reason to believe that something is wrong; there is no reason yet to believe—by which I mean, there is no reason in these statistics to believe—that what is wrong could be put right by the imposition of more severe punishments, although there *is* reason to believe that it might be put right by *more* punishments, or by a greater rate of punishments, a rate sufficient to allow us to say that crime does not pay, or does not pay so well.

Prevent or Punish?

Such a judgment, however, rests on an assumption: that crime is deterred by punishment. This is rejected by a powerful group of reformers, led, perhaps, by a former Attorney General of the United States, Ramsey Clark. He says that we "can prevent nearly all of the crime now suffered in America—if we care,"¹ and the evidence of our caring would consist not in trying to deter crime by punishing it more efficiently, but by rehabilitating those who commit it. "Rehabilitation," he writes, "must be the goal of modern corrections. Every other consideration should be subordinated to it." In its most exaggerated form—as it appears in the work of psychiatrist Karl Menninger, for example—the only criminals are those who would inflict punishment on those who commit what society now calls crimes. *The Crime of Punishment*, he entitles his book. "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)."² I quote another passage:

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.³

Can We "Cure" Criminals?

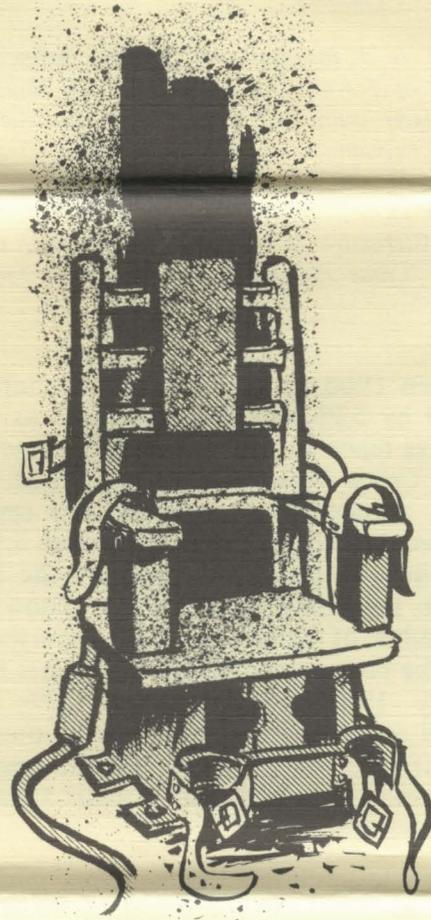
Rehabilitation is the solution: treatment will cure most of the so-called criminals, he says in a chapter entitled "Love against Hate." We must love those we call criminals, and out of this love will come treatment and the solution to the problem. One is reminded of Nietzsche's words written almost a century ago:

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."⁴

Be that as it may, what, in fact, is the evidence as to rehabilitation?

The President's Commission on Law Enforcement and the Administration of Justice, in one of its task force reports, tried to convince us that rehabilitation works and can be made to work better, and one is inclined to think that this must be so. After all, we have to a great extent been led to think that crime is somehow and in some way an illness, and we have lots of doctors around. The Commission directs our attention to the California Youth Authority Community Treatment Project, which is well known in the field of corrections as the best of the rehabilitation programs. Prisoners are paroled and are counseled, individually and in groups, and are tutored in school subjects, and so on. The effectiveness of the program is then evaluated by comparing the recidivism rate among these persons and the rate among those who are not paroled. According to the Task Force, the difference is marked and altogether in favor of the effectiveness of the rehabilitation program. Unfortunately, this is simply not true. The Task Force did not take into consideration the proclivity of those who administer and evaluate these programs, especially at state budget time, to exaggerate the efficacy of their own work. An independent re-analysis of the

evidence shows "that the positive results in favor of the experimental group over the control group reflected not differences in the delinquent behavior of the boys, but differences in the parole-revoking behavior of the parole agents."⁵ One researcher, after assessing a variety of "correctional programs," concluded that, "Post-release outcome was not significantly different irrespective of exposure to any type of group counseling program. . ."⁶ This altogether discouraging, but not altogether unexpected, conclusion is confirmed now by the most thorough-going study of parole ever com-



pleted. A comparison was made of the recidivism rate among those paroled from Ontario prisons and those who served their full time, and the different rate was accounted for by the fact that better risks are selected for parole. "When one allows for the fact that better risks are selected for parole, parolees are no less likely to be re-arrested than those who are discharged [after serving a full term in prison]."⁷

Is Death Penalty a Deterrent?

So much for rehabilitation. What about the extent to which crime is deterred by punishment, and especially the crime of murder by capital punishment? Dr. Menninger, you will recall, claims that "scientific studies" have shown

that "most punishment" does not accomplish "any of the purposes by which it is justified," and since it is usually justified on the ground of deterrence, this would mean that punishment does not deter. This is probably not the case; in fact, a number of recent studies, some of them dealing specifically with homicide rates, show an inverse relation between punishment and the rate of crime. This confirms what our common sense tells us, and these studies have also been confirmed by the most sophisticated analysis yet undertaken. Using a simultaneous equation model for a regression analysis involving some fourteen discrete variables, only three of them having anything to do with punishment, and a mass of crime statistics from most of the states over a period of time (1940, 1950, 1960), Isaac Ehrlich was able to show that the "rate of specific felonies is . . . positively related to estimates of relative gains [the more money to be gained by stealing, the more attempts made to steal it] and negatively related to estimates of costs associated with criminal activity." Hence, the "rate of specific crime categories, with virtually no exceptions, varies inversely with estimates of the probability of apprehension and punishment by imprisonment. . . and with the average length of time served in state prisons. . . ." ⁸ These findings suggest that big-city mayors are not wrong to argue for larger police forces and longer sentences for the criminals caught by these police forces.

Since Ehrlich dealt with time in prison—that is to say, the range of punishments did not include the death penalty—we are not entitled to say that he proved the deterrence value of the death penalty. We can say, however, that if the death penalty is regarded as the most dreadful penalty—and the abolitionists so regard it—his findings do suggest the deterrence value of it. This is so because the greater the penalty, the "higher the costs associated with criminal activity," and the higher these costs, the fewer crimes committed. The abolitionists are not inclined to accept these findings. They have insisted that murder especially is a crime of passion, a crime committed in the heat of passion, or under the influence of alcohol, and, therefore, by persons least able and least likely to calculate costs, or the "incentives and disincentives," to use Ehrlich's formulation. If this argument proves anything, however, it proves the opposite of what the abolitionists contend. It suggests that because of the high costs, murders tend to be committed *only* by those unable to calculate those costs, and that those able to calculate those costs are less likely to commit murders.

Justification of Punishment

But does the death penalty act as a deterrent? Does it deter the commission of homicides, for

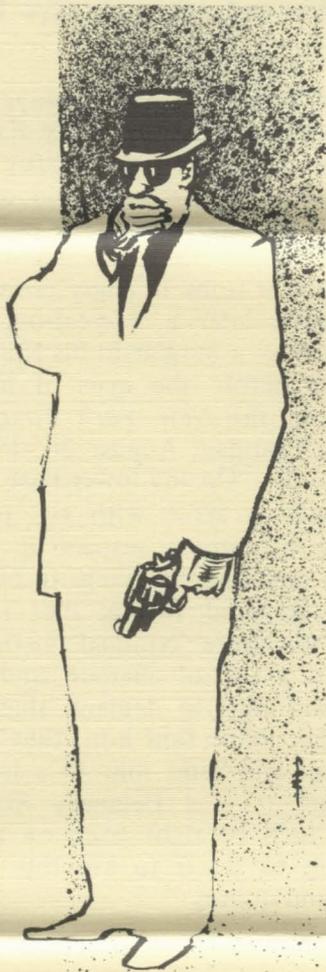
example? Thorsten Sellin says the evidence shows clearly that it does not, and his findings have been cited around the world. H.L.A. Hart, in a more guarded statement, says there is no evidence that it does deter. Mostly it has been chiefs of police who have disagreed and who have insisted that the death penalty is necessary because it does deter. What is of particular interest to me is that in modern times almost the entire argument concerning the death penalty has taken place within the limits of this aspect of the subject. This assumes that deterrence is the only possible justification for the death penalty and for punishment in general, that we employ police to prevent the commission of crimes, if possible, but that we employ prosecutors and criminal trials and prisons and executioners to prevent further offenses by those we catch up in this system and to deter others—*pour decourager les autres*, to paraphrase Voltaire. It seems to me that this is patently not sufficient.

When we say make the punishment fit the crime, we are plainly not talking about deterrence. When the abolitionists advocate life imprisonment, instead of the death penalty for murderers, they are quite plainly not concerned with deterrence, because these same abolitionists insist that murderers, in addition to being model prisoners, are, of all criminals, the least likely to repeat their crimes. If the death penalty does not deter, and if they are unlikely to repeat their crimes anyway, why bother to put them in prison at all? Why bother to arrest them? And if deterrence is the only purpose of punishment, why a life sentence for a murderer and a couple of months for a prostitute, who *is* likely to repeat her offense? And why do we continue to resist the arguments of the so-called reformers, usually the psychiatrists, who would remodel the entire system in order to make the punishment (or the treatment) fit the criminal, according to which rule it is entirely possible that the prostitute and the shoplifter will remain in custody longer than the murderer?

Penalties Reflect Principles

It is quite clear, I think, that the schedule of penalties to be found in any criminal code reflects some principle other than deterrence. We punish murder more severely than shoplifting because we regard murder as a much more serious crime. We punish murder more severely than conspiracies to obstruct justice because we regard murder as a much more serious crime. We punish murder more severely than larceny, even grand larceny, because we regard the taking of a human life as a much more grave offense than the taking of property, in whatever amount. I insist that we take a life—after due process of law—precisely because we

value life, although the abolitionists have heaped so much ridicule on this proposition that it has become unfashionable in our day to say so. The result is that we find the retentionists disputing Professor Sellin's deterrence statistics, as if the whole question of capital punishment turned on its power to deter. Our schedule of punishments reflects what we have been made ashamed to admit now, namely, that in addition to the effort to deter crime, we punish in order *to pay back*, to retribute. Retribution constitutes a justification for



gross disproportion between Booth's deed and Menninger's response to it; and I submit that in that disproportion there is embodied an implicit disrespect for Lincoln's life, for human life. For the dignity of human life is displayed in Lincoln's life, and in our punishing of Booth (as we would not punish a dog or a horse); but the dignity of human life is not displayed in Booth's life or in Lee Harvey Oswald's life. Something of this is contained in the principle that the punishment should fit the crime. Would it have been proper to put Lee Harvey Oswald in a minimum security prison, even for life? Or not put him in prison at all—after all, do we not know from statistics that murderers are the least likely of criminals to repeat their crime? Why is it that we cannot accept that conclusion?

Crime Is the Guide

Menninger and his colleagues say to make the punishment fit the criminal, not the crime; they are guided by the criminal; they are not guided by the crime. And because they are not guided by the crime, they minimize the crime; they ignore the difference in the magnitude of crimes; in their response, they ignore the enormity of some crimes and the pettiness of others. By making the punishment fit the criminal instead of the crime, they would do away with the schedule of punishments whereby the more serious crimes are punished more severely. But in that schedule is reflected our idea of what is important to man, and what it is to be a man. To do away with it, to obliterate it from the law, is to depreciate the importance and the significance of human actions and, thereby, of human life. To remove it from the law is to reveal a disrespect for human life. It is not by chance that the argument against the death penalty is a modern argument, and only a modern argument; it is not by chance that no political philosopher argued against the death penalty; it is not by chance that the argument against the death penalty seems to have come out of Hobbes by way of Beccaria, although Hobbes, of course, did not make it. For from Hobbes we learned the right of self-preservation; and from Hobbes we learned that the first law of nature is to seek peace; and as a result, *mere* life took on an importance it lacked in the past. *Mere* life is a life without dignity; *mere* life—just staying alive—lacks significance; and *mere* life—purposeless life—turns out to be life very cheaply regarded indeed.

It is not strange that retribution has been made to appear to be the most abominable of sentiments, and that so many tears are shed for the murderers

punishment, and, I shall argue, it is altogether proper to pay back a murderer in kind. Our schedules of punishment are an effort to make punishment fit the crime; to agree with this principle is to agree that retribution should play a role in punishment.

What should we do with John Wilkes Booth and Lee Harvey Oswald, killers of presidents? Karl Menninger would have us treat Booth—after all, it is a crime to punish him; and suppose we are successful in this treatment, and after a year, say, we pronounce him cured, and he returns to the community promising never to do it again. But Abraham Lincoln is dead. There is such a

today, at a time when innocent human lives are being taken in ever greater numbers, and are being taken not only in fits of passion, by the amateur murderers, but in cold blood by the professional murderers, and not only by them but by the heads of states acting in the name of what they call science, a so-called racial science in the case of Hitler, and a so-called science of history in the case of Stalin and Mao. Why should human lives, even six or thirty million of them, stand in the way of history? Why should these millions of what are regarded as purposeless human lives stand in the way of history, when meaning is contained in history, not in human lives?

Retribution in Ill Repute

It is not strange that retribution is held in such ill repute at a time when human life is held so cheap in the literature we read and the films we see, and on which we bestow our prizes. Shakespeare's Macbeth killed for a kingdom, at a time when the world and the lives within it had meaning; and the consequences of his murder were terrible: the cosmos turned into chaos. Dostoevsky's Ras-kolnikov killed for profit during the solid, calculating 19th century, but because of that act he somehow found God and learned that murder is terrible. Camus's Meursault (in *L'Étranger*) killed for no reason at all, at a time when human life is regarded as having no meaning at all. And in that much-honored film, "The Godfather," the taking of human life is a regular business practice, like making a bank deposit.

So far I have considered deterrence and retribution as independent justifications for capital punishment. But there is a point where they come together. We can recognize that point of convergence when we acknowledge 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 forget, however, that in punishing the guilty (when it blames the deed he commits), the law praises those who do not commit the deed. The law praises righteousness and obedience to law. This point is well made by Adam Smith: we resent the criminal, he says. So much do we resent him, that not only do we wish to see him punished, but we wish to see him punished by our own hand and for the crime he committed. We feel cheated, he says, if the criminal should die of a fever before he is brought to justice. And with respect to murder, "nature, antecedent to all reflections upon the utility of punishment, has in this manner

stamped upon the human heart, in the strongest and most indelible characters, an immediate and instinctive approbation of the sacred and necessary law of retaliation."⁹ This passion—which he labels resentment—must of course be tamed; it must be tamed lest it become simple revenge, the "most detestable of the passions." It is the job of the law to tame this passion, which the law does by satisfying it. The law tames that passion, that anger we feel in the presence of injustice, by satisfying it, and it satisfies it when it brings the guilty to justice and when it pays him back.

Last summer, for example, a seven-year-old boy was brutally murdered on the lower East Side of Manhattan. The next day, in a nearby neighborhood, a 28-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 31-year-old man was stabbed to death by a burglar in his Ninth Avenue apartment, this before the eyes of his wife. I now quote from the *New York Times* account of these events (Sunday, August 26, 1973. News of the Week, p. 6): "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 shop-keeper. 'Then he'll be right back on the street. The only thing to do is to kill this man right away, quickly and quietly.'"

Injustice Arouses Justified Anger

That anger is not reprehensible. Anger is the sentiment aroused by the sight of injustice, and is therefore intimately allied with justice—and civil society requires justice. But that anger has to be tamed, and the local police alone cannot do it. I mean, the police protecting the suspect at the police station cannot tame that anger unless they can assure that righteously angry crowd that the murderer will be paid back. But there is more in this than immediately meets the eye: that anger is satisfied when retribution is exacted, yes, but that righteous anger is also *rewarded* when retribution is exacted. And that righteous anger should be rewarded, for its basis is the sentiment

that to murder is wrong. The law blames murder when it punishes the murderer; the law praises those who do not murder when it punishes that murderer, and in this way deters murder. "Many are the pangs of the wicked, but steadfast love surrounds him who trusts in the Lord. Be glad in the Lord, and rejoice. O righteous, and shout for joy, all you upright in heart." (Psalm 32, vs. 10-11)

The abolitionists, following modern thought, want to excise anger from the soul—to get rid of it rather than to make a virtue of controlling it. To them anger is mere selfishness and altogether reprehensible. But if anger is a natural attribute of the human soul, one is bound to wonder how it will manifest itself when it is denied its legitimate expression, however tamed. And what would a world without anger be like? Nietzsche thought this through and called what he saw in his imagination the world of the Last Man.

¹Ramsey Clark, *Crime in America* (1970), p. 21.

²Karl Menninger, *The Crime of Punishment*, p. 113.

³*Ibid*, p. 9.

⁴Friedrich Nietzsche, *Beyond Good and Evil*, (Kaufmann trans.) Sec. 201.

⁵Kasebaum, Ward, and Wilmer, . *Prison Treatment and Parole Survival: An Empirical Assessment* (1971), p. 308.

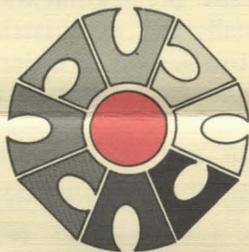
⁶*Ibid*, p. 251.

⁷Irvin Waller, *Men Released from Prison* (Toronto: University of Toronto Press, 1974), p. 199.

⁸Isaac Ehrlich, "Participation in Illegitimate Activities: A Theoretical and Empirical Investigation," *Journal of Political Economy*, vol. 81 (May-June, 1973), p. 545.

⁹Adam Smith, *Theory of Moral Sentiments* (Augustus Kelley ed., 1966), p. 99.

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