Towards a Human Rights Theory of Criminal Law: A Humanistic Perspective

John Delaney

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TOWARDS A HUMAN RIGHTS
THEORY OF CRIMINAL LAW:
A HUMANISTIC PERSPECTIVE

John Delaney*†

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and Dr. Matthew Les Spetter.

I dedicate this article to Gerhard O.W. Mueller and to the memory of Edmund
Cahn, illuminating teachers and persistent advocates of a more humane law.
Human culture taken as a whole
may be described as the process of man's
progressive self-liberation.¹

INTRODUCTION

We live in a century of proliferating paradigms of thought. In
physics, philosophy, theology, history, sociology, and psychology,
traditional paradigms compete with emerging paradigms. In many
instances, these new paradigms present fundamentally different
ways of thinking from which arise radically new formulation, analysis,
and action. These differences reflect antithetical world views
with opposing conceptions of the most basic issues.²

Criminal law jurisprudence represents a traditional paradigm
of thought which dominates most thinking about criminal law and
which determines most of our practice. Even criticism and reform
proposals are usually expressions of this traditional thinking. This
article presents a critique of criminal law jurisprudence which fo-
cuses on the principal justifications of punishment. The critique ex-
amines some of the underlying metaphysical, epistemological, and
ethical presuppositions of criminal jurisprudence. The article also
outlines an alternative justification of punishment: a different way
of thinking which leads to different formulation, analysis, and ac-
tion. Both the critique and the alternative manifest a humanistic
perspective.

The principal justifications of punishment are general deter-
rentre and retribution.³ These justifications, along with a dominant

¹. E. Cassirer, An Essay on Man 228 (1944).
². Compare B.F. Skinner, Beyond Freedom and Dignity (1971) with S.
Freud, A General Introduction to Psycho-analysis (1935) and C. Rogers, On
Becoming a Person (1961).
³. This article does not deal with two prevalent justifications of punishment:
rehabilitation and incapacitation. For books containing worthwhile critiques of re-
habilitation, see American Friends Service Comm., The Struggle for Justice
(1971); M. Frankel, Criminal Sentences: Law Without Order (1973); N. Kit-
trrie, The Right to Be Different (1971); A. von Hirsch, Doing Justice: The
Choice of Punishments (1976). Incapacitation does not appear to be a separate
conception of the role of the criminal law in society, comprise central elements in traditional criminal law jurisprudence. This jurisprudence, and its underlying network of presuppositions, are vivid examples of what Edmond Cahn aptly characterized as "the imperial or official perspective" for viewing the problems of society. Cahn believed that this perspective "controls the thinking of most lawyers, judges, politicians, and businessmen." He terms this view an imperial or official perspective because it is largely the product of "rulers, governors and other officials" in every part of the world. It is a perspective for those committed to the status quo. In an American context, it is for the affluent and successful, for Presidents, for the Chamber of Commerce, for the National Association of Manufacturers, for the leadership of the AFL-CIO, for the professional and technical elites, for the authors of high school civics and history textbooks—for all of the purveyors of the officially sanctioned dream. In a Soviet context, it is for the members of the Communist Party, for the military, for the secret police, for the censors, for the managers, for the official poets, painters, and writers, for the new Communist bourgeoisie. In short, this perspective is for all those who are, or who hope to be, primary beneficiaries of social, political, and economic arrangements dominated by elite groups.

General deterrence theory is an excellent example of the imperial perspective. General deterrence, or what Johannes Andenaes calls general prevention, has been defined as the "restraining influences emanating from the criminal law and the legal machinery."
It includes the threat of penal law enforcement—what Andenaes calls “mere deterrence”—as well as what he calls the general preventive effects of the penal law—its ripple effect in “moral or socio-pedagogical influence.”

Belief in the theory and practice of general deterrence is experiencing a renaissance. Legal commentators, and others, are engaged in many new analyses and studies. Norval Morris describes deterrence as the “primary and essential postulate” of “every criminal law system in the world.” H.L.A. Hart describes it as the primary task of the criminal law. Johannes Andenaes says it “has occupied and still occupies a central position in the philosophy of criminal law, in penal legislation, and in the sentencing policies of the courts.”

General deterrence is important not only as a favorite paradigm of penal theoreticians; it is immensely influential and popular among Presidents, governors, legislators, and administrators, who often urge it as the justification for far-reaching programs in criminal law and criminal justice and even as the answer to the crisis of crime.

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8. Andenaes, supra note 7, at 950.
9. Id. (emphasis deleted).
10. Id. (emphasis deleted).
12. Id.
16. The daily newspapers abound in illustrations. For example, former President Nixon stated in a position paper on crime that “‘[i]f the conviction rate were doubled in this country, it would do more to eliminate crime in the future than a quadrupling of the funds for any governmental war on poverty.’” R. Harris, The
The first thesis of this article is that general deterrence is a repugnant justification for the criminal law process in any segment of the twentieth century world committed to humanistic views of the person and society. Its presuppositions, its formulations of the problem of crime, its mode of analysis, and its conclusions, should be considered bankrupt. General deterrence is repugnant because it formulates the issue of crime solely as an individual phenomenon and rests on a characterization of the offender as an "indispensable sacrifice to the common safety," an "example," and even a "scapegoat." Its conception of crime and crime control is reductionist; its conception of responsibility is inherently scapegoatist; and its conception of sentencing is inevitably highly politicized and lawless. It does not violate justice—it displaces justice with a "calculus of social interest" weighted against the individual. Indeed, it is not really a justification of punishment, but a rationalization and weapon of the status quo and its ideological and material structures.

The second thesis of this article focuses on retribution, which, unlike general deterrence, does not lend itself to a definition commanding general support. An array of retributive conceptions exists, and are often blended with utilitarian ideas. This article presents and criticizes the retributive theories of Kant, Hegel, and Herbert Morris. In addition, certain popular approaches to retribution are analyzed. As with general deterrence, retribution is impor-
tant not only as a favorite paradigm of certain philosophical and
general theorists; it is also immensely influential and popular among
judges, legislators, and the public. A triumph of the revival of re-
tribution is the constitutional approval of the death penalty by the
United States Supreme Court, principally on retributive grounds.
In the words of Justice Stewart, concurring in Furman v. Geor-
gia:°° "[T]he instinct for retribution is part of the nature of man,
and channeling that instinct in the administration of criminal justice
serves an important purpose in promoting the stability of a society
governed by law." Moreover, in Gregg v. Georgia, the Court
stated: "Retribution is no longer the dominant objective of the
criminal law . . . but neither is it a forbidden objective nor one
inconsistent with our respect for the dignity of men." 20

The second thesis of this article is that retribution is as repug-
nant a justification for the criminal law process as is general deter-
rrence. The Kantian and Hegelian theories of retribution presup-
pose central theories in the political and social dimension of their
philosophies. Accept these presuppositions and the retributive
theories follow. Reject these presuppositions and the theories fall;
indeed, they then make little sense. They are dependent theories,
really subtheories: They have the character of epiphenomenon.
Narrowly, the theories, though different, should be rejected be-
cause the conception of punishment in both is one-sided, reduc-
tionist, and scapegoatist. Broadly, the Hegelian theory should be
rejected as part of Hegel's philosophical glorification of the state. In
W. Friedmann's words:

Hegel's teaching of the function of the individual in [the] state,
and in particular his thesis that true freedom is gained only
through the individual's integration in [the] state [is related to
his] identification of the state with freedom and the "reality of
the moral idea." [Thus,] Hegel finds it easy to subordinate the
individual to any claim of the conservative nationalist monarchy
which he revered. 21

Herbert Morris, a contemporary exponent of Kantian retributivism,
offers a theory of retribution which should be rejected as an eloquent

17. 408 U.S. 238 (1972).
18. Id. at 308 (Stewart, J., concurring).
20. Id. at 183 (citation omitted).
21. W. FRIEDMANN, LEGAL THEORY 174 (5th ed. 1967) (citing C. FRIEDRICH,
PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE (1958)).
HUMANISTIC PERSPECTIVE ON CRIMINAL LAW

and sophisticated expression of imperial reasoning. Neither Kant, Hegel, nor Morris should be faulted for the diverse popular forms of retribution. Neither should these popular forms be justified by the theories of these philosophers. The popular forms of retribution are really a rationalization and weapon of the status quo, not a justification for punishment.

The third, closely related, thesis of this analysis is that the traditional, fundamental role of the criminal law—to support the dominant moral and social status quo—is also objectionable from a humanistic perspective. Criminal law support for current arrangements should be explicitly contingent upon a status quo which is just. The inadequacy of the traditional articulation of this role is succinctly exemplified by Roscoe Pound’s statement that the “criminal law exists to maintain social interests as such,” and in Justice Holmes's similar assertion that “[f]or the most part, the purpose of the criminal law is only to induce external conformity to rule.” This inadequacy is also manifested in a Soviet context by an official characterization that “[c]riminal law is designed to provide protection for the Soviet social and state system, socialist property, and the person and rights of citizens against criminal encroachments.” This inadequate conception of the role of the criminal law makes it easier for the criminal law to become the tool of any group that possesses power, whether it be theocratic or capitalistic, fascist or Marxist. The criminal law system and the “social interests” protected should be judged, not assumed to be, valid.

The culminating thesis of this article is that the role of the criminal law should be reformulated from a weapon of the status quo to an instrument for fostering human rights. This new human rights role for the criminal law must be justified. At the same time, there is an accompanying need for a critical, humanistic consciousness to replace the traditional, status quo consciousness which underlies general deterrence, retribution, and the dominant conception of the criminal law role.

25. See id. at 19.
If the theory and practice of deterrence and retribution, and of the traditional role of the criminal law, are examples of an imperial perspective on the problems of society, the analysis offered in this article emerges from an antithetical, humanistic perspective. With significant historical antecedents, a humanistic perspective has emerged in the twentieth century as an influential current in philosophy, theology, psychology, and sociology. Although by no means monolithic in character, this humanistic view is founded on a commonly shared myth: that the person and humankind are the source of value, the focal point in determining purpose, policy, and practice. As Cahn notes:

Only when we put the old [imperial] view aside . . . are we able to perceive the practical significance of our institutions, laws, and public transactions in terms of their impacts on the lives and homely experiences of human beings. It is these personal impacts that constitute the criteria for any appraisal we may make. How, we ask, does the particular institution affect personal rights and personal concerns, the interests and aspirations of individual, group, and community? We judge it according to its concussions on human lives.

Humanism gives rise to a vision of humankind and social life in which the quest for human liberation for oneself and for others is a


27. E. Cahn, supra note 4, at 30.
primary task of life. Humanists reject the ground of reality that is rooted in status quo social arrangements. They substitute another ground of reality—human liberation and service to humankind in this quest. The shift in ground of reality is basic: It gives rise to radically different modes of perception, imagery, and thought—a different consciousness which is expressed in a radically different network of master beliefs.\textsuperscript{28}

\textsuperscript{28} Master beliefs expressing different forms of consciousness play a central role in societal legitimation. Max Weber writes that each type of “domination” in a society (i.e. (1) charismatic; (2) traditional; and (3) legal) manifests a need to justify itself:

He who is more favored feels the never ceasing need to look upon his position as in some way “legitimate,” upon his advantage as “deserved,” and the other’s disadvantage as being brought about by the latter’s “fault.” . . .

. . . Every highly privileged group develops the myth of its natural, especially its blood, superiority. . . .

Indeed, the continued exercise of every domination . . . always has the strongest need of self-justification through appealing to the principles of its legitimation.

M. Weber, On Law in Economy and Society 335-36 (1954). Other social theorists describe this process in different language. C. Wright Mills suggests that “[e]very society holds images of its own nature—in particular, images and slogans that justify its system of power and the ways of the powerful.” C.W. Mills, The Sociological Imagination 80 (1959). Mills also suggests that “[t]hose in authority attempt to justify their rule over institutions by linking it, as if it were a necessary consequence, with widely-believed-in moral symbols, sacred emblems, legal formulae.” Id. at 36.

Peter L. Berger and Thomas Luckman stress that all institutional orders require “legitimation,” a process of explaining and justifying. P. Berger & T. Luckman, The Social Construction of Reality 93 (1967). These explanations and justifications include proverbs, moral maxims, legends, and folk tales as well as “explicit theories,” id. at 94, and “symbolic universes,” id. at 95, which are “bodies of theoretical tradition that integrate different provinces of meaning and encompass the institutional order in a symbolic totality.” Id. “[T]he symbolic universe provides the ultimate legitimation of the institutional order by bestowing upon it the primacy in the hierarchy of human experience.” Id. at 98. It provides “sheltering canopies over the institutional order as well as over individual biography.” Id. at 102. McDougal and Lasswell refer to the dominant beliefs, assumptions and loyalties (the myth) of any given society . . .

Each value-institution pattern has a specialized system of myth and of operational technique. The myth falls into three parts: doctrine, formula, folklore. Political doctrines, for instance, include the prevailing philosophies of politics and law. Economic doctrines include theoretical justifications of capitalism or socialism. Respect doctrines either justify social class discrimination or the opposite. And every other value has its doctrinal myth. McDougal & Lasswell, The Identification and Appraisal of Diverse Systems of Public Order, 53 Am. J. Int’l L. L. 1, 13 (1959).

It should be noted that recognition of the function and significance of the symbolic universe or mythological structure is not inconsistent with sharp conflict among different social interests in the society. For example, in Soviet Russia, there may often be such conflict among representatives of the party and the military and industrial managers over the relative priorities of party, military, and industrial projects in
A contrast of key master beliefs illustrates the differences in the two competing structures of thought presented in archetypical form:

<table>
<thead>
<tr>
<th>Key Master Beliefs in Imperial Consciousness</th>
<th>Key Master Beliefs in Humanistic Consciousness</th>
</tr>
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</table>
| 1. Society (culture and institutions) tends to be viewed as a product of  
  — God  
  — History  
  — Nature  
  — Cosmic Laws  
  — Biology | Society (culture and institutions) is viewed as a humanly-created social reality, a result of political, social, and ethical choices. |
| 2. Society is viewed as valid because it is grounded in God, History, and Nature. | Society is viewed as valid insofar as it serves its members and humankind in attaining realization. |
| 3. Society is viewed as objective. | Society is viewed as embodying and fostering clusters of values, ideologies, and social interests. |
| 4. The future is viewed as an organic development from the past and present, a largely predetermined unfolding. | The future is viewed as a social reality which is shaped by human choice. |
| 5. Societal mystification and obfuscation of phenomena are necessary instruments of social control. | Mystification and obfuscation are not seen as necessary for social control. |
| 6. Society can validly use the individual as a means for societal benefit (e.g., social control). | Societal benefits (including social control) should not be achieved by instrumental use of individuals. |
| 7. The political and social responsibility of individuals should be to conform to apportioning the national budget; in the United States, there is often conflict between the leadership of the National Association of Manufacturers (NAM) and the leadership of the AFL-CIO over economic issues. But all this conflict is at a particular level and generally presupposes the validity of the underlying social interests and the related symbolic universe or mythological structure. The Soviet groups, for example, are committed to a general Marxist position and the NAM and the AFL-CIO are committed to a neo-capitalist position. The contrast is with dissenters who reject the reigning social interests and symbolic universe and suggest a fundamental change (e.g., Solzhenitsyn in Soviet Russia and Michael Harrington in the United States). In this analysis, the dominant principles of legitimation, the symbolic universe, or the mythological structure are referred to as the master beliefs. |

29. The following chart in text emphasizes the dichotomy of these key master beliefs. The items in the humanistic column obviously are primarily normative in contrast to the items in the imperial column, which are both normative and empirical.
8. Traditional philosophy should be used mostly to rationalize existing cultures, institutions, and norms.

9. Education should inculcate youth in the available norms, roles, and opportunities; it socializes youth to respect existing institutional arrangements.

10. Traditional psychologies and sociologies present conformist self-identities and criteria for self-esteem.

11. The criminal law should be primarily directed against dissidents and crimes committed by the poor.

12. Competing interests and values should be resolved by balancing.

13. Justification should be on a means-ends basis in which the ends justify means and the means are seen as separate from ends.

14. Theories and concepts, if considered valid, are viewed as essentially objective, value-free, and neutral.

15. Social research is objective, neutral, and value-free.

16. Social research should focus on the problems of people who do not meet society’s expectations (e.g., poor, offenders, Blacks, Hispanics, workers, and women).

17. Social policy should be determined by pragmatic research to determine what works.

Key Master Beliefs in Imperial Consciousness (continued)

Key Master Beliefs in Humanistic Consciousness (continued)

form to societal institutions and authorities.

societal institutions and authorities which foster humanistic norms and to resist those institutions and authorities which violate humanistic norms.

Philosophy should provide a basis for assessing fundamental premises; it should be a critical philosophy.

Education should foster human realization by assisting youth to live authentic moral lives in the community and to develop a critical consciousness about themselves, the institutions, and the culture.

Psychologies and sociologies which foster human realization by helping individuals to overcome inner and outer barriers should be stressed.

The criminal law should be directed equally against the powerful and powerless, against the crimes of the rich, the middle class, and the poor.

Competing interests and values often should be resolved by value ranking according to humanistic principles.

Initial and intermediate stages are as important as ends of processes. Justification should occur at each stage. Means are ends in themselves.

Theories and concepts inherently have political, social, and ethical implications.

Social research inherently reflects values, interests, and ideologies.

Social research should investigate the rich and powerful as well as the powerless (e.g., executive, legislative, judicial, corporate, and professional behavior).

Pragmatic measures should be subordinate to a humanistic political, social, and ethical framework.
Key Master Beliefs in Imperial Consciousness (continued)

18. Traditional theology and morality should foster conformity to the status quo.

19. Truth is viewed as defined in scientific and intellectual terms. Verification is the criterion of truth.

Key Master Beliefs in Humanistic Consciousness (continued)

Humanistic theology and morality should provide a basis for judging the status quo and for presenting the higher spiritual and moral possibilities of human existence.

Truth is viewed as primarily an ethical imperative. Empirical verification should be distinguished from ethical truth. An ethical approach to truth should not be subordinated to scientific verification.

This article assesses these contrasting imperial and humanistic master beliefs. It demonstrates that each set of master beliefs is derived from a selective use of knowledge and methodology. The article details implications of the contrasting master beliefs for the theory and practice of deterrence and retribution and for the criminal law's role in support of the status quo. Master beliefs derived from philosophy, theology, politics, psychology, and sociology can be means of human domination or means of human liberation. The need is for choice. In the words of Edmond Cahn:

If, as we are assured, everything depends on and varies with the point of view, then the point of view, the angle of vision, the chosen perspective necessarily becomes the most decisive factor in the formulation of responsible judgment. If everything depends on the point of view, we are under a pressing need to select the best, wisest and most enlightened among available points of view. If everything depends on the point of view, one of the prime tasks of legal philosophy is to examine diverse points of view, contrast their respective implications for a free society, and indicate the point of view that intelligent judges may esteem and just judges may adopt.30

The choice is fundamental: A humanistic approach rests on a different philosophical framework from which could emerge a different consciousness, a new conception of role, and a radical reconstruction of justification, policy, and practice—in short, an important step towards a new criminal law jurisprudence.

Part One of this article contrasts the imperial metaphysical, epistemological, and ethical presuppositions underlying the princi-
pal justifications of punishment with humanistic presuppositions. Part Two presents a critique and assessment of the humanistic thinking of Heidegger. Part Three presents a humanistic critique of general deterrence within its framework of utilitarian philosophy. Part Four critiques Kantian, Hegelian, and contemporary retributive theories. Finally, Part Five outlines a humanistic theory of criminal law.

PART I

IMPERIAL AND HUMANISTIC PRESUPPOSITIONS

An Imperial Metaphysics and Ethics

A fundamental and traditional ontological view underlies criminal law theory and the dialectic of the modern advocates. In this view, social reality tends to be fixed, composed of predetermined structures. Human nature, social institutions, norms, and morality are all given this status. They are not provisional, contingent, and evolving; rather, they are identified with reality—"being"—in the most profound and fixed sense. They are reified. A closely-related theory of value identifies this ontological position with the valid or the good. What is is what should be. What is real is also what is good. Thus, existing institutions, norms, morality, and definitions of human nature take on special status: They are identified with transcendent being and value.  

Imperial ontology and axiology require a highly reified mode of consciousness, that is, "the apprehension of the products of human activity as if they were something else than human products—such as facts of nature, results of cosmic laws, or manifestations of divine will." Identifying "society," "social interests,"  

31. As to why we reify, there is insight in Ernest Becker's suggestion that we seek to transcend our mortality through culture-building: "[A]ll those who join together under one banner are alike and so qualify for the privilege of immortality; all those who are different and outside that banner are excluded from the blessings of eternity." E. BECKER, ESCAPE FROM EVIL 113 (1975) (footnote omitted).

The thing that makes man the most devastating animal that ever stuck his neck up into the sky is that he wants a stature and a destiny that is impossible for an animal; he wants an earth that is not an earth but a heaven, and the price for this kind of fantastic ambition is to make the earth an even more eager graveyard than it naturally is.

Id. at 96. If we seek immortality through culture, reification of culture is an imperative. We shall die as individuals, but we shall live on in our membership in a particular ideological, ethnic, religious, social, or party grouping.
"human nature," "moral codes of society," and the "legal system" with transcendent being and value reinforces imperial interests.\textsuperscript{32} What is is seen as not simply rooted in humankind’s past and present activity. Social reality is not seen as a human product. An existing social reality, a particular arrangement of human existence, is transformed into the “social order,” which "appears to merge with the world of nature . . . necessity and fate."\textsuperscript{33} The “basic recipe for this reification” is to “bestow” on the social order an ontological status independent of human activity and signification. What is forgotten is that the “social order exists only as a product of human activity” and “no other ontological status may be ascribed to it without hopelessly obfuscating its empirical manifestations.”\textsuperscript{34} However, this obfuscation of the human authorship of current social arrangements, including the “legal system,” is essential to the imperial identification of what is with transcendent being and value.

More concretely, no distinction is made between social reality and, for example, biological and astronomical reality. Yet such a distinction is of critical importance. What we think about social reality (e.g., a Marxist vision of society), if supported by powerful social forces (e.g., the Communist Party and military, political, and economic structures), may be embodied in a concrete social reality (e.g., the Soviet Union or Communist China). But if our vision is that the world is flat, it does not make the world flat; if we believe the universe circles around the earth, such belief does not change the path of the planets; if we believe that earthquakes do not exist, such belief does not eliminate them. A social reality is different precisely because it is a continuing human product, while the stars and earthquakes possess a different ontological status.

Any social reality (e.g., the Soviet Union, Communist China, or the United States) is strengthened and justified by identifying itself with Nature, Cosmic Laws, Divine Will, or the Laws of History. More specifically, imperial interests which benefit most from current forms and modes of social organization have a stake in the confusion of social reality with other forms of reality. The confusion strengthens the political power of dominant interests. The individual is dwarfed by the reified status quo structures: He or she is

\begin{itemize}
\item \textsuperscript{32} P. Berger & T. Luckman, The Social Construction of Reality 89 (1966).
\item \textsuperscript{33} Id. at 90-91.
\item \textsuperscript{34} Id. at 90.
\end{itemize}
an object of these structures, not a creator of them. A criticism is then viewed not simply as a social and political polemic: It can be construed as a slight against God, or against the requirements of History, Cosmic Laws, or Nature. Such an interpretation is of particular assistance in justifying practices that are otherwise difficult to defend, for example, economic, political, cultural, and racial stratification.\textsuperscript{35} One is reminded of Aristotle's defense of slavery in terms of the nature (even the physical characteristics) of slaves; or of a defense of vicious economic exploitation in terms of natural economic laws or social Darwinism (i.e., a social version of the biological idea of survival of the fittest). What is eclipsed in these reified formulations is the notion of human responsibility for both beneficial and harmful social policies and practice, and human responsibility for shaping the future in a less destructive mold. How can humans be responsible for social policies, practices, and the future, which are rooted in God's Will, in the requirements of Nature, or in the inexorable Laws of History? Political and social issues are transformed to a cosmic reality beyond human accountability. This imperial deception not only fosters acceptance of existing

\begin{quote}
35. Ernest Becker suggests that culture, viewed as systems of death denial with continuing rejection of social justice, inequality of social classes, and state repression of freedom, leads to internal victimage and to external victimage: "Whatever form of government uses victimage, the use is still the same: to purify evil social arrangements, distract attention from the failure to solve internal problems." E. Becker, supra note 31, at 166. Becker also suggests that guilt is a factor in producing "victimage and scapegoating all across history":

Guilt is a reflection of the problem of acting in the universe; only partly is it connected to the accidents of one's birth and early experience. Guilt, as the existentialists put it, is the guilt of \textit{being} itself. It reflects the selfconscious animal's bafflement at having emerged from nature, at sticking out too much without knowing what for, at not being able to securely place himself in an eternal meaning system. . . .

There is no "harmonious development," no child-rearing program, no self-reliance that would take away from men their need for a "beyond" on which to base the meaning of their lives. The fallacy of vulgar Marxism was that it overlooked the depth and universality of the fear of death; Marcuse has remedied this. The other fallacy was to fail to see the naturalness of existential guilt—and here Marcuse likewise fails. The task of social theory is to show how society aggravates and uses natural fears, but there is no way to get rid of the fears simply by showing how leaders use them or by saying that men must "take them in hand." Men will still take one another's heads \textit{because their own heads stick out} and they feel exposed and guilty. The task of social theory is not to explain guilt away or to absorb it unthinkingly in still another destructive ideology, but to neutralize it and give it expression in truly creative and life-enhancing ideologies.

\textit{Id.} at 158, 162.
\end{quote}
economic, political, and social arrangements but also of their right-
ness and legitimacy.

Mystification and obfuscation of the dominant phenomenal and
normative reality are the principal techniques in this process of
reification. Plato, perhaps the most influential of Western
philosophers, openly advocates their use to implement his utopian
scheme for social organization:

“Now I wonder if we could contrive one of those convenient
stories we were talking about a few minutes ago,” I asked, “some
magnificent myth that would in itself carry conviction to our
whole community, including, if possible, the Guardians them-
selves?”

“What sort of story?”

... “I shall try to persuade first the Rulers and Soldiers,
and then the rest of the community that the upbringing and
education we have given them was all something that happened
only in a dream. In reality they were fashioned and reared, and
their arms and equipment manufactured, in the depths of the
earth, and Earth herself, their mother, brought them up, when
they were complete, into the light of day; so now they must
think of the land in which they live as their mother and protect
her if she is attacked, while their fellow-citizens they must re-
gard as brothers born of the same mother earth.”

... “We shall,” I said, “address our citizens as follows:

You are, all of you in this land, brothers. But when God
fashioned you, he added gold in the composition of those of you
who are qualified to be Rulers (which is why their prestige is
greatest); he put silver in the Auxiliaries, and iron and bronze in
the farmers and the rest. Now since you are all of the same
stock, though children will commonly resemble their parents,
occasionaly a silver child will be born of golden parents, or a
golden child of silver parents, and so on. Therefore the first and
most important of God’s commandments to the Rulers is that
they must exercise their function as Guardians with particular
care in watching the mixture of metals in the characters of the
children. If one of their own children has bronze or iron in its
make-up, they must harden their hearts, and degrade it to the
ranks of the industrial and agricultural class where it properly
belongs: similarly, if a child of this class is born with gold or
silver in its nature, they will promote it appropriately to be a
Guardian or an Auxiliary. For they know that there is a
prophecy that the State will be ruined when it has Guardians of
silver or bronze.’ That is the story. Do you think there is any way of making them believe it?”

“Not in the first generation,” he said, “but you might succeed with the second and later generations.”

“Even so it should serve to increase their loyalty to the state and to each other. For I think that’s what you mean.”

The mystification and obfuscation process for identifying social reality with a Cosmic Plan or Order or an otherwise exalted ontological status is both explicit and implicit in the writings of many of the advocates of retribution. Crime, in Morris R. Cohen’s words, is a “violation or disturbance of the divine or moral order. When Cain kills Abel, the very earth cries for vengeance. The moral order can be restored, or the violation atoned for, only by inflicting evil . . . . The sentiment of just vengeance or retribution is . . . deeply grounded in human nature . . . .”

Sir James Fitzjames Stephen, comparing the passions of vengeance and love, states: “The forms in which deliberate anger and righteous disapprobation are expressed, and the execution of criminal justice is the most emphatic of such forms, stand to the one set of passions in the same relation in which marriage stands to the other.” For Kant, the failure to punish for murder results in a “bloodguiltiness . . . upon the people.” Reification is the common premise underlying these diverse retributive expressions; punishment has an express or implicit “ontological status independent of human” choice and signification. Punishment is an imperative of God, of the moral order, of human nature, of the need to restore cosmic equilibrium.

The advocates of deterrence postulate a series of core premises as givens which are not subject to analysis. These givens, if not reified, are given an exalted ontological status. The vocabulary used and the meaning expressed manifest this process: Pound’s attribution of exalted status to “civilized society,” “social interests,” and the “system of duties”; Andenaes’s “human natures,” “moral codes of society,” and his neat division of humankind into “crimi-
nals,” “potential criminals,” and the “law-abiding”; Packer’s image of the criminal process as legitimate “public rituals” and “rites”; Zimring’s “solemn commands of a legal system” and “loyalty to the parent society”; Henry M. Hart’s conformity-oriented “theory of social justice” stressing “training of an adult in the larger circle of the community”; and Mark DeWolfe Howe’s use of “nature” and “Man’s nature” to legitimize the law’s “respect” for the “strong,” and his approval of the “law’s willingness to allow a measure of oppression to prevail.”

The prevailing ethical and moral code for individuals usually derives from this ontological and axiological position. In simplified statement, since the individual is defined by existing social structures and norms, his ethical obligation is clear: He must conform to the roles and duties which these institutions prescribe. The individual derives social value and personal meaning by fulfilling his or her destiny of subordination and service to existing social forms. Morality and ethics also are reified or otherwise exalted as givens. Just as social organization is identified with transcendent being and value, ethical and moral obligations undergo the same transformation. They too are given an ontological status independent of human activity and signification. Their human authorship is obscured. If not reified, existing ethical obligations are given a preferred, a priori status or are otherwise one-sided, a weapon of the powerful against the weak. John Rawls’ A Theory of Justice illustrates a sophisticated form of status quo ethical reasoning. Rawls, in Peter Singer’s words, “thinks that moral philosophy should take the firmest” of our “moral judgments” as “data” and “unify our particular intuitions about justice.” These moral intuitions are givens and are not subject to “rigorous criticism.” Not surprisingly, Rawls’ conclusions justify a society comparable to that which exists in the United States and say almost nothing about “the demands of justice in distribution between nation-states.” There is a circular-

42. See Andenas, supra note 7.
43. See H. Packer, The Limits of the Criminal Sanction (1968).
44. See F. Zimring, Perspectives on Deterrence (National Institute of Mental Health, Public Health Service Pub. No. 2056 (1971)).
49. Id.
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ity in the reasoning: It provides brilliant apologetics for the status quo. What should be a central element to be justified—the "firmest" of our "moral judgments"—becomes a priori "data."

Another example of this ethical approach is contained in the analysis of the modern advocates of deterrence. Although aware and troubled by the ethical issues in sentencing the convicted individual on the basis of the threat posed by others, they overcome these reservations. With misgivings, they place the burden for controlling crime on the hapless individual offenders who manage to lose in our lottery system of criminal justice and are convicted of a crime. This is scapegoatist ethics: The responsibility for crime is summed up and personified in the punishment of the offenders who are convicted. All others implicated in the pervasive aggression, violence, and greed in our culture are thereby aided in escaping ethical responsibility. There is a gross reductionism underlying this scapegoatism; ethics is encapsulated. The rationale given for this approach is that it is the practical way to control crime, at least at present.

In this thinking, there is not a broad ethical or sociological imagination, or an anthropological or social-psychological imagination, or a moderate political perspective.

50. Andenaes seems particularly troubled by these ethical issues. See Andenaes, supra note 7, at 981-83.

51. Zimring and Hawkins qualify their support for this proposition:

Professor Packer in his The Limits of the Criminal Sanction speaks of "the inevitability . . . of punishment." He says, "In our present state of comparative ignorance about the sources and control of human conduct there is no escape from the use of punishment (whether criminal or not) as a device for reducing the incidence of behavior that we consider antisocial." Packer is clearly right, but the history of crime control and penal methods should warn us that complacent conclusions about inevitability and the assumption that no alternatives exist have in the past all too often been taken to justify barbarity and inhumanity.

It may well be that in some instances more effective police work, possibly involving the expansion of police forces, could provide the same or even better protection for the public than an increase in penalties. Where alternative methods of crime reduction do exist and are not employed, we are in the even less enviable position of explaining to the offender that his extra punishment is our method of saving other scarce resources.

F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 40-41 (1973) (quoting H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 249 (1968)). The notion of crime control alternatives does not extend to concrete political and social efforts to reduce the violence, greed, and gross inequality embedded in our culture and institutions. We need a broader conception of crime control possibilities.
An Imperial Epistemology

The imperial position as to what is real, what is valued, and what humankind must do, is matched with a preferred epistemological stance as to the character of fact. Fact (as society and ethics) is given a reified status; epistemology follows ontology. In traditional cultures, the tendency is to view social facts as a product of God’s Will or Fate. In our culture, the tendency is to view the source, scope, and nature of social facts as transhuman phenomena of nature: objective, neutral, and value-free. In both cases, facts are given a status independent of human activity and signification. In both cases, humans are subordinate to facts: facts are the master, we the effect. Our role is to recognize their exalted status and to adjust our hopes, behavior, and demands to accord with them.

With this underlying epistemological stance, there is a compelling argument, usually by implication, that policymaking should be determined ordinarily by research into the facts. Andenaes, for example, emphasizes the need to separate empirical questions about the effectiveness of deterrence from ideological arguments, so that these questions can be discussed “dispassionately and without bias.” The assumption is that facts have no ideological context: They are neutral and value-free. Indeed, Andenaes (and other advocates of deterrence) emphasizes the “neglected” factual “issue”: “[T]o what degree, and under what conditions, it is possible to direct the behavior of citizens by means of the threat of punishment.”

The sophisticated modern advocates of deterrence do not explicitly argue that the resolution of empirical questions provides the principal basis for policymaking. Yet that is the thrust and effect of their analysis. The discussion of deterrence is characterized as “in the main quite unscientific.” The “deterrence debate . . . if not meaningless [is] at least largely irrelevant to any material concern.” The emphasis is not on “rhetorical statements” but “propositions which could be evaluated on the basis of fact.” It is verification of facts, not ideological arguments, which offers the potential for answers. The emphasis on verification is not without concern for the ethical issues. These concerns, however, are

52. Andenaes, supra note 7, at 954.
53. Id.
55. Id. at 4-5.
56. Id. at 2.
57. See id. at 32-50.
mostly overcome, albeit not without misgivings.

If the social structure is considered a static and fixed world, then it is likely that social fact also will be seen as static and fixed, that is, as one of the determined structures. The source, scope, and status of fact is related to the ontological view. The failure to distinguish between social being and, for example, biological and astronomical being is paralleled by a failure to distinguish between social facts and, for example, biological and astronomical facts. The distinction is as critical at the level of fact as it is at the level of ontology. Inquiry into social facts and inquiry into natural science facts both involve at each stage the impact of “heritage,” “culture,” and “personality.” The distinction is not one of objectivity and subjectivity. The distinction is that the social inquiry is aimed at revealing a humanly-created reality while the natural science inquiry is aimed at revealing a different reality: that, for example, of the path of the stars, of the cause of earthquakes, or of the components of DNA. The facts revealed by the first inquiry may reveal the secrets of past and current political and social choices; the facts revealed by the natural science inquiry may reveal some of the secrets of nature. But the facts of slavery, of the achievements of women, serfs, workers, and aristocrats in particular historical periods are humanly-created facts, quite different from facts about stars, earthquakes, and DNA. The imperial effort to reify social institutions is matched by an effort to reify social facts—to obscure their human origins by imputing social facts with a more exalted status. The facts of social arrangements assume a more imposing status—facts of Science or Nature or God’s Will.

A Humanistic Metaphysics

A humanistic metaphysics and ethics provide very different approaches to fundamental questions. Being is not fixed and manifested in a world of determined structures. It is a flux; a continuous, creative process in which humankind plays a critical role. Being is becoming: Social institutions, norms, morality, and, (to a startling extent) human nature—and even nature—are an ever-changing product of a dynamic and evolutionary process.

58 In this article, there is no effort to provide a ground for the humanistic enterprise beyond human consciousness and activity. There is no suggested cosmology. From a traditional religious viewpoint, God is the ground. From a secular viewpoint, humankind alone is the ground. For others, a cosmic design or order of some sort may provide a ground. The emphasis in this article on human beings providing a ground, out of our experience and struggle, does not preclude a cosmological quest. Such a quest, however, is beyond the scope of this article.
All things are caught up in this universal surge of constantly changing reality. We no longer consider things as fixed in their structure. We speak now in developmental terms; not of cosmos but of cosmogenesis, not of fixed species but of biogenesis, not of mankind as a determined reality but of anthropogenesis, for man is making himself at the same time as he is in a manner making the world.\(^5\)

Julian Huxley, in his introduction to Teihard de Chardin's *The Phenomenon of Man*, emphasizes the "absolute necessity of adopting an evolutionary point of view".\(^6\) "[T]he different branches of science combine to demonstrate that the universe in its entirety must be regarded as one gigantic process, a process of becoming, of attaining new levels of existence and organization, which can properly be called a genesis or an evolution."\(^6\)\(^1\) Jóse Ortega y Gasset applies this process to men and women and their human nature:

> Man does not have a nature, but a history. . . . Man is no thing, but a drama. . . . His life is something that has to be chosen, made up as he goes along, and a man consists in that choice and invention. Each man is the novelist of himself, and though he may choose between being an original writer and a plagiarist, he cannot escape choosing. . . . He is condemned to be free. . . . Freedom is not an activity exercised by an entity that already possessed a fixed being before and apart from that activity. Being free means . . . being able to be something else than what one is and not being able to settle down once and for all in any determined nature. . . . Unlike all the other things in the universe which have a pre-fixed being given to them, man is the only and almost inconceivable reality that exists without having an irrevocably pre-fixed being. . . . It is not only in economics but also in metaphysics that man must earn his living. . . .\(^6\)\(^2\)

But in which direction should men and women remake themselves and the world? What is the nature of the good to which they should evolve? What *is* at any point in the unfolding process of individual and social life is not automatically equated with what

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\(^{61}\) *Id.* at 13.

should be. Neither the existing social order nor related norms should be consecrated as an embodiment of the good, which determine one's life and destiny. This process would make absolute a particular, transient, social, and individual example. It would reject the concept of a constantly evolving process and would “freeze” being. A deeper, separate source of moral value is required. Humanism provides a direction, ground, and context for the endless evolution of humankind and the world. The unfolding of being centers on the person and humankind: “The central problem of philosophy is not the abstract relationship of matter and mind but, rather, the place of man in the world: what is and what ought to be, his relation to nature and to other human beings and society as a whole.”63 The adoption of this new focus provides a basis for a radical conceptual and valuative shift in the meaning and status of the person, the relationship between the person and society, the purpose and function of social institutions, and the ethical nature of the human and social endeavor.

The person assumes center stage. He or she is a subject, an end. The person provides a ground for theory, values, policy, and action. The person is no longer seen through the “lens” of one’s role in the traditional social order; no longer sacrificed, as in much “traditional thought” to “cosmological considerations,” the dominant master beliefs, and imperial social interests. He or she cannot be objectified as a mere utilitarian instrument for a social, economic, and political status quo.

Humanism, however, does not focus only on the individual. Humans are social creatures who seek fulfillment and meaning in familial, cultural, economic, religious, political, and other associations. This quest for fulfillment and meaning has physical, emotional, intellectual, spiritual, aesthetic, and economic dimensions. The person may not be artificially abstracted from the various social contexts in which he or she achieves realization and meaning. The individual and collective dimensions of life create conflict. The individual search for fulfillment and meaning may conflict with the quest of others. While some conflict and tension is inherent and desirable, humanism provides a framework in which to seek to resolve the conflict creatively. The individual search for fulfillment and meaning is inseparable from the same quest of others. Each quest is diminished by the degradation of the other and each is

enhanced by the freedom and justice that others enjoy. No humanistic individual ideal can be realized in a society characterized by economic and cultural victimization.

The purpose and function of humanistic political, legal, and ethical structures is to serve humankind. The validity or lack of validity of these structures and related master beliefs result from their success or failure in serving humankind's evolving experience, consciousness, and needs. The person and humankind transcend what is and only derive personal meaning and social value from their role in status quo structures insofar as these structures embody a humanistic conception of the person and of society. For example, Gandhi made clear that he remained loyal to an institution "so long as that institution conduce[d] to [his] growth and the growth of the nation.' Immediately upon finding that the institution 'instead of conducing to its growth impedes it,' he considered it his 'bounden duty to be disloyal to it.'" In the words of McDougal and Lasswell:

Instead of institutional symbols such as "capitalism" versus "socialism," "territorial" versus "functional" representation, "centralized" versus "decentralized" planning, considered abstractly and affirmed dogmatically, the focus of attention and debate can usefully shift to the appraisal of contemporary structures according to their positive or negative impact upon present and prospective value-sharing and sharing.

The basic shift in the relationship between the person (individually and collectively) and society also flows from an historic change, in comparatively modern times, in the theory of society. From ancient times until the American and French Revolutions in the eighteenth century, a theory of a static society prevailed. In the medieval period, it was characterized by, inter alia: (1) a divine right for political and social authority; (2) a restoration theme as a basis for the occasional revolts; (3) a rooting of ideals, justifications, and utopias in the past, for example, a defense of peasant rebellions by a justification that the earthly lord had violated ancient traditions and laws; (4) religious conflict (Catholic versus Protestant) centered on which faction was most traditionally authentic (i.e., most Christian); and (5) an economic approach that emphasized no growth, and detailed economic regulation designed to restrict

growth. In the traditional theory of society, a core purpose of the entire social structure was to keep each person in his appointed groove in society. He was to work out his life through the forms and modes of social organization available to him, as a serf, a slave, or whatever. This conception of society, and the relationship of the individual to it, is embodied in the medieval view of the world:

The fundamental institutions of the medieval world—the empire, the church, and feudalism—seemed to be the guardians of a cosmic order which man had to accept but which he could not modify to the slightest degree. They worked primarily to show that all the material and spiritual goods to which man can aspire (from daily bread to truth) derive from the order to which he belongs, that is, the hierarchies which are the interpreters and custodians of the cosmic order.66

The humanistic idea of the primacy of the person shatters this traditional conception of society. Fundamental institutions have a different purpose, function, and basis. Social structures can no longer legitimately be organized on the principle that reified structures reflect the cosmic order and can subordinate and sacrifice the person to the needs of dominant social institutions and groups. Instead, society should be organized on the principle of serving the individual, group, and community. The individual would no longer be viewed in terms of his status in a particular social order. What is important is the fact that he is a human being.

The change in the legal status of the person parallels the change from a traditional to a humanistic conception of society and the individual. In the traditional legal relationship between the person and society, organized on the principles of distinct hereditary castes, the rights of persons flowed from their status as serfs, nobility, clergy, and the like. This concept shifted to the modern democratic and humanistic idea that our rights flow from our common status as human beings. In traditional society, a core theme of the legal system is to “keep man in his appointed groove in society” in order that he serve society. In a democratic society with a commitment to what Joel Feinberg has called the “revolutionary idea of equal human rights,”67 civil and political rights are no longer grounded in the fixed roles of the traditional social order.

The substitution of this new ground of our common status as

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human beings helps to liberate human rights from bondage to status quo "forms and modes." The meaning of status quo legal and other social structures is transformed: In traditional language, they become means to achieve equal civil and political rights, not ends in themselves. The raison d'être of these structures would be to serve the individual and humankind. The Declaration of Independence provides a striking formal example of this approach. After holding "that all men are created equal" and have "unalienable rights" including "Life, Liberty and the pursuit of Happiness," the Declaration states:

That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Governments, laying its foundations on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.68

Edmond Cahn expresses a humanistic interpretation of the statement "that all men are created equal" in stressing its civil and political dimensions as well as its social and economic implications:

As any literate person understands, when Thomas Jefferson wrote in the American Declaration of Independence that "all men are created equal," . . . [h]e was not formulating a principle of biological science but a working maxim of public action. The free man's fundamental right is to be treated equally in all political and legal transactions.

This right is incontestable as far as it goes but it does not go nearly far enough; for of what practical value are political and legal equality to a man who has no bread to eat, no clothes to wear, no roof to shelter him, no chance to earn a livelihood? A man must eat before he can discuss public affairs rationally, must have an opportunity for employment under decent conditions for a living wage before he can vote intelligently, and must have a modicum of rest, leisure, and psychic security before he can hold office worthily in a free community.69

Equal human rights should include two broad categories of rights, civil and political rights and social and economic rights. The broad statement of human rights, "Life, Liberty and the pursuit of

68. DECLARATION OF INDEPENDENCE.
69. E. CAHN, supra note 4, at 115-16.
HAPPINESS," leads to a democratic specification which includes civil and political rights to due process, free speech and press, and free exercise of religion, petition, and assembly. A humanist specification, however, also emphasizes human rights in social-economic terms: the right to a job, to food, to medical care, to housing, to education, to clean air, to a pension, to assistance in the event of disability or sickness or death of a parent or mate.

Both categories of rights are necessary to realize ideals of human dignity and worth as well as privacy, self-determination, and self-realization. Indeed, both categories of rights can easily be viewed as included within (and necessary to) the attainment of the broader statement of rights in the Declaration, at least from a humanistic perspective. Andrei Amalrik, an activist in the Human Rights Movement in the Soviet Union, emphasizes that both categories of rights are "inseparable":

[M]an has not only a stomach but also a head and a heart . . . . A slave who has eaten his fill retains the psychology of a slave if he has never thought about freedom while he was hungry. If you respect hungry human beings, you should not only feed them but also convey to them a sense of their human dignity. Unless these two processes progress hand in hand, we shall live in a monstrous world.70

The actualization of equal human rights, while a sine qua non for a humanistic community, is insufficient. We do not live by rights alone. The ideal of equal human rights does not address the question of what we are to do with these rights. Although clearly valuable in themselves, we still confront the issue of what vision of life we mean to serve with these rights beyond the ideal of equality. Equal civil and political rights often has meant equal rights to aggrandize wealth, privilege, and power so as to victimize the poor and powerless and perpetuate actual inequality. Such an exercise of equal rights fosters greed and domination which violates the most basic ethical principles in a humanistic approach. An emphasis on equal human rights must be complemented with an emphasis on ethical principles in the exercise of those rights and on the creation of a culture of humanistic ethics as a guiding framework (a subject beyond the scope of this article). Together, the realization of equal human rights in a culture of humanistic

ethics could result in the creation of a social life in which our endemic competition, aggression, and alienation are replaced with cooperation, community, and fraternity. Amalrik denounces the liberal ideal of "leave me alone and I will leave you alone" as a breeder of loneliness and alienation. "People don't want to be left alone. They want others to care for them. They want something to be asked of them. They want something to be given to them. The knowledge that nothing in the world depends on you is a difficult burden to bear." 71

To be sure, the substitution of a humanistic basis for the specified human rights does not define their content or resolve many basic conflicts in definition, interpretation, and application. But this substitution provides a basis for liberating human beings from the clench of status quo social forms and establishes a perspective for definition, interpretation, and application. In provides goals, objectives, and criteria for beginning to assess existing social institutions, norms, and morality, including the legal system. In the words of McDougal and Lasswell:

It is . . . feasible . . . to dissolve the curtains of confusion created by the common practice of glorifying specific institutional practices instead of glorifying the goal values of human dignity and engaging in a continuous reappraisal of the circumstances in which specific institutional combinations can make the greatest net contribution to the over-arching goal. 72

In a fundamental sense, a series of new and different questions reflect the basic change in framework. The transformed status of existing social forms is presupposed in such questions as: To what extent do these social forms exemplify equal human rights in goal and objective? To what extent do they provide for fulfillment of human potential in cultural and personal realms? Traditional ideas of the status of the individual and of the relationship between the individual and society are clearly reformulated.

In discussing human rights and systems of world order, McDougal, Lasswell, and Chen express this shift from traditional to humanistic formulations:

[W]e would emphasize that the animating conception of any international law of human rights is, at its core, a humanistic world view: a conception of the human being as an end in himself and

71. Id.
a legitimator of power and not as an instrument of a corporate society, deriving his right to existence from that society . . . . The Enlightenment's reinstatement of the individual as of central concern has only now begun to reshape the basic constitutive structures of the world process of decision.\textsuperscript{73}

This shift in perspective applies not only to society's goals and objectives. Most tyrants preach laudable ends. The new perspective is not only end-focused, but is existential. It applies to living persons in all their day-to-day social interactions—to the policies, pressures, norms, methods, and techniques that they and social institutions exemplify. It provides a separate value basis for assessing these societal means as well as societal goals and objectives.

To those well-molded by status quo socialization and experience, this vision of the person and of social institutions is utopian and largely unrelated to the practicalities of the real world. But is it more practical and realistic to continue with the traditional status quo consciousness, structure, and practice that have resulted in 50 million dead in twentieth-century wars; the Holocaust; about $300 billion spent worldwide annually for militarism; institutionalized racism and sexism; and extensive economic, political, and social exploitation? Is it practical to continue on a path that threatens atomic and nuclear proliferation and war, increasing world starvation, and destruction of the environment (including depletion of the world's natural resources)? One is reminded of C. Wright Mills's phrase, "crackpot realism," a practicality and realism that is mindless and that may result in disaster. The specter of this horror is raised in a recent report to the Club of Rome on World Resources and Growth in which the industrialized countries are urged to limit their own use of finite resources and help other countries out of poverty: "Unless this lesson is learned in time, there will be a thousand desperados terrorizing those who are now rich, and eventually nuclear blackmail and terror will paralyze further orderly development."\textsuperscript{74} Even assuming that the affluent can insulate themselves from the "thousand desperados" in a garrison state, the moral, social, and economic price of such insulation creates its own specter of horror. From this vision of the unfolding future, it is easy to argue that a reconstruction of national and world structures is a \textit{sine qua non} of self-interest and practicality as well as a re-


quirement of any decent moral sense. The status quo interpretation of what is practical and what is realistic would be reversed. The myth and moral framework of humanism is a requirement of our historical evolution and of our contemporary experience. It is myth and moral framework whose time has come and without which the time of humankind may be limited. In Amalrick's words: "I believe that everyone who values freedom is confronted by the problem of creating a new ideology which will transcend both liberalism and Communism and make its central issue the indivisible rights of man. . . . I am for an ideology of humanism." If we confront our history, acknowledge that we are the creators and recreators of the political and social world, we are compelled to take responsibility for what we have wrought, including authoritarian and totalitarian systems: monarchy, feudalism, fascism, Leninism and Stalinism, and exploitative capitalism. If we have created these destructive myths and ideologies and embodied them in structures of domination, we can also create humanistic myths and ideologies and embody them in structures of liberation.

A Humanistic Ethics

On a personal ethical level, a humanistic approach to what is real and what is valued leads to a rejection of conventional adjustment ethics and to a redefinition of the individual and social endeavor. Traditionally, the conventional ethical question of what a person should do was answered by one's role in the social structure as well as by its norms. One's duty was to conform to preexisting patterns and not to move beyond them. Ethics meant adjustment to the existing embodiments of what is real and what is good. But if existing social structures and norms are a transient manifestation of evolving being and if the source of value and purpose is a humanistic myth of humankind and society, the foundation for adjustment ethics collapses. Mere automatic conformity to existing roles and norms at a particular historical juncture is unacceptable. It is to deny the evolving idea of being, to reject the humanistic ground for humankind and society, to seek to immortalize a moment in historical evolution. These roles and related normative rules become issues for ethical analysis, not grounds for ethical analysis. In existential terms, to succumb to conformist ethics is to lose one's authenticity, one's "personhood," one's chance for a self-created freedom. In religious terms, it is to engage in idolatry.

75. Amalrik, supra note 70, at 33, col. 2.
Worst of all, automatic conformity denies human ethical responsibility for social institutions and culture, including responsibility for the very roles which provide the ground for conventional ethical obligation. We must recognize that human beings are accountable for the ethical values that exist: We are the authors and the legitimizers. We are responsible for choosing our values and for incorporating them in personal and social realms. We must provide the direction and purpose for evolving being and foster the evolution by our life work which cannot be only a personal odyssey. “Just as in the past, he was judged to betray his personhood if he ceded to a life of instinct, so now the same condemnation is leveled against him if he merely accepts the social order he finds and makes no attempt to better it.”

Humanists link the realm of ethics to social, economic, and political contexts. The ethical obligation owed by the individual to society and its institutions, policies, and practices is contingent upon their validity. Humanism provides a framework for formulating and analyzing that validity. Sometimes the determination of that validity poses complex and subtle questions; sometimes the analysis and conclusions are clear: bombing and strafing civilians in “free fire” zones in Vietnam; or collectively retaliating against an anticolonial populace in Angola, Mozambique, and Rhodesia. Individually and collectively, we bear responsibility for our individual acts and for those acts committed in our name.

In humanistic ethics, there is a basis for a fundamental challenge to central societal techniques of legitimization and denigration. Scapegoatist ethics is rejected. The responsibility for grave defects in our culture and institutions—for example, schools which do not teach, an economic system which leaves millions unemployed, and a culture which glorifies greed—lies not with those who are the victims of these failures, for example, the unemployed. The rejection of scapegoatist ethics means, too, that the responsibility for crime cannot be summed up and personified in the punishment of convicted offenders. Individuals should not be used to remedy problems whose nature and scope go to the heart of our society. Encapsulated ethics leads to encapsulated sociological and criminological formulations focused on the individual. A broader ethical imagination, reflecting the insights, for example, of Mer-

77. See generally W. RYAN, BLAMING THE VICTIM (1971).
ton\textsuperscript{78} or Küngr\textsuperscript{79} leads to a broader sociological, anthropological or social-psychological imagination, or a combination of them. With a broader perspective, there is a different context for asking questions about the crime control potential of legal institutions.\textsuperscript{80} Reductionist formulations are seen as a requisite of scapegoatist ethics, a prime support for an unjust status quo.

From a religious perspective, Hans Küngr offers a challenge to status quo ethical reasoning:

This means that \textit{service to man} has \textit{priority over observance of the law}. No norms or institutions can be made absolute. Man may never be sacrificed to an allegedly absolute norm or institution. Norms and institutions are not simply abolished or annulled. But all norms and institutions, all laws and precepts, edicts and statutes, regulations and ordinances, dogmas and decrees, codes and clauses, must be judged by the criterion of whether they exist for man or not. Man is the measure of the law. In the light of this, is it not possible critically to discriminate between what is right and what is wrong, what is essential and what is irrelevant, what is constructive and what is destructive, what is good or bad order?

God's \textit{cause} is not law, but \textit{man}. Man himself therefore replaces a legal system that has been made absolute. \textit{Humanity} replaces legalism, institutionalism, juridicism, dogmatism. Man's will, it is true, does not replace God's will. But God's will is made concrete in the light of the concrete situation of man and his fellow men.\textsuperscript{81}

\section*{A Humanistic Epistemology}

Flogging slaves, prisoners, or workers may well have been effective in enforcing the will of the slavemaster, the warden, or the employer. The proposition that flogging achieves the desired result may be verified. The slaves may become submissive, the prisoners compliant, the workers productive. The proposition is true in the sense that it is factually verified. At least three issues are raised by these facts and this truth.

The first is the impact of the underlying perspectives in per-

\textsuperscript{78} See, e.g., T. MERTON, CONFESSIONS OF A GUILTY BYSTANDER (1968).
\textsuperscript{79} See, e.g., H. KÜNG, ON BEING A CHRISTIAN (E. Quinn trans. 1976).
\textsuperscript{80} For an example of question-asking on a broader scale, see I. TAYLOR, P. WALTON, & J. YOUNG, THE NEW CRIMINOLOGY: FOR A SOCIAL THEORY OF DEVIANCE 268-82 (1973).
\textsuperscript{81} H. KÜNG, ON BEING A CHRISTIAN 252-53 (E. Quinn trans. 1976).
ceiving, selecting, and categorizing these facts into conclusions. It is evident that we are looking at the facts through the lens of the slavemaster, the warden, and the employer.\textsuperscript{82} The perspectives manifest the values and interests of the slavemaster, the warden, and the employer in relation to submissive slaves, compliant prisoners, and productive workers. The perspectives are related not only to the values and interests of those on top but also to their power. They have the power to exemplify their perspectives in practice—to create the fact of flogging for violations of their rules. Impeccable scientific research could be utilized in evaluating this application: for example, how much flogging is required to secure obedience from various types of violators? Perceiving, selecting, and categorizing these facts into conclusions is not a neutral, value-free process. The nature of this process is immediately apparent if we look through the lens of the slaves, the prisoners, and the workers. They have a different perspective which manifests their interests and which leads to contrasting perceptions. It is more difficult, however, for them to actualize their perspective into facts in relation to their victimizers, for they lack a critical element: power.

Gunnar Myrdal expresses the role of value and interest in looking at facts:

This implicit belief in the existence of a body of scientific knowledge acquired independently of all valuations I soon found to be naïve empiricism. "Facts do not organize themselves into concepts and theories just by being looked at; indeed, except within the framework of concepts and theories, there are no scientific facts but only chaos. There is an inescapable \textit{a priori} element in all scientific work. Questions must be asked before answers can be given. The questions are all expressions of our interest in the world; they are at bottom valuations. Valuations are thus necessarily involved already at the stage when we observe facts and carry on theoretical analysis, and not only at the stage when we draw political inferences from facts and valuations."\textsuperscript{83}

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  \item \textsuperscript{82} It is helpful to keep in mind the words of the philosopher W.V. Quine: "The totality of our so-called knowledge or beliefs, from the most casual matters of geography and history to the profoundest laws of atomic physics or even of pure mathematics and logic, is a man-made fabric . . ." Quine, \textit{Two Dogmas of Empiricism}, in 3 \textit{Philosophy in the Twentieth Century} 102, 118-19 (W. Barrett & H. Aiken eds. 1962).
  \item \textsuperscript{83} G. MYRDAL, \textit{Objectivity in Social Research} 9 (1969) (quoting \textit{Preface} to G. MYRDAL, \textit{The Political Element in the Development of Economic Theory} at ix-xvi (1954)).
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In analyzing deterrence, Andenaes emphasizes the "neglected" factual "issue": "[T]o what degree, and under what conditions, it is possible to direct the behavior of citizens by means of the threat of punishment."\(^{84}\) The question is highly ideological: It involves a political and social choice, and the facts gathered reflect the values included in the question. Initially, the perspective underlying the question is authoritarian. The transparent point is that it is highly ideological to pose an "empirical" question about directing behavior by threat of punishment. Related empirical questions about the degree to which the direction of behavior is possible and the requisite "conditions" for such direction (as well as questions about control and prevention) are equally ideological. At an extreme, Nazi officials directed these questions to at least five million foreign workers in German industry and the tens of millions in Nazi-occupied territories. Their response: a terroristic general deterrence.\(^{85}\) Nazi researchers could systematically gather facts about the effectiveness of this response as applied in various factories and diverse occupied territories. There is nothing neutral or value-free about the research: It serves Nazi interests against the interests of other peoples.

This example is extreme but hardly unique: The question is being asked—and answered—by white South Africans who continue to subjugate the black population, and it surely was a focus of American intervention in Vietnam.\(^{86}\) In these instances, too, facts

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84. Andenaes, supra note 7, at 954.
85. Referring to control of the millions of foreign workers in Germany, Himmler stated: "They are none of them dangerous so long as we take severe measures at the merest trifles." Opinion and Judgment of the International Military Tribunal at Nuremberg, reprinted in NAZI CONSPIRACY AND AGGRESSION (1947). Referring to control of "disorder" in the occupied portions of the Soviet Union, Keitel said: "[A] human life in unsettled countries frequently counts for nothing, and a deterrent effect can be obtained only by unusual severity." Id. at 63.
86. As Telford Taylor quotes a United States Marine Corps "Ultimatum to Vietnamese People": "The U.S. Marines will not hesitate to destroy immediately, any village or hamlet harboring the Vietcong." Another Marine leaflet "informed the inhabitants that their village 'was bombed because you harbored Vietcong' and 'will be bombed again if you harbor Vietcong in any way.'" T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 144 (1970). Taylor summarizes the techniques of American terror:

- forced resettlement of millions of rural families with utterly inadequate provision for their health and human dignity; complicity in the torture of prisoners by our wards, the South Vietnamese; enthusiasm for body counts overriding the laws of war on the taking of prisoners; devastation of large areas of the country in order to expose the insurgents; outlawry of every visible
could be systematically gathered and analyzed by researchers utilizing sophisticated techniques (e.g., interviews, observation, and use of experimental and control groups), but this research is not neutral or value-free.

The second issue is the ground and status of these facts of flogging. The slavemaster, the warden, and the employer ordered the floggings—they had the power to create these facts and the consequent facts of pain, fear, and compliance by those flogged and by those intimidated. These facts originated in the slavemaster’s mind in the idea that flogging could be effective. This idea is actualized by the flogging; the facts are the externalization of the slavemaster’s idea. The cuts, the blood, the scars, and the terror have incontrovertible factual reality. These facts also have a valutative element. They operationalize the values and interests of the systems of slavery, prison, and work. They are grounded in these systems. The facts themselves are not neutral or value-free. These facts—and the verified truth of their effectiveness—do not reveal the laws of Nature (or Fate or God’s Will). They reveal the laws—and power—of the slavemaster, the warden, and the employer.

The thesis here is that humans are the fact-makers: We create political and social facts by our political and social choices. These facts materialize the values inherent in such choices. These facts include values and hence have a “subjective” element. Empirical questions are also “ideological arguments.” This epistemological stance reflects the ontological position: If culture and institutions are a human product, it is only a corollary to maintain that the facts of that cultural and institutional web are a human product too. If, in contrast, culture and institutions are reified (e.g., viewed as a part of nature), it follows that the facts will be reified (e.g., viewed as a manifestation of nature). It is a consistent and logical step, then, to hold that such facts are neutral and value-free (e.g., as nature is neutral and value-free). The conclusion follows inescapably: “Empirical questions” are the core questions and should be carefully separated from ideological arguments.

If, however, one views facts not as a product of nature but as arising from the interaction of people in humanly-created culture and institutions, empirical questions cannot be separated from human being in the free-fire zones; slaughter of the villagers of Son My even to the infants-in-arms.

*Id.* at 152.
ideological questions. As social structures exemplify particular values and related theories (e.g., czarist or Leninist, feudal or capitalist, monarchist or democratic), the facts arising in these frameworks exemplify these values too. Such facts must be rooted in an historical epoch, a political and social fabric. They must be historicized, politicized, and socialized. The point is not the valuable insight that values are operative in the observation and categorization of facts and in the drawing of inferences from them, but that the facts themselves have an element of value. In Ernst Cassirer’s words:

[W]e find immediate confirmation of Goethe’s saying: “the highest thing would be . . . to recognize that everything factual is itself theoretical.” There is no such thing as a sheer facticity, as an eternal and immutable datum: on the contrary, what we call a fact must always be theoretically oriented in some way, must be seen in reference to a definite conceptual system, which implicitly determines it. The theoretical means of determination are not subsequently added to the sheer fact but enter into the definition of the fact itself.87

With this insight, the dichotomies between empirical and ideological, and fact and value collapse.88 Instead of these dichotomies, there is substituted a continuum from the abstract to the concrete. Values and ideology are constructs of the world of ideas. They can also be exemplified in the world of fact. Values and ideology, if supported by political and military force, produce not only cultural and institutional structures but also an accompanying world of fact (e.g., the facts of Maoist China, Franco’s Spain, or the neo-capitalist West). In contrast, if we believe that we can accomplish the physically impossible, such belief cannot lead to the creation of corresponding facts that empirically verify the beliefs.89 The nature of the realities addressed vary: They have different ontological essences. Humans are not fact-makers in these areas in the ways in which we are in the sphere of the political and the social.90

88. The dichotomy of objective and subjective collapses, also, if what is meant is that the objective is neutral and value-free in contrast to the subjective. The dichotomy is valid, however, if what is meant is that the objective has external reality in contrast to a feeling or a thought (an internal reality).
89. This distinction is not itself what it appears to be, see, e.g., J. PEARCE, EXPLORING THE CRACK IN THE COSMIC EGG (1974).
90. Scientific facts have a social element also. Science itself is not a transhuman
The third issue relates to the relationship between empirical verification and policymaking. Policymaking is viewed as essentially normative in character, because the objects of policymaking—culture and institutions—are themselves the embodiment of values. It is impossible to have a value-free analysis of a normative reality. Nevertheless, empirical research can be vitally important in clarifying the effects of current policy and in estimating the possible effects of the adoption of different policies. Thus, empirical research is a valuable method for determining policy.

Verifying the facts of the status quo, however, does not establish the validity of the status quo and its techniques. Verifying the facts of domination and victimization does not establish the validity of the systems of domination and victimization. These facts reveal a human-made world, not the laws of nature, or Fate, or God's Will. Facts about the achievements and lack of achievements of Third World peoples, poor blacks, hispanics, appalachian whites, and women, are not facts about human nature, innate potential, or value-free reality. They are facts about politics, power, culture, and an historical epoch. They are facts about people in diverse social roles struggling for available opportunities. They are facts about what peoples are tracked into different paths and facts about a human-made configuration.

To apply this analysis to Andenaes's question about directing behavior in contemporary America (or a Western context assumed by Andenaes), it may be possible to verify the propositions that the incidence of crime could be reduced among the many unemployed black school dropouts in central Harlem by severe sentencing schemes justified on a general deterrence theory; or that execution of those convicted of murder or rape would reduce violence in our society; or that making an example of corporate violators would reduce corporate crime; or that life sentences even for possession of small amounts of narcotics would reduce the narcotic problem. Empirical verification of these propositions, however, does not establish their political and social validity. The propositions would be true only in the limited sense of being verified. They are not established as true in the sense of the political and social validity re-

91. See, e.g., W. RYAN, BLAMING THE VICTIM (1971).
92. I do not mean to imply that Andenaes or other modern theorists would necessarily approve of these sentencing schemes.
quired for policymaking. Such decisions must be made in accordance with acceptable political-social norms and values.

The effect of this argument is not to denigrate empiricism in favor of armchair analysis. Policymaking is not performed in a Platonic heaven of ideas. Empirical research can verify that operationalized policy choices work or do not work and can also illuminate the potential effectiveness of alternative approaches. Thus, verification is necessary but not sufficient.

Policymaking cannot be based on policy analysis which postulates the need for a dichotomy between ideological arguments and empirical questions so that the latter issues "can be discussed dispassionately and without bias." Such a formulation obscures the nature of both fact and policymaking and the role of fact and norm in policymaking. The formulation tends to transform issues of justice into issues of fact. It ignores an essential reality: Humans are the fact-makers; we must, therefore, judge and shape the world of humanly-created facts and not be objects of it.

PART II

A CRITIQUE OF HUMANISM

Humanism does not yet represent a systematic and well-developed mode of thinking and action. It is far from this stage in that it lacks an adequate theory of history, society, science, power, change and meaning in diverse historical, cultural, economic, and political contexts. Nor does it have an adequate theory of the relationship between humankind and nature. Although humanistic psychology is advanced, humanistic currents in philosophy, theology, jurisprudence, sociology, and natural science are quite embryonic. Compared to Marxist, neo-capitalist, religious, or fascist systems of thought and action, the coherent and systematic quality of humanism is quite limited. In fact, humanism could be rejected as failing to meet minimum analytical standards or could even be ridiculed as an amalgam of pious hopes. However, if the effects of these more developed systems of thought and action, (i.e., the current status of the world) are considered, is there not fundamental doubt as to their value?

From this standpoint, the analytical weakness of humanism is a spur, not a barrier, to clarify thinking and action. The failures of

93. Andenaes, supra note 7, at 954.
traditional modes of thinking and action cast doubt on the validity of the criteria used to reject humanism. Is it reasonable to expect an alternative mode of thinking and action, an embryonic world view for a faintly perceived future world, to emerge in highly developed form? Does not this very requirement exemplify the thinking that impedes such development so that the criticism is status quo validating? Humanism, as a mode of thinking and acting, will be refined in the ongoing process of analysis and action, a process which is not only intellectual but is also a continuing, existential process of humankind remaking itself and the world in a crucible of world problems, crises, and opportunities. The worth of humanism does not depend only on its development into a highly developed analytical form. That may or may not occur. Nevertheless, humanistic thinking could be increasingly influential in a variety of theoretical and material structures by providing an initial framework for formulation, analysis, and action. This framework can be described as a perspective, a ground, an angle of vision, a direction for thinking and action. Its value is in its insistence that thinking and action be rooted in and justified by their impact on humankind, far different from the situation described by Emerson: "Things are in the saddle, and ride mankind."

Perhaps the most searching critical issue about humanism is raised by Heidegger's rejection of humanism as incomplete and rootless, since it leaves unasked and unanswered the question in what man's humanity is to be rooted. Heidegger presents a fundamental metaphysical issue:

The humanistic interpretations of man as animal rationale, as "person," or as an intellectual, spiritual, corporeal, being, are not declared wrong, nor rejected. The only thought is rather that the highest humanistic determinations of the essence of man do not yet come to know the authentic dignity of man. In this the thinking in Sein und Zeit runs counter to humanism. But this opposition does not mean that such thinking would make common cause with the opposite of the human and espouse the inhuman, defend inhumanity and degrade the dignity of man. Humanism is opposed because it does not set the humanitas of man high enough.94

To note that different humanists root man's humanity in different sources—for example in God, or in science, or elsewhere—does

not end the metaphysical quest for the source of human dignity. But the task of finding a sufficient moral base for the reconstruction of criminal law theory and practice does not require the resolution of this fundamental metaphysical issue. The quest is different and the pluralistic base could be a sufficient foundation for this purpose, at least until a superior alternative is demonstrated. Indeed, in the world and in highly pluralistic societies, such as the United States, a humanistic moral framework offers a distinct advantage precisely because an array of people with disparate ultimate commitments, such as religious people, atheists, and others, can all substantially support it. This advantage is evident when humanism is compared to the traditional alternatives of natural law and positivism, whose basic presuppositions are unacceptable to many.

There is a response to Heidegger’s issue which, if not satisfactory on a metaphysical level, is adequate on another level. Social philosophers have suggested a social policy basis for a humanistic approach to social life. Joel Feinberg offers a highly pertinent and useful analysis of grounds for the theory of universal equal human rights—an analysis that is applicable to a closely related issue: “In what man’s humanity is to be rooted.” Construing Gregory Vlastos, Feinberg suggests that the doctrine of universal equal human rights presupposes a concept of equal and universal human worth, independent of human merit, and assumes that at least some basic rights are “based on the worth human beings have as individuals.” Humanism also presupposes equal and universal human worth. Feinberg critically reviews the grounds offered to support the doctrine of equal and universal human worth. If value characteristics are used (e.g., the worth of humans arises from their “infinite value” or “intrinsic pricelessness”) the immediate query is: “what is the nature and source of these qualities?” If empirical factors are used (e.g., “man’s unique rationality”) a grading concept, connecting worth to degree of rationality, is implied. This approach is inconsistent with the theory of equal human worth.

Feinberg comments that metaphysical claims such as “men are ends in themselves” and “men are sacred,” explain human worth only by renaming that which is to be explained. Feinberg argues

96. Id. at 88-89 (construing Vlastos, Justice and Equality, in SOCIAL JUSTICE 31 (R. Brandt ed. 1962)).
97. Id. at 91.
98. Id.
99. Id. at 92.
that the case for equal and universal human worth may well be “groundless—a kind of ultimate attitude not itself justifiable in more ultimate terms.”

He cites parental love for the child who has gone bad as “groundless” (i.e., not based on any quality of the child) but not “irrational or mysterious.”

He also suggests that the ground may simply be that “all men equally have a . . . unique angle from which they view the world. They are all equally centers of experience, foci of subjectivity.”

This manner of regarding men may express an attitude toward “each man’s person” that is not “grounded on anything more ultimate than itself, and . . . is not demonstrably justifiable.”

Feinberg contends that “a world with equal human rights is a more just world, . . . a less dangerous world generally, and one with a more elevated and civilized tone.”

Feinberg concludes that “[i]f none of this convinces the skeptic, we should turn our backs on him to examine more important problems.”

The skeptic’s persistent “why” seems to be based on two faulty expectations. First, there is, or should be, some conclusive and demonstrably provable ground for any structure of thought. This is an expectation which belies the reality that ultimately any such structure (e.g., natural law, positivism, and science itself) is predicated on basic postulates as to preferred conceptions of reality (ontology) and preferred conceptions of fact and method (epistemology). The second faulty expectation is that the burden of proof should be with those who postulate human worth. This expectation ignores the logical option that the burden could be with those who deny human worth.

The quest for an adequate basis is, in essence, a quest for an acceptable theory of justification; thus, it questions the adequacy of available theories of justification. Traditional Western religions offer a religious ground for human worth (man is made in the image of God) that is sufficient only for believers. Natural science, a powerful source of legitimacy in the modern world, seems inadequate as a ground for human worth, which involves a different subject matter than that addressed by natural science. Human worth is a human construct of moral value rather than a phenomenon of nature whose validity can be empirically measured and studied by

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100. Id. at 93.
101. Id.
102. Id.
103. Id. at 94.
104. Id. (emphasis deleted).
105. Id.
scientific concepts and techniques. Status quo “forms and modes” in each society presuppose a notion of human worth of some sort, but such notions are inextricably entangled with existing social interests and master beliefs and are often, therefore, artifacts of the powerful.

Feinberg’s characterization of the “attitude of respect toward the humanity in each man’s person” as “groundless” (“not grounded on anything more ultimate than itself”)

106 pinpoints the inadequacy of the traditional theories of justification. All of these theories manifest a need to find validity in sources outside of explicit human determination: in God, in nature, in human nature, in science, or in status quo social structures. Feinberg’s point can be articulated somewhat differently: The ground of “human worth” is within us. We create social reality. We also create meaning. We are the ground of being and value—of theory, policy, and action. The “buck” stops with us.

History, as Feinberg intimates, demonstrates that genocide, slaughter, and other victimization is accompanied by a rejection of “the attitude of respect—toward the humanity in each man’s person.”

107 A witness at the International Military Tribunal at Nuremberg testified about the slaughter of 90,000 men, women, and children, mostly Jews, by one Nazi unit: “I am of the opinion that when, for years, for decades, the doctrine is preached that the Slav race is an inferior race, and Jews not even human, then such an outcome is inevitable.”

108 Richard Hammer describes the rejection of “the attitude of respect” towards the Vietnamese by American soldiers:

And that all of them are something not quite human, some kind of lower order of creature. You give them names to depersonalize them, to categorize them as you’ve become convinced they ought to be categorized. They become dinks and slopes and slants and gooks, and you begin to say, and believe, “The only good dink is a dead dink.”

109 Indians, slaves, freed Blacks, workers, and many other subordinated groups have been characterized as savage and inferior as a
means of justifying their subordination. The lesson seems clear: Rejecting the "attitude of respect" is a sine qua non of victimization. It is easier to kill, plunder, and exploit savages and inferiors; it is harder to kill, plunder, and exploit men, women, and children who are respected. Potent human impulses towards sociability and fraternity must be overcome by ceremonies of degradation which precede the fact of victimization. Incorporating the "attitude of respect" into a culture of respect is a primordial humanistic priority. The ground for belief and action is not located so much in verbal and intellectual acrobatics, but in what we have learned from thousands of years of human experience and struggle.

PART III

UTILITARIAN PUNISHMENT

Utilitarian Thought: A Humanistic Critique

Much of utilitarian thinking is a classic example of imperial theorizing. Since the utilitarian justification of punishment, particularly general deterrence, emerges from traditional utilitarian thought, certain aspects of that thought are first critiqued from a humanistic perspective. This critique is then followed by a critique of the utilitarian approaches to punishment as expressed in general deterrence.

In a critique of utilitarian thinking, H.J. McCloskey, a retributivist, argues that such thinking can justify "scapegoat" and "collective" punishment if they are found to be "useful":

An occupying power which is experiencing trouble with the local population may find it useful to punish, by killing, some of the best loved citizen leaders, each time an act of rebellion occurs; but such punishments do not commend themselves to us as just and right. Similarly, collective punishment is often useful . . . Collective punishments of the kind employed by the Nazis in Czechoslovakia—destroying a village and punishing its inhabitants for the acts of a few—are notorious as war crimes. Yet they appear to have been useful in the sense of achieving Nazi objectives.110

In a carefully reasoned response to the McCloskey critique, T.L.S. Sprigge, a utilitarian, nevertheless, states:

Consider the type of scapegoat punishment [McCloskey] mentions. It is within the bounds of possibility that a commander whose chances of victory demanded some sort of cooperation from the local people, and who had good reason to believe that without this victory the common good of humanity would suffer, finding this method of securing the population's cooperation the only workable one, would rightly consider that it was justified. I say that it is within the bounds of possibility . . . .

In saying that such an undesirable means to a desirable end might possibly on rare occasions be justified, one is not giving one's general approval to such methods of gaining one's ends . . . .

. . . [T]he utilitarian has every reason for urging the serious damage done to the goods of justice on any likely occasion of scapegoat or collective punishment, and for insisting therefore on the extreme gravity of any decision to use them.\textsuperscript{111}

The "commander" in this example could be serving Nazi purposes in occupied Czechoslovakia, France, or Russia; he could be serving Soviet purposes in occupied Germany or Hungary; or he could be serving American purposes in Vietnam during the recent war. All three commanders could determine that the "common good of humanity" demanded scapegoat and collective punishment on "rare occasions" and in situations of "extreme gravity." Indeed, all of these commanders would probably agree that killings of this nature should be reserved for such occasions. Nazi, Soviet, and American master beliefs supply a logical, coherent, and internally valid justification. The master beliefs vary: Nazi beliefs foster the Hitler myth, saving the world from communism; the Soviet beliefs foster the Marxist myth, saving the world from fascism; and the American beliefs in Vietnam foster the democratic myth, saving the Vietnamese and the world from communism. All three master beliefs provide a conception of "the common good of humanity," a noble end that justifies such killings. The cited examples are only illustrations. Nazi utilitarians could justify the massive slaughter of Jews, and Stalinist utilitarians could justify the slaughter of political, cultural, and other dissidents as well as the Gulag Archipelago; English utilitarians could justify the firebombing of Dresden; and American utilitarians could justify the slaughter of innocents in Hiroshima, Nagasaki, and Mylai. All may be found to be justified by their usefulness in serving different conceptions of the "common

\textsuperscript{111} Sprigge, A Utilitarian Reply to Dr. McCloskey, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 66, 75-76 (G. Ezorsky ed. 1972).
interests of humanity.” And, in fact, all were so justified. As four military utilitarians, sergeants in the U.S. Army in Vietnam, justified the Mylai massacre:

“You know this is a VC village, they are the enemy, they are a part of the enemy’s war apparatus. Our job is to destroy the enemy, so kill them . . . . If I must kill old men, women or children to make myself a little safer, I’ll do it without hesitation.”

The slaughter and destruction in the twentieth century, this most barbaric of centuries (which weds malevolence with technology), is performed in the name of the common good of humanity. Horror is masked by claims of virtue. What can one say about this mode of reasoning, this “engine” of imperial “justification”?

First, much of utilitarian philosophy assumes the validity or good of existing conceptions of utility and of their exemplification in dominant master beliefs and social structures. Utilitarianism provides no intrinsic basis for assessing the quality and worth of existing conceptions of the good. But utility is not a neutral or objective concept. As illustrated, it derives its meaning from a particular historical, ideological, and material context. In the final analysis, the particular conception of utility to be enforced is determined by power which has economic, cultural, political, and legal forms.

As soon as the fantasy view of the world—as unity, harmony, and justice—is dispelled, the determination of utility is seen as primarily a political process which fosters particular interests and which is dependent upon the power of such interests. Viewed as political process, the analytical questions become: utility for whom; for which social interests; at whose expense; on what rationales; and with what ramifications for existing realities of power, policy, and practice?


113. Oppositional conceptions of utility exist too, of course, and can be urged against the dominant, exemplified conceptions. Naturally, however, the oppositional conceptions are not exemplified in practice (unless they obtain military and political support), and it is often difficult to prove their superior value by the facts of the status quo (which can be viewed as substantially a product of the exemplified dominant conceptions of utility). They seem impractical, speculative, even visionary, in the way, for example, that the abolition of slavery seemed a bizarre notion from a slavemaster’s perspective. It seems obscuring to formulate conflict as posing contrasting conceptions of utility when what may actually be at stake is competing ideologies, master beliefs, and related interests.
The particular nature of the presuppositions underlying each form of utilitarian thought (its political and power dimensions, and narrow range of thinking) is vividly illustrated in extreme form by the testimony of the Nazi camp commandant of Auschwitz during his postwar trial. Eager to demonstrate the efficiencies he had introduced, he stated: “Another improvement we made over Treblinka was that we built our gas chambers to accommodate 2,000 people at a time, whereas at Treblinka their gas chambers only accommodated 200 people each.”\footnote{114} From a Nazi standpoint, there is a “clear surplus of value” in the camp commandant’s “improvement.” On the same theme, a German manufacturer of ovens extolled the efficiency of his product: “We are submitting plans for our perfected cremation ovens which operate with coal and have hitherto given full satisfaction . . . . We guarantee their effectiveness, as well as their durability, the use of the best material and our faultless workmanship.”\footnote{115}

Stated differently, that which is useful depends on whose criteria of usefulness are employed. These criteria are not unchangeable. They emerge from an underlying, particular framework of value and social interest (e.g., communism, fascism, capitalism, Christianity). Hence, it seems more analytically fruitful to assess the validity and meaning of the particular criteria of value employed in specific historical, cultural, economic, and political contexts. Utilitarian thinking is a sophisticated and valuable analytical method which can be utilized in any context. Society is not neutral, however, and the dominant master beliefs provide the framework within which the method is applied.

Traditional utilitarian reasoning tends to sacrifice the dignity and value of individual human life and human rights to prevailing conceptions of the common good. Bentham emphasizes this focus on the common interest in utilitarian thought when he defines a person as a “partizan of the principle of utility, when the approbation or disapprobation he annexes to any action, or to any measure, is determined by and proportioned to the tendency which he conceives it to have to augment or to diminish the happiness of the community.”\footnote{116} For the authoritarian and the totalitarian, this sacrifice is axiomatic: The meaning and worth of the individual emerges from his or her contribution (actual or potential) to the

\footnotesize{\begin{itemize}
\item \footnote{114} T. Merton, Conjectures of a Guilty Bystander 241 (1968).
\item \footnote{115} Id.
\item \footnote{116} Bentham, An Introduction to the Principles of Morals and Legislation, in The Utilitarians 19 (1961).
\end{itemize}}
building of the militarist, fascist, or Communist state—an abstraction several levels removed from individual or community happiness. The individual has no intrinsic value apart from this social contribution. In states with elected parliaments, although the value and dignity of human life is formally and rhetorically exalted, it is often subordinated to various other conceptions including a generic economic good illustrated by the fight against inflation as a basis for vetoing a job program for the unemployed; a military or political good illustrated by the fight against communism in Vietnam or by the need to reassert national power and prestige in the Mayaguez affair. In addition, the triumph of narrow economic, party, class, cultural, and regional interests often becomes transformed into the common interest by democratic master beliefs and processes. There is thus a secular sanctification of particular interests as the general good. In this manner, special interest legislation passed by Congress is postulated as the embodiment of the common good (e.g., the Internal Revenue Code) and the policy determinations of individual Presidents (e.g., Presidents Kennedy, Johnson, Nixon, and Ford) are similarly presented as the common good (e.g., the Bay of Pigs and Vietnam). Grounded in dominant master beliefs and related social structures, authoritarian, totalitarian, and, often, republican conceptions of the common good are typically antithetical to a humanistic perspective focusing on the value and dignity of each individual human life and on the primordial importance of human rights as the ground, the starting point, and the center in determining public purpose, policy, and practice. Traditional utilitarian thought lacks this humanistic ground and tends to sacrifice individuals and groups to imperial conceptions of the common interest. This justification in the name of the common good illustrates the dynamic power and danger of abstract thinking not grounded in a humanistic foundation.

**Utilitarian Approaches to Punishment**

The basic differences in premise, purpose, and form between utilitarian and humanistic thinking extend to approaches to punishment. Within the utilitarian framework, there is a variety of approaches. Richard Brandt, who advocates a utilitarian approach to punishment, explains a typical position:

Traditional utilitarian thinking about criminal justice has found the rationale of the practice, in the United States, for example, in three main facts . . . . (1) People who are tempted to misbehave, to trample on the rights of others, to sacrifice pub-
lic welfare for personal gain, can usually be deterred from misconduct by fear of punishment, such as death, imprisonment, or fine. (2) Imprisonment or fine will teach malefactors a lesson; their characters may be improved, and at any rate a personal experience of punishment will make them less likely to misbehave again. (3) Imprisonment will certainly have the result of physically preventing past malefactors from misbehaving, during the period of their incarceration.

In view of these suppositions, traditional utilitarian thinking has concluded that having laws forbidding certain kinds of behavior on pain of punishment, and having machinery for the fair enforcement of these laws, is justified by the fact that it maximizes expectable utility. 117

The utilitarian justification of punishment is oriented to a specific theme and purpose: the prevention of crime. For Jeremy Bentham, the "first object . . . is to prevent, in as far as it is worth while, all sorts of offenses;"118 this principal object is accomplished by example. Bentham also described "the three inferior objects": "reformation, disablement and compensation."119 For Justice Holmes, prevention is the "chief and only universal purpose" of punishment.120 Given the logical thrust of utilitarian thinking, it is not startling that individual offenders are sacrificed to a conception of the common good, and to this path to it. Witness Bentham: "[T]he infliction of punishment becomes a source of security to all . . . as an indispensable sacrifice to the common safety."121 Consider Justice Holmes: "Public policy sacrifices the individual to the general good . . . ,"122 and the law "is ready to sacrifice the individual so far as necessary in order to accomplish that purpose."123 His rationale is that "[i]t is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder."124 Finally, note the Bentham-like words of J.D. Morton, former Dean of the Osgoode Law School:

119. Id. at 184.
120. O.W. HOLMES, supra note 16, at 40.
122. O.W. HOLMES, supra note 16, at 41.
123. Id. at 42.
124. Id. at 41. The assumption is that punishment is "the only way" or the best way to end robbery and murder. See text accompanying note 111 supra.
I am suggesting that all these legal tests of culpability or responsibility can only be understood in terms of finding a suitable object for the purposes of the object-lesson or trial, that is, one whom the citizens will believe to deserve the punishment imposed.

... "[G]uilty" means "suitable for demonstration purposes" and that on no other basis can meaning be attributed to the rules governing criminal responsibility.125

Morton believes this demonstration is primarily "to preserve the normal citizen from breach of society's criminal laws . . . . Inasmuch as the criminal is involved in this process, he is no more than an essential means to this end. He is the 'indispensable sacrifice to the common good.'"126 Morton also characterizes this "means," or "suitable object for the object-lesson," as a "scapegoat."127

This willingness to sacrifice the individual for a conception of general utility ("a clear surplus of value") even extends to the punishment of the wives and children of offenders in exceptional situations. H.L.A. Hart, in commenting upon the occasional historical resort to punishment of offenders' wives and children, states in Punishment and Responsibility, published in 1968: "In extreme cases many might still think it right to resort to these expedients but we should do so with the sense of sacrificing an important principle."128

The issue has more than historical interest. Under Hitler and Stalin, members of families could be punished for certain crimes committed by a family member. This willingness to sacrifice individual human rights in exceptional situations extends to the sacrifice of an innocent. H.L.A. Hart comments on the hypothetical situation where a "negro might be sent to prison or executed on a false charge of rape in order to avoid widespread lynching of many others":

[B]ut a system which openly empowered authorities to do this kind of thing, even if it succeeded in averting specific evils like lynching, would awaken such apprehension and insecurity that any gain from the exercise of these powers would by any utili-

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125. J.D. MORTON, supra note 121, at 40-41.
126. Id. at 52 (quoting J. BENTHAM, RATIONALE OF PUNISHMENT).
127. Id. at 39, 40.
tarian calculation be offset by the misery caused by their existence. But official resort to this kind of fraud on a particular occasion in breach of the rules and subsequent indemnification of the officials responsible might save many lives and so be thought to yield a clear surplus of value.\textsuperscript{129}

By implication, then, this leading contemporary theorist finds scapegoating an innocent justifiable in exceptional situations if the process is shrouded in the fog of state authority. The core of this utilitarian approach to punishment is to use the ordinary offender as an “example,” as a sacrifice to the “general good,” and as a “scapegoat” and “suitable object for demonstration purposes.” The offender is objectified: He becomes a hostage to society’s utilitarian purpose in crime prevention. In utilitarian thought concerning punishment, there are at least three forms of objectification and scapegoatism. First, in extreme cases, a few utilitarian thinkers believe that an individual who is innocent—(e.g., a wife or child of an offender, or a Black)—may be punished as a scapegoat. Second, Bentham stresses that the “principle object” of punishment is the general “example” so that the ordinary offender is punished not because of considerations of legal justice, but to prevent crime by others. Though presumably guilty, such an offender is nevertheless a scapegoat because his punishment is determined not by his fault but by the fault of others. His punishment is justified because of their violation, actual or threatened. Third, an offender may also be used as a scapegoat in another sense: for a special “example” if he or she commits a type of crime where there is ordinarily neither certainty nor celerity of punishment. Consider Bentham:

To enable the value of the punishment to outweigh that of the profit of the offense, it must be increased, in point of magnitude, in proportion as it falls short in point of certainty . . . . Punishment must be further increased in point of magnitude, in proportion as it falls short in point of proximity.\textsuperscript{130}

Justice Holmes vividly defends an objectified status for the offender. To the objection that the offender is treated as a “thing and the like”\textsuperscript{131} and that he is used “as a tool to increase the general welfare at his own expense,”\textsuperscript{132} Justice Holmes replies that this

\textsuperscript{129} Id. (emphasis added) (emphasis deleted).
\textsuperscript{130} Bentham, An Introduction to the Principles of Morals and Legislation, in THE UTILITARIANS 170, 173-74 (emphasis deleted).
\textsuperscript{131} O.W. HOLMES, supra note 16, at 38.
\textsuperscript{132} Id. at 40.
“course is perfectly proper; but even if it is wrong, our criminal law follows it, and the theory of our criminal law must be shaped accordingly.” 133 Justice Holmes frankly acknowledges that “justice to the individual is rightly outweighed by the larger interests on the other side of the scales.” 134

Morris Cohen responds forcefully to the objection to deterrence as a violation of legal justice: “Kant and others have urged that it cannot be just to punish anyone except for a wrong actually committed; and much less can it be just to punish Peter in order to prevent Paul from attempting any crime.” 135 Using some of Justice Holmes’s examples, Cohen replies:

Why should we not inflict pain on A if that is the only way of securing the safety of the society of which he is a part, or preserving the general conditions of desirable life on which he depends for all his goods? 136 We tax an old bachelor for the support of the education of other men’s children and we conscript our youth and put them in positions where they will be killed in order that others shall be able to live. Consider the case of the typhoid carrier Mary who spreads the germs of that dreadful disease wherever she goes. Do we not by detaining her and limiting her freedom in effect punish her for her misfortune rather than for her fault? We are at all times inflicting pains on innocent people in order to promote the common good, in time of peace, as well as in war. . . . We are all members of a common body and the health of the entire body may demand inflicting pain or even the cutting off of some member. 137

Again we are reminded of Justice Holmes’s words: “Public policy sacrifices the individual to the general good. It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder.” 138

133. Id. The shaping of criminal law theory to accord with practice is a conspicuous example of imperial theorizing: The function of theory is to justify practice, not to provide a basis for judging it.

134. Id.


136. The assumption is that punishing the offender is “the only way” to secure “the safety of society.” From a status quo perspective, it is “the only way.” Other ways, rooted in a minimum anthropological, sociological, or social psychological perspective could raise disquieting issues about core values and practices (e.g., glorification of aggressiveness, violence, and greed).


A critique of these varied utilitarian approaches to punishment requires a basis for assessment.

Criteria of a Justification of Punishment

Any analysis of the validity of traditional justifications of punishment—retribution and general deterrence—presupposes the resolution of an underlying issue: How do we judge a purported justification as valid or invalid? Before we can judge particular justifications, we must first confront what we mean by a justification. What should be its nature and scope? What standards do we use in judging? H.L.A. Hart suggests an initial framework: Theories of punishment are normative rather than empirical in character.

Theories of punishment are not theories in any normal sense. They are not, as scientific theories are, assertions or contentions as to what is or what is not the case; the atomic theory or the kinetic theory of gases is a theory of this sort. On the contrary, those major positions concerning punishment which are called deterrent or retributive or reformatory "theories" of punishment are moral claims as to what justifies the practice of punishment—claims as to why, morally, it should or may be used.139

Stated differently, theories of punishment are prescriptive, not simply descriptive or explanatory or interpretive. Theories of punishment are moral claims dealing with a problem in society and history, not simply an abstract metaphysical or theological problem.

What are the specific criteria to determine the validity of such a moral claim? Any justification of a policy and "practice of punishment" requires that there first be established the justice of a penal code which provides the framework for punishment. This requires a particular ethical assessment (e.g., is the code validated by humanistic master beliefs); a particular social and political assessment (e.g., does the code fairly distribute prohibitions in the community—is it a weapon of dominant ruling elites); a particular legal assessment (e.g., is it procedurally fair); and the recognition of an evolving historical and cultural context within which all this varied assessment occurs.

Second, any justification of punishment requires that the role assigned to the penal law system be addressed. This is the "how much" question—for example, "how much" crime control is to be sought as an ideal or objective and why.

Third, a particular penal law system and its role are not simply

139. H.L.A. HART, supra note 13, at 72 (emphasis deleted).
formal policy and “law-in-the-books”: They are also “law-in-action.” A justification of punishment must validate or invalidate punishment on the formal, institutional level and as it is actually practiced by police, court, and prison personnel. This includes the imposition of punishment against individuals.

Lastly, a justification of the policy and “practice of punishment” must be an integral part of a more general theory of criminal law. Such a theory should specify a basis for validating or invalidating the justice of substantive and procedural penal provisions, the appropriateness of a response to the “how much” question, and the fairness of “law-in-action.” Resolution of these issues is essential to justify punishment and to fulfill other functions of the criminal law, such as its central role in the preservation of liberty and its role in relation to economic and social rights. To fulfill these functions, a theory of criminal law must be rooted in political-legal theory. Historically and currently, the criminal law has been an integral part of the total web of institutions and practice through which communities function. It is artificial and distorting to separate a theory of criminal law from theories justifying the total web of institutions and practice. As Helen Silving notes, the “divergent criminal law philosophies . . . are in the last analysis philosophies of government.”

They should be explicitly linked to the more general philosophies to which they are related (e.g., capitalist, Marxist, or religious), and they should be judged by their conformity to or their departure from humanistic master beliefs.

A Humanistic Critique

Humanists reject general deterrence in its central organizing principles: its concept of the individual offender and its concept of the relationship between the offender and the state. Offenders should not be objectified as hostages to the state’s political purpose; they are not “an indispensable sacrifice to the common safety”;

they are not a “tool to increase the general welfare at [their] own expense”;

and they are not a “suitable object” for “demonstration purposes.” All of this is classic imperial thought: the individual objectified as a means to achieve state purpose.

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141. See note 121 supra and accompanying text.
142. See note 132 supra and accompanying text.
143. See note 125 supra and accompanying text.
Humanism offers precisely opposing organizing principles in viewing the individual and in limiting the state's use of individuals to increase "aggregate social welfare." In the words of John Rawls:

It has seemed to many philosophers, and it appears to be supported by the convictions of common sense, that we distinguish as a matter of principle between the claims of liberty and right on the one hand and the desirability of increasing aggregate social welfare on the other; and that we give a certain priority, if not absolute weight, to the former. Each member of society is thought to have an inviolability founded on justice, or, as some say, a natural right, which even the welfare of everyone else cannot override. Justice denies that the loss of freedom for some is made right by a greater good shared by others . . . . Therefore in a just society the basic liberties are taken for granted and the rights secured by justice are not subject to political bargaining or to the calculus of social interests.\(^{144}\)

C.S. Lewis comments:

There is no sense in talking about a "just deterrent" . . . . We demand of a deterrent not whether it is just but whether it will deter . . . . Thus when we cease to consider what the criminal deserves and consider only what will . . . . deter others, we have tacitly removed from him the sphere of justice altogether; instead of a person, a subject of rights, we now have a mere object . . . .\(^{145}\)

There is an irreconcilable difference between the requirements of a utilitarian-based prevention and the requirements of legal justice. They are in fundamentally different realms of meaning, purpose, and social organization. General prevention does not violate justice—it displaces justice.

Humanists reject all forms of objectification and scapegoatism. Innocents should not be scapegoated, even in extreme cases, not even to gain a clear surplus of value.\(^{146}\) Offenders should not be scapegoated because of the threat posed by others, whether actual or potential. An offender should not be scapegoated because he or she commits a type of crime where there is ordinarily neither "certainty nor celerity of punishment." Institutional ineffectiveness in producing certainty and celerity should not be compensated for by


\(^{146}\) See H.L.A. Hart, supra note 13, at 12.
scapegoating the offender who is caught and convicted. Lastly, individuals should not be scapegoated as a way to remedy problems that are rooted in systemic realities.

The specific analogies cited by Justice Holmes and Morris Cohen to justify using deterrence of the individual for social benefit present examples which are distinguishable. First, the example of the conscripted soldier assumes that conscription is valid. Conscription for an aggressive war, aside from ethical considerations, is invalid because such wars are illegal since the Nuremberg Judgment and the United Nations Charter. Conscription in a humanistic society for a defensive war should be unjustified and unnecessary because masses of citizens would volunteer to serve. Conscription would be abolished as a classic weapon of the imperial state. Second, the example of the family whose home is being taken for a road or bridge assumes that the road or bridge will serve a public interest. Experience indicates that it may serve mostly the interest of road or bridge builders and their political and union supporters. If the road or bridge is justified, the family whose home is being taken is being used. That must be acknowledged. But the family is not used as a scapegoat and liberty is not at stake. The payment of compensation, though it may be insufficient for what is lost in family roots and meaning, expresses the completely different use of the family. The compensation is an effort to minimize or eliminate any economic loss. The family may nevertheless be hurt, but it is not being scapegoated or even punished for a wrong. Third, Typhoid Mary is being used for a general good, but she, too, is certainly not being scapegoated or punished for a wrong. She is not the subject of condemnation. Indeed, the Constitution forbids punishment for a status (e.g., being a drug addict). In addition, there may be medical alternatives to confinement.

The state's use of offenders as scapegoats differs markedly from the state's subordination of individual interests to the claimed common interest in other situations. It is one thing to argue that individual interests may be fairly subordinated to a legitimate general interest. It is another thing to argue that an individual offender may be used as a scapegoat to achieve such an interest. The traditional formulation of this issue—whether or not a person may be treated merely as a means or must be treated as an end also—is rejected as too gross. This formulation masks the sharply different ways in which individual interests may be sacrificed to claimed

common interests and the political and ethical validity of these diverse interests and sacrifices.

Humanists reject general deterrence on both institutional and individual levels. On the institutional level, humanists reject general deterrence as the correct "primary and essential postulate" of the criminal law system, as the correct "General Justifying Aim of the practice of punishment,"¹⁴⁸ and as deserving a "central position in the philosophy of criminal law."¹⁴⁹ General deterrence provides no autonomous purpose or justification for the institutional criminal law process. Any general preventive empirical effect emerging from the operations of a criminal law system, including any "moral and social-pedagogical influence,"¹⁵⁰ is ancillary and is not a justification. Society must explore other paths to cope with its crime problems. The pursuit of the "aggregate social good" must not sacrifice the "rights secured by justice" to "political bargaining or to the calculus of social interests."

On the individual level, general deterrence provides no autonomous purpose or justification for sentencing the offender. An offender has a right to legal fairness, including a right to be free from use as a scapegoat for the achievement of a general social purpose. This principle should be embodied in practice. Each person has the right to be free from punishment except for wrongs he or she has committed. Violation does not make a person fair prey to suffer for the wrongs which others have committed, are committing, or might commit. The individual should not be available for such use.

No punishment should be based or extended on general deterrence considerations because that would ignore or displace considerations of justice. As Henry M. Hart states: "[The] very ideal of justice is offended by seriously unequal penalties for substantially similar crimes . . . ."¹⁵¹ Yet general deterrence inevitably causes unequal punishment because of the shifting political needs of the state for crime control. The use of the offender to meet these shifting needs adds a sharp political dimension to punishment.

This highly politicized sentencing is incompatible with one of the most basic principles of criminal law jurisprudence: Each person is responsible for what he or she does; guilt is personal. Punishment should not be collectively determined. This politicized

¹⁴⁸. See generally text accompanying notes 58-93 supra.
¹⁴⁹. See generally id.
¹⁵⁰. See text accompanying note 9 supra.
sentencing is also lawless. As Andenaes states, although the sentence imposed is within the specified sentencing framework for a particular crime (usually providing substantial discretion), "such sentences are not, in fact, applications of previously established norms. The judge establishes a norm to suit the situation." As Andenaes points out, this ad hoc approach exists whenever a sentence is imposed on a deterrence rationale. This form of ad hoc politicized sentencing seems to reflect traditional political-legal theory according to which rights flow from our membership in the political society; this justification is a social contract approach. When we commit a crime, we place ourselves outside the society. We are metamorphosed from our position as persons with many rights to what Kant described as a "condition" of penal "slavery" or, in traditional legal language, to a condition of being "a slave of the state" with no legal rights. This political-legal approach has changed with the rejection of the slave of the state doctrine and with the recognition that offenders have a range of constitutional rights, whether on parole, on probation, or in prison. It is time to effectuate the principle that both guilt and punishment are personal and to forbid this lawless and highly politicized sentencing. Our constitutional imperatives of equal protection and due process, and our prohibition of cruel and unusual punishment, should bar this sacrifice of the individual by means of the violation of basic principles of criminal law jurisprudence.

Finally, general deterrence is not a justification of punishment from a humanistic standpoint. When viewed narrowly, general deterrence thinking presupposes or ignores the validity of the underlying substantive penal code; the fairness of the procedural code; the role of enforcement of both codes in fostering selective societal interests; and the response to the question of "how much" social control is to be sought by punishment. For a valid justification, all of these issues must be addressed. When viewed more broadly within a utilitarian framework, general deterrence thinking can provide a basis for addressing these issues. That basis, however, is

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152. Andenaes, supra note 7, at 983.
153. Id. at 982.
a conception of utility exemplified in "dominant master beliefs and social structures" in a "particular historical, ideological, and material context." The validity of this conception is assumed, not addressed, and it usually serves the interests of dominant elites. General deterrence thinking, based on a conception of utility, is, therefore, an "engine" of "justification." It can easily justify substantive and procedural penal codes, the use of both codes in serving dominant elites, and a response to the "how much" question. Indeed, these codes and practices themselves exemplify dominant master beliefs and related interests. General deterrence thinking can provide a basis for invalidating practice which is inconsistent with the dominant beliefs, but it cannot invalidate these beliefs because they have an a priori status: They are assumed to be valid. General deterrence, even when viewed within an utilitarian framework, therefore, is a rationalization of status quo practice and is not a justification of punishment from a humanistic point of view. It provides a defective basis for assessing and judging a theory and practice of punishment.

PART IV

RETRIBUTIVE PUNISHMENT

The major expositions of retribution in modern philosophy are made by Kant and Hegel. Both theories are presented and critiqued from a humanistic perspective. In addition, popular forms of retribution are briefly assessed.

Kant's Retribution

Kant, one of the most influential of modern philosophers, urges a distinctive and provocative form of retribution.

Punishment is the right of the "supreme power" of the state "to inflict pain on a subject in consequence of his having committed a crime."\(^\text{157}\) This supreme power (or suzerain) himself cannot be punished.\(^\text{158}\) The grounds for punishment of subjects is in what the subject deserves for committing a crime, not in utility, either for the offender or for others.\(^\text{159}\) A person "can never be manipulated merely as a means to the purposes of someone else."\(^\text{160}\)

\(^{158}\) Id.
\(^{159}\) Id. at 100.
\(^{160}\) Id.
person's "innate personality" prohibits using him in a quest in the "winding paths of a theory of happiness." In contrast, "punishment is a categorical imperative [for] [i]f legal justice perishes, then it is no longer worthwhile for men to remain alive on this earth." 161 The decisive principle and standard of legal justice is "equality": the "principle of not treating one side more favorably than the other." 162 In Kant's words: "[A]ny undeserved evil that you inflict on someone else among the people is one that you do to yourself. If you vilify him, you vilify yourself; if you steal from him, you steal from yourself; if you kill him, you kill yourself." 163 Kant's meaning is that a theft "makes the ownership of everyone else insecure," and hence the thief "robs himself . . . of the security of any possible ownership." 164 By implication, the same result occurs in instances of assault, murder, and other crimes. Kant concludes that, "[o]nly the Law of retribution (jus taliones) [administered by a court] can determine exactly the kind and degree of punishment." 165

Kant's approach to punishment is expressed vividly in his famous example of the island society which has decided to dissolve itself, with the people dispersing to other places: "[T]he last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the blood-guilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment . . . ." 166

Kant's retributive theory of punishment is an integral part of his political and legal philosophy. Professor John Ladd, a philosophical interpreter and translator of Kant, describes Kant as "the philosophical defender par excellence of the rights of man, of his equality, 167 and of a republican form of government." 168

Strong arguments can be mustered, as Ladd does, for this characterization. The dignity of the individual is a central element in Kant's thinking, giving the person an intrinsic worth that is

161. Id.
162. Id. at 101.
163. Id.
164. Id. at 102.
165. Id. at 101.
166. Id. at 102.
167. Kant's notion of equality has sweeping exceptions: apprentices, servants, minors, women, private tutors, sharecroppers, and children born out of wedlock—all of those who "must be under the orders of protection of other individuals." Id. at 79.
168. Ladd, Introduction to id. at ix.
“‘above all price and admits of no equivalent.’”\textsuperscript{169} From this worth flows Kant’s principle of the equality of man, the innate right to freedom, and hence, legal and political rights. Morality and law are founded on individual rights, not social utility; violation of the rights of men, therefore, cannot be justified on the basis of “the good of mankind.” The end does not justify the means.\textsuperscript{170} An opponent of slavery, war and violence, and revolution, Kant believed that freedom and peace are requirements of justice.

Kant’s statement that “any undeserved evil that you inflict on someone else . . . is one that you do to yourself”\textsuperscript{171} seems to be a reflection of his idea that each person gives the moral law to himself—that each of us is a sovereign legislator in the moral realm. This statement also seems to express Kant’s categorical imperative: “Act only according to that maxim by which you can at the same time will that it should become a universal law.”\textsuperscript{172} This, according to Kant, means practically that one should, “[a]ct so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.”\textsuperscript{173} Theft, robbery, assault, and murder treat the victim as a means, disregarding the victim’s dignity and worth, and violate the victim’s legal rights to negative freedom and peace (i.e., to be free from such intrusions). The evil done to the perpetrator when he victimizes another person arises from violation of the categorical imperative: “[I]f you steal from him, you steal from yourself; if you kill him, you kill yourself.”\textsuperscript{174} Given the centrality of these principles in Kant’s social philosophy, his emphasis upon “punishment” as a “categorical imperative”\textsuperscript{175} seems more understandable. Juridical punishment is the realization of these ethical and political principles; the evil done to another is paid back to the perpetrator.\textsuperscript{176} The failure of legal justice imposes a “blood-guilt”—in the case of

\textsuperscript{169}. Id. (quoting I. Kant, Foundations of the Metaphysics of Morals 53 (L. Beck trans. 1959)).


\textsuperscript{171}. I. Kant, The Metaphysical Elements of Justice 101 (J. Ladd trans. 1965).

\textsuperscript{172}. Ladd, Introduction to id. at x (quoting I. Kant, Foundations of the Metaphysics of Morals 39 (L. Beck trans. 1959)).

\textsuperscript{173}. Id. (quoting I. Kant, Foundations of the Metaphysics of Morals 47 (L. Beck trans. 1959)).

\textsuperscript{174}. I. Kant, The Metaphysical Elements of Justice 101 (J. Ladd trans. 1965).

\textsuperscript{175}. Id. at 100.

\textsuperscript{176}. Id. at 100-01.
murder—upon all those who are responsible for the failure.\textsuperscript{177} And the rejection of utilitarian justifications of punishment manifests Kant's general rejection of utilitarian justifications of law and morality.

Kant's retributive theory of punishment is centrally related to a paradoxical dimension of his political principles: his role as a philosophical defender of the politically powerful. In Kant's words, "there is no right of sedition . . . much less a right of revolution . . . . It is the people's duty to endure even the most intolerable abuse of supreme authority. The reason . . . is that resistance to the supreme legislation can itself only be unlawful . . . as destroying the entire lawful constitution . . . ."\textsuperscript{178}

While there is no right of revolution\textsuperscript{179}—indeed it is characterized as a "crime of the people"\textsuperscript{180}—

if a revolution has succeeded and a new constitution has been established, the illegitimacy of its beginning and of its success cannot free the subjects from being bound to accept the new order of things as good citizens, and they cannot refuse to honor and obey the suzerain . . . who now possesses the authority.\textsuperscript{181}

Kant is relentless in insisting on the command, "[o]bey the suzerain who has authority over you," even asserting that "it is in itself punishable to inquire publically into the title of his acquisition."\textsuperscript{182} When challenged by a friendly critic for failing to distinguish between the "Idea of sovereignty" and a person who has "imposed himself upon me as a lord,"\textsuperscript{183} including the prohibition of inquiring into "who has given him the right to issue commands to me,"\textsuperscript{184} Kant reaffirmed his position.\textsuperscript{185}

Professor Ladd provides insight into the Kantian reasoning:

Every actual state represents to a greater or lesser degree of perfection the Idea [ideal] of the state; in Plato's terms, it "par-

\begin{tabular}{l}
\textsuperscript{177} See generally id. at 102. \\
\textsuperscript{178} Id. at 86. \\
\textsuperscript{179} Id. at 88. Nevertheless, Kant was a fervent supporter of the French Revolution, and particularly of the ideals embodied in the Declaration of the Rights of Man. \\
\textsuperscript{180} Id. at 89. \\
\textsuperscript{181} Id. at 140. \\
\textsuperscript{182} Id. at 139. \\
\textsuperscript{183} Id. at 130. \\
\textsuperscript{184} Id. at 138. \\
\textsuperscript{185} Id. at 138-41.
\end{tabular}
ticipates in” or “imitates” the Idea of the state, the archetype. ... All our political and legal obligations have their source in the Idea, and so we are obligated to obey the political authorities in actual states because, however imperfectly, they still represent the Idea.\(^{186}\)

Kant’s defense of the politically powerful rests on what he sees as the alternative: a Hobbesian state of nature involving war and violence or a constant threat of war and violence.\(^{187}\) In constituting themselves a state, a people have “completely abandoned [their] wild, lawless freedom [in the state of nature] in order to find [their] whole freedom again undiminished in a lawful dependency, ... in a juridical state of society.”\(^{188}\) The state of nature is repugnant to Kant’s principle of the innate right to liberty and, hence, all have the duty to leave the state of nature and join a juridical society.\(^{189}\)

Kant’s retributive theory of punishment is rooted in the belief, as Ladd expresses it, that “[a]ny act of violence or lawlessness ... represents a return to the state of nature and is to be deprecated as a crime of injustice.”\(^{190}\) Crime provides both a sufficient and necessary condition of punishment. Crime is illegitimate coercion, and punishment is legitimate coercion. Legitimate coercion is “consistent with the freedom of everyone in accordance with universal laws.”\(^{191}\) Within this framework, Kant’s emphasis that “[t]he law concerning punishment is a categorical imperative”\(^{192}\) is a logical expression of these principles; so is his insistence that “[i]f legal justice perishes, then it is no longer worth while for men to remain alive on this earth [and thus they will return to the state of nature].”\(^{193}\) His insistence on executing “the last murderer remaining in prison” in the dispersing island society may also be interpreted as upholding the “Idea” of the “juridical state of society.”

Key elements in Kant’s retributive theory of punishment (right-hand column) rest upon, \textit{inter alia}, key elements in his polit-

\begin{itemize}
  \item \(^{186}\) Ladd, \textit{Introduction} to \textit{id.} at xxx-xxxi.
  \item \(^{187}\) \textit{Id.} at xx.
  \item \(^{188}\) I. Kant, \textit{The Metaphysical Elements of Justice} 81 (J. Ladd trans. 1965).
  \item \(^{189}\) Ladd, \textit{Introduction} to \textit{id.} at xx.
  \item \(^{190}\) \textit{Id.} at xxi.
  \item \(^{191}\) \textit{Id.}
  \item \(^{192}\) I. Kant, \textit{The Metaphysical Elements of Justice} 100 (J. Ladd trans. 1965).
  \item \(^{193}\) \textit{Id.}
\end{itemize}
HUMANISTIC PERSPECTIVE ON CRIMINAL LAW

A. Law and morality are based on a priori general principles of justice, not on utility.

B. A Hobbesian view of natural human behavior (wild and violent). 194

C. A Hobbesian view of social life in the “state of nature” with war and violence or threat thereof (where, for example, “killing another can never be called murder”).

D. Organized political society—the state—offers the only escape from dismal life in a state of nature.

E. The state is the realizer of rights, the vindicator of wrongs, and the guarantor of peace and freedom.

F. “Act only according to that maxim by which you can at the same time will that it should become a universal law.” 195

G. The laws are identified with justice.

Punishment is based on principles of legal justice, not on utility. 194

“If legal justice perishes, then it is no longer worth while for men to remain alive on this earth.” 195

“If legal justice perishes, then it is no longer worth while for men to remain alive on this earth.”

Crime represents a return to the abhorrent “state of nature” and creates a sufficient and necessary condition for punishment to prevent this return.

Punishment is a categorical imperative for the state. 196 Failure to impose punishment imposes a “bloodguilt” (in the case of murder). 197

“[A]ny undeserved evil that you inflict on someone else . . . is one that you do to yourself. . . . Only the Law of retribution (jus taliones) can determine exactly the kind and degree of punishment.” 198

Criminal law, legal justice, and desert are identified with justice.

(continued on page 894)

199. Ladd, Introduction to id. at x (quoting I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 39 (L. Beck trans. 1959)).
201. Id. at 33.
H. There is a focus on the violence and lawlessness of subjects. Punishment provides a means for domination by the "supreme power"; only subjects may be punished, not the "supreme power." 202

A Critique of Kant's Retribution

Kant's retributive theory of punishment is an integral part of his political philosophy—his world view and its requisite presuppositions. 203 One is reminded of Helen Silving's characterization of "divergent criminal law philosophies . . . which are in the last analysis philosophies of government," 204 or at least partial philosophies of government. Kant's punishment theory rests, in substantial part, on his theory of human nature and behavior ("natural violence"); 205 on his theory of social life in a "state of nature" ("[m]en . . . can never be safe against violence from each other"); 206 on his theory of a powerful state (a "supreme power") as the realizer of individual rights and the creator and guarantor of peace and freedom; and on his theory of law which identifies it with "justice." Reject these presuppositions and the core idea of punishment as a "categorical imperative" topples. If one rejects Hobbesian notions of natural human behavior in a state of nature (say on philosophical, historical, and anthropological grounds), the idea of crime as a threat of a return to a state of nature makes no sense. If one views the state not as the realizer of individual rights and as the creator and guarantor of peace and freedom, but as their principal violator, historically and currently, by way of war, slaughter, genocide, and other oppression, the one-sidedness of Kant's punishment theory—exempting the "supreme power" and concentrating on the crimes of subjects—is a travesty. The state does not represent the "holiest right and justice": 207 It is frequently a Leviathan whose officials are instrumental in the worst horrors.

202. Id. at 90.
203. For another view of Kant's political and legal philosophy, see W. FRIEDMANN, LEGAL THEORY 157-61 (5th ed. 1967).
204. Silving, supra note 140, at 404.
206. Id.
To postulate desert and *jus taliones* as principles of punishment, while restricting punishment to subjects, exposes a core function of these principles in an ideology and apparatus of state domination. Outside of the state framework, even "killing another . . . can never be called murder [in the state of nature]," and the existence as well as the destruction of an out of wedlock child can be ignored. The reason: The "child has crept surreptitiously into the commonwealth" and is "outside the protection of law." If one sees law partly as a traditional institutional means in colonialism, militarism, racism, and classism, then criminal law, legal justice, and desert are not automatically identified with the archetype of, or even an imperfect representation of, the idea of Justice—either in practice or in theory. Even Kant's antiutilitarian stance seems like a mask, which obscures his instrumental view of punishment as a counter to the threat posed by crime of a return to the state of nature. Despite Kant's statement that punishment is a good in itself, he does not advocate punishment simply for its own sake or simply for "justice," but to preserve the "juridical society." Moreover, Kant's emphasis on equality provides a dismal basis for thinking about punishment because of his sweeping exceptions. Lastly, despite Kant's emphasis on equality, crime is viewed as simply individual in character. This reductionist view of crime leads inevitably to a similar view of punishment: Convicted offenders bear the entire responsibility for crime, a scapegoatist punishment. With the rejection of these core principles in Kant's approach, his punishment theory collapses as one-sided, state-centered, reductionist, and scapegoatist.

Kant's punishment theory is an expression of the paradox of his political and legal analysis: The "philosophical defender par excellence of the rights of man, of man's equality, and of a republican form of government," is at the same time a proponent of a "marked authoritarianism"; the fervent supporter of the French Revolution is an unremitting foe of revolution, this "crime of the people"; the apostle of equality is an advocate of inequality. Kant's towering stature in modern philosophy should not rest on this political and legal analysis. Clearly, Kant's philosophy provides insight for our era, but no philosophy rooted in the past can provide sufficient guidance for the unfolding present.

208. *Id.* at 106.
209. *Id.*
Hegel's Retribution

Like Kant, Hegel has a distinctive and influential theory of retributive punishment. Hegel believes that crime is the coercive infringement of "right." Considerations of deterrence and reformation presuppose the fact that punishment "is inherently and actually just." For Hegel, the "only important things are, first, that crime is to be annulled, not because it is the producing of an evil, but because it is an infringement of the right as right, and secondly, the question of what that positive existence is which crime possesses and which must be annulled." Hegel explains that "[t]he sole positive existence which the injury possesses is that it is the particular will of the criminal." Hence, to penalize "this particular will . . . is to annul the crime, which otherwise would have been held valid, and to restore the right."

A crime is "the action of a rational being and this implies that it is something universal and that by doing it the criminal has laid down a law which he has explicitly recognized in his action and under which in consequence he should be brought as under his right." Punishment is "a right established within the criminal himself, i.e., in his objectively embodied will, in his action," and thus "by being punished he is honoured as a rational being,

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211. Hegel's full definition of crime and the criminal law is:

The initial act of coercion as an exercise of force by the free agent, an exercise of force which infringes the existence of freedom in its concrete sense, infringes the right as right, is crime—a negatively infinite judgment in its full sense, whereby not only the particular (i.e. the subsumption under my will of a single thing . . .) is negated, but also the universality and infinity in the predicate 'mine' (i.e. my capacity for rights). Here the negation does not come about with the co-operation of my thinking (as it does in fraud . . .) but in defiance of it. This is the sphere of criminal law.

G. Hegel, Philosophy of Right 67-68 (T. Knox trans. 1942) (footnotes omitted).

Friedmann summarizes Hegel's conception of crime and punishment as follows:

[I]n so far as the individual is a being of impulses, private interests, etc., he may oppose himself to the universal will. This results in a wrong, of which the greatest is crime. By committing a crime, the individual openly negates the right, and right must restore itself by negating the negation. This is done by punishment, the object of which is to restore the true will of the criminal, that is the will which is in accordance with the universal. Hegel therefore rejects the deterrent theory of punishment. The object of punishment is to restore right.


212. G. Hegel, Philosophy of Right 70 (T. Knox trans. 1942).

213. Id.

214. Id. at 69 (footnote omitted).

215. Id.

216. Id. at 70.
treated “as a harmful animal who has to be made harmless, or with a view to deterring and reforming him.” \(^{217}\)

Since Hegel defines both crime and punishment in light of his concept of right, his definition of right is vital: “In speaking of Right . . . we mean not merely what is generally understood by the word, namely civil law, but also morality, ethical life, and world-history; these belong just as much to our topic, because the concept brings thoughts together into a true system.” \(^{218}\) Hegel is clear that not all coercion is a violation of right. He “justifies civilized nations in regarding and treating as barbarians those who lag behind them in institutions which are the essential moments of the state.” \(^{219}\) Hegel is quite specific in this justification of imperialism: “Thus a pastoral people may treat hunters as barbarians, and both of these are barbarians from the point of view of agriculturists . . . . The civilized nation is conscious that the rights of barbarians are unequal to its own and treats their autonomy as only a formality . . . .” \(^{220}\) Imperialism by “civilized nations” in no “coercive infringement of a right” and hence no crime. It seems only a corollary that all those anywhere who resist this coercion may be repressed as without right.

In Hegel’s scheme, state aggrandizement is not limited to imperialism against hunters, pastoral people, and agriculturists. One state can acquire “absolute rights” against other states:

The nation to which is ascribed a moment of the Idea in the form of a natural principle is entrusted with giving complete effect to it in the advance of the self-developing self-consciousness of the world mind. This nation is dominant in world history during this one epoch, and it is only once . . . that it can make its hour strike. In contrast with this its absolute right of being the vehicle of this present stage in the world mind’s development, the minds of the other nations are without rights, and they, along with those whose hour has struck already, count no longer in world history . . . . \(^{221}\)

The exercise of “absolute right” against the nations “without rights” is no infringement of right and hence no crime. A fortiori, those people anywhere who oppose this exercise of “absolute right” have no right and may be repressed. Hegel is clear that “coercion” by

\(^{217}\) Id.

\(^{218}\) Id. at 233.

\(^{219}\) Id. at 219.

\(^{220}\) Id.

\(^{221}\) Id. at 217-18 (footnote omitted).
“heroes” who found states and make history “is a rightful coercion.” Hegel’s emphasis on war as a way of strengthening the state, quieting domestic strife, and preventing stagnation and corruption legitimizes war as an instrument of the state and of heroes who incorporate the “world mind.”

Hegel’s theory of retributive punishment is derived from his theories of history and ethics. To understand these theories, it is essential to understand Hegel’s political theory, his concept of the state. A brief sketch of these theories is therefore appropriate; however, no effort is made here to present or criticize Hegel’s general philosophy. The sketch of Hegel’s theories of history, ethics, and politics is presented with an awareness that his writings are paradoxical and extraordinarily challenging and that Hegel may have intended something different from what his writings appear to say. The interpretation presented here is not novel; it relies essentially on Ernst Cassirer’s analysis in his The Myth of the State. Whatever may have been Hegel’s intent, his writings have had specific consequences for political and legal thought. Hegel was multifaceted: an incredible philosophical genius; an admirer of Napoleon in his days of triumph (“I saw the emperor, this soul of the world”); and “the philosopher of the Prussian State.” All of these realities have influenced his writings.

In Ernst Cassirer’s description of Hegel’s theory of history, “God not only ‘has’ history, he is history”; “history is the development of Spirit in Time . . . .” In Hegel’s words:

It was for a while the fashion to profess admiration for the wisdom of God, as displayed in animals, plants, and isolated occurrences. But, if it be allowed that Providence manifests itself in such objects and forms of existence, why not also in Universal History? This is deemed too great a matter to be thus regarded. But divine wisdom, i.e. Reason, is one and the same in the great as in the little; and we must not imagine God to be too weak to exercise his wisdom on the grand scale. . . . Our mode of treating the subject is, in this aspect, a Theodicaea—a justification of the ways of God . . . .

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222. Id. at 45.
223. Id. at 210, 217, 295-96.
225. Id. at 272.
226. Id. at 292.
227. Id. at 255.
228. Id. (quoting G. Hegel, Lectures on the Philosophy of History 16 (J. Sibree trans. London 1857)).
Hegel concludes: "[W]e are thus concerned exclusively with the Idea of Spirit and in the History of the World regard everything as only its manifestation . . . ."229

Hegel, however, does not, in Cassirer's words, "seek the 'Idea' in a supercelestial space. . . . [Rather,] [h]e finds it in the actuality of man's social life and of his political struggles."230 Hegel emphasizes that "[w]hat is rational [the Idea] is actual and what is actual is rational. . . . [N]othing is actual except the Idea . . . ."231

"[T]he great thing," Hegel says, "is to apprehend in the show of the temporal and transient . . . the eternal which is present."232 Hegel's Philosophy of Right is "the science of the state" and is antithetical to any effort to "construct a state as it ought to be."233 "The state is the actuality of the ethical Idea . . . ."234 The individual, as a member of the state, acquires "objectivity, genuine individuality, and an ethical life."235 Hegel's ethical imperative for individuals follows inexorably: "[I]n an ethical community [i.e., in a state], it is easy to say what a man must do. . . . [H]e has simply to follow the well-known and explicit rules of his own situation."236

Hegel's conception of history and of ethics leads to his conception of the state. The state is the "incarnation of the 'spirit of the world,' . . . the 'Divine Idea as it exists on earth.' "237 "[M]ajesty and absolute authority" are characteristics of "the absolutely divine

229. Id. at 261 (quoting G. Hegel, Philosophy of Right 82 (T. Knox trans. 1942)).
230. Id.
231. G. Hegel, supra note 211, at 10 (footnote omitted) (emphasis deleted). Hegel, however, does not equate all empirical reality with the rational:

We must presuppose intelligence enough to know . . . . that existence is in part mere appearance, and only in part reality. In common life, any freak of fancy, any error, evil and everything of the nature of evil, as well as every degenerate and transitory existence whatever, gets in a casual way the name of reality. But even our ordinary feelings are enough to forbid a fortuitous existence getting the name of a real; for by fortuitous we mean an existence which has no greater value than that of something possible which may as well not be as be. As for the term reality, these critics would have done well to consider the sense in which I employ it. In a detailed logic I had treated amongst other things of reality, and accurately distinguished it not only from the fortuitous, which, after all, has existence; but even from the cognate categories of existence and other modifications of being.

E. Cassirer, supra note 224, at 261-62 (quoting G. Hegel, Encyclopaedia of the Philosophical Sciences, § 6).
232. G. Hegel, supra note 211, at 10.
233. Id. at 11.
234. Id. at 155.
235. Id. at 156.
236. Id. at 107 (emphasis deleted).
237. E. Cassirer, supra note 224, at 263.
principle of the state.” In the state, then, in Cassirer’s words, there is “the supreme and most perfect reality,” an unprece-
dented political theory. The state “has supreme right against the
individual, whose supreme duty is to be a member of the state.”
The origin of the state is not the social contract; its end is not the
protection of “personal freedom” and “property.” Neither heroes
who found states and make history nor the state itself is bound by
moral limitation; “heroic coercion is a rightful coercion.”

A Critique of Hegel’s Retribution

The contrast below portrays the antithetical nature of the
Hegelian theories sketched above and of humanistic ideas pre-
viously presented.

Hegel

1. The individual, as a member of the
state, acquires “objectivity, genu-
ine individuality, and an ethical
life.”

Humanism

Individuals realize their individuality in
an ethical life by fulfilling their poten-
tialities within the context of supportive
institutions and culture.

238. G. Hegel, supra note 211, at 157. Paradoxically, the “absolute authority”
has some limitation. In Cassirer’s words:

There is, however, one point in which the difference between Hegel’s
doctrine and modern theories of the totalitarian state becomes obvious.
While it is true that Hegel exempted the state from all moral obligations and
declared that the rules of morality lose their pretended universality when
we proceed from the problems of private life and private conduct to the
conduct of states, still there remain other bonds from which the state could
not be released. In the Hegelian system the state belongs to the sphere of
the “objective mind.” But this sphere is only one element or moment in the
self-actualization of the Idea. In the dialectic process it is transcended by
that other sphere which, in Hegel’s language, is called the realm of the “Ab-
solute Idea.” The Idea develops itself in three moments: Art, Religion, and
Philosophy. It is clear that the state cannot treat these highest cultural goods
as mere means for its own purposes. They are ends in themselves that have
to be respected and furthered. It is true that they have no separate existence
outside the state, for man cannot develop them without having organized his
social life. Nevertheless these forms of cultural life have an independent
meaning and value. They cannot be brought under a foreign jurisdiction.
The state remains, as Hegel says, “on the territory of finitude.” Hegel could
not subordinate art, religion, and philosophy to it.

E. Cassirer, supra note 224, at 274 (footnote omitted). Cassirer also emphasizes that
Hegel “would have rejected and abhorred the modern conceptions of the ‘totalitar-
ian’ state.” Id. at 275.

239. E. Cassirer, supra note 224, at 263.
240. G. Hegel, supra note 211, at 156.
241. Id. at 156-57.
242. Id. at 245.
243. Id. at 156.
<table>
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<tr>
<th>Hegel (continued)</th>
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<td>2. The state is the “incarnation of the ‘spirit of the world,’ . . . the ‘Divine Idea as it exists on earth.’”^{244}</td>
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<td>3. The state with its majesty and absolute authority “has supreme right against the individual, whose supreme duty is to be a member of the state.”^{245}</td>
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<td>4. “The state is the actuality of the ethical Idea . . .”^{246}</td>
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<td>5. “[T]ruth . . . lies in power . . .”^{247}</td>
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<td>6. “What is rational [the Idea] is actual and what is actual is rational . . .”^{248}</td>
</tr>
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<td>7. “[P]hilosophy is the exploration of the rational, . . . the present and the actual, not the erection of a beyond, supposed to exist, God knows where . . . .”^{249}</td>
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<th>Humanism (continued)</th>
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<td>Society (culture and institutions) is viewed as a humanly-created social reality, a result of political, social, and ethical choices.</td>
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<tr>
<td>The state acquires authority insofar as it serves humanistic values. Individual duties to the state are superseded by the obligation to live in accordance with humanistic norms.</td>
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<tr>
<td>The state should be judged from the perspective of independent normative criteria.</td>
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<td>That which is true is not necessarily politically powerful; that which is politically powerful is not necessarily true.</td>
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<tr>
<td>Human beings have the responsibility to create reality by actualizing humanistic norms.</td>
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<tr>
<td>Philosophy should provide a basis for a critique of present structures and related justifications; it should be a critical philosophy concerned with what ought to be.</td>
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Cassirer states that “[a]ll the German liberals . . . saw in the Hegelian system the firmest stronghold of political reaction . . . Hegel was the most dangerous enemy of all democratic ideals.”^{250} Rudolf Haym wrote:

> [A]ll that Hobbes or Filmer, Haller or Stahl have taught, is relatively open-minded in comparison with the famous phrase regarding the rationality of the real in the sense of Hegel’s Preface [to his *Philosophy of Right*]. The theory of divine free grace and the theory of absolute obedience are blameless and innocuous in comparison with the frightful doctrine which canonizes the subsisting as such.^{251}

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^{244} E. CASSIRER, *supra* note 224, at 263.
^{245} G. HEGEL, *supra* note 211, at 156.
^{246} Id. at 155.
^{247} E. CASSIRER, *supra* note 224, at 267.
^{248} G. HEGEL, *supra* note 211, at 10 (footnote omitted) (emphasis deleted).
^{249} Id.
^{250} E. CASSIRER, *supra* note 224, at 250-51.
^{251} Id. at 251 (footnote omitted) (quoting R. HAYM, HEGEL UND SEINE ZEIT 367 (Berlin 1857)).
To view the state as the "Divine Idea as it exists on earth" is a startling political theory, a form of state worship—what Cassirer calls "an entirely new type of absolutism."252 Hegel develops this to a frightening extreme.253 This conception of the evolution of the world has no limitation in morality. That is for the individual will, not for the "Divine Idea" as it actualizes itself in the state. Nor is this state worship limited by a notion of truth: "truth . . . lies in power."254 These latter words prompt the usually restrained Cassirer to say that they "contain the clearest and most ruthless program of fascism that has ever been propounded by any political or philosophic writer."255

Hegel's "Theodicaea—a justification of the ways of God" presupposes a God whose "ways" include war, imperialism, and other forms of state domination clothed in the name of right.256 Religious humanists postulate a God without such savage ways who is manifested not in the state but in the strivings of many for a personal and social life in accordance with humanistic norms.257 Indeed, viewing the central role of the state in the horror of history, it may be that the state is the diabolic idea as it exists on earth.

Hegel's theory of retributive punishment is valid only if Hegelian presuppositions are accepted. These presuppositions include the Hegelian ideas of right and power; the idea of the state, the idea of the individual, and the relationship between them; the notion that crime is an assertion of the "particular will" against the universal will; and the notion that the sole positive existence which the injury possesses is that it is the particular will of the criminal. Reject these presuppositions, however, or even a number of them, and Hegel's retributive theory falls. Hegel's emphasis on penalizing "this particular will" to "annul the crime" presupposes the prior beliefs. So does his emphasis on punishment as a "right" of the criminal and his conception of punishment as "inherently and actually just."258 Humanists postulate a different conception of right, power, the individual, and the social order and therefore a dif-

252. Id. at 263.
254. E. Cassirer, supra note 224, at 267.
255. Id.
256. Id. at 255.
258. Despite this language, the Hegelian retributive theory seems quite utilitarian within the Hegelian world view: It is punishment for justice as defined in the context of Hegel's conception of right, history, the state, and ethics.
different conception of crime and punishment. Clearly, humanistic thought is also incompatible with the reductionism and scapegoatism which is inherent in regarding the phenomenon of crime and the responsibility for it solely on an individual level. Nevertheless, twentieth century humanists can value Hegel’s insistence that “punishment” must first be “inherently and actually just” and his emphasis on right, though the meaning of justice and right is quite different from a human rights point of view.

A Contemporary View of Retribution

A forceful presentation of contemporary retribution is offered by Herbert Morris, an influential advocate:

Let us suppose that men are constituted roughly as they now are, with a rough equivalence in strength and abilities, a capacity to be injured by each other . . . a limited strength of will, and a capacity to reason and to conform conduct to rules. . . . The core rules of our criminal law . . . [provide] benefits for all persons. . . . The rules establish a mutuality of benefit and burden. . . .

. . . Fairness dictates that a system in which benefits and burdens are equally distributed have a mechanism designed to prevent a maldistribution in the benefits and burdens. . . . It is just to punish those who have violated the rules and caused the unfair distribution of benefits and burdens. . . . Justice—that is punishing such individuals—restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt.259

Humanists deny that the rules of criminal law establish a mutuality of benefit and burden. Morris describes the “core rules” as “rules that prohibit violence and deception and compliance with that which provides benefits for all persons. These benefits consist in noninterference by others with what each person values, such matters as continuance of life and bodily security.”260 To understand why this is incorrect, it is necessary to note, first, that the criminal law protects the grossly unequal distribution of general benefits and burdens inherent in most existing political, economic, and social structures, whether in Western, Marxist, or Third World societies. Benefits and burdens are distributed in these societies

260. Id. at 78.
according to class, race, sex, ethnicity, party, and other criteria, and the criminal law does not prohibit these stratifications. In fact, criminal law strengthens and legitimizes the structures which produce such gross inequality in general benefits and burdens. \(^{261}\)

In addition, political, economic, and social structures powerfully affect that “maldistribution of benefit and burden” concerning the “continuance of life and bodily security.” \(^{262}\) Those political leaders in charge of the war system are incomparably the greatest violators of life and security. Young men have borne an especially heavy burden in these nightmares. Our economic system produces a class stratification which has a decisive effect on the day-to-day risk of being murdered, assaulted, raped, or robbed (a much higher risk in ghettos than in affluent neighborhoods). Indeed, class and racial stratification profoundly influence the chance of being born alive, of surviving infancy, of obtaining decent medical care, and of acquiring sufficient quality education necessary to have the money to live in low-risk communities. \(^{263}\) The criminal law is an accomplice in the “maldistribution of benefit and burden” in the area of the “continuance of life and bodily security.” The criminal law obscures and mystifies the actual inequality of benefits and burdens with an egalitarian pretense and then reinforces this status quo magic by pretending that punishment “restores [an] equilibrium” that never existed. \(^{264}\)

This status quo magic describes justice as retributive punishment of those who have violated the rules and caused the unfair distribution of benefits and burdens. Punishment erases the unfair advantage gained by the violator. It “exact[s] the debt.” \(^{265}\) This formulation transforms the entire burden of institutional and cultural injustice and inadequacy to individual violators. Societal re-

\(^{261}\) Illustrative examples of such support include: killings of soldiers in combat are not murder; rape of wives by husbands, even if long separated, is not legally prohibited rape in most states; beatings of students by teachers is not assault; confinement of thousands of our Japanese citizens during World War II is not kidnapping; violation of the laws of war by civilian officials is not criminalized; depletion of irreplaceable natural resources is not barred; and concentration of extreme wealth in the face of extreme poverty is not condemned.

\(^{262}\) Morris, supra note 259, at 78-79.


\(^{264}\) Morris, supra note 259, at 79.

\(^{265}\) Id.
sponsibility for the most fundamental problems is transformed into purely individual responsibility. This is retributive scapegoatism masquerading as justice. Crime is conceptualized only at the individual level; justice is conceptualized only as individual legal justice. These notions are inherent too in Kantian and Hegelian retribution and in the current popular forms.

**Popular Forms of Retribution**

Retribution is not, however, simply an abstract philosophical issue. It is also a profound reality in the world of action. There was a Nazi retribution and there are Soviet forms of retribution, Maoist forms of retribution, Saudi Arabian forms of retribution, and American forms of retribution. It would be grossly inaccurate to explain the wide range of retributive concepts and practices in the world (some of them horrifying) in light of Kant's or Hegel's theory of retribution. These concepts and practices are not a matter of Kantian or Hegelian philosophies of punishment.

The word retribution in its best dictionary meaning is defined as "the dispensing or receiving of reward or punishment according to the deserts of the individual." The key word—"deserts"—has a Kantian or Hegelian meaning on a philosophical level. In the world of action, however, the meaning of the word "deserts" is defined not by Kant or Hegel, but by context. "Deserts" arises from violating specific penal norms in a concrete historical and political context. "Deserts" is defined in diverse sentencing statutes, in prison codes, and in day-to-day practice. The concept is not monolithic. Nazis, Stalinists, militarists, religionists, democrats, republicans, and others define "deserts" and operationalize its meanings in penal codes, courts, and prisons. Some of these definitions and practices are a horror, and some are probably justified. In all cases, however, the content for "deserts" comes from the underlying ideological and material context. To invoke the names of Kant and Hegel, among others, in service of "deserts" is in some cases to cloak the indefensible with philosophical authority; in other cases, it at least obscures the true ground of "deserts" in the dominant ideological and material contexts. Popular retributive concepts and practices are artifacts of such ideologies and interests. The philosophical theories are invoked not as a priori justifications, but as post hoc rationalizations.

PART V

TOWARDS A HUMAN RIGHTS THEORY OF CRIMINAL LAW

A human rights theory of criminal law begins with a specific view of the person, of society, and of the relationship between the two. The initial premise is that humans are social animals of great worth who realize their inherent potentialities in social life in the context of community. Stated differently, we become human through shared interactions with others, not alone. Becoming human in accordance with a humanistic model requires forms of social interaction which foster, rather than impede, the realization of human potentialities (i.e., physical, emotional, aesthetic, intellectual, ethical, and fraternal). Becoming human in accordance with this model is not only an individual odyssey: We journey together, and one of the fundamental needs is to actualize our potential for human solidarity. Becoming human, then, is a continuing process of human liberation; of realizing our potentialities so that we can evolve towards what we could be, individually and communally. This process has cultural and institutional dimensions governed by a common theme: Structures exist to serve humans.

We actualize our potentialities through the realization of our human rights. The human rights formulation translates the process of becoming human from an abstract, philosophical level to a more concrete level.

In addition to domestic articulation of human rights, an array of human rights has been articulated in a variety of international declarations, treaties, and proposals. These include the United Nations Charter; the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights and Its Optional Protocol; the International Convention on the Elimination of All Forms of Racial Discrimination; the International

267. The purpose of this section is to postulate a human rights theory of criminal law. Necessarily, the theory is not fully developed here. The segment on individual punishment is especially embryonic.


269. See U.N. CHARTER ch. 1, art. 1, para. 3.


Covenant on Economic, Social and Cultural Rights; and the Convention on the Prevention and Punishment of the Crime of Genocide. The human rights articulated in these international declarations and treaties provide a concrete humanistic basis for guiding, measuring, and judging progress towards the ideal of human liberation.

The contemporary articulation of human rights, whether at the domestic or international level, provides a framework for constructing a human rights theory and practice of criminal law. In this endeavor, the first question is what is to be justified, i.e., the nature and scope of a theory of criminal law, including a justification of punishment. As previously argued, this includes:

A. Justifying punishment as a moral claim.
B. Justifying the substantive content of a penal code (i.e., the specific principles, doctrines, and prohibitions set forth in the general and special parts), and justifying the content of a code of criminal procedure.
C. Justifying “law-in-action” and the actual imposition of punishment against particular individuals.
D. Justifying punishment as an integral part of a theory of criminal law rooted in political-legal theories which justify other institutions in the matrix of which punishment finds its meaning and expression.
E. Justifying the quantitative role of the criminal law in a society—the “how much” question.

A.

Utilizing internationally-prescribed legal rights in constructing a human rights approach meets H.L.A. Hart’s initial requirement that a theory of punishment be a moral claim. A human rights
theory of punishment is not an empirical claim. It is a moral claim "as to what justifies the practice of punishment—claims as to why, morally, it should or may be used."281 The distinctive nature of this moral claim is revealed by contrasting it with the theories of general deterrence and retribution. They are moral claims too. General deterrence, even within a utilitarian framework, is a veritable "engine of justification." Given the malleable concept of utility and the deterrent emphasis on enforcement, a great variety of criminal law systems have been justified. Certainly there is no inherent human rights focus in the deterrent theory of punishment.282 The moral claims in the Kantian and Hegelian theories of retribution seem to be predominately related to punishment as an ideology and apparatus of status quo domination. A human rights approach, however, is a different moral claim, a marked contrast to deterrent and retributive theories.

B.

A criminal law is justified if it fosters the realization of the internationally-specified human rights in its principles, doctrines, and prohibitions. The justification of a penal law is part of the justification of all law: to foster human liberation by embodying human rights in political, economic, legal, and other institutions. This justification of law is an imperative derived from a humanistic view of the raison d'être of all institutions. As a central institution in society, the criminal law system must contribute to the realization of the humanistic master beliefs in everyday life, and to the creation of that form of social intercourse which fosters the fulfillment of human potentialities. A fortiori, the principles, doctrines, and prohibitions in a penal law must do so.

The internationally-prescribed human rights provide a concrete basis for translating this abstract justification into specific criteria for evaluating and reconstructing a criminal law code.283 In illustrating this process, it is useful to distinguish those rights which, at a minimum, should be protected in all criminal codes from those rights which arguably warrant protection by embodiment into penal norms depending on varying cultural and social traditions. It

281. H.L.A. HART, supra note 13, at 72 (emphasis deleted).
282. See, e.g., O.W. HOLMES, supra note 16, at 42.
283. These rights delineate specific conceptions of justice and freedom. The explication of these conceptions—politically, economically, and culturally—is beyond the scope of this article.
is important to note, also, that a penal prohibition is the embodi-
ment of a duty that is an expression of a particular right (e.g., the
right to bodily integrity leads to a penal prohibition of assault and
rape). Finally, the new theory and specification of internationally-
prescribed rights leads to a focus on the violation of rights by state
officials as well as to a focus on the violation of rights by “subjects.”
There is a new focus on crimes characteristic of such officials (e.g.,
aggressive war, genocide, and apartheid). The criminal law be-
comes not only an instrument through which state officials
vindicate state interests as they determine them; it is designed also
to protect against depredations by state officials. The idea of penal
harm therefore is broadened by a human rights perspective. Examples of the translation of internationally-prescribed rights into
penal prohibitions are the following:

<table>
<thead>
<tr>
<th>Internationally Based Rights</th>
<th>Penal Prohibitions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Civil and Political Rights</strong></td>
<td><strong>Aggressive war; genocide; homicide.</strong></td>
</tr>
<tr>
<td>“Every human being has the inherent right to life.”**284</td>
<td></td>
</tr>
<tr>
<td>“The right to security of person and protection by the State against violence or bodily harm, whether inflicted by Government officials or by any individual, group or institution . . . .”**285</td>
<td>Assault; rape; robbery; kidnapping; compulsory sterilization; compulsory resocialization.</td>
</tr>
<tr>
<td>“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence . . . .”**286</td>
<td>Illegal wiretapping; “bugging”; burglary; interference with mail and with fourth and fifth amendment rights.</td>
</tr>
<tr>
<td>“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment . . . .”**287</td>
<td>Torture; “third degree”; extreme forms of harassment.</td>
</tr>
<tr>
<td>“[T]he right to freedom of thought, conscience and religion . . . .”**288</td>
<td>Serious, willful violations could be criminalized.</td>
</tr>
</tbody>
</table>

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287. Id. pt. III art. 7.
288. International Convention on the Elimination of All Forms of Racial Dis-
Internationally Based Rights (continued)  

Penal Prohibitions (continued)

"[T]he right to own property alone as well as in association with others . . . ."289

Social, Economic and Cultural Rights

"[T]he right to work, . . . [including] [f]air wages . . . equal pay for equal work . . . [and] [s]afe and healthy working conditions . . . . ."290

"[T]he . . . right of everyone to be free from hunger . . . ."291

"[T]he right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing . . . ."292

"[T]he right of everyone to education . . . . Higher education shall be made equally accessible to all on the basis of capacity . . . . ."293

A criminal law, in addition to affirmatively embodying human rights norms, also acts as a barrier to the introduction of antihuman rights norms, for example, apartheid restrictions. In this preventive function, a penal law preserves freedom by prohibiting arrest, charge, conviction, and punishment on substantive grounds which violate human rights. A penal law, then, preserves our right to be free from state intrusion on our freedom except on the grounds of our violation of the specified human rights of others.

A code of criminal procedure is justified if it fosters human rights in its specification of procedural rights. These rights are specified in the International Covenant on Civil and Political Rights294 and include the guarantees which have evolved in the

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290. Id. pt. I art. 5 § (d)(v).
291. Id. art. 11 § 2.
292. Id. art. 11 § 1.
293. Id. art. 13 §§ 1, 2(c).
Western tradition through centuries of struggle. Among these rights are: "the right to liberty and security of person";\textsuperscript{295} the prohibition of "arbitrary arrest or detention";\textsuperscript{296} the right to be promptly informed of charges after an arrest;\textsuperscript{297} the right to prompt arraignment and trial;\textsuperscript{298} the right to challenge the legality of an arrest or detention;\textsuperscript{299} the right to a fair trial by a "competent, independent and impartial tribunal";\textsuperscript{300} and the right to appeal.\textsuperscript{301} In its preventive function, a procedural code preserves our right to be let alone by restricting arrest, charge, conviction, and punishment except in accordance with procedural rights. In addition to the manifest function of protecting the rights of those who are accused, a procedural code prohibits arbitrary arrest and conviction and thereby protects the liberty of all.

Both a penal law and a procedural code foster and preserve freedom for those who are arrested, for those who will be arrested, and for those who will never be arrested. Indeed, those who assume freedom from state intrusion in their lives, and who assume their rights to life, to their thoughts, to their religion, and to their communal life, are important beneficiaries of a penal law and procedural code which reflect substantive and procedural human rights. A human rights theory of criminal law explicitly justifies preserving and strengthening freedom as a primary purpose of the criminal law process. Within this theory, the rule of law has a specific substantive and procedural content: It is a human rights rule of law. The principle of legality (no crime, no punishment, without law) is modified: no crime, no punishment, without human rights law.

C.

Shared responsibility includes individual responsibility. The premises of individual responsibility and choice are a \textit{sine qua non} in a humanistic framework as they are in much of traditional Western thought. The humanistic emphasis on realizing human rights and freedom requires these postulates. The humanistic approach, however, is to make these postulates empirically real.

\begin{itemize}
  \item \textsuperscript{295} Id. pt. III art. 9 § 1.
  \item \textsuperscript{296} Id.
  \item \textsuperscript{297} Id. § 2.
  \item \textsuperscript{298} Id. § 3.
  \item \textsuperscript{299} Id. § 4.
  \item \textsuperscript{300} Id. art. 14 § 1.
  \item \textsuperscript{301} Id. § 5.
\end{itemize}
As the institutions evolve and actualize human rights norms, and as individuals personify these norms in their lives, a momentum towards the fulfillment of human rights principles is fostered. Both consciousness and practice evolve concurrently. In this evolution, all should participate and be responsible for their acts. Violation of humanistic norms impedes the evolutionary process and justifies punishment. This punishment, however, is not the deterrent use of the person as an example/scapegoat; nor is it the retributive use of the person for retaliation, restoration of the disturbed “equilibrium,” or even satisfaction of a notion of just desert.

Punishment, then, is one way for the community to say that it intends to make these norms real so that the evolution towards a human rights society will continue effectively. Punishment is one communal method for affirming and actualizing the humanistic consciousness. The community’s action in punishing a violator should be conceived as a powerful symbolic act to affirm and validate its core values. The community’s action in punishing also affirms and validates these values by compelling an awareness of their importance upon the individual violator himself. This awareness is essential for both personal and communal evolution.

Individual responsibility for observance of prescribed human rights is an imperative of humanistic interaction. It highlights the obligations we owe to each other to respect human worth and dignity. Without mutual observance of human rights, our opportunities for freedom through realization of rights is diminished. It is precisely the importance of the rights at stake that justifies punishment against those who impair human rights by violation.

To make these rights real in everyday life requires a recognition that rights impose duties. The enjoyment of one’s rights requires that others in the social matrix of one’s life recognize these rights. Others recognize our rights by fulfilling duties which are correlative to such rights. These duties are of two types: first, a duty not to violate our rights by positive action (e.g., aggressive war and homicide which violate our “inherent right to life”); and second, a duty not to violate our rights by negative action (e.g., failure to assure “the right to work” or to assure “safe and healthy working conditions”). Since we become human in a communal process, the mutual observance of rights and correlative duties is essential. We affirm the rights of others by fulfilling our duties to them; others affirm our rights by fulfilling their duties to us.

In the struggle to evolve in accordance with human rights principles, all are obligated to fulfill these duties, including those...
who are most victimized. Victimization creates no right to victimize others. Even if a penal code is not presently justified from a human rights perspective, the duty to observe the human rights of others does not end. These rights are preexisting moral-legal claims. A penal law codifies these claims, but it does not create them. Their ground is not in the penal law which affirms them, but in the dignity and worth of each person. Victimizing others (usually other victims) aggravates victimization. In degrading others, we degrade ourselves, deepen our own victimization, and impede both a communal and personal evolution towards fulfillment of human rights principles. In respecting the human rights of others, we need not, therefore, approve a penal code—or a political-legal order—which presently fails to meet human rights requirements.

In punishing, any scapegoating of the offender is specifically prohibited; it is antithetical to the idea of punishment as a communal method for affirming and attaining human rights. The commission of the offense is not an occasion for sacrificing the offender. The realization of human rights has basic institutional and cultural realms. To place a disproportionate burden for this realization on the offender is to slight the role that should be played by institutional and cultural structures, and by all of us. The burden that is attributable to the offender arises from the type of harm inflicted—the act, its consequences, and the significance accorded to both. The harm inflicted determines the permissible extent of the punishment. There is a fundamental communal interest in maximizing freedom and, therefore, in limiting the right to punish.

Punishment includes condemnation. Henry M. Hart has suggested that the “judgment of community condemnation” is what distinguishes a criminal from a civil sanction. This condemnation expresses, in Joel Feinberg’s words, a communal “judgment” of “disapproval” of the behavior. Inherent in the condemnation is an authoritative disavowal of the wrong; a symbolic nonacquiescence, rejecting any responsibility that may be implied by silence in the face of wrong doing; and a vindication of the law.

The condemnation manifesting a human rights approach, however, is quite different from traditional forms of condemnation. The human rights condemnation is an affirmation and actualization of the humanistic consciousness for the community, the violator, and

the victim. This condemnation is not the expression of the community's hatred, fear, or contempt for the convict. It is not an expression of vengeance or retaliation. Nor is it a use of the violator as an "example." These are words and images of scapegoatism—of pariah-creation, of evading our complicity in much wrongdoing. It is possible, in contrast, to condemn a violation of right with the implied disavowal, nonacquiescence, and affirmation of the right, without scapegoatism, vengeance, hatred, or contempt. The condemnation is primarily of the act, not the violator.

This may seem an artificial distinction; after all, the act is personal, not abstract, and we punish the person who commits it. Nevertheless, the difference is real: witness the theological idea of hating the sin, not the sinner. The sinner, though responsible for the wrong, remains a valued member of the religious community. The violator, though responsible for the act, remains a valued member of the humanistic community. This image of the violator is the antithesis of the traditional image of him as an object of scapegoatism, vengeance, hatred, or contempt. The distinction seems well-grounded, too, in our ability to judge morally many acts as violations of rights and as producing rippling forms of harm against others in the community. This harm is usually manifest, or at least discernible. But how do we morally judge an individual? To do so validly would require knowledge of all the past and present social, psychological, and biological variables, the ability to assign weight to each, insight into the violator's decisionmaking process, and the wisdom to judge all these factors. That judgment is a task for gods, not human beings.

The incorporation of the distinction between condemning an act and condemning the actor into our consciousness and our practice of punishment requires a fundamental shift in the way we think and act. This shift will not be easy, but it is not impossible. Berman expresses an example of condemnation of the act in the Russian peasant's conception of the corporate character of sin. While criminal punishment is valid for the prohibited act, the offender is regarded as an "'unfortunate one'—a victim of society or of his own human temptations or perhaps of both. . . . [T]he community shares in his guilt."304

In the human rights form of punishment, we punish a member of the community, not an outsider, not a "criminal." We punish someone whose guilt we share to some degree. We punish with

HUMANISTIC PERSPECTIVE ON CRIMINAL LAW

respect and humility, not contempt and self-righteousness. Life is a web whose strands tie us all together.

In addition to condemnation, a human rights punishment could utilize other methods for affirming and actualizing the humanistic consciousness for the community, the violator, and the victim. Reparation should be a central theme and practice. Reparation focuses on concrete material and symbolic measures to restore both the individual who has been harmed and the specific communal interests which may have been harmed. In emphasizing reparation, there is a recognition that the violation of the right can never be undone. The reparation is not intended to do so. Where material measures are impractical or insufficient, symbolic measures are still emphasized. It is illusory, however, to believe that such techniques will be useful unless they are part of a broad effort to realize human rights. Indeed, without an evolving consciousness and practice, the techniques are a charade. The punishment process will not have a different meaning.

D. and E.

Justifying the extent of the role of the criminal law in a society evolving in accordance with humanistic principles—the how much question—requires a context for analysis. The how much question needs to be raised in the context of a how much question for other institutions. Thus, the reformulated question is: how much do we expect to achieve from the criminal law institution relative to what we expect to achieve from other institutions? To begin to think about this question requires consideration of the rationale underlying the criminal law institution and the rationale of other institutions. The human rights rationale of the criminal law is a reflection of a general rationale of all institutions: All institutions should foster human liberation by enabling individuals to fulfill their potentialities in diverse realms through the realization of their human rights. For example, the economic institution enables individuals to realize their economic rights (e.g., the right to work or the right to an adequate standard of living). The educational institution fosters the realization of educational rights. Theoreticians, including theologians, philosophers, and social theorists, critique dominant theory, structures, and operations, including the human rights approach. Political and legal institutions translate human rights into specific, enforceable legal rights (civil, political, social, economic, and cultural rights). These legal rights are law-in-the-books in the process of becoming law-in-action.
All of these institutions have an important responsibility for realizing human rights. As this process is being realized, the role of the criminal law institution is important but not primary. The humanistic premise is that a severely coercive institution—punishment—should be used as sparingly as possible, and that this normative postulate can be realized in everyday life. If human rights are being increasingly realized, the role of the criminal law institution will be secondary. If they are not being increasingly realized, the remedy is primarily within other institutions, or in alternatives to them, not in an expanded role for criminal law. Extreme coercion cannot be the means to realize human rights.

The problems of crime control, social control, and law and order are viewed as a consequence of success or failure in attaining human rights. Such problems are conceptualized and formulated as a consequence of political, economic, educational, and cultural deficiencies, perhaps at fundamental levels, and not simply as individual problems which are the responsibility of the criminal law. The response to crime should be primarily the reign of justice. The punishment of individual offenders through the criminal law process is rejected as the remedy to systemic violations, including: (1) aggressive war, genocide, apartheid, victimization of consumers and workers, and the poisoning of our air, food, and water; (2) offenses disproportionally centered in victimized social groups (e.g., traditional homicides, assault, robbery, and burglary); and (3) offenses related to culturally glorified values such as greed and violence (e.g., larceny by the poor and rich and the violent crimes specified above).

The answer to the “how much” question depends on the evolutionary stage of the society. If systemic problems are endemic, it is vital that the role of the criminal law be limited to avoid obfuscating and mystifying the problem (e.g., blaming the victim). If such problems are substantially overcome, this risk is less, and the role could be enlarged. There is no definitive answer, for it depends on the stage of evolution.

Nevertheless, a range of contemporary debate and action about criminal law responses to crime would fade. Draconian sentencing schemes, capital punishment, expansion of public and private policing, the symbolic dramatization through the crime-dominated TV screen—all of this would fade as a masking and obfuscating charade. With few exceptions, maximum sentences would be radically reduced. Alternatives to the criminal law process—and alternatives to imprisonment—would be emphasized.
The rejection of punishment as the remedy to systemic problems does not require rejection of punishment of individuals. Institutions act through individuals who fill institutional roles. The state, for example, acts not abstractly but through officials who are responsible for their acts. Corporations act through corporate officials. Moreover, violations of human rights by crime is not reducible to a systemic dimension. Violations spring from individuals acting in institutional and private roles. Individual responsibility for one's acts is a cardinal humanistic principle and also a premise in the post-World War II treaties, declarations, and proposals. It is an ethical and legal sine qua non.

**Conclusion**

The traditional emphasis upon punishment reflects narrow conceptions of human existence. We need not elevate into fixed principles the notions of general prevention, vengeance, retaliation, or even the quid pro quo principle of desert. At worst, these notions reflect some of the lowest levels in human consciousness. Many people struggle to transcend these levels of existence, knowing from experience, as well as from literature and philosophy, that hatred begets hatred, contempt begets contempt, and violence begets violence. At best, these notions reflect a ledger-sheet approach to life. Many people struggle to transcend this level of existence, too, because it is inconsistent with the complexity and mystery of human behavior and emerges from a low level of consciousness. To be sure, a substantial segment of crime victims (as well as many others) want punishment in the form of vengeance, an example, or variations thereof. But others are ready to forgive, and still others to transcend such responses and proceed with life's business. Some of these people are fatalistic, either on religious or secular grounds ("It is God's Will" or que será será"). Some may simply be oriented towards the present and future, not the past. Some may doubt the wisdom of punishment on philosophical or other grounds or may feel a moral complicity. This variety of responses is illustrative, not exhaustive, and is rooted in a diversity of life experiences and orientations. These responses illustrate, also, that the emphasis upon punishment is itself a human product which rests not in human nature but in particular conceptions of life within a far larger universe of possibilities. In punishment, as in other realms of life, we can actualize higher or lower levels of consciousness. Either choice starts rippling waves whose end we
cannot see. As human consciousness evolves, as a community embodies human rights, we should have less need and inclination to punish individuals with a traditional consciousness and practice. The emphasis upon these forms of punishment could fade and be recalled eventually as an artifact of epochs in the evolution of humankind.