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STUDIES IN LAW, POLITICS, AND SOCIETY VOLUME 30

PUNISHMENT, POLITICS, AND CULTURE

EDITED BY

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EDITOR'S NOTE

The article in this special issue of Studies in Law, Politics, and Society emerge from work done as part of a 2002 National Endowment for the Humanities Summer seminar for College and University Teachers, held at Amherst College. In addition to the work represented in this issue, other participants in the seminar were Ava Chamberlin, John Pittman, Robert Gordon, and Alisa Rosenthal.

PART I.
REVISITING THE HISTORY AND PHILOSOPHY OF PUNISHMENT

“PATTERN PENITENCE”: PENITENTIAL NARRATIVE AND MORAL REFORM DISCOURSE IN NINETEENTH-CENTURY BRITAIN

Anna Kaladiouk

ABSTRACT

The accounts of moral reform that nineteenth-century convicts offered the officials in charge were frequently characterized by such uniformity that it caused Dickens to mistrust their sincerity and to brand them scornfully as “pattern penitence.” Unlike Dickens, however, prison officials were more willing to credit the questionable authenticity of “patterned” repentance. The paper argues that rather than an effect of personal gullibility, reformers’ attitudes can be seen as an outcome of specific interpretative strategies which, in turn, constituted a response to several institutional challenges facing the nineteenth-century Penitentiary.

> It is a sad misunderstanding, the legacy of rationalism, that truth can only be that sort of truth that is put together out of general moments, that the truth of a proposition is precisely what is repeatable and constant in it.
>
> M. Bakhtin[1]

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INTRODUCTION

In *Imagining the Penitentiary*, a study of eighteenth-century fiction, John Bender (1987) investigates the nature and the extent of the novel's contribution to the transformation of the old gaol into the modern prison. According to Bender, it was the novel's persistent representation of the power of confinement to effect important changes in subjectivity that enabled a new conception of penal order which in the late eighteenth century became embodied in the institution of the Penitentiary. Bender's move to locate the origins of the Penitentiary in the depth of novelistic discourse reflects his larger project to challenge the common understanding of art and literature as a mere mirror of social reality and to reconceptualize them as major forces behind institutional formation.

While my concerns in this paper are more local, I share Bender's preoccupation with the role of language and narrative in the life of institutions. Shifting attention from the eighteenth to the nineteenth century, and from the novel to the works of social journalism, the writings of prison officials and convicts' narratives, I draw on these texts to explore two different but interrelated issues. I examine what these texts reveal about prison reformers' (often but not always intuitive) perceptions of the function of language and narrative in the project of remaking individual moral character, and I explore the role that language played in measuring the effectiveness of disciplinary strategies directed towards that goal.

My account spans about a quarter of the nineteenth century, beginning in the early 1820s, when the 1823 Gaol Act officially endorsed the principle of classification, and ends in the late 1850s, when the influence of the Separate system of prison discipline, the system that most energetically and most vocally proclaimed its commitment to the objective of moral reformation, began to dwindle. By no means do I intend this account to serve as a comprehensive history of these three decades of the prison reform movement in Britain, or even as an exhaustive discussion of what moral reformation meant to various interested constituencies. Instead, I focus on just one strain of the reformative discourse which I believe lends itself to a further investigation into the role of language and narrative in institutional development.

I suggest that the reformers' anxieties about criminal slang, coupled with their peculiar investment in the language of moral reform, reflect their belief in the centrality of language to the reformative process. In the argument I offer, the project of restructuring criminal character appears to be inseparable from the task of training the criminal to tell his story in the appropriate language and in a particular sort of way. He was taught, in short, to abide by the representational conventions of what Dickens (1995) reviled, both in his fiction and journalism, as the genre of "pattern penitence" (p. 223). But while Dickens explains the reformers' readiness

to succumb to the obviously feeble rhetorical powers of "pattern penitence" by reference to their vanity and gullibility, I will try to propose a different interpretation.

Recasting Dickens's terms on the plane of institutional pragmatics, I will consider the reformers' willingness to credit the dubious authenticity of convicts' exercises in patterned self-delineation in light of several institutional tasks and interests. On the one hand, in keeping with Dickens's hermeneutics of suspicion, one can re-inscribe his imputation of vanity as an outcome of the institutional need for self-legitimization. In teaching the criminal to follow the conventions of the institutionalized script, prison reformers not only hoped to stabilize the dangerous fluctuations of the criminal self and to introduce him to new ways of making sense of his (criminal and prison) experience, but also to testify to the efficiency of disciplinary practices that underpinned his reform. On the other hand, what Dickens alternatively criticizes as the reformers' undue gullibility can be viewed not in terms of the officials' personal flaws but in terms of the institutional commitment to a specific conception of truth and its corresponding set of interpretative practices and ways of reading. Here, I will argue that by describing the process that was not empirically verifiable (moral reform) with reference to the rigid discursive paradigm of reformation narrative, pattern penitence externalized and negotiated the imperatives of the two major epistemologies underlying the institution of the Penitentiary. While "the pattern" in "pattern penitence," with its emphasis on the formulaic and repeatable, exemplified the institutional recognition of the demands of empiricist rationalism, with its prizing of the objective, verifiable and reproducible, "the penitence" in the same formulation belonged to the province of evangelical idealism, where it was conceived as a transforming experience of a profoundly personal, and therefore unrepeatable, kind. But more than an epistemological oxymoron, "pattern penitence" goes beyond documenting this unlikely alliance while simultaneously signaling its incongruity; it also attests to the predicament that the Penitentiary faced in having to deal institutionally and thus uniformly with the material that was characterized by radical specificity, and yet to enact change that was essentially the same.

The map of the paper is as follows. I begin with a discussion of the role that the Victorian cultural imagination attributed to language, and particularly personal narratives of the "dangerous classes," as a vector for the spread of criminality, which in turn was conceived of in terms of disease. Section II considers the system of classification, as well as the Separate and the Silent systems of prison discipline that replaced it, as successive measures designed to stop the spread of criminal "contagion" by means of regulating convicts' communications. This section also addresses the question of the institutional approach to criminals' personal stories. Section III introduces Dickens's term "pattern penitence," while Section IV

continues to explore institutional modes of dealing with personal narratives, this time by looking at the ways in which prison reformers appear to have construed and interpreted "patterned" testimonies of moral transformations. This last section of the paper relies on Mikhail Bakhtin's work in discourse analysis. As someone whose life-long project was, in Michael Holquist's words, "to generalize about uniqueness," Bakhtin is particularly useful for discussing the challenges that attend to interpreting personal stories within institutional contexts (Bakhtin, 1990, p. xx).

I.

The comparison of vice with disease was not a nineteenth-century invention. Indeed, the idea that "bad habits are as infectious by example, as the plague itself by contact" was an old adage even in Fielding's times (Fielding, 1975, p. 4). The association persisted, however, throughout much of the nineteenth century and was further buttressed by scientific discourses of the time which provided new and more elaborate paradigms for thinking about disease and infection. According to the influential miasmatic theory of contagion, for example, infectious disease spread through miasmas, or noxious effluvia, given off by the decaying matter (Hamlin, 1985, p. 389).

The new vocabulary offered fresh ways to elaborate on the old maxim. Crime was increasingly often referred to as "moral disease" and was seen as impregnating "the moral atmosphere" of whole neighborhoods with "a subtle, unseen, but sure poison (·) dangerous as is deadly miasma to the physical health" (May, 1973, p. 18).[2] Language such as this suggested that crime and disease shared more than just the same city areas. They were also believed to have analogous mechanisms of circulation.[3] Just as discourse on pathology theorized physical contagion as a result of contact between pure and impure matter, and subsequent transformation of the purity into a replica of impurity, so discourse on crime often imagined criminal corruption as a result of a similar contact, only between people. In encounters of this kind, the vector of influence was always directed from corruption to innocence, or to quote from Alexis de Tocqueville (1964), it is always "the more depraved who influence those who are less so" (p. 55).

But if disease spreads through effluvia and miasma, what are crime's channels of dissemination? The rhetoric of nineteenth-century commentators suggests that they believed the conduit of moral infection to lie in the "association" between members of the lower classes and in the stories they told one another. Giving expression to the widely held Victorian assumption that the poor were accustomed to beguiling their free time in telling stories, Henry Mayhew comments on the conduct of daily work seekers at the London Dock, "There, seated on long

benches ranged against the wall, they remain, some telling their miseries, and some their crimes, to one another, while others doze away their time" (Mayhew, 1968, p. 36). In barely distinguishing stories of misery from those of crime, Mayhew's language not only registers the proverbial Victorian instability of the boundaries separating poverty from criminality, but also reveals the suspicion with which the upper classes regarded communications of their social inferiors. But if associations of the "dangerous classes" outside prison walls caused much anxiety to their social betters, communications within the prison were considered more pernicious still. As M. de Metz wrote in a 1856 letter to William Gladstone, "It is an axiom of all writers upon penal treatment, that *prison contact produces certain contamination*" (cited in Adshead, 1856, p. 22). If left in idleness and allowed freedom of association, convicts, it was commonly held, passed their time instructing one another in secrets of their criminal trades, forming partnerships for future projects, and telling stories of their lives. This is how one commentator bewails the fate of a young woman who a few weeks before the sessions was thrown in a ward with "a collection of persons of every shade of guilt:"

> A servant girl of about sixteen a fresh-looking healthy creature, recently up from the country, was charged by her mistress with stealing a brooch. She was in the same room – lived all day, slept all night, with the most abandoned of her sex. They were left alone; they had no work to do; no books – except a few tracts for which they had no taste – to read. The whole day was spent, as is usual in such prisons, in telling stories – the gross and guilty stories of their own lives. There is no form of wickedness, no aspect of vice, with which the poor creature's mind would not be compelled to grow familiar in the few weeks she passed in Newgate awaiting trial. When the day came, the evidence against her was found to be the lamest in the world, and she was at once acquitted. That she entered Newgate innocent I have no doubt. But who shall answer for the state in which she left it? (Dixon, 1850, p. 9).

Given the persistent anxiety with which prison reformers regarded convicts' communications, one can argue that prison reform of the first half of the nineteenth century in Britain can be seen as a series of efforts to regulate and later to outlaw the circulation of their "gross and guilty stories."

II.

The first attempt to regulate the dissemination of prisoners' stories can be located in the 1823 Gaol Act whose aim was to put an end to the evils of contamination by dividing convicts into groups characterized by a similar degree of criminality. While this was particularly important in the case of juvenile offenders, adults were also believed to be highly susceptible to the moral corruption that inevitably accompanied any association among convicts. In the words of Henry Mayhew

(1968), "the comparatively innocent" could not help being contaminated "when brought into contact with the polluted" just as pure water could not help being polluted when mixed with the contaminated water (pp. 96, 102).

To determine the degree of "badness" was no easy matter, however. To counter an intuition of the radical idiosyncrasy of every case to be classified, reformers concentrated on what was in those cases repeatable and objective: the nature of the offence, age and gender. But given the widely held belief that convicts spent much of their time in telling stories of their lives, one may argue that in separating out various gradations of guilt, the reformers were also sorting out convicts' personal narratives, arranging them, as it were, in a peculiar taxonomy of genres. The way in which the reformers went about classifying convicts' personal histories both looks forward to the future strategies of dealing with the narratives of "pattern penitence" and backward to the models worked out by these reformers' famous predecessor and reform theorist, Jeremy Bentham.

While Bentham fully recognized the radical idiosyncracy of the human subject and his experience, an idea postulated in various ways by many of his contemporaries from Helvétius to Holbach, he still harbored considerable optimism that for the purposes of social policy making the seemingly unmanageable singularities of personal circumstances and dispositions could be legitimately and effectively circumscribed by reference to what he called "ostensible circumstances."[4] His examination of the thirty-two factors that have influence on one's sensibility in *An Introduction to the Principles of Morals and Legislation*, contains the following discussion:

> It is allowed that the greater part of these differences of sensibility are inappreciable: that it is impossible to prove their existence in individual cases, or to measure their force or degree; but fortunately these interior and hidden dispositions, if it may be so said, have external and manifest indications. These are the circumstances which have been called secondary: *sex, age, rank, race, climate, government, education, religious profession*; circumstances evident and palpable, which represent the interior dispositions. Here then the legislator is relieved from a part of his difficulty. He does not stop at metaphysical and moral qualities; he lays hold only of ostensible circumstances. He directs, for example, the modification of a certain punishment; not on account of the greater sensibility of the individual; or on account of his steadiness, strength of mind, or knowledge, but on account of his sex or age (Bentham, 1962, p. 34).

Although Bentham's primary concern here is with the problem of regulating and equalizing the degree of pain that ought to be experienced by different individuals punished for the same crime, this discussion also reveals Bentham's optimism about the efficacy of "external and manifest indications" (although of widely ranging generality) to accurately represent the inaccessible and otherwise unknowable "interior dispositions." The concluding recommendation to the legislator on how to go about calibrating punishment in the face of the radical impossibility to

assess all those "metaphysical and moral qualities" that play into the subjective experience of pain is particularly revealing of Bentham's methodology. The move to further restrict the "ostensible circumstances" to just sex and age, the least problematic and the most readily identifiable factors even among "the secondary circumstances," exemplifies most clearly Bentham's project to produce what David Simpson (2002) calls "manageable policies out of unmanageable epistemologies" (p. 60).

To the extent that a personal narrative can be viewed as a recounting of the unique relationships between the person's "interior and hidden dispositions," singular and unverifiable, and corresponding to them "external indications," observable and recurrent, Bentham's focusing on the latter, and avoiding of the former, anticipates the interpretative procedures built into the 1823 Gaol Act. Following Bentham's recommendation, the reformers privileged the "evident and palpable circumstances" over the unknowable "interior dispositions," while simultaneously hoping for the stable correlation between the two. But in counting on age, gender and the nature of the offense to serve as reliable indicators of criminals' degree of "moral perversity," and thus as a basis for classification strategies, they also privileged what was formulaic and repeatable in their "gross and guilty stories" over what was idiosyncratic and unique.

In its pure form, however, the system of classification proved to be relatively short-lived. Its practical failures to achieve its principle objective of improving prisoners' morals corroborated many reformers' theoretical intuition that no two individuals can be corrupted in exactly the same manner and degree, or in the words of Alexis de Tocqueville (1964), "There are similar punishments and crimes called by the same name, but there are no two beings equal in regard to their morals" (p. 55). Henry Mayhew's belated attempt to provide an alternative basis for classification in his 1862 study of the London prisons testifies to the awareness that previous efforts were deemed too insensitive to the radical specificity of the individual experience. In shifting the basis for classification from "the objects against which the crimes are committed" to "the causes and passions giving rise to them," Mayhew attempts to bring back at least some measure of what is specific and particular to each criminal's personal history (Mayhew, 1968, p. 88).

A still more intense appreciation of the incomputable variation of individual situations and shades of moral character colors the reflections of Feodor Dostoevsky in his fictional autobiography *Notes from the House of the Dead*. Writing simultaneously with Mayhew (the bulk of the novel was written in 1861–1862), Dostoevsky (1972) repeatedly returns to the problem of commensurability of punishments and crimes, a question that to him appears insoluble, something on a par with the attempts "of squaring a circle" (p. 43).[5] Alexander Petrovich

Gorianchikov, a nobleman convicted for the murder of his wife and the novel's narrator, writes:

> But I remember that one question in particular preoccupied me; it constantly preyed on my mind, throughout all my life in prison, a question that I could not solve then and cannot solve now. It was the question of the disparity of punishments meted out for the same crimes. But then crimes are also hard to compare, even roughly. Let's say, two men committed murder; the circumstances of each crime are carefully considered; the corresponding punishments in both cases have turned out to be nearly identical. And yet look at how dissimilar these crimes are! One has committed a murder for no reason, for a trifle – for an onion. He came out on a highroad, stabbed a traveling peasant to death, and found on him just one onion and nothing else. (·) And the other killed a lecherous despot, defending the honor of his wife, his sister, or his daughter. One, a tramp half dead with hunger and hunted down by a horde of police, killed a person while defending his liberty, his life. And the other slays little children for amusement, to feel their warm blood on his hands, to delight in their anguish, in their dove-like trepidation under his knife. And what is the outcome? They are all sentenced to hard labor. It is true that there are some gradations in the length of the sentences, but these gradations are not very numerous, whereas variations of the same crime are infinite. There are as many crimes as there are characters (Dostoevsky, 1972, pp. 42–43).

But however serious, the Procrustean nature of institutional punishments is only one problem to consider. Besides the inevitable failure of punishment to stand in a meaningful correspondence to the true nature of the offense (which in Dostoevsky, as in Mayhew, appears to be determined not "by the object of crimes," but precisely by "the causes and passions giving rise to them), there is also a related problem of the disparity of pain that the same punishment entails for different people" (Mayhew, 1968, p. 87). In contrast to Bentham, Gorianchikov holds no faith in the possibility of ever obliterating the inequality of suffering that the radical variability of personal circumstances, emotional temperaments, and moral constitutions makes unavoidable. While one man "wastes away like a candle," Gorianchikov reflects, punishes himself more severely than any law can, another may never, not even once in all his prison years, have reflected on the murder he has committed, and may even consider himself innocent (Dostoevsky, 1972, p. 43). Still others enjoy their life in prison immensely, and even commit crimes hoping to get there and thus to release themselves from a free life that is harder than any hard labor (Dostoevsky, 1972, p. 43). Class and education also play a role in how one responds to a punishment. While this does not mean that a nobleman or an educated person feels more deeply than, say, a peasant, those who say that they experience the same degree of pain are nevertheless mistaken (Dostoevsky, 1972, p. 197). "I know, I've heard this opinion expressed often enough lately, and read about it, too," Gorianchikov comments. "The sentiment on which this opinion is founded is good and humane," he goes on, "for all convicts are human beings. But the idea itself is too abstract. It fails to take into account numerous practical

considerations upon which experience alone can pronounce" (Dostoevsky, 1972, p. 197).

Unlike Mayhew, who realized the relevance of these and similar considerations yet still believed in the possibility of creating a defensible classification by means of fine-tuning its basic principles, Gorianchikov rejects such a possibility altogether, but not without trying it first. In a curious illustration to John Bender's analogy between the novel and the Penitentiary, he attempts to organize his memories of prison life and his fellow convicts by replicating Western classification strategies, then unknown to the Russian prison system. Dissatisfied and frustrated, he soon cuts himself short, however. In what anticipates Bakhtin's discussion of theoretism, a concept I consider later in the paper, he writes:

> I am now trying here to separate the convicts into classes, but can it be done? Reality is infinitely more diverse than even the most ingenious conclusions of abstract thought, and it does not tolerate sharp and clear differentiations. Reality tends to infinite subdivisions (Dostoevsky, 1972, p. 197).

But while the observable commonalities fail to yield a meaningful basis for classification, there is after all one thing that all of Gorianchikov's fellow inmates share. What each of them has is a story of his life, unique to him and nobody else. "And yet every one of them," Gorianchikov observes elsewhere, "had his own story to tell (*svoia povest'*), dreary and leaden, like a headache from the last night's drinking bout" (Dostoevsky, 1972, p. 11). To the extent that these stories gave shape to the radical singularity of every man's experience it was these narratives then that Gorianchikov found impossible to classify.

Returning to the Britain of the early 1830s, one may argue then that in rejecting classification for its failure to fulfill its main mission of improving convicts' morals, prison reformers recognized, in a sense, their failure as literary critics who were called upon to judge criminals' stories. In admitting that the manifest markers of "evident and palpable circumstances" failed to yield a workable basis for producing defensible regularities out of radical variation, they also acknowledged that the infinite variety of criminals' "gross and guilty stories" which the law enjoined them to order subverted their attempts at systematization. Unlike age, gender and the type of offence, the degree of "moral perversity," they explained, resisted classification and overrode all other formal distinctions. Observable constants and describable commonalities on the level of form did not reflect a corresponding stability on the level of content. The challenge of compiling a satisfactory classification of contagious narratives turned out to be overwhelming. Breaking convicts – and their narratives – into categories failed to prevent them from entering into new partnerships and plotting new crimes, perfecting their crafts and learning new ones, studying cant and generally having a good time, as prison officials were sure was

the case whenever inmates "were suffered to indulge in the kind of society within the jail which they had always preferred when at large" (Mayhew, 1968, p. 99). Despite classification, British prisons remained the loci of moral contagion. As the Surveyor-General of Prisons Colonel Jebb acidly put it, "[H]ad it been an object to make provision for compulsory education in crime, no better plan could have been devised" (cited in Mayhew, 1968, p. 100). While some, like the Reverend J. Kingsmill, the chaplain at Pentonville, occasionally pointed to technical difficulties to explain the failure of classification (in part Kingsmill attributed the impossibility to separate "the very bad from the better sort" to the fact that "they are continuously changing places; those in for felony at one sessions being for larceny or assault the next, and vice versa"), most of the commentators agreed that the predicament was more serious and deep-seated (cited in Mayhew, 1968, p. 99). According to Jebb, the main problem was one of measuring the individual's criminality. "There does not exist," Jebb wrote bitterly, "any moral standard by which it (the system of classification) can be regulated so as to avoid the mischievous effects of bringing together criminals of different degrees of criminality and of every shade of character" (British, 1970, p. 439).

For someone like Jebb, who worked tirelessly to standardize and formalize all aspects of prison life, from cell measurements to diet to uniforms, it must have been a disturbing fact indeed that the very method of assessing criminality remained indistinct and obscure. It was the community of people like him, prison officials and penitentiary scientists, that was particularly distressed by the absence of an objective moral test to measure the individual's criminality, for in contrast to legislators, they resisted the imperatives of the Classical School of Jurisprudence, indifferent to everything but the crime itself. To them, the offender's moral character, a notion which included not only his intention, but also, it seems, his personal circumstances and social status, was at least as important as the offense per se.[6] As Charles Lucas, a founder of French penitentiary science, argued as early as 1827, "repressive justice should (·) be focused on agents and not on acts," and "the length of punishment should be proportioned to the actor's perversity and not to his violations as such" (cited in Normandeau, 1972, p. 143).[7] Understanding the criminal's moral constitution was all the more important, in Lucas's view, because therein lay the key to the offender's reformation – how long it will take, how successful it will be, how long-lived it will prove. But while the prisoner's character was becoming the most important parameter to consider, the way to assess it – Jebb's "moral standard" – proved to be too difficult to define. F. Voisin, a French authority on the treatment of the deviant and Jebb's contemporary, expressed similar frustration: "Everywhere, today, one seeks to cure the insane, everywhere one seeks to modify, enlighten and reform criminals, and everywhere the necessary scientific elements are lacking. (·) Our

knowledge has not attained the same level as our sentiments" (cited in Castle, 1983, p. 252).

One may argue then that underlying the growing dissatisfaction with the system of classification was a deeper epistemological crisis that eventually led to the re-examination of prison policies. British prison reformers came to recognize each prisoner's story as a class in itself and gave up the hope of ever arranging them in homogeneous and innocuous groups. If the prison was to be, in the words of the novelist Charles Reade "a hospital for diseased and contagious souls," each soul had to be isolated from all others, as each carried moral germs peculiar to itself (Reade, 1970, p. 88). But how was one to segregate infected souls? The advocates of the rival systems of prison discipline – the Separate and the Silent (both modeled after the American penal experiment) – adopted what they thought were two distinctly different approaches. While separatists advocated complete isolation in individual cells for extended periods of time, the champions of the Silent system required isolation only at night. During the day, prisoners were to work together in common quarters but in strict silence enforced by prison guards. The two camps were engaged in a heated polemic, often colored by strong personal animosities.[8]

Indeed, it appears that the long and bitter struggle between the two camps made them insensible to how much in fact their two philosophies shared. Although separatists championed solitary confinement, i.e. literal isolation, and the supporters of the silent system advocated a regime of silence in common quarters, i.e. figurative isolation, to the modern day reader, the underpinning principles appear to have been the same.[9] Regardless of the apparent dissimilarities, both regimes aimed at disrupting the circulation of pernicious narratives and stopping all association between convicts. They sought to enforce, in other words, what Henry Mayhew once called a "criminal quarantine." "Of late years," Mayhew wrote in 1862 in reference to the recent developments in prison regulations,

> we have made rapid advances towards the establishment of a kind of criminal quarantine, in order to stay the spread of that vicious infection which is found to accompany the association of the morally disordered with the comparatively uncontaminated; for assuredly there is a criminal epidemic – a very plague, as it were, of profligacy – that diffuses itself among the people with as much fatality to society as even the putrid fever or black vomit (Mayhew, 1968, p. 80).

Mayhew's quotation illustrates retrospectively (the text from which it is drawn appeared twenty years after the opening of Pentonville penitentiary, a model prison that marked the heyday of the Separate system) how an understanding of crime as "moral contagion" had enjoined a particular disciplinary vision – that of a moral quarantine – and had been translated by reformers into specific policies and practices. To the extent that the orbits of infection were prisoners' narratives, one can also see Mayhew's "criminal quarantine" as a sort of "narrative quarantine."

This quarantine, however, was not absolute. Even in the Separate system, at least in theory, the inmate's solitude was to be broken by frequent visits from prison officials and chaplains, who were to spend substantial amounts of time daily in morally improving conversation with their charges. (For a number of practical reasons, such as overcrowding and lack of personnel, these visits were neither as long nor as frequent as the more conscientious chaplains desired.) Prisoners were also given books to read. Most of the books and periodicals were supplied by the Society for the Promotion of Christian Knowledge, and although lists of approved titles varied from prison to prison, the main criterion for selecting a text was its morally edifying character (Fyfe, 1992, p. 3). Besides the Bible, a prison library could include a variety of religious tracts, some philosophical treatises and, occasionally, some historical narratives, usually with a moral lesson. Needless to say, the majority of inmate population in Victorian prisons had little taste for such reading. In some places, most notably at Reading, prisoners were assigned to memorize substantial portions of the Bible. In others, the literate were encouraged to write their autobiographies, an exercise that people like the Reverend John Clay, the chaplain at Preston, believed to have important therapeutic value.

All of these activities were designed to help, in their own way, to rid the convict of his criminal "germ." In the silence of "criminal quarantine," the convict was to be drained of his pernicious vernacular in which he was used to boasting of his life of vice and depravity, and to become infused with a new language and a new set of representational conventions in which to tell his new story, a story of the reformed self. The reformers' nervousness about the corrupting effects of criminals' speech in general and criminal argot in particular underscores the importance they attached to a peculiar transfusion of language that was to take place in prison. The juxtaposition of the corrupt language of the inmate population with the language of the Bible and prayer books that we find in the following lines from John Field is entirely typical. Criticizing prison association, Field, an ardent separatist and the chaplain at Reading, writes:

> Oaths, cursing, swearing, blasphemies, obscenity, and the cant phrases of criminals, were the current language of the ward. Bibles, prayer books, and other books were provided, but generally despised, and frequently destroyed, and if any attempted to read or seek instruction he became the object of ridicule and scorn, and almost every effort was defeated (Field, 1848, p. 40).

He goes on to quote extracts from the testimony given by prisoners themselves to the Inspectors of Prisons in 1837:

> The conversation of prisoners is generally bad; it relates to their exploits out of prison; how they performed them, &c., and they boast of these things. No doubt a man might learn every mode of committing crime; they learn of each other the cant language, and are proud of shewing their knowledge of it. There are words for highway robberies, for picking pockets, for house-breaking, &c. Most of the prisoners are anxious to learn this kind of language:

> there are names for almost everything. I suppose the prisoners must get worse by this kind of conversation, which takes place I know throughout the prison (Field, 1848, p. 42).

"They used to learn the cant words," adds another prisoner, "and repeated them to each other as boys used a spelling-book" (Field, 1848, p. 43).

The question of prisoners' motivations aside, the fact that these kinds of testimonies made it into numerous official reports testifies to the reformers' anxiety about criminal slang and their belief that it was not compatible with the reformative process. The stakes of inculcating the criminal with a new language were particularly high, one would think, because reformation, just like criminality, could not be measured by any objective test, or to use Jebb's words again, by any "moral standard." Belonging to the realm of "interior and hidden dispositions," it could only be known in its effects, i.e. in the absence of recidivism. But since even this outcome, when and if achieved, was highly problematic in that it was not to be distinguished from the effects of deterrence, one important evidence of rehabilitation seems to have lain in the story the criminal would tell upon his release. To continue to rely on Bentham's vocabulary, it is as if the prisoner's story functioned as an "external and manifest indication" of those "moral and metaphysical qualities" that the legislator, or in this case the prison official, was powerless to assess directly. It is only from the way the prisoner narrated both his pre-prison life and prison experience that one could gauge the success of his reformation. In this sense, it appears that one of the most important goals of a reformative regime was to train one to fit one's personal narrative into the appropriate mold. That this is, in fact, how many "measured" reformation's success is evident from the fact that appeals to convicts' own stories figure in the reformers' writings, including official reports, nearly as often as appeals to statistics and other hard data. *Memoirs of Convicted Prisoners* (1853), a collection of convicts' letters published by the chaplain of Chester Castle H. S. Joseph, for example, is representative of how in the eyes of many, personal stories could in fact constitute proof of moral reformation. They needed, however, to be narrated properly. What emerges from the pages of Joseph's *Memoirs* is a whole narrative genre with its own laws and conventions that govern both their structure and rhetoric.

Structured around a set of questions which the inmate writers were bound to have learnt from their encounters with prison officials – what is your family, when was the first crime committed, when was the last time you attended church, do you know how to pray, did you ever see your mother pray – the stories these letters told were designed to confirm their addressee's – and by extension the middle-class reader's – understanding of the origins of crime and channels of reformation (the collection's full title is *Memoirs of Convicted Prisoners*; *Accompanied by the Remarks on the Causes and Prevention of Crime*). Lack or absence of religious instruction,

idleness, bad company, fickleness of desires and restlessness of temperament – all the familiar elements of Victorian discourse on crime – figure prominently in these accounts of individual moral demises. The narratives abound in expressions of contrition and proclamations of the newly found faith and are cluttered with Biblical allusions, references to religious practices and Christian rhetoric. Many authors talk with gratitude about their prison experience:

> Since I have been here, I have thought very differently of religion. I feel that I am a very great sinner in the sight of God. I hope to spend the rest of my days in a very different way (Joseph, 1853, p. 63).

Others express their indebtedness to the chaplain himself:

> (It) is to you that I am indebted for the benefits which I receive from our Lord Jesus Christ. (·) When I first came to Chester, I did not care whether I heard the Word of God or not; but now, thanks to the Almighty Providence, I could sit the whole day to hear it (Joseph, 1853, p. 85).

Still others refer to the most memorable sermons:

> I shall often think of that sermon you preached to us from Luke, 15th chapter, 7th verse. Oh that the Lord may convert my soul. I tremble when I think how much I have resisted the workings of God's holy spirit in my soul (Joseph, 1853, p. 69).

Many wish that their former companions shared with them their blessed state and found their way to repentance:

> I only wish many of my partners could hear from you. They are a wicked set, and never go to church. 'The Lord have mercy upon us all' (Joseph, 1853, p. 78).

It is on the basis of these and similar narratives that H. S. Joseph judged with unperturbed confidence of their authors' successful reformation. "From the foregoing letters, which have been received from convicted felons," Joseph writes in the conclusion of the *Memoirs*,

> we may trust that the good seed which has been sown among them, has not been in vain. Indeed we have great reason to believe that many of *them*, as well as many discharged prisoners, have been brought from 'darkness to light, and from the power of Satan unto God.' For these mercies we would give all the praise and all the glory to Him, who hath given the Gospel treasure unto earthly vessels, "that the excellency of the power might be of God and not of man" (Joseph, 1853, p. 142).

This sample of Joseph's own style explains vividly why he felt the need to preface *Memoirs* with an assurance that he was giving the reader "the statements of the different prisoners as they were narrated by them without any alteration" (Joseph, 1853, p. 18). This disclosure was indeed in order, for what followed resembled Joseph's own arguments not only stylistically but also thematically. A letter from the convict who blamed his love of novels and romances for his moral failings

illustrates the striking resemblance that the assessments of the convicts bore to the opinions of their chaplain: Joseph's own conclusion to *Memoirs* features an extended argument for suppressing publication and circulation of "thrilling narratives," which in his opinion constituted "one great cause of crime" (Joseph, 1853, p. 142).

It is of course tempting to dismiss *Memoirs* as phony drivel of crafty "Joeys" (Victorian prison slang for a convict who fakes reformation by displays of religious feelings), who managed to dupe their gullible chaplain, just as it is tempting to dismiss Joseph's optimistic confidence in the reformation of his flock as the mere prattle of a naive man who mistook assumed contrition for the real thing.[10] But since Joseph and his congregation represent a definitive strain in the history of Victorian prison reform, it is a credit to Victorian skeptics such as Dickens that they did not simply dismiss "Joeyism" but attempted to analyze its cultural significance.

III.

While the most famous of Dickens's inroads against the phenomenon of the "model prisoner" appears of course in *David Copperfield* (1849–1850), I would like first to turn to his journalistic work, where he rehearsed the arguments that were later to reappear in the novel. Seven months prior to the publication of the final monthly installment of *David Copperfield*, he had taken up the issue in "Pet Prisoners," a leading article that appeared anonymously in *Household Words* on April 27, 1850.[11] In that piece, Dickens condemned the mixture of narcissism and hypocrisy that, he believed, "the system" promoted in the convict when it made him the center of universal attention, often at the expense of the forgotten victim. Even murder victims and their families, Dickens bitterly complains, have but a weak claim on anybody's memory or consideration, least of all on the murderer's. His persona and his salvation become the pre-eminent concern:

> The state of mind into which a man is brought who is the lonely inhabitant of his own small world, and who is only visited by certain regular visitors, all addressing themselves to him individually and personally, as the object of their particular solicitude – we believe in most cases to have very little promise in it, and very little of solid foundation. A strange absorbing selfishness – a spiritual egotism and vanity, real or assumed – is the first result. It is most remarkable to observe, in the cases of murderers who become this kind of object of interest, when they are at last consigned to the condemned cell, how the rule is (·) that the murdered person disappears from the stage of their thoughts, except as a part of their own important story; and how they occupy the whole scene. *I* did this, *I feel* that, *I* confide in the mercy of Heaven being extended to *me*; this is the autograph of *me*, the unfortunate and the unhappy; in my childhood I was so and so; in my youth I did such a thing, to which I attribute my downfall – not this thing of basely and barbarously defacing my Creator, and sending an immortal soul into eternity without

> a moment's warning, but something else of a venial kind that many unpunished people do. I don't want the forgiveness of this foully murdered person's bereaved wife, husband, brother, sister, child, friend; I don't ask for it, I don't care for it. I make no enquiry of the clergyman concerning the salvation of that murdered person's soul; *mine* is the matter; and I am most happy that I came here, as to the gate of Paradise (Dickens, 1995, p. 220).

"Now, God forbid," Dickens adds a few lines down the page, "that we, unworthily believing in the Redeemer, should shut out hope, or even humble trustfulness, from any criminal at that dread pass; but it is not in us to call this state of mind repentance" (Dickens, 1995, p. 220).

If such is the case with convicted murderers awaiting execution, the picture Dickens paints of less serious offenders is gloomier still. "The dread of death not being present," their "tendency to hypocrisy" is even stronger (Dickens, 1995, p. 220) "If I, John Styles, the prisoner," Dickens dramatizes the thoughts of an imaginary convict,

> don't do my work, and outwardly conform to the rules of prison, I am a mere fool. There is nothing here to tempt me to do anything else, and everything to tempt me to do that. (·) I should be weary of myself without occupation. I should be much more dull if I don't hold these dialogues with the gentlemen who are so anxious about me. I shouldn't be half the object of interest I am, if I don't make the professions I do. Therefore, I John Styles go in for what is popular here, and I may mean it, or I may not (Dickens, 1995, pp. 220–221).

Further in the piece, Dickens introduces the narrative of a reformed offender, which he goes on to analyze to show the same "spiritual egotism and presumptions of which we have already spoken" (Dickens, 1995, p. 223). He makes a point of borrowing this letter from *Prison Discipline*; *And the Advantages of the Separate System of Imprisonment* (1848), a treatise by John Field, the chaplain at Reading Gaol and Dickens's adversary, whose criticisms of the chapter on Philadelphia prison in *American Notes* (1842) had cut Dickens to the quick.

The letter Dickens considers could have easily made it into Joseph's *Memoirs* or other such collection. It follows the same conventions and has the same tone and feel. Anticipating Uriah Heep's sermonizing in *David Copperfield*, the letter's author expresses his enthusiasm about his "present state" and prays day and night for God's forgiveness; he frets about his parents and sends his respects to his companions, hoping that they will see their folly, as he has seen his. Seizing on the letter's language, Dickens invites his reader to observe a characteristic preaching on the part of its felonious author about "the wickedness of the unfelonious world" (Dickens, 1995, p. 222). Then he goes on to contrast this piece of writing to a different kind of a "reformed" narrative, written, as Dickens puts it, of his own (i.e. convict's) mind. In this alternative narrative (composed of course by Dickens himself), an imaginary author faces his degradation instead of pointing at the sinfulness of others, names his crime frankly and clearly instead of glossing over

it, admits his evil influence on those "littler" than he instead of casting himself as a victim of bad associates, and promises "to work (his) fingers to the bone to make restitution" instead of avoiding as much as a mention of the wronged party (Dickens, 1995, p. 223).

What would happen if a letter like this would fall, say, into Joseph's hands? "Would that be better? Would it be more like solid truth?" Dickens asks. The answer, he believes, is no. A narrative such as this would not strike anybody as more truthful because it "is not the pattern penitence" (Dickens, 1995, p. 223). "There would seem to be," Dickens goes on to explain the term, "a pattern penitence, of a particular form, shape, limits, and dimensions, like the cells." While he merely goes on to make another quick foray against Field, suggesting insidiously that in their "overweening readiness to lecture other people," pattern penitents in fact imitate chaplains like him, the point that Dickens makes rises above personal attacks (Dickens, 1995, p. 223).

What he registers in this brief comment is an understanding of the process by which the system coped with the same absence of "moral standard" that we saw Colonel Jebb lament earlier in the paper. It is as if to deflect the challenge that this void posed to the practicality of the institution's goals, that prison reformers welcomed a rigid set of parameters for the genre of "pattern penitence." Having failed to classify convicts' stories on the way in, the system attempted to synchronize them on the way out. If reformed subjectivity could indeed be recognized only through the story it told about its reformation, this genre, just like the process of reformation itself, called for strict routinization. It was formalized in the same way as diet, uniforms, hours of work, exercise and worship, and admitted of no infractions to its narrative discipline. Just as any violation of prison regime entailed a penalty, violation of this genre's conventions threatened a rhetorical failure. Once its protocol was spurned, the system, personified by people like Field and Joseph, could not, according to Dickens, recognize the message.

While Field and Joseph could have objected, of course, that what Dickens was proposing was simply a different "pattern" by which to organize the penitence and that he was just as dogmatic in his position that *no* expression of subjectivity conveyed through the existing institutional script could be trusted, Dickens's remark raises important questions about the relationship between language and social institutions, and more specifically about the role that language played in measuring the effectiveness of reformative practices to whose formulation we saw it contribute earlier in the paper.

On the one hand, one may argue that in instructing the prisoner in the art of "pattern penitence," the system sought not only to enact moral conversion but also, and perhaps more importantly, to transform him into an extension of itself. By training him to tell his story in a new language and with reference to a new

set of representational conventions, it recast him into someone who could testify to its efficiency and speak on its behalf in the language it could understand. And because, as John Bender points out, the institution of the Penitentiary could only represent itself through the means that are "indirect and procedural rather than theatrical and emblematic," the move to shape and to regulate the genre of "pattern of penitence" can be viewed as a move to control the accounts through which the Penitentiary lived in the public mind (Bender, 1987, p. 208).

To a less suspicious reader, however, the reformers' willingness to believe convicts' exercises in patterned repentance may appear in a less sinister light. Instead of seeing it as a questionable strategy of promoting the institution they served, one may be inclined to interpret it as a consequence of their trustfulness, a possibility I would like to explore in the pages that follow. But rather than view the misplaced credulity of "believers" like Field and Joseph in terms of their personal flaws, I will suggest that it arose out of a specific set of reading strategies with which they approached the discourse of pattern penitence. While also institutional in character, these strategies, I will suggest, reflect not so much the reformers' effort to legitimate, at whatever cost, the institution of the Penitentiary, as their attempt to cope with the challenges ingrained in its very nature. This concluding section of my discussion relies on a number of concepts developed in Mikhail Bakhtin's work on discourse analysis.

IV.

Before addressing the question of how prison officials read patterned penitential narratives, I would like to consider briefly why it was important for them to introduce convicts to its discursive conventions. If the goal of teaching criminals the art of pattern penitence was not to instruct them in how to promote the system's interest while simultaneously advancing their own, what could it be? One may argue, perhaps, that in introducing prospective penitents to the conventions of penitential discourse, the reformers were intuitively hoping that they were also introducing them to a new way of making sense of their experience. In so doing they anticipated, as it were, a Bakhtinian understanding of a literary genre as a way of seeing. As Pavel Medvedev, a member of Bakhtin's circle and the author of *The Formal Method in Literary Scholarship* (1928) writes with reference to literary genres, "If we approach genre from the point of view of its intrinsic thematic relationship to reality and the generation of reality, we may say that every genre has its methods and means of seeing and conceptualizing reality, which are accessible to it alone" (Bakhtin, 1978, p. 133).[12] "One might say," Medvedev continues, "that human consciousness possesses a series of inner genres for

seeing and conceptualizing reality. A given consciousness is richer or poorer in genres, depending on its ideological environment" (Bakhtin, 1978, p. 134). While Medvedev is primarily concerned with literature and the role that it plays in enriching our consciousness "with new devices for the awareness and conceptualization of reality," it is possible to extend this idea to other social institutions that develop their own languages, and hence new systems "of means and methods for the conscious control and finalization of reality" (Bakhtin, 1978, p. 133). Although not exactly a literary genre, but rather a speech genre, a broader category that in Bakhtin's arrangement includes literary genres as a subset, pattern penitence still implies a particular set of values and ways of conceptualizing experience.

But introducing penitents to the appropriate way of formulating their accounts of personal spiritual transformations was only one stage in a two-step undertaking. There was also the task of interpreting. The way in which the reformers seem to have approached the tales of patterned penitence suggests that they assumed the penitential language to be deployed as "direct," "unmediated," "object oriented" discourse (all terms come from Bakhtin's analytical arsenal), one whose purpose is "naming, informing, expressing, representing," and that is "intended for equally unmediated, object-oriented understanding" (Bakhtin, 1993, p. 186). Oblivious to the (inevitably) stratified nature and multivalent meanings of the words it uses, a direct unmediated discourse, Bakhtin explains, "recognizes only itself and its object, to which it strives to be maximally adequate" (Bakhtin, 1993, p. 187). It is a discourse that knows no irony and is well fitted for speaking "in earnest." And this is apparently how Joseph (as well as his fictive counterparts in *David Copperfield*, as we will see shortly), sees his correspondents use the language of pattern penitence. That they probably learnt this language from Joseph himself does not trouble the solemn reformer. And, according to Bakhtin, there may be indeed no cause for concern. As Bakhtin explains, the fact that a direct unmediated discourse may imitate someone or learn from someone "does not change things in the slightest" (Bakhtin, 1993, p. 187). As long as the project of an utterance does not include the task of giving the stage to the imitated voice next to the imitating one (becoming double-voiced in the process), it remains single-voiced, direct and unmediated (Bakhtin, 1993, p. 187). Confident about its semantic authority, it has no doubt that this authority is located within its borders. And if the language of penitence that Joseph's charges have learnt from him accurately reflects – or so they feel – the process they claim to have undergone, its uniformity and resemblance to the language of their spiritual mentor does not in itself constitute evidence that it is used spuriously. It is apparently this theoretical possibility that Dickens has in mind when in "Pet Prisoners" he suggests in reference to the professions of the fictitious convict John Styles that he "may mean it" (Dickens, 1995, p. 221).

Most likely, however, he does not. At least, Styles' novelistic counterparts do not. In Chapter LXI of *David Copperfield*, which relates David's visit to the model prison, Dickens not only continues his critique of the Separate system, which he had begun in *American Notes* (1842), but also holds up for ridicule the gullibility of its officials eager to believe the professions of penitence that both David and the reader know to be fraudulent. Coming as they are from Uriah Heep and Mr. Littimer, the novel's villains and confirmed hypocrites, they can be nothing else. But "the system," represented here by Mr. Creakle, David's old schoolmaster turned magistrate, and his colleagues, is blind to the fact. The officials appear to be fully taken in by the professions of the two hypocrites, as does the majority of the visitors who tour the prison along with David (Dickens, 1985, p. 917). Adapting the conventions of patterned penitence to oral discourse, the duo take turns preaching at David and calling on him and others "to see (their) wickedness, and amend." They bless their "present state" and declare that prison has made them "sensible of (their) follies" (Dickens, 1985, pp. 927–928). They only wish that their visitors could all be "took up and brought here" (p. 929). "When I think of my past follies, and my present state," Uriah concludes his sermon, "I am sure it would be best for you. I pity all who ain't brought here!" (p. 929).

Dickens's representation is of course a caricature of the conventions of patterned penitence and an attack on the institution's unthinking readiness to credit the obviously fake displays of contrition and professions of moral reformation. As any caricature, it exaggerates the features that it targets, hyperbolizing not only the obvious duplicity of Uriah and Littimer but also overstating the light-headed gullibility, not to say obtuseness, of the officials. But regardless of how dull-witted (or self-serving) the officials are made out to be, one may argue that it is in principle unfair to expect of them the same insight into the penitents' subjectivity as David and the reader possess. The perceptiveness that we share with David (and that is denied to the officials and the visitors) is an effect of our privileged position. It originates in the surplus of knowledge we have that they don't. After all, what constitutes chief evidence of Heep's and Littimer's insincerity is precisely their "moral character." But what is literally an open book to us, Heep's and Littimer's past being delineated as it is in the course of David's autobiographical novel where both figure as characters, is not at all an open book to Mr. Creakle and others. They are invited to assess these characters' morality without the benefit of the information that David and the reader are privy to, and get ridiculed when they misjudge. But while one may justly remind us that Mr. Creakle himself is not exactly a paragon of benevolence and that our laughter can be easily justified on other grounds, it is still worth remembering that what Mr. Creakle, and "the system" in his person, has at his disposal (besides of course the details of the penitents' crimes that both they and the officials are too shy to recall) is for the most part

representations made by these characters themselves. The question then arises as to how they read them.

Just as Heep and Littimer imitate their real-life models in constructing their versions of patterned penitence, "the system" in *David Copperfield* imitates real-life believers like Joseph in interpreting them. Just like Joseph and Field, it reads their professions as direct unmediated discourse oriented towards its referential object, which it optimistically assumes to be the two characters' penitence and moral conversion. What the system fails to see, I would like to suggest, is that Littimer's and Heep's speech is not direct unmediated discourse but represented and objectified one. In fact, it is objectified on two levels, by Dickens and by the characters themselves. To sort out this point, I need to turn briefly to Bakhtin's discussion of objectified discourse.

Objectified discourse, Bakhtin explains in *Problems of Dostoevsky's Poetics*, is different from direct unmediated discourse in that it itself becomes an object of representation. The most typical form of represented discourse is the direct speech of characters (Bakhtin, 1993, p. 186). It is treated, Bakhtin continues, "as someone else's discourse, as discourse belonging to some specific characterological profile or type," that is to say "as an object of authorial understanding and not from the point of view of its referential orientation" (Bakhtin, 1993, p. 187). While a character's speech does of course have direct referential meaning, it is also "at the same time the object of someone else's intention, the author's" (Bakhtin, 1993, p. 189). Its task to carry out referential intention is subordinated to an overriding task posited by the author. Objectified discourse itself, however, knows nothing of this superseding task. Nor is it aware of serving any functions other than those that are consistent with what is expected of direct and unmediated discourse that it knows itself to be and which it is if viewed from within the character's field of vision.

For example, in Heep's professions of repentance Dickens represents the discourse of pattern penitence. While Heep himself uses this discourse to make representations about his (alleged) moral conversion, Dickens surrounds it with the text (of the entire novel) that clearly exposes Heep's speeches as lies, making thus a critical statement not only about Heep but also about the discourse itself. Dickens's intention, however, does not penetrate inside the objectified speech of Heep, who remains unaware that he participates in the debunking of his own discourse, but is realized through the contrast between Dicken's and Heep's opposing semantic goals. And it is precisely this opposition that constitutes this representation as parody.

But while it is easy to see how Dickens objectifies the discourse of pattern penitence, it is more important for my argument to see how Heep and Littimer do the same. Just as Dickens's intention to discredit Heep and Littimer's objectified

discourse lies outside its parameters (and in so doing keeps it free from authorial intrusion), so does these characters' real intention lie outside the scope of patterned penitence and has little to do with its referential powers. Their intention, after all, is not to use the pattern to represent the penitence but rather to use this discourse to construct the kind of selves that are consistent with the system's conception of the reformed subjectivity.[13] From this standpoint, Heep and Littimer use the language of pattern penitence not as characters but as novelists whose project is to author their own new selves that are different from their real ones. It is in this sense that their use of pattern penitence is analogous to a novelist's use of objectified discourse of another.

If this level of objectification is not immediately apparent it is because both Dickens and the two characters want it to be this way. On the one hand, Dickens's agenda of discrediting the language of pattern penitence depends on our associating it with Heep, whom we know to be a confirmed hypocrite and a liar, and on removing all distance between him and that language. And indeed, there is an easy fit between Uriah's familiar hypocritical protestations of "umbleness" and the new language he acquires while in prison. If someone like Heep adopts the language of pattern penitence, Dickens seems to be saying, then of course this language is fraudulent. On the other hand, it is also in Heep's interest to make it appear as if he is speaking "his own language." He knows that his chances of convincing others of his reform are higher if the language he uses to make his professions sounds like "his own." It is because of these converging interests that Dickens inadvertently shares with his hypocritical characters that the second layer of objectification is barely perceptible. And yet it exists, as indeed it should, for Heep no longer functions as just a character in Dickens's novel but also as an author of a self that matches the institutional definition of a reformed criminal. It is in authoring this new self, this new character in his own novel, so to speak, that he makes use of a newly learnt discourse that is, after all, a discourse of another. A murderous look that David detects on Heep's face and that is so radically at odds with the spirit of Heep's preaching communicates exactly that otherness (Dickens, 1985, p. 928). Not only does it indicate to David and to the reader that Heep's declarations of contrition are opportunistic and untrustworthy, but it also frames his words as a quote, as discourse of another that Heep the author puts in the mouth of Heep the character that he forges for the consumption of the system.

That David can see through Heep's and Littimer's dissembling while "the system" remains blind to it can be attributed then just as much to David's familiarity with their inglorious past as to his occupation as a professional writer. It is only natural that as someone who himself is in the business of making characters he has a better eye for detecting similar activities of others. Adept in creating subtle double-voiced utterances, as his own discourse amply demonstrates, he

is understandably more sensitive to other people's discursive manipulations.[14] Furthermore, it is due to his experience as a writer, and even more importantly an author of an autobiographical novel, that he is able to see the separation between the author and the character in the authoring activities of Heep and Littimer. And it is because the system fails to see this separation that it mistakes their discourse for a genuinely penitential narrative, or confession. As Bakhtin explains in his early philosophical essay "Author and Hero in Aesthetic Activity," it is precisely the distance between the authoring self and the authored one (or "the ratio of I-for-myself to I-for-another," as Bakhtin's commentators Morson and Emerson (1990) put it, using his own terminology) that distinguishes autobiography from confession (p. 217).[15] While a confessional narrative essentially merges the author and the hero into one, autobiography calls for some distancing of the objectified self.[16] And because confession arises out of "an attempt to fixate oneself in repentant tones in the light of the ethical ought-to-be," the system's next conclusion is to assume that it is repentance and self-condemnation that now shape the confessors' (i.e. Heep's and Littimer's) inner lives (Bakhtin, 1990, p. 141).

But there is perhaps yet another way to account for the facility with which the system appears to have credited professions of pattern penitence. It is to relate it to a particular set of interpretative practices, those that concentrate on the elements of the form, taking less (or no) notice of the content. Just as with classification the system attempted to systematize the endless variety of personal histories by focusing on what was formulaic and repeatable (age, gender, the type of offence), so in interpreting pattern penitence it similarly privileged the (repeatable and objective) elements of the pattern over the (unrepeatable and subjective) content of the penitence. Insofar as such practices are consistent with the ethos of Formalism as a method of literary analysis, one may liken the believers in pattern penitents to formalist critics who view works of literature as assemblages of artistic devices and analyze them in terms of their formal features.[17]

But for Bakhtin, the impulse to privilege formal elements at the expense of content was not limited to the field of literary and language studies. Rather, he understood it as a symptom of a particular worldview that underwrote not only Formalism, semiotics, structuralism and other schools with which Bakhtin was most directly linked in a polemic, but all those fields of knowledge that were characterized by what he saw as context-obliterating tendencies. Such tendencies were typical, according to Bakhtin, of all forms of theoretism, a term that meant to him something like misguided valorization of systems.[18] In giving precedence to what is systematic and generalizable, theoretism suppresses what is singular and unrepeatable, and in so doing privileges code over context. "A context," Bakhtin wrote in the early 1970s, "is potentially unfinalized; a code must be finalized.

A code is only a technical means for transmitting information; it does not have cognitive, creative significance. A code is a deliberately established, killed context" (cited in Morson & Emerson, 1990, p. 58). It is precisely their insensitivity to the importance of the context and undue regard for the code that lead these disciplines to develop an impoverished view of the world, causing them to mistake their own codifications of reality for reality itself.

The distinction between the code and the context, which continued to be important for Bakhtin throughout his entire career, is variously reformulated in his writings to better accommodate the nuanced demands of his arguments: as a distinction between what is posited and what is given, a distinction between "*znachenie* (the objective, generalizable, dictionary meaning of something) and *smysl* (its sense or particular meaning in a given, unrepeatable context)," *znanie* (knowledge) and *priznanie* (acknowledgenment), precision and depth, monologic and diaologic (Morson & Emerson, 1990, p. 98). What remains constant, however, is Bakhtin's advocacy of those analytical models that demonstrate an understanding of the importance of context, that value depth over precision, that care about "smysl" more than about "znachenie." While Bakhtin concedes that there are areas of human activity where the alternative models of analysis can be put to valid uses, such as natural sciences, for instance, in spheres more directly concerned with the lived experience of individual people, those models, he argues, foreclose genuine understanding.

If considered in terms of these distinctions, the institutional response to pattern penitence emerges as both strikingly un-Bakhtinian and quasi-scientific. As if illustrating what Bakhtin describes in this paper's epigraph "as a sad misunderstanding" and "the legacy of rationalism," believers in pattern penitence seem to have been measuring the truth of penitential narratives precisely by "what (was) repeatable and constant in (them)" (cited in Morson & Emerson, 1989, p. 7). In this sense, reformers' privileging of form over content, code over context and the constant over the unrepeatable can be accounted for not (just) by reference to their vanity or gullibility but as a consequence of a particular approach, one that appears to be more consistent with the spirit of scientific investigation than that of humanistic inquiry. By approaching reformation narratives with the yardstick of pattern penitence against which to gauge their correspondence to the governing discursive paradigm, the reformers mimicked, as it were, the procedures of science, favoring the measurable and the objective over the intuitive and metaphysical. And this ought not to be surprising, given the extent to which the nineteenth-century Penitentiary embodied the scientific principles that governed the thinking of its eighteenth-century originators and that warranted the appellation of science as a term to describe the philosophy of punishment which underpinned their efforts.

The nineteenth-century Penitentiary, then, imprisoned not just bodies, but stories. Even as the prison imposed a stringent regimen of discipline upon bodies, the penitentiary project likewise disciplined narratives. The modes in which convict testimony was channeled into pat tales of early home life, first crimes, irreligiousness, and vicious company, reflect more than a thin veneer of Victorian moral convention. They also point at reformers' understanding of these narratives' multiple tasks. On the one hand, while the convict testimony provided a language that penal administrators could interpret, and thereby assess whether reform in the convict had occurred, this testimony, to the extent it was intelligible as a reformation narrative, was always already inscribed with the categories that legitimated the institution of the prison itself. In this sense, in moral reform discourse, no hermetic boundaries separated the penitent subject – whether the "real" subject of Joseph's *Memoirs* or the fictive subject of *David Copperfield* – from the institutions of punishment. But this was not all. One may also argue that pattern penitence both externalized and attempted to meet the challenge that the Penitentiary faced in having to deal institutionally, and therefore more or less uniformly, with the infinite variety of individual experience. By relating experiences that were characterized by radical specificity with reference to conventions that were characterized by strict uniformity, pattern penitence helped to neutralize the challenges posed by what was diverse and unverifiable on the level of content by making it appear homogeneous and repeatable on the level of form. In so doing, it constituted a (partial) response to the institutional predicament of using standard procedures to enact change that was the same in the material that was radically diverse, while simultaneously giving expression to the dialogue between materialist theories and evangelical discourses that had found its meeting place in the institution of the Penitentiary.[19]

NOTES

1. The epigraph comes from Bakhtin's early essay "Toward a Philosophy of the Act." Cited in Morson and Emerson (1989, p. 7).

2. May (1973) quotes from Mary Carpenter, "Juvenile Delinquency in its Relation to the Educational Movement," in *Essays Upon Educational Subjects* (1857).

3. Margaret May (1973) and Gertrude Himmelfarb (1971) make a similar point. Also see Chapter 7, "Architecture against Communication," in Robin Evans (1992). For a more general discussion of the relationship between dirt, disease, and morality that informed Victorian texts, see Stallybrass and White (1986, pp. 125–148).

4. For a discussion of Bentham's response to the challenge of formulating defensible social policies in the face of the radical disparity of individual characters and personal situations, see Simpson (2002, pp. 59–62).

5. Translations from Dostoevsky are mine.

6. Marie-Christine Leps (1992) comments on the difference in attitudes typical of these two professional communities in *Apprehending the Criminal: The Production of Deviance in Nineteenth-Century Discourse* (pp. 20–21).

7. Normandeau quotes Charles Lucas, *Du système pénal et du système répressif en général, de la peine de mort en particulier* (1827).

8. For a classic nineteenth-century account of the American experiment, see Gustave de Beaumont and Alexis de Tocqueville (1964). Besides Foucault (1977) and Rothman (1971), see also Philip Collins (1994), particularly Chapters 3 and 5, and Michael Ignatieff (1978), Chapter 1, for an extensive modern-day discussion of both systems of prison discipline in Britain. For a history of the Separate system, see U. R. Q. Henriques (1972).

9. David Rothman (1971) makes a similar observation in *The Discovery of the Asylum: Social Order and Disorder in the New Republic*. See Chapter 4, "The Invention of the Penitentiary."

10. Mayhew (1968) explains this slang term in *The Criminal Prisons of London* (p. 169).

11. The piece appeared three to four weeks following the publication of "Model Prisons," a violently critical pamphlet by Carlyle written upon his visit to Coldbath Fields, a prison organized on the Silent system. While Dickens never mentions Carlyle's pamphlet and, in contrast to Carlyle, zeroes in on Pentonville – a model prison on the Separate system – many of the attitudes that he expresses in "Pet Prisoners" are very similar to Carlyle's.

12. In the controversy surrounding the authorship of the so-called "disputed" texts of the Bakhtin canon, I am taking the position of Morson and Emerson (1989, pp. 31–49; 1990, pp. 101–119) that credits Medvedev with the authorship of this work. A different view is presented in Clark and Holquist (1984, pp. 146–170).

13. Robert Barsky (1994) makes a similar observation with regard to the procedure of the Convention refugee hearing. "In this regard, the hearing is more of a test of the claimant's ability to sort through his experience for appropriate selection than it is an evaluation of whether or not his experience is in line with our definition of the Convention refugee. Whether the experiences are "true" or "false" is hereby subordinated to the larger concern of whether this individual has adequately assessed the requirements of this hearing and is able to articulate appropriate content in an acceptable narrative form. (·) If this is the case, as the procedure of this hearing suggests, then the grounds for admissibility are indeed more contingent upon manner of self-construction and expression than upon verifiable experience" (Barsky, 1994, p. 119).

14. Consider, for instance, the following sentence from the same chapter. In reference to the invitation he has received from Mr. Creakle to visit the model prison under his supervision, David says to his friend Traddles: "And he writes to me here, that he will be glad to show me, in operation, the only true system of prison discipline; the only unchallengeable way of making sincere and lasting converts and penitents – which, you know, is by solitary confinement. What do you say?" (Dickens, 1985, p. 921). This is a classic example of Bakhtin's "hybrid construction," that is an utterance that appears to belong to a single speaker but that contains within its formal boundaries two different voices. Juxtaposed to the voice of Mr. Creakle, who diligently reproduces in his letter the language of treatises advocating the Separate system of prison discipline, the reader can "hear" David's voice that says, "You know" and "What do you say?" The interjection and the question cast a thick ironic shade on Mr. Creakle's stilted language of official reports. The chapter features several more examples of the same use of official prison reform discourse. On hybrid constructions, one of the favorite Dickens's stylistic devices, see the chapter on heteroglossia in Bakhtin's "Discourse in the Novel" (Bakhtin, 1996, pp. 303–324).

15. In reference to confession Bakhtin writes, "The essential, *constitutive* moment of this form is the fact that it is a *self*-objectivation, that the *other* with his special, *privileged* approach is excluded; the only principle that organizes the utterance here is the pure relationship of the *I* to itself. Confession as a self-accounting comprises only that which I myself can say about myself (in principle, of course, and not in fact); it is immanent to the morally acting consciousness – it does not exceed the essentially necessary bounds of that consciousness; all moments transgredient to *self*-consciousness are excluded. In relation to these trasgredient moments, that is, to the possible axiological consciousness of the other, confessional self-accounting assumes a negative attitude and contends against them for purity of self-consciousness – for the purity of one's solitary relationship to oneself. (·) A pure, axiologically solitary relationship to myself – this is what constitutes the ultimate limit toward which confessional self-accounting strives by overcoming all the transgredient moments of justification and valuation that are possible in the consciousness of other people" (Bakhtin, 1990, pp. 141–142). Autobiography, on the other hand, like biography, narrates the story of the self as if from the outside. And although the author and the hero come very close to each other, they are not the same. "The author of biography is that possible other by whom we are most likely to be possessed in lived life; the possible other who is with us when we look at ourselves in the mirror, when we dream of glory, when we make plans for our life; the possible other who has permeated our consciousness and who often guides our acts, our value judgments, and our vision of ourselves side by side with our own *I-for-myself*; the other in our consciousness with whom our external life can still be sufficiently active (whereas an intense inner life, when we are possessed by another, is impossible, of course, and it is here that a conflict arises and a struggle begins with the other for the liberation of my *I-for-myself* in all its purity: confession as an account rendered to myself for my own life) (Bakhtin, 1990, p. 152).

16. See "Author and Hero in Aesthetic Activity," particularly pp. 141–155, in Bakhtin (1990).

17. In a somewhat similar move, Robert Barsky (1994) compares the Senior Immigration Officer conducting a refugee hearing to Bakhtin's monologic author, "Like Bakhtin's monologic author, the S.I.O. is not listening to the 'fundamental heteroglossia inherent in actual language; he mistakes social overtones, which create the timbres of words, for irritating noises that it is his task to eliminate"' (p. 184). Barsky quotes from "Discourse in the Novel," *Dialogic Imagination* (Bakhtin, 1996, p. 327).

18. I am paraphrasing a definition of theoretism offered by Morson and Emerson (1990, p. 28). On Bakhtin's understanding of "theoretism," also see *Rethinking Bakhtin* (Morson & Emerson, 1989, pp. 29–30).

19. For a discussion of nineteenth-century prison reform movement in Britain as a point of intersection, both practical and theoretical, of evangelicalism and materialist theories, see Ignatieff (1978), particularly Chapter 3. Also see Weiner (1990), for a discussion of the notions held in common by evangelicalism and utilitarian theory (pp. 38–45).

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“FOREMOST AMONG THE PREROGATIVES OF SOVEREIGNTY”: THE POWER TO PUNISH AND THE DEATH OF COMITY IN AMERICAN CRIMINAL LAW

Karl B. Shoemaker

ABSTRACT

This essay explores a radical shift in how the relationship between the power to punish and sovereignty has been conceived in modern American law; specifically focusing on the quiet death of comity as an operative principle in the exercise of criminal jurisdiction. While this essay attends to certain legal issues arising from historical intersections of federal, state and Indian sovereignty in the field of criminal law, this essay is not an attempt to directly evaluate the history of federal policies applied to Indian tribes or tribal lands. Nor is this essay in any strict sense a legal history of federal-tribal relations, or federal penal policy in relation to Indian tribes. Rather, I am concerned here with a series of liminal moments in the American legal tradition in which the power to punish came to be understood ever more one-sidedly, as an atomizing attribute of sovereignty rather than an identifying feature of community within a pluralistic legal framework.

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INTRODUCTION

In Supreme Court jurisprudence, the power to punish has been represented both as a centerpiece of sovereignty and as a marker for membership in distinct sovereign communities. As the Court recently pronounced in the context of federalism, "the power to create and enforce a criminal code" stands "foremost among the prerogatives of sovereignty" (*Heath v. Alabama*, 474 U.S. 82 (1985)). As a historical concomitant, American law has also characterized the power to punish as closely linked to, and limited by, the boundaries of community membership. Hence, the power to punish not only signals a core feature of sovereignty, but also signals the contours of a sovereign political community. In punishing, a community distinguishes itself both as capable of "exercising its own sovereignty" (*United States v. Wheeler* 435 U.S. 313 (1978)), and as capable of claiming those who belong to it.

Not surprisingly, this understanding of sovereignty has figured prominently in legal conflicts between Indian tribes, states, and the federal government over matters of criminal jurisdiction. First, through a series of federal treaties, Supreme Court decisions, and congressional legislation stretching back to the end of the eighteenth century, the power to punish has been a basis for support of (or challenges to) Indian sovereignty. For example, in early nineteenth-century cases, several Supreme Court justices specifically treated the power to punish as a *sine qua non* of sovereignty. At numerous points in those decisions, Indian tribes were determined to possess (or lack) sovereignty based on their capacity to punish their own members. Second, early treaties with Indian tribes were sometimes preoccupied with the question "who could punish whom?" The possibility that Indian tribes might exercise criminal jurisdiction over white settlers, or white settlers over Indians, was a cause of some anxiety in the late-eighteenth and early-nineteenth centuries. Community membership checked, at least in principle if not always in practice, the exercise of penal power over non-members. The power to punish at once anchored claims of sovereignty and limited the reach of sovereign power exercised by federal, state, and tribal communities respectively.

A venerable tradition of political thought conceives the relationship between sovereignty and the power to punish in much the same terms. After all, the word "sovereign" – derived from the Latin verb *superare* (to overcome, to vanquish, and, tellingly, to survive) – speaks already the intimate link between dominion and sanction. Machiavelli, for instance, understood the power to punish as a constituent element of sovereignty, and named that power necessary for the continued survival of a healthy republic (1970). Hobbes was equally explicit, listing the power to punish in his catalogue of "Rights" necessary for the "Institution of a Commonwealth" (1988, p. 90).

Hobbes is instructive here because while he understood the power to punish as a core feature of sovereignty, he also thought the concept of punishment was limited in particular ways. For instance, Hobbes implied a distinction between punishment proper and mere acts of hostility against another. Harm inflicted by a sovereign against a former subject who professed to remove himself from subjection, thought Hobbes, was not punishment. Instead, such harm was only "an act of Hostility"; akin to martial action undertaken against an outsider, an "enemy of the commonwealth" (1988, p. 166). Of course, Hobbes thought it legitimate for a sovereign to inflict harm when necessary for the preservation of the commonwealth ("in declared hostility, all infliction of evil is lawful," p. 166), but by his lights this was not punishment. Punishment, wrote Hobbes, had a paternalistic component. It was intended for the improvement of subjects. Against non-subjects, the sovereign merely preserved itself by necessary acts of hostility. For Hobbes, sovereignty entailed having the power to punish, but a sovereign only truly punished those it claimed as its own.

The student of modern political thought will recognize something rather dated in this Hobbesian conception of sovereignty. Michel Foucault has taught us to associate this form of the power to punish with the uniquely pre-modern sovereign (1977). Monarchs of the old regime punished by inscribing their sovereign power on the very bodies of their subjects. But in modern penal thought, argues Foucault, the old link between sovereign and subject has been muted; overturned (though, he stresses, not altogether replaced) by diffused disciplinary strategies aimed at governing populations rather than inscribing sovereignty upon subjectivity (1979, p. 6). Although Foucault's critique possesses great explanatory power, certain strands of the American jurisprudential tradition continue to present the relationship between sovereign communities and the power to punish in rather Hobbesian terms. This is particularly so in case law and legislation treating the intersections of federal, state and tribal criminal law.

But this older tradition of thinking about the power to punish – what I have been calling Hobbesian – was historically linked to an adjacent, and perhaps less intuitive, tradition of comity. There, the power to punish matched the separateness of sovereigns, but also joined separate sovereigns in mutual recognition of their own lawfulness. Sovereigns, according to long-standing juridical practices in Anglo-American and Continental legal traditions, gave respect to the judgments of other sovereigns. This respect, or comity, rested upon a shared understanding; a recognition that, despite existing as atomized sovereignties, two communities might still treat wrongs in a manner intelligible as lawful to each. This link between comity and the power to punish is not always explicit. In Hobbes' Leviathan for instance, it is present only by implication. A thriving notion of comity, however, can be located in strands of western juridical practice stretching

back to the Middle Ages. Contemporary legal doctrines such as Double Jeopardy and *autre fois* judgments are historical embodiments of principles of comity between sovereigns. In separateness, indeed because of it, sovereigns recognize something held in common, the capacity for sanctioning the wrongs of members, and respect it by honoring those judgments. This concept of comity was deeply embedded in the western legal tradition. Late-medieval jurists found doctrines of comity crucial for delineating secular sovereigns from one another and from the Church (Helmholz, 1996, p. 355). As Laura Benton has recently shown, western notions of comity between sovereigns played a crucial role in the early formation of legal pluralism in colonial cultures as well (2002). Constitutional scholars Akhil Amar and Jonathan Marcus have argued that the Double Jeopardy clause of the United States Constitution was grounded on a legal principle, sometimes called the English Rule, which called for the criminal judgments of foreign sovereign states to be respected as if they were England's own (Amar & Marcus, 1995). Even scholars questioning whether the Double Jeopardy clause of our Bill of rights was specifically intended to embody this so-called English Rule recognize that as a "principle of international comity" sovereigns respected the penal judgments of other sovereigns well into the nineteenth-century (Paulson, 1996).

In *Heath v. Alabama* (1986), the Court rejected (though not for the first time) this notion of comity between sovereigns. The intellectual groundwork for *Heath* had been prepared even in certain nineteenth-century decisions, but *Heath* made clear that, for the modern Court, the power to punish was no longer linked to a principle of mutual respect of judgments between sovereigns. Seemingly, a Hobbesian form of the sovereign power to punish survived, but it survived in an astoundingly one-sided and incomplete way. Seen this way, the important transformation in American law regarding tribal sovereignty and the power to punish is not to be mapped onto some supposed transformation from Hobbesian to Foucauldian modes of thought. The crucial transformation is the withering of comity.

When the Supreme Court in *United States v. Wheeler* (1978) affirmed that tribal sovereignty was constituted by an inherent power to punish members, it affirmed only one side of an ancient political and jurisprudential legacy. But at the same time, the *Wheeler* signaled a departure from this ancient legacy. The *Wheeler* Court found that precisely *because* Indian tribes are separate sovereigns for constitutional purposes, federal courts are *not* bound to respect their judgments. Thus, after *Wheeler*, a federal court could try a tribal member already convicted in tribal court for an offence arising out of the same underlying wrong. Some have suggested that the *Wheeler* Court never denied the tribe the power to try Wheeler in the first instance, and have shared some respect for tribal sovereignty. But this should not be read as respect for tribal sovereignty. The Court refused to acknowledge the tribe's sovereign judgment as meaningful at all, and found the federal government

unconstrained by the tribal court's exercise of judgment. Nothing in the tribe's power to punish was found inherently lawful, evocative of deference, respect, or recognition, and the federal government found itself free to punish Wheeler again.

I.

By the early decades of the nineteenth century, the legal status of Indian tribes vis-à-vis the states and the federal government had become a highly contested matter. A steady string of federal treatises attempted to articulate, and re-articulate, tribal legal status. Additionally, a line of early nineteenth-century of Supreme Court cases decided questions such as whether land titles conveyed by Indians were valid against conveyances made by the United States government (*Johnson and Graham's Lessee v. McIntosh* 21 U.S. 574 (1823)); whether Indian tribes were able to invoke federal court jurisdiction (*Cherokee Nation v. Georgia* 30 U.S. 1 (1831)); and whether a state statute annexing lands occupied by the Cherokee Indians was constitutional (*Worcester v. Georgia*, 31 U.S. 515 (1832)). Implicitly or explicitly, the relationship between the power to punish and tribal sovereignty figured prominently in these contests. Even where punishment was not directly at issue, assertions regarding Indian sovereignty very often involved observations regarding the perceived ability, or inability, of tribes to hold their own members accountable through penal law. The discussion that follows casts complicated historical matters in an overly schematic manner. While the discussion posits a relatively linear history in which tribal sovereignty and concomitant notions of comity wither in the face of federal overreaching, the facts were not so neat. Some of the earliest acts of Congress, passed at a time when I locate a surviving comity, were strong challenges to tribal sovereignty, controlling, for instance, disposition of tribal lands and limiting tribal treaty power. On the other hand, legislation as late 1855, a period I find to be the twilight of comity, granted to tribes some criminal jurisdiction over wrongs committed by members, suggesting some kernel of comity was still operative. Even so, the story that follows attempts to show that while sovereignty and the power to punish remained intimately linked, nineteenth-century relations between the United States and the Indian tribes were marked by an unquestioned decline of ancient principles of comity.

In *Cherokee Nation v. Georgia* (1831), the Cherokee nation challenged the constitutionality of Georgia statute, which, in part, annexed Cherokee land and delegitimated tribal governing institutions. The immediate constitutional question facing the Court in *Cherokee Nation* was whether the tribe could invoke federal jurisdiction at all. This question turned on whether or not the Cherokees "constitute(d) a foreign State in the sense of the constitution." If they were not

a foreign state for constitutional purposes, then they could not invoke federal jurisdiction. Article III, section 2 of the Constitution grants federal jurisdiction to cases "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." If, said the Court, Indian tribes were "foreign States" in this sense, then they could sue in federal court. But the matter was complicated by another constitutional provision that granted Congress power to "regulate commerce with foreign nations, and among the several states and with the Indian tribes" (art. 1, sec. 8). In this clause "foreign nations" are delineated from Indian tribes. Attempting to resolve the apparent textual inconsistency, the Court concluded that Indian tribes were distinct from "foreign states" for constitutional purpose" (p. 18). Therefore:

> An Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States (p. 20).

Though the Cherokee lost the case, claims they made in defense of their sovereign nationhood are instructive for present purposes. For the Cherokee claim to nationhood – the claim that they were "responsible in their political character for . . . any individual of their community" (p. 16) – was closely linked to the exercise of penal power. A key component of the Cherokee complaint was that the Georgia statute divested the tribe of its power to punish. Indeed, as the tribe claimed, Georgia's legislative scheme made "it murder for officers of the Cherokee government to inflict the sentence of death in conformity with the Cherokee laws" (p. 8). The Georgia statute made tribal officials liable to "death by hanging" for the exercise of their own law (*id.*). This, complained the Cherokee, amounted to "political annihilation" (p. 15). For the tribe, the ability to hold its own members accountable to Cherokee law was an essential way in which the community bound itself together and claimed its own people. In short, the Georgia statute struck at the heart of Cherokee sovereignty.

The Cherokee nation was not alone in linking claims of sovereignty to the power to punish. Concern for the relationship between the power to punish and sovereignty appears in other early nineteenth-century sources as well. For instance, language in treaties between the United States and other Indian tribes show that the power to punish was tightly bound up with defining the sovereignty and jurisdictional reach of each nation. But the sources also suggest a vital concern with comity between sovereigns.

The first Indian treaty undertaken by the revolutionary Congress was with the Delaware Indians in 1778 (Kappler, 1904). At the passage of the treaty, the United States was still at war with England. Unsurprisingly, much of the treaty sought to define the territorial boundaries of the Delaware tribe, to arrange for troop movement through Delaware territory, and to specify the types of military assistance to be given by each party to the other. Even so, the fourth article of

the six-article treaty dealt specifically with the power to punish. According to the article:

> neither party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders by imprisonment, or any other competent means, till a fair and impartial trial can be had (art. 4).

The trial and punishment of wrongdoers was to be a joint activity. The treaty provided for a tribunal composed of "judges or juries of both parties," who were to judge "as near as can be to the laws, customs and usages of the contracting parties and natural justice," and resolve the case. The treaty contemplated a form of mixed jury. It is not clear whether mode of process was intentionally modeled after similar medieval English practices, conformed to native customs, or simply suggested itself as a natural way to address inter-community disputes.[1] In fact, I have not yet found any instances where this procedure was actually used. Yet, it is worthwhile to note that these procedures suggest that the Delaware Indians and the federal government presumed each other capable of sitting together in one body and reaching an appropriate judgment. Each side, moreover, saw the other as capable of holding its own members accountable at law.

Two major treaties with the Cherokees, the Hopewell Treaty of 1785 and the Holston Treaty of 1791, highlight similar concerns. Article 5 of the Hopewell Treaty provided that any citizen of the United States attempting to settle on Indian hunting grounds would "forfeit the protection of the United States." After a citizen forfeited such protection, "the Indians may punish him or not as they please" (art. 5). Article 6 of the Hopewell Treaty addressed capital crimes committed by an Indian against "any citizen of the United States, or person under their protection." In such cases, the offending Indian was to be delivered up in order to "be punished according to the ordinances of the United States." Indians punished under this provision, would not be subjected to any greater punishment than in cases of capital crime "committed by a citizen on a citizen." In contrast to the mixed-jury provisions of the Delaware treaty, the Hopewell Treaty provided that the United States would unilaterally punish its own citizens who committed crimes against Indians. Instead, in the Hopewell Treaty the United States claimed jurisdiction over Indians committing capital crimes against United States citizens as well as jurisdiction over United States citizens committing capital crimes against Indians. Gestures of comity were still being made. The treaty conceded that whenever the United States punished its own citizens who had committed a capital crime against a Cherokee, "punishment shall be in the presence of some of the Cherokees." While the treaty did not provide a place for the Cherokees in the trial or punishment of a United States citizen, it seemed to presume justice entailed allowing Cherokees to observe the punishment. Of course, the provision allowing the Cherokees to

observe the punishment may betray a level of mutual mistrust between the parties. Nonetheless, at the least, the treaty still presupposes two communities capable of coming to agreement over when an unlawful act touching each had been properly resolved.

The 1791 Holston Treaty is similar in many respects to that of Hopewell. It no longer specified, however, that Cherokee citizens were allowed to witness the punishment of United States citizens. Moreover, the treaty required that any crime, including capital felonies, committed by United States citizens "against a Cherokee are to be punished by the state to which they belong (art. 11).[2] Hence, punishment of citizens of the United States was cast not as a federal matter, but as one for the state that claimed the offender.

Supreme Court dicta are instructive as well. For instance, in his *Cherokee Nation* dissent, Justice Thompson urged that the Cherokee was a sovereign foreign nation, "govern(ing) itself by its own authority and laws" (p. 53). In part, Justice Thompson based this conclusion on the practice contemplated in treaties already established with the Cherokees: "They have been admitted and treated by their own laws, usages, and customs within their own territory, claiming and exercising exclusive dominion over the same" (*id*.). In partial contradistinction to the majority's opinion, Thompson sought to ground the foreign and sovereign character of the tribes upon more than their territorial position. It was, he argued, "their political condition" and their ability "to maintain a separate and distinct government" that mattered, and this bore "no relation" to their "local, geographic, or territorial position" (p. 55). Justice Thompson then recounted those provisions in the Hopewell and Holston treaties that treated questions of criminal law. These provisions, noted Thompson, presuppose "a marked distinction between the Indians and citizens of the United States" (p. 70). Implicitly, Justice Thompson's dissent understood the power to punish as a key attribute of political community; an attribute whose presence confirmed sovereignty and implied comity.

In the next year, when the Court did strike down Georgia's legislation in *Worcester v. Georgia* (31 U.S. 515), Justice Mclean added a concurrence that echoed some of Justice Thompson's understandings. After noting the importance of territory for sovereignty, Justice Mclean found that the sovereignty might rest on attributes of self-government, not simply possession of land. As he stated: "They punish offenses under their own laws, and, in doing so, they are responsible to no earthly tribunal . . . The exercise of these, and other powers, gives to them a distinct character as a people, and constitutes them in some respects, a state, although they may not be admitted to possess the right to soil" (p. 581). Much like Justice Thompson's *Cherokee Nation* dissent, Justice Mclean presumed that the capacity to punish was so strongly connected with sovereignty that it could overcome the absence of absolute territorial rights.

Remarkably similar presuppositions are revealed in the opinion of Justice Johnson, though he comes to the exact opposite conclusion regarding the existence of Cherokee sovereignty. Justice Johnson too, it seems, understood the power to exercise and enforce criminal law as evidence of sovereign status. He simply did not think the Indians possessed such power. As he stated, "they still claim independence, and actually enforce their own penal laws, *such as they are*, even to the punishment of death" (p. 25, emphasis added). Implicit here, is a judgment about the quality of Cherokee penal laws. Nonetheless, the exercise and enforcement of penal law remained *prima facie* evidence of sovereignty.

Thus far, the discussion has focused on Supreme Court opinions and federal treaty language concerned primarily with the relation of the Indian tribes to the federal government. But equally important was the relation between the tribes and the several states. Here too, the power to punish informed contests over the limits of state and tribal claims to sovereignty.

In *United States v. Bailey* (24 F. Cas. 937 (1834)), an indictment was brought against a Tennessee citizen for the murder of another Tennessee citizen committed upon Indian land located within the boundaries of Tennessee. The indictment was brought under an 1817 congressional act that extended federal criminal jurisdiction over Indians in federal territory. The federal circuit court dismissed the indictment, finding the 1817 act unconstitutional because it attempted to grant federal jurisdiction over "Indian territory, though it be within the limits of a state" (p. 939). On their face, these words seem contrary to the Cherokee cases, which envisioned federal rather than state control in dealings with Indians. The *Bailey* case was at once a call for a "federal government . . . of limited powers" and an assertion of state prerogative over the power to punish. On the one hand, the court held that the federal government had jurisdiction over Indians by virtue of the Commerce Clause. Thus, said the court, "congress (has) power to inflict punishment on all who violate the laws, which regulate a commercial intercourse with the Indians" (*id.*). But where "a murder has been committed by one white person on another within the Indian territory . . . (that is) in no respect . . . connected with the commerce of the Cherokee Indians, or with their property or safety." Even early Commerce Clause jurisprudence was inflected by assumptions about the relationship between sovereign and subject.

As the court went on to explain by analogy, "the state of New York, for many years had punished its citizens for crimes committed in the Indian territory within its limits; and the state of Georgia, before its laws were extended over Cherokee country, within the state, punished its own citizens for offenses committed within that territory" (*id.*). Like the arguments of the Cherokees themselves in *Cherokee Nation*, this opinion contemplated the power to punish as something most properly exercised by a sovereign over its own members. This holding might run counter

to Marshall's vision of federally-centered nation building, but it also seems firmly grounded in a notion that individuals ought to be punished for their offenses by the sovereign to which they belong. Had the crime, the murder of one citizen of Tennessee by another, "interfere(d) with (the Cherokees) property or safety," said the court, the outcome would have been different (p. 940). But absent any Commerce Clause implications, punishment belonged, if it were to be exercised at all, to the offender's state community.

The next year, in *United States v Cisna* (25 F. Cas. 422 (1835)), a federal district court in Ohio made a similar determination. There, a white citizen of Ohio was indicted under federal law for stealing the horse of a "friendly Indian." Again, the constitutionality of a federal statute authorizing this indictment was challenged. Like the lower federal court in Tennessee territory, the *Cisna* court held that, as regards the federal government, "when the power to regulate commerce ceases, the power to punish must also cease" (p. 425). Moving even beyond the holding of the *Bailey* court from the previous year, the *Cisna* court found that theft of a horse from an Indian in a portion of Indian territory "limited to twelve miles square . . . surrounded by a dense white population, which have daily intercourse with the Indians," was more properly a state than federal matter. In the court's judgment, the close proximity of the Indian territory to the surrounding white community and the frequent intercourse between communities overrode an explicit grant of federal jurisdiction.

Whatever violence the court may have done to the Commerce Clause power, the court's conclusions were grounded upon more than an anti-federalist impulse. Rather, the court also had a positive vision of state prerogatives over the wrongs of its own citizens. As the court concluded, "Ever since the state government has been organized, it has had power to punish its own citizens for offenses committed within its limits; whether within Indian territory or not" (p. 425). Indeed, the court went on to say that where no constitutional provision stood to the contrary, "the state has power to punish its own citizens for offenses committed beyond its own limits" (*id*.). The court supposed the obligations of state citizenship to override even territorial boundaries. In fact, after holding that there was no federal jurisdiction over the indictment, the federal court concluded its decision by noting that "prosecution in the state court would be instituted against the defendants" and then "directed the marshal to deliver over the defendants to the state authorities to answer" (p. 426).

II.

Sources from the later half of the 1840s show a continued identity between concepts of sovereignty and the power to punish. Nonetheless, as the *Cisna* and *Bailey*

decisions foreshadow, the centrality of comity as an operative principle between the tribes and federal government had begun to fade. Punishment remained a hallmark of sovereignty, and citizenship continued to mark out the limits of the exercise of that sovereignty. But the notion of tribal law as something requiring the deference of federal courts was losing traction.

In part, concerns with comity were muted by anxieties over how tribal and state citizenship was to be defined. In 1847, the federal district court in Arkansas heard the indictment of Thomas Ragsdale, a Cherokee Indian, "for the crime of murder . . . committed upon a certain Richard Newland, a white man, in the country now occupied by the Cherokee Indians" (*United States v. Ragsdale* 27 F. Cas. 684, 685). Ragsdale argued that Newland, though white, was actually a citizen of the Cherokee nation. As Ragsdale argued, the murdered man was "by virtue of his marriage and in accordance with the constitution, laws (and) usages of (the Cherokee) nation . . . entitled to all the rights and immunities, civil and political, which appertained to any and all other citizens of the tribe" (p. 684). Therefore, claimed Ragsdale, he was "subject and amenable to the laws and regulations of the Cherokee nation" (p. 685). Newland's contested citizenship was pivotal because all prior crimes committed by Cherokees against other Cherokees had been pardoned in a federal treaty adopted the previous year. As the court noted, if "the person against whom (the murder) was committed, . . . (was), at the time (a) citizen or individual of the Cherokee nation . . . it is manifest that the offender has received a full and plenary pardon" (*id.*).

However, continued the court, "the question here arises, whether a white man can become a member of the Cherokee tribe of Indians, and be adopted by them as an individual member of that tribe?" The Supreme Court had in fact addressed a form of this question just the year before. In *United States v. Rogers* (45 U.S. 567), the Court refused to accept the argument of an accused murderer that he and the victim, though both white, had become citizens of the Cherokee nation. This plea, had it been successful, would have placed Rogers within a provision of a treaty exempting "crimes committed by one Indian against the person or property of another Indian" from federal criminal jurisdiction (p. 572). But Justice Taney held that while a white man "may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages . . . he is not an Indian and the exception is confined to those who by the Indians are regarded as belonging to their race" (p. 573). According to Taney, the pertinent treaty provision did not hinge upon membership in a sovereign nation. Rather, it turned on race. As Taney explained, "whatever obligations the prisoner may have taken upon himself by becoming a Cherokee . . . He was still of the white race, and therefore not within the exception" (*id.*).

Under *Rogers*, a white man could not remove himself from federal jurisdiction by becoming a tribal citizen. Nonetheless, he could make himself amenable to

tribal jurisdiction. This is in fact what Ragsdale had done. The *Ragsdale* court, referring to *Rogers*, said, "the language is too clear to be misunderstood: . . . a white man may incorporate himself within an Indian tribe, be adopted by it, and become a member of the tribe" (p. 686). Thus, "the plenary pardon to all native born Cherokees" also extended to those "subject to all the burdens, and entitled to all the immunities of native born citizens or subjects" (*id*.).

These two opinions point to a tension between an understanding that found race to be the touchstone of membership in a sovereign nation and an understanding which found amenability to "burdens," "usages and customs," to be conclusive. Importantly, this question arose in the context of how those individuals were to be treated for purposes of the exercise and enforcement of criminal law.

For present purposes, the import of the *Ragsdale* decision, like the earlier Marshall Court cases, is its suggestion of a strong association between the power to enforce criminal law and the exercise of sovereignty. But the latter portion of the opinion in *Ragsdale* suggests, though only incidentally, a transformation which in the end would tend to jurisprudentially atomize Indian tribes and state governments in a new way. Besides arguing the treaty's pardon, *Ragsdale* had also argued that the federal court had no jurisdiction of his case because he had already been tried and acquitted under Cherokee law. This argument called to the general common law understanding that the judgments of other sovereigns – whether for conviction, acquittal or pardon – would be recognized and respected in courts of the United States. Commonly called the English rule, this rule was based upon a notion of comity between sovereigns (Amar, 1996). This was the operative rule in American courts at the time *Ragsdale* was decided.[3]

Yet *Ragsdale* appears to suggest an abandoning of this rule, at least as regards Indian nations.[4] Concerning the plea of prior acquittal the Court said "This plea (is) clearly insufficient upon the ground that the Cherokee court had no jurisdiction of (this) case" (p. 686). The court did not, however, explain why the Indian court had no jurisdiction. The court simply stated that the tribal court had no jurisdiction for "reasons" that "will suggest themselves to every reflecting mind" (p. 686). It may be that the court thought that, as signers to the treaty containing the pardon clause, the Cherokees were bound to respect the pardon just as the federal court did. The opinion seems to suggest, though, that this was not the case. Rather, the assertion that the Cherokees had no jurisdiction in the case appears grounded in an assumption that, either by treaty or federal statute, excusive jurisdiction over all crimes, even those wholly contained within the Cherokee community, rested with the federal government. Thus, while allowing the defendant Ragsdale to be identified with the Cherokees for purposes of the treaty pardon, the court explicitly denied the Cherokees jurisdiction over one of their own members. The no longer presupposed a common ground

upon which otherwise separate sovereigns might recognize the lawfulness of the other.

Even so, extension of federal jurisdiction over crimes committed by Indians against Indians in tribal territory continued only slowly. Events at the end of the nineteenth century, however, prompted a more complete extension. In 1883, a Sioux Indian was tried and convicted in federal court for the murder of another member of the Sioux tribe (109 U.S. 556 (1883)). The defendant, a man named Crow Dog, was sentenced to death. On appeal to the Supreme Court, the crucial question in the case was jurisdictional. A federal statute expressly denied the court jurisdiction. But a treaty with the Sioux granted jurisdiction. The Court had to decide which provision was applicable. Ultimately, the Court determined that it had jurisdiction over the case, but found that the crime fell within an exception for "crimes committed by one Indian against the person or property of another Indian" (*id*.) Thus, the conviction in federal court was voided and the prisoner was set free.

It is interesting for our purposes to note that Crow Dog had in fact made peace with the kin of the slain man (Harring, 1994). A tribal council oversaw reconciliation between the parties in which Crow Dog gave eight horses, a blanket, and $600 to the dead man's family (*id*. 1). But at no point did the Court suggest that this settlement should factor in the jurisdictional question. But the Court did stress the cultural distance between the Indian law and United States law revealed in this case.

The Court suggested that its finding of a lack of jurisdiction was reinforced not only by the court's statutory interpretation but also by the "the nature and circumstances of (a) case" where "law . . . is sought to be extended over aliens and strangers" (p. 573). The Court strongly questioned the wisdom of extending the law of the United States "over members of a community, separated by race, by tradition (and) by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code." The Court explained that extending federal law in such instances "tries (Indians) not by their peers, nor by the customs of their people," but "judges them by a standard made by others."

There was, implied the Court, an unbridgeable gulf between the lawfulness of the savage tribe and the United States. For the Court, tribal conciliatory practices – characterized in the opinion as merely "red man's revenge" – could not be measured against "the maxims of the white man's morality" (*id*.).

Despite the Court's doubts concerning the wisdom of extending federal criminal to all crimes committed by Sioux Congress did so two years later. In fact, Congress was responding directly to the Court's opinion in *Ex parte Crow Dog*. Remarks made on the floor of Congress illustrate pressing anxieties regarding tribal criminal jurisdiction and the efficacy of federal law. Congressman Cutcheon of Michigan

would urge for the complete extension of federal law over Indians in Indian territory by referring to the *Crow Dog* decision. "We all remember," said Congressman Cutcheon,

> the case of Crow Dog, who committed the murder of the celebrated chief Spotted tail. He was arrested, tried by a federal tribunal, and convicted of the murder, but the case being taken to the Supreme Court of the United States upon habeas corpus, it was there decided that the United States courts had no jurisdiction in any case where one reservation Indian committed a crime upon another (16 Cong. Rec. 934, 1885).

The natural result of the Court's decision, remarked Cutcheon, "was that another murder grows out of that . . . And so these things must go on unless we adopt proper legislation on the subject" (*id*.).

The presumption running throughout Congressman Cutcheon's remarks was that the Indians lacked the power to punish in any proper way, and therefore lacked recognizable sovereignty as a distinct community. The extension of federal criminal law was intended for the "advancement and civilization of the Indian tribes." In part, the lack of civilization of the Indian tribes resulted from their lack of the proper exercise and enforcement of criminal law. Thus, Congressman Cutcheon could not think of leaving them to punish their own. "If . . . an Indian commits a crime against an Indian on an Indian reservation there is now no law to punish the offense except . . . the law of the tribe, which is just no law at all" (*id*.).

According to Congressman Cutcheon, the Indians exercised no intelligible law upon their own. It was necessary for Congress to "show them that they are not only responsible to the law, but amenable to its penalties" (*id*.) No longer, it seems, was punishment to be considered a matter for sovereign communities over those they claimed as their own. The external law of the federal government was to be brought to bear upon the tribes, not to define the boundaries of their community, but to civilize. Congressman Cutcheon's words are remarkable when compared to the language of the preceding one hundred years of Court opinions and treaties. Whereas many opinions and treaties contemplated Indians as a "political society," a "political community," a "nation," a "state," and a "domestic dependent sovereign," Congressman Cutcheon spoke of "advancement" and "civilization" of "reservation Indians."

In the early history of the question of Indian sovereignty the Court looked the existence of criminal law as an indicator of sovereignty and nationhood. At the same time, the treaties and general common law background of the rules contemplated that communities thus separated might still be joined in an understanding of law intelligible to both. By the late-nineteenth century, extension of federal law into Indian territory and over tribal members stemmed from a conclusion that the tribes

had no legitimate law of their own. Thus, with no criminal law and no corresponding sovereignty, nothing stood in the way of imposing federal law on the tribes. Indeed, the cause of civilization seemed to demand it.

III.

The extension of federal law over tribal law would not be absolute. An 1885 act allowed for concurrent Indian jurisdiction by tribal courts.

An alteration to the Major Crimes Act of 1884, made on the floor of the House during debate allowed tribal courts to retain concurrent jurisdiction over minor crimes committed by tribal members. Even a century later the Supreme Court could still describe the tribes as "subject to ultimate federal control (but) nonetheless remain(ing), . . . a separate people, with the . . . undisputed . . . power to enforce their criminal laws against tribal members" (*Wheeler*, 435 U.S. 313, 322 (1978)). The nature of the relationship between this power to enforce criminal laws and the tribal status as "self-governing sovereign political communities," though, had transformed remarkably.

In the early nineteenth century, the possession of a criminal law and the capacity to hold tribal members accountable to it had been a touchstone of tribal sovereignty. Concomitantly, the assertion that a particular tribe lacked such a capacity had been treated as evidence of sovereignty's absence. After nearly a century of extension of federal criminal law into Indian territory, the discourse had altered. Rather than evidence of sovereignty, the power to punish offenses by tribal members was merely an "inherent power" not yet "extinguished" by the federal government. Whereas, in the early nineteenth century the possession of criminal law had marked a people as separate and sovereign, it now was only a residue a "limited sovereign" (p. 323). Moreover, the federal government had already appropriated to itself the power to punish serious crimes on the reservation and fully assumed to itself power to punish non-tribal members for crimes committed on Indian lands. Sovereignty remained linked to the power to punish, but the comity that once inflected these matters, even if imperfectly, had withered.

This withering is perhaps best illuminated in the 1978 case *United States v. Wheeler* (435 U.S. 313). *Wheeler* simultaneously reasserted the sovereign status of Indian tribes and confirmed a radical separation between the law of the tribes and the law of the federal government. In *Wheeler*, a member of the Navajo tribe was arrested by tribal police for "disorderly conduct" and "contributing to the delinquency of a minor." He was sentenced under the Navajo Tribal Code (p. 315). A year later, for the same set of facts, he was charged with statutory rape in federal court. On appeal from his conviction in federal court, Robert Wheeler argued that

the subsequent prosecution in federal court was barred by the Double Jeopardy clause of the Fifth Amendment.

Ironically, such a defense would only prevail in the event the tribal court and federal court were found to be "arms" of the same sovereign. That is, if tribal courts were understood to be wholly in the service of the federal government, the Double Jeopardy clause would offer protection to Mr. Wheeler. As the Court had already ruled, Double Jeopardy protects against subsequent punishment by the same sovereign (*United States v. Lanza*, 260 U.S. 277 (1958)).

The Supreme Court, however, determined that the Navajo courts were not "merely arms of the federal government," but "separate political communities." Thus, while the Indians were free to prosecute and convict Wheeler, so was the federal government. This decision carries two important features. On the one hand it stands as a reaffirmation of tribal sovereignty and stresses the importance of the power to punish. On the other hand, though, the Court's decision also sounds the death knell of comity. The tribes might exercise the power to punish but the federal government need not acknowledge the tribe's action as lawful and worthy of respect. The Court completely abandoned the English rule that had informed historical interactions between separate sovereigns.

But the death of comity was foreshadowed already by longstanding federal legislation that had stripped the tribes of the power to punish their own for serious wrongs. The misdemeanors for which Wheeler was tried in tribal court represented the full extent to which he could be prosecuted under the powers left by federal legislation to the tribe. The federal government had aggregated to itself the power to punish serious crimes committed by tribal members. The veritable erosion of tribal power to punish was highlighted by another case handed down by the Court the same term Wheeler was decided. In *Oliphant v. Suquamish*, 435 U.S. 191 (1978), the Court again limited tribal jurisdiction over non-tribal members who committed crimes on tribal land. *Wheeler* paradoxically confirmed tribal sovereignty while denuding it of any significance, and *Oliphant* stripped tribes of significant governing power over those present in their territory. Quietly lost in the Court's jurisprudence was the possibility for separate political communities to come to common recognition and judgment of an act.

Wheeler, in fact, fits neatly within the modern Court's Double Jeopardy jurisprudence outside the tribal context. A few years later, the Court would work the same denial of comity between sister states. As the Court pronounced, one political community's "interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another('s) . . . enforcement of its own laws" (474 U.S. 93). Notably, the power to punish was articulated not as a contrast upon the boundaries of political community or as a positive claim upon community members, but simply as a "vindication" of authority. One side of the

ancient political tradition remains, but the corresponding notion of comity is gone. This ability to impose law and punishment remains a hallmark of sovereignty, but only in a way that radically separates sovereign communities.

CONCLUSION

The early history of the relationship between the federal governments and the Indian tribes suggests a central role for criminal law in defining political community. In this early period, criminal law stood as a mark of nationhood and gave a people a claim to political existence. At the same time, criminal law was a way in which a political community was bound together, as its members were claimed by the "customs," "usages," and "obligations" of the community. Moreover, sovereigns also stood in a certain unity with each other, encompassed within an understanding where lawfulness could be mutually recognized. With the passing of notions of comity, and the demise of treaty practices that presumed a common ground for separate communities to meet upon, the thought of imposing a foreign and alien code upon the tribes emerges. With *Wheeler's* reaffirmation of tribal sovereignty, and the identification of the power to punish as an element of a reduced core of sovereign authority, the separation between the federal government and tribes became radicalized. Now the power to punish is a prerogative by which a sovereign asserts and maintains its authority, rather than a way in which community membership was defined and recognized. Criminal law remains central to the constitution of authority, but now it only separates and atomizes. It no longer joins.

NOTES

1. The history of the mixed jury in the English law is told by Marianne Constable in *The Law of the Other*: *The Mixed Jury and Changing Conceptions of Citizenship*, *Law and Knowledge* (1994).

2. 1791 Treaty with the Cherokee, art. XI.

3. *United States v. Furlong*, 18 U.S. 184, 197 (1811). There can be no doubt that the plea *autre fois* acquit would be good in any civilized State, though resting on a prosecution instituted in the courts of any other civilized State. Furlong itself is a very interesting case. As to the crime of robbery on the high seas the Court gave a ringing endorsement to longstanding principles of international comity, but as to the crime of murder, the Court found that comity did not apply.

4. It would not be until 1985 that the Court would abandon this rule as regards judgments of criminal courts between sister states. *Heath v. Alabama*, 474 U.S. 82 (1985).

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PUNISHMENT, INSTITUTIONS, AND JUSTIFICATIONS

Leo Zaibert

ABSTRACT

The justification of punishment is an age-old debate which continues unresolved. In late twentieth century several attempts were made to reconcile the two opposing justifications: retributivism and consequentialism. But these attempts focused narrowly on merely one manifestation of punishment, i.e.: criminal punishment carried out by the state. To the extent that these mixed justifications are successful, they relate to only one (undoubtedly important) manifestation of punishment. But clearly punishment can occur in many different institutional contexts, and the institutions in each context vary dramatically in complexity and relevance. I recommend analyzing punishment in its manifold manifestations.

1. INTRODUCTION

The debate regarding the justification of punishment, i.e. the debate between retributivism and consequentialism, once appeared straightforward. I do not mean to suggest that the choices the debate forces upon us were ever easy (they have never been); my suggestion is rather that the distinction between the opposing alternatives was *conceptually* straightforward. Traditional consequentialist justifications of punishment asserted, roughly, that punishment is justifiable only by the (good) consequences that follow from it, whereas retributivist theories

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asserted, roughly, that punishment is justifiable only by attending to desert. Thus, to tell whether a justification of punishment was retributivist or consequentialist used to be relatively easy: for example, Kant was without a doubt a retributivist, Bentham was without a doubt a consequentialist. But recently all sorts of *mixed* justifications of punishment have sprung up, supposedly coherently combining the retributive and the consequentialist rationales.[1]

These mixed justifications are typically ingenious, and their study is highly illustrative, though I think they are ultimately unsuccessful. I shall argue that these mixed justifications do not really engage with the fundamental problem as to the justification of punishment. Instead, they evaporate the problem by appealing to definitional and logical considerations and by narrowly focusing upon but one possible manifestation of the variegated phenomenon of punishment (its manifestation within the context of political institutions).

I shall describe at the outset what I take to be the most basic phenomenology of punishment; in so doing I shall also begin to fill-in the details as to what exactly the thorny problem of the justification of punishment really is. My initial goal is to show that the tension between retributivism and consequentialism arises in a general, pre-institutional context (or at least, and in a sense to be explained in due course, in *thinly* institutional contexts), and that the analysis of the justification of punishment in this very basic context packs great theoretical potential which might be extended to the analysis of punishment in other contexts. The second step in my analysis deals with the shortcomings of the mixed justifications of punishment. In the second section of the paper, I shall discuss two famous mixed justifications of punishment which appeal to logic in order to distinguish retributivism from consequentialism. Later, in the third section, I shall discuss another pair of famous mixed justifications of punishment which while still strongly basing the distinction between retributivism and consequentialism on logic, also focus on the political institution that permit and shape (one manifestation of) punishment. There is one main conclusion of and one main corollary to my discussion of the mixed justifications of punishment. The main conclusion is that the mixed justifications of punishment discussed herein ultimately fail. The main corollary is that, as a result of emphasizing logic and political institutions, proponents of these mixed justifications distort the notion of retributivism (already a contested notion) almost beyond recognition. Therefore, in Section 5 I endeavor to shed much needed light on the meaning of retributivism. I shall defend the thesis that retributivism is neither a logical nor a political thesis: it is a moral thesis – as we shall see, this claim is surprisingly contentious. But retributivism is a *narrow* moral thesis, in a sense to be explained in the last section of the paper, where I shall discuss the connection between the retributivism/consequentialism pair in the specific realm of punishment and the deontological/teleological pair in the realm of comprehensive moral doctrines.

2. THE BASIC PHENOMENOLOGY OF PUNISHMENT AND ITS JUSTIFICATIONS

Let me begin with a methodological word of caution. The debate between retributivism and consequentialism is not the primordial debate that could arise regarding punishment. Both retributivists and consequentialists, unlike abolitionists (who think punishment is never justified – see Meinninger, 1969; Skinner, 1971), believe that punishment is sometimes justified. They simply disagree as to why it is justified. But the debate between retributivists and consequentialists is still, in a way, secondary, since the debaters all belong to the same group when viewed from the vantage point of the more general debate between "punishers" and abolitionists. Perhaps it might seem that I have nothing to say here about abolitionism. But, given my emphasis on the existence of different manifestations of punishment, it becomes extraordinarily difficult, if not downright absurd, to defend abolitionism *tout court*. That is, in some contexts it is almost inconceivable to imagine punishment abolished altogether.

Consider the way in which Rawls bemoans the fact that the mainstream debate in the literature is entirely an in-house debate, amongst two camps that equally believe that punishment is justified (retributivism and consequentialism). Rawls wonders why so very "few have rejected punishment entirely," given, as he puts it, "all that can be said against it" (Rawls, 1999, p. 21). I shall, unoriginally perhaps, continue to assume that punishment is sometimes justified; sometimes it is justified in the form of criminal punishment carried out by the state, but without a doubt punishment is sometimes justified in other contexts as well. Not nearly as much as Rawls fears can really be said against every possible manifestation of punishment. There is room, and plenty of it, to criticize punishment in specific contexts, such as the political context, and regarding the frequently abusive ways in which it is applied in those contexts. But there is less room to criticize punishment *tout court*, in all the contexts in which it can arise.

Punishment, by definition, is an action carried out in response to something else; it is a reaction, typically to behavior we find blameworthy. (This is of course only *part* of the definition of punishment – countless things other than punishment can also be reactions to blameworthy actions.) The grounds for the blameworthiness are of course innumerable, and by no means are they restricted by legal or political considerations. For millennia persons have punished each other, and whether they have done it because good consequences were likely to ensue or because they thought that inflicting punishment was in itself, as a matter of principle, the right thing to do, has always been a genuinely interesting dilemma. It takes no great perspicuity to realize that blameworthy behavior has been around probably as long as any human behavior has been around, and that therefore, the tension

between retributivism and consequentialism has existed at this very basic level, in some form, for quite a long time – for as long as the types of blameworthy forms of behavior which give rise to punishment have existed. Punishment thus could arise in pre-state, and even pre-institutional contexts. I shall here try to contrast the most commonly studied manifestation of criminal punishment inflicted by the state, on the one hand, with pre-institutional (or thinly institutional) punishment on the other. Few authors seriously entertain doubts concerning the existence of punishment at this very general and basic level (see Binder, 2002). Most authors, however, simply ignore pre-institutional punishment (without necessarily claiming that it does not exist), assuming it is unimportant. Most discussions purportedly of punishment in general, deal, overwhelmingly in fact, with only one type of punishment: criminal punishment carried out by the state.

What Rawls has in mind when he talks about punishment is criminal punishment inflicted by the state, a phenomenon which he defines as follows:

> a person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen on the ground that he has violated a rule of law, the violation having been established by trial according to the due process of law, provided that the deprivation is carried out by the recognized legal authorities of the state, that the rule of law clearly specifies both the offense and the attached penalty, that the courts construe statutes strictly, and that the statute was in the books prior to the time of the offense (Rawls, 1999, p. 26).

But surely punishment can be carried out in private spheres as well, as when our parents punish us for misbehaving, when friends or even strangers punish us, say, for our indiscretions, and perhaps it is even possible for us to (non-metaphorically) punish ourselves. Of course, in many of these contexts, people typically choose a reaction different from punishment, i.e. friends frequently talk to us about our indiscretions, rather than punish us for them, though it is possible that someone could very well just, by way of punishment, slap us for an indiscretion.

Conspicuously present in Rawls' definition of institutional punishment we find all sorts of political principles: rule of law, non-retroactivity of the penal law, due process, strict interpretation of statutes, as well as concepts pertaining to political and legal philosophy: citizenry, rights, trials, statutes, etc. More than a definition, this reads like a wish-list. It is of course of paramount importance within political philosophy to make sure that the infliction of punishment is constrained by these and other principles. It remains to be seen whether these principles are of like importance in other contexts in which punishment could occur, whether each context has its own set or its own hierarchy of principles, or whether some principles hold identically across contexts. While these are fascinating questions, if one is trying to understand the phenomenon of punishment, it can only help to analyze it in a context in which said analysis is not necessarily tangled up with these other considerations.

Like Rawls, H. L. A. Hart defined punishment in a way that betrayed his overwhelming concern with punishment carried out by the state. The first step in his strategy is to emphasize the similarities between punishment and property, insofar as both are "social institutions" linked to "*legal* rules" (Hart, 1968, p. 3). Amongst other considerations, Hart's definition of punishment includes the following two requisites: "It (punishment) must be for an offence against legal rules" and "It (punishment) must be imposed by an authority constituted by a legal system against which the offence is committed" (Hart, 1968, p. 5). Unlike Rawls, Hart at least admits that institutional state punishment is but the "standard case" of punishment, and that many other forms of "sub-standard" punishment also exist – ("sub-standard," not even "non-standard!").

Hart's main reason for allowing sub-standard forms of punishment is to prevent the abusive use of the strategy of the "definitional stop." From Hart's perspective, this strategy is wrongly applied by some utilitarians who justify punishment on optimific grounds, but claim that they would never justify punishing the innocent, because, by definition, such apparent punishment simply would not be punishment at all. Of course, this is just a silly, ineffectual word-game; sensible critics might simply reformulate their indictment of utilitarianism along the lines that it justifies hurting or harming the innocent. (Grotesque as this word-game clearly is, the definitional stop has been a favorite argument by some Justices of the Supreme Court of the United States, where it is commonly (ab)used in arguing, for example, that conditions of imprisonment are not, by definition, part of the punishment of the defendant.)[2] I wholeheartedly agree with the rejection of the definitional stop. What is important to emphasize at this point, however, is that Hart is not directly interested in sub-standard forms of punishment in themselves, but only indirectly (and at any rate for reasons different from the ones I care about), insofar as they help him stave off the definitional stop.

Duff, too, focuses on criminal punishment; while he sensibly claims that "the punishment imposed by criminal courts by no means exhaust the realm of punishment and penalty, not even that of punishments or penalties imposed by organs of the state" (Duff, 2001, xiii), he still refers to the question "What can justify criminal punishment?" as "the central question in philosophical discussions of punishment," a question which unavoidably is of great interest "for anyone who cares about how states treat their citizens" (Duff, 2001, xi). Accordingly, most of what Duff has to say about punishment concerns just criminal punishment carried out by the state; that is, just one manifestation, amongst many, of punishment.

I do not wish to focus, as most authors do, upon criminal punishment carried out by the state; nor do I wish to suggest that instances of familial or personal punishments are sub-standard cases of punishment. Even abolitionists tacitly focus on state punishment, given that it seems utterly implausible, though it would

undoubtedly be nice, to live one's life without ever believing that punishment, in the non-political sense, ought to be inflicted, since that would entail that either we never found any behavior blameworthy or that whatever blameworthy behavior we encountered did not deserve punishment. I want to give non-institutional punishment, for once, the center stage.

While I cannot undertake the daunting task of presenting a full-blown definition of punishment, for my current purposes it is sufficient to say that we are in the presence of a person punishing another person when a person X inflicts upon a person Y a certain treatment which X considers to be both painful (in a broad sense of painful), and the appropriate response to something Y did (a something which X considers to be blameworthy).[3] This way of understanding punishment agrees with ordinary language (an agreement whose importance I do not wish to overstate), and it allows us to see, first, that pretty much anyone can be punished by anyone, and, secondly and crucially importantly, that the debate between retributivists and consequentialists can arise in many contexts: personal, familial, national, etc.

Examples of what I understand by non-institutional punishment abound in everyday life and in literature. Think of Othello, who, prey to Iago's evil machinations, decides to punish Desdemona for what he believes was her blameworthy behavior. Or imagine rather, if the fact that Desdemona did not do anything wrong casts doubt on the usefulness of the example, the strong inclination we would have to punish Iago-like characters if we encountered them in real life. Or think about the actions carried out by Edmond Dantes in Alexandre Dumas' *The Count of Monte Cristo*. There is a certain tension between vengeance and just punishment regarding Dantes' plans that runs, probably purposely, throughout the novel. But if in the final analysis Dantes is merely taking revenge, and not really inflicting punishment, it is not because what Dantes does is outside the realm of political institutions. (Amongst the differences between (retributive) punishment and vengeance, the presence or absence of a political institutional setting does not play a role. For more on the distinction between retribution and revenge, see Nozick, 1981, pp. 366–374; contra see French, 2001; *passim* but especially 67 ff.; Sarat, 1997; *passim* but especially, pp. 166–170.)

In each of these cases the tension between retributivism and consequentialism vividly comes to life. When asked, for example, "Why do you punish this Iago-like character for the evil thing that he did?" One could answer either: (1) Because he deserves to be punished, given what he did"; or (2) one could answer along the lines of "Because this will teach him (and/or to others) a message," "because this would make me happy," "because this will prevent him from doing it again," etc. We see the force of each of these answers: none of them seems utterly without merit. The second set of answers contains consequentialist justifications of punishment, whereas the first answer constitutes a retributive justification of sorts. The classical

slogan used to identify consequentialist justifications of punishment, that they are forward-looking, apply quite well to the second set of answers, whereas the classical slogan associated with retributivism, that it is backward-looking, applies well to the first answer. The problem of the justification of punishment is: Which type of answer to choose? And, quite clearly, cases like these, pre-institutional, give rise to the justificatory problem in very general terms. Obsessed with criminal punishment carried out by the state, however, the proponents of the mixed justifications of punishment remain virtually silent about the general justificatory problem.

I need to address one last point before turning to the analysis of the mixed justifications of punishment. An objection could be raised against my suggestion that pre-institutional punishment exists, alleging that every example of punishment in the previous paragraph constitutes an institutional context, maybe not a context of full-blown political institutions, but an institutional context nevertheless. In every example, the objection continues, punishment is inflicted by someone in a certain position of authority (our parents have authority over us, so have friends over each other in some contexts, and so have we over ourselves), and this alone makes the context an institutional one, insofar as there must be institutions setting up the conditions of, at the very least, that authority. My reply to this objection is that it spreads the notion of "institutional" far too thin, rendering it too vague to be of much use, let alone intelligible.

The notion of "institutions" has received considerable attention from analytic philosophers. Though elsewhere I have criticized it at length, the most sophisticated account of the ontology of institutional reality is John Searle's (see Searle, 1995; Zaibert, 1998a, b; Zaibert et al., 2001; Zaibert, 2003a). Searle suggests a few elements which are crucial in the transition from brute facts to institutional facts; amongst them we find collective intentionality and the assignment of function, and others. I cannot discuss these elements here, but will simply emphasize one corollary of Searle's ontology of institutions: in order for an institution to exist, it must be the result of agreements between social groups, and this corollary is generally assumed to be a given (see also Anscombe, 1958; Gilbert, 1992). Think of a group of Neanderthals and imagine that one of the Neanderthals did something which another Neanderthal found blameworthy, and that as a result, the second Neanderthal punished the first one. This seems a perfectly simple case of punishment devoid of any institutional background. (I choose an example with Neanderthals simply to pre-empt distracting objections of the sort of "language itself already presupposes an institutional background," etc. For an explanation as to why these are mere distractions, see (Searle, 1995, 27 ff., & 60 ff.) where he stresses the difference between the statement of a fact and the fact stated.

Even if the existence of a context completely devoid of institutions, a pre-institutional context, is rejected, I think that the fact that some contexts display

more and less sophisticated webs of institutions is hardly debatable. Even Neanderthals, of course, had norms they lived by, but whether the existence of such norms amounted to the existence of institutions is unclear. What is clear, however, is that even if the Neanderthal's norms did constitute some sort of institutional context, such a context was thin, when we compare it to the sort of institutional context of XXI century societies. And whenever Neanderthals punished each other, they did not have all of the same considerations that modern states have when they inflict punishment on those duly convicted by criminal courts.

Some of the examples of punishment that I have presented do not presuppose the requisite social agreements inherent to institutional arrangements and thus they can hardly be considered institutional. At the very least, the allegedly institutional context of self-punishment, or of punishment between friends or strangers, is radically different from the context of state punishment. The institutional background regulating the interaction between strangers, say at a movie theater, where they relate to each other briefly, superficially and horizontally, where they have paid to be in, and could voluntarily leave, where there is no central authority quite like the state, and so on, if it exists at all, is obviously different from the institutional background which sets up and regulates the functioning of the state. At the very least, then we should speak about thick and thin institutional backgrounds. And the thinner the institutional background of a certain manifestation of punishment the more likely our attempt to understand the thorny issues surrounding the justification of punishment will succeed. After all, the thicker the institutional setting of punishment, the tougher it gets to disentangle the discussion of punishment proper from the discussion of whatever other institutions it is tangled up with in such institutional setting.

3. THE LOGIC OF PUNISHMENT: QUINTON AND DUFF

In somewhat of a contemporary rendition of the simultaneous discovery of infinitesimal calculus by Leibniz and Newton, Anthony Quinton in *On Punishment* and John Rawls in *Two Concepts of Rules* simultaneously "discovered" a way of reconciling consequentialism (which they both misleadingly called "utilitarianism")[4] and retributivism. True, as Rawls claims (Rawls, 1999, 21, fn. 4), there are some differences between the two articles, but they nevertheless remain strikingly similar. They are also similar to the ways in which Hart and Duff reconcile the two justifications of punishment; I have decided to, non-chronologically, group Quinton and Duff together thematically, and then Rawls and Hart together, since I think that the first two authors represent quite vividly an attempt to resolve the tension between retributivism and consequentialism through logical maneuvers,

whereas the last two authors, while not devoid of logical maneuvering, add also a marked emphasis upon political institutions.

In his famous article, Quinton set to resolve the "prevailing antinomy about the philosophical justification of punishment," i.e. the antinomy confronting "the two great theories(:) retributiv(ism) and utilitarian(ism)" (Quinton, 1954, p. 134). Quinton's solution to the antinomy is, in spite of its simplicity, far-reaching:

> retributivism, properly understood, is not a moral but a logical doctrine, and (. . .) it does not provide a moral justification of the infliction of punishment but an elucidation of the use of the word (Quinton, 1954, p. 134).

This passage contains, in embryo, the kernel of Rawls' and Hart's mixed justifications of punishment as well. I shall dub this "the two-question strategy."

Quinton's solution to the antinomy consists, then, in claiming that retributivism and utilitarianism are responses to two different questions. Retributivism is relevant in connection to the question "when (logically) can we punish?" and utilitarianism is relevant in connection to the question "when (morally) may we or *ought* we punish?" (Quinton, 1954, p. 134). The essential strategic move that allows Quinton to postulate such a radical thesis is a peculiar definition of retributivism, according to which all that retributivism amounts to is to the claim "that punishment is only justified by guilt" (Quinton, 1954, p. 134).

Quinton distinguishes retributivism from three related views with which it is commonly confused: (1) that "the function of punishment is the negation or annulment of evil or wrongdoing; (2) that punishment must fit the crime (*lex talionis*); and (3) that offenders have a right to punishment" (Quinton, 1954, p. 135). Though I object to some of Quinton's points (in particular to his equation of the view that punishment must fit the crime with a crude understanding of *lex talionis*), many of Quinton's clarifications are illuminating, and I shall come back to them below. But I disagree with Quinton's facile, hasty conclusion that since retributivism is different from these three views, it is therefore merely a logical doctrine based on the view that "the essential contention of retributivism is that punishment is only justified by guilt" (Quinton, 1954, p. 134). This is truly the leitmotif of Quinton's piece, which allows him to deduce that since "retributivism is the view that only the guilty are to be punished," then retributivism permits three possibilities: "the punishment of the guilty, the non-punishment of the guilty, and the non-punishment of the innocent" (Quinton, 1954, p. 137).

This reduction of retributivism to a mere logical thesis according to which all retributivism does is to stipulate that guilt is a necessary condition for punishment is, however, at odds with many accounts of retributivism, including both its most famous classical account (Kant, 1965) and its most important contemporary formulation (Moore, 1997). For Kant and for Moore, and for many other

retributivists, guilt is (also) a *sufficient* condition for punishment, not merely a necessary condition. And the sorts of examples presented at the end of last section would give some credibility to this way of articulating retributivism. After all, many would privately punish Iago-like characters for their reprehensible deeds simply because they are guilty, that is, their guilt would constitute, in many cases, a sufficient condition for punishment. Many would take for granted that Iago-like characters who commit heinous wrongs can (both logically and morally) be punished: they would insist that the fact that they do this or that constitutes sufficient ground (morally) to punish them.

As he reduced retributivism to a mere logical thesis, Quinton also paved the way for distinguishing it from consequentialism on purely logical grounds. Incipiently, Quinton hinted at a distinction between retributivism and consequentialism along the lines that in consequentialism "there is no *logical* relation between punishment and its actual or expected utility" (Quinton, 1954, p. 140), whereas such logical relation exists in retributivism. Clearly, what Quinton means is that, in consequentialist justifications of punishment, there is no logical *necessity* in the relation between punishment and its expected utility. This theme is fully developed by Duff, over forty years later.

Like Quinton, Duff focuses on the logical aspects of the distinction between retributivism and consequentialism. Duff takes one central tenet of Quinton's work, improves upon it, and develops it into an extraordinarily sophisticated justification of punishment. Duff takes Quinton's seminal idea and then fully draws the distinction between retributivism and utilitarianism along the following lines: " 'Consequentialism' . . . insists that the justification of any human practice depends on its actual or expected consequences: on its *contingent* or *instrumental* contribution to an *independently identifiable* good" (Duff, 2001, p. 3). Retributivism, in contrast, "justifies punishment in terms not of its contingently beneficial effects but of its *intrinsic* justice as a response to crime" (Duff, 2001, p. 19). In other words, the relationship between punishment and its justification is necessary in the case of retributivism, and it is contingent in the case of consequentialism.

Duff unequivocally describes his justification of punishment as a "species of retributivism" (Duff, 2001, p. 27), as one of "three lines of retributivist thought" (Duff, 2001, p. 21), though he also admits that his justification of punishment combines retributivism with the "forward-looking purpose" (Duff, 2001, p. 30) typical of consequentialism, that, in short, his account is not "purely retributivist" (Duff, 2001, p. 21). As it happens in Quinton's case, Duff appeals to a highly revisionist account of retributivism, insofar as this account does not mention desert, which is the essence of retributivism (as I shall argue below). Insofar as it is not shown that the only form of construing a necessary connection between

punishment and its justification is through the notion of desert, it is not clear why this should be considered a form of retributivism.

As we shall see, one main problem with the mixed justifications of punishment is the typically contrived definitions of retributivism, such as Duff's, to which they appeal. I think that Duff's mixed justification of punishment faces difficulties, though they are somewhat unrelated to the general themes of this article, and thus I will not discuss them here (but see Zaibert, 2003b). Duff does not really embrace the two-question strategy, though he shares with our other authors a certain privileging of logical distinctions in his articulation of the distinction between retributivism and consequentialism. But there is one aspect of Duff's way of understanding retributivism and consequentialism which I should mention, and which I will discuss again in the last section of this paper. Since Duff defines consequentialism as the maximization of an independently identifiable good, and retributivism as regarding punishment the right thing to do in itself, it is easy to see that Duff maps consequentialism under teleological moral theories and retributivism under deontological moral doctrines. This is indeed the typical way of understanding retributivism and consequentialism, but below (in Section 6) I shall object to it.

4. THE LOGICAL STRUCTURE OF INSTITUTIONS: RAWLS AND HART

As stated earlier, to the logicist approach to punishment and its justifications exhibited by Quinton and Duff, Rawls and Hart add a strong emphasis upon the institutional aspects that frame criminal punishment carried out by the state. In Rawls' case the concern with institutional punishment is evident in his very definition of punishment (presented above), though it is also evident in the very way he defines retributivism and "utilitarianism."

Rawls' initial definition of retributivism goes as follows: retributivism "is the view that punishment is justified on the grounds that wrongdoing merits punishment" (Rawls, 1999, p. 21), and he adds another important aspect of retributivism: "it is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing" (Rawls, 1999, pp. 21–22). Rawls' account of retributivism is in accord with the retributivist rationale that I presented above in the example of punishing Iago-like characters. There is no need to appeal to anything institutional in order to endorse the "wrongdoing merits punishment" account of retributivism. When Rawls defines "utilitarianism," in contrast, he smuggles institutional concerns: for he defines utilitarianism as the view according to which

> punishment is justifiable only by reference to the probable consequences of maintaining it as one of the devices of the social order . . . if punishment can be shown to promote effectively the interest of society it is justifiable, otherwise it is not (Rawls, 1999, p. 22).

A question regarding this asymmetry suggests itself: why does Rawls appeal to societal, institutional goals in his definition of utilitarianism, but not when he defines retributivism? After all, someone might decide to punish Iago-like characters for consequentialist reasons, without being at all concerned with the social order or the overall interests of society.

Famously, Rawls attempted to explain away the distinction between retributivism and consequentialism by distinguishing between "the justification of a rule or practice and the justification of a particular action falling under it" (Rawls, 1999, p. 22). It is important to keep in mind that this distinction belongs entirely within the public (thick), institutional context; the "particular action" to which Rawls refers is not a case of private, pre-institutional punishment such as the ones sketched above; it simply is an instance of punishment carried out by the state.

Rawls claims that he is able to reconcile retributivism with "utilitarianism" "by the time-honored device of making them apply to different situations" (Rawls, 1999, p. 24). Thus, the retributive rationale applies to the justification of punishment of the particular action falling under the rule, and the utilitarian rationale applies to the justification of the practice as a system of rules. So, Rawls deploys his own version of the two-question strategy when he suggests that we consider two different questions a son might ask his father: (a) "Why was F put in Jail yesterday?" and (b) "Why do people put other people in jail?" (Rawls, 1999, p. 22). According to Rawls, the first question seeks merely the justification of one specific action falling under a rule, whereas the second question seeks a justification of the very rule.

Not surprisingly, the answers Rawls suggests corresponding to each of these questions are different. The father would answer the first question along the lines of "Because he (F) robbed the bank at B. He was duly tried and found guilty"; whereas the answer to the second question would be of the following tenor: "To protect good people from bad people" (Rawls, 1999, p. 22). Rawls, moreover, suggests that these sorts of questions and their respective answers teach a lesson far more important than the hypothetical conversations between father and son. These answers reveal two different perspectives from which to analyze the institution of punishment: the first question and its corresponding answer illustrate the judicial perspective, the second question and its corresponding answer illustrate the legislative perspective.

> One can say, then, that the judge and the legislator stand in different positions and look in different directions: "one to the past, the other to the future" (Rawls, 1999, p. 23).

And to further emphasize his point, Rawls unequivocally states that

> the justification of what the judge does, *qua* judge, sounds like the retributive view; the justification of what the (ideal) legislator does, *qua* legislator, sounds like the utilitarian view (Rawls, 1999, p. 23).

Deus ex machina, the "time-honored device" has done it again; Rawls has put the debate between retributivists and consequentialists to rest. Yet, after presenting his two-question strategy Rawls asks "But can it really be this simple?" (Rawls, 1999, p. 24). Surprisingly, perhaps, Rawls believes that the two-question strategy does go a long away in reconciling retributivism and utilitarianism, to a great extent, Rawls believes that *it is* this simple. But Rawls' confidence depends on rather superficial and narrow accounts of both retributivism and utilitarianism. He thinks that his solution would in principle be acceptable to retributivists insofar as Rawls, like Quinton, believes that what they "have rightly insisted upon is that no man can be punished unless he is guilty, that is, unless he has broken the law" (Rawls, 1999, p. 24). Utilitarians would not object to this retributivist insistence, given that, for Rawls (again like Quinton), they believe that the claim that punishment should only be for the violation of the law is "understood from the concept of punishment itself" (Rawls, 1999, p. 24). Like in the case of Quinton and Duff, the success of Rawls' solution hinges on an idiosyncratic understanding of retributivism. In Rawls' case, this move is all the more suprising, in light of the fact that this formulation of retributivism is in tension with his very own account of retributivism that I presented above.

Still, Rawls sees two potential shortcomings in his application of the "time-honored device," though he thinks that they are not really too serious. First is the well-known question as to whether utilitarianism might end up justifying too much; that is, whether, on occasion, utilitarianism might not justify harming an innocent person on behalf of general welfare. (To use the word "harming" and not "punishing" already factors in the definitional stop. The definitional stop, in any case, would not solve the tension between retributivists and utilitarians, since even if technically speaking (by definition) utilitarianism cannot possibly allow punishing the innocent, retributivists can still object that utilitarianism might allow *harming* the innocent.) Rawls' solution is to conceptualize utilitarianism in the form of rule-utilitarianism rather than in the form of act-utilitarianism. The distinction between rule-utilitarianism and act-utilitarianism consists of the following: act-utilitarianism is optimific in that it commands that we should use the utilitarian standard every time we act. Of course, act-utilitarianism overburdens us, and it is rather impracticable. Rule-utilitarianism seeks to remedy these difficulties by making the utilitarian standard apply not to discrete actions, but to the creation of rules which in turn should tend to promote, in general, the best possible consequences.

It is not my purpose here to discuss the impressive resiliency of utilitarianism, but merely to stress two points. First, Rawls' alleged way of coping with this classical objection to utilitarianism, if it succeeds, succeeds only regarding rule-utilitarians, not regarding act-utilitarians. And while Rawls compellingly insists that most classical utilitarians were rule-utilitarians of sorts (in spite of the fact that they never used the term), surely there have been some act-utilitarians of note, like G. E. Moore, and those under his influence (see Moore, 1992, see also Lyons, 1965, p. 9 ff.). Even within rule-utilitarianism, moreover, Rawls' answer to the problem is not that successful since it is after all conceivable that a rule-utilitarian-minded person might endorse a rule stating that harming an innocent is forbidden *except* in truly extraordinary cases in which harming an innocent might save the world, the whole nation, or something like that – such a rule does not seem unreasonable. Even Rawls' own conclusion leaves room for skepticism as to the success of Rawls defense:

> if one is careful to apply the utilitarian principle to the institution which is to authorize particular actions, then there is *less* danger of its justifying too much (Rawls, 1999, p. 28, italics in the original).

That is, rule-utilitarianism is less likely to justify as much as act-utilitarianism, though it is *possible* that it, too, might justify too much.

Second, and perhaps even more importantly, according to Rawls, the distinction between act-utilitarianism and rule-utilitarianism has another significant, though regrettably much less studied, aspect. The distinction does not merely relocate the utilitarian standard (from acts to rules); as a matter of fact Rawls thinks that this trite point, upon which the bulk of the literature has focused, is rather obvious. That is why Rawls develops this distinction in the first part of his article, which deals with the "importance" of the distinction (the distinction is important because, allegedly, it protects utilitarianism from supposedly devastating objections), and devotes the other section of the paper to the "significance" of the distinction (Rawls, 1999, p. 21). The crucial point regarding the significance of the distinction is that the rules of rule-utilitarianism are not just any rules.

Rawls distinguishes between summary rules and practice rules (for more on this distinction and on rules in general, see Zaibert, 2003c). This is a subtle distinction. The choices carried out in accordance to summary rules are logically prior to the rules themselves. The rules are the result of looking back in search of dilemmas similar to the one we now face, and then applying the rule that summarizes the best courses of action in the past to the current case. Practice rules, in contrast, are logically prior to the choices that they permit. Practice rules are, in a way, constitutive of the activity. To control the center, in chess, is a summary rule (if one does not follow it, one might be a bad chess player, but one is playing chess

nonetheless); to move bishops diagonally is a constitutive rule (if one does not follow it, one is no longer playing chess).

Rule-utilitarianism, according to Rawls, is made up of practice rules, and as such, we cannot violate these rules without at the same ceasing to be involved in the activity that the rules create. Thus, if there were a rule in rule-utilitarianism which prohibited inflicting harm on an innocent person (as we have seen, not even this is settled), to violate it would be, logically speaking, to situate oneself outside the institutional setting that rule-utilitarianism *creates*. Thus, rule-utilitarianism is quite unlike act-utilitarianism in that its normativity is actually logical normativity, not moral normativity (see Zaibert, 2003d). The significance of the difference between rule-utilitarianism act-utilitarianism, according to Rawls, turns out to be based on logic. Rawls would want to prevent the potential violations of the rules of rule-utilitarianism by agents alleging optimific considerations by insisting that to violate such rules would be to place themselves outside of the institutions. But of course, anyone could ask "Why should I remain within institutions?" "Why should I care about logical normativity?" All the same, punishment as Rawls understands it is framed within a web of *practice* rules, and thus, his reconciliation of consequentialism and retributivism is the result of the logical structure of institutions, not of any credible reconciliation of substantive moral principles.

The second shortcoming Rawls tentatively concedes regarding his reconciliation of retributivism and consequentialism concerns the fact that retributivists might oppose his reconciliation because they would object to the wholly utilitarian rationale for legislation in such a way that the so called guilty (legally guilty) would not really deserve (morally deserve) to be punished. But Rawls tell us that, assuming "that the rules of the criminal law are justified on utilitarian grounds" as his reconciliation would have it, then it would *follow* that "the actions which the criminal law specifies as offenses are such that, if they were tolerated, terror and alarm would spread in society" (Rawls, 1999, p. 25). Then "retributionists can only deny that those who are punished deserve to be punished if they deny that such actions are wrong." And in a rather unusually brief and cryptic remark, Rawls simply and laconically tell us: "This they will not want to do" (Rawls, 1999, p. 25). And he leaves it at that. Of course, the question "Why would they not want to do this?" begs for an answer.

Rawls' effort to reconcile retributivism and utilitarianism, the two-question strategy, actually evaporates the debate between retributivism and consequentialism at the pre-institutional level. There are one-single-question situations in which we feel the force of both rationales, and in which we might have trouble deciding what the correct justification might turn out to be in the final analysis. Rawls' two-question strategy says precious little about manifestations of punishment outside of political institutions.

Hart's approach to the justification of punishment is strikingly similar to that of Rawls. It might seem that the differences between the two authors are somewhat deep, since while Rawls completely ignored non-institutional punishment, Hart, as noted earlier, at the very least admitted that there are possible non-institutional instances of behavior which should be considered punishment. These other forms of punishment are sub-standard. Much, if not all, of what Hart has to say applies, in the final analysis, and like in Rawls' case, only to institutional state-punishment. For all practical purposes Hart, in spite of his rhetorical gesture to non-institutional punishment, shares Rawls' focus on institutional punishment at the expense of pre-institutional punishment.

Hart's reconciliation of retributivism and utilitarianism is the result of an ostensibly sensible attempt to shed much needed light on the philosophical analysis of punishment. Indeed, Hart grandiloquently begins his *Punishment and Responsibility* by stating:

> General interest in the topic of punishment has never been greater than it is at present and I doubt if the public discussion of it has ever been more confused (Hart, 1968, p. 1).

Under this light, however, it is merely a corollary of Hart's house-cleaning project that retributivism and utilitarianism might be reconciled. To be sure, Hart does believe that there are grounds for believing

> that the view that there is just one supreme value or objective (e.g. Deterrence, Retribution or Reform) in terms of which *all* questions about the justification of punishment are to be answered, is somehow wrong (Hart, 1968, p. 2).

In fact, influenced by post-war Oxford's ordinary language philosophy, Hart warns against our "inherited ways of talking and thinking about punishment (which lead to) over-simplification" (Hart, 1968, p. 3). The antidote to our mumbled discourse is the realization that

> what is most needed is *not* the simple admission that instead of a single value or aim (Deterrence, Retribution, Reform or any other) a plurality of values and aims should be given as a conjunctive answer to some *single* question concerning the justification of punishment. What is needed is the realization that different principles (each of which may in a sense be called a 'justification') are relevant at *different points* in any morally acceptable account of punishment (Hart, 1968, p. 3, emphasis on 'different points' added).

Hart's project is based on the idea that the beginning of wisdom is to recommend a separation between what he, rightly I think, believes are three different theoretical issues, each giving rise to an independent set of problems: (1) the definition of punishment; (2) the analysis of the general justifying aims of punishment; and (3) the analysis of the distribution of punishment. While there is some normativity involved in the very definition of punishment, the two main normative

components in this tripartite framework are the analyses of the general aims and of the distribution of punishment – these are the "different points" referred to in the quotation above. And since Hart believes that these are *somewhat* independent issues (I will explain my emphasis upon "somewhat" shortly), it might very well occur that the general justifying aim of punishment is either retributive or utilitarian, and the justification of this or that scheme of distribution of punishment is either utilitarian or retributive. Hart's two somewhat independent "points" correspond to two different questions, the two-question strategy strikes yet once more! One question relates to the general justifying aim of punishment and the other relates to the distribution of punishment, as follows: First, "Why are certain kinds of action forbidden by law and so made crimes or offenses?" (Hart, 1968, p. 6), and second, "To whom may punishment be applied?" (Hart, 1968, p. 9). "Failure to distinguish Retribution as a General Justifying Aim from retribution as the *simple insistence* that only those who have broken the law and voluntarily broken it may be punished" is to be found "in many writers" and it is the cause of "much confusing shadow-fighting" (Hart, 1968, p. 9, emphasis added).

According to Hart, not all combinations are possible, though. It is possible to have a utilitarian-inspired justification for the general aim of punishment with either retributivism or utilitarianism under-girding the justification of the distribution of punishment. In Hart's words,

> it is perfectly consistent to assert *both* that the General Justifying Aim of the practice of punishment is its beneficial consequences and that the pursuit of this General Aim should be qualified or restricted out of deference to (retributive) principles of Distribution which require that punishment should be only for an offender for an offense (Hart, 1968, p. 9).

Obviously, it is not inconsistent either to endorse utilitarianism as the underlying principle regarding both the general justifying aim and the distribution of punishment. "Conversely," Hart tells us, "it does not in the least follow from the admission of the latter principle of retribution in Distribution that the General Justifying Aim of punishment is Retribution" (Hart, 1968, p. 9).

Yet, and hence my rider above regarding Hart's view that the general justifying aims and the distribution of punishment are merely "somewhat" independent, Hart also tells us "of course Retribution in General Aim entails retribution in Distribution" (Hart, 1968, p. 9). It is hard to see why this is obvious. This claim is problematic in light of Hart's view that the "retribution in the Distribution of punishment has a value *quite independent* of Retribution as Justifying Aim" (Hart, 1968, p. 12, emphasis added). To further complicate things, Hart also believes that even if we endorsed the retributive standard when answering his second question ("Who may be punished?") nothing would follow "as to the severity or amount of punishment" (Hart, 1968, p. 11).

Quite clearly, then, Hart's two questions are strikingly similar to Rawls' two questions. Rawls' question from the legislative perspective is clearly similar to Hart's question regarding the general aims of punishment, and Rawls' question from the judicial perspective is clearly similar to Hart's question regarding the distribution of punishment. Nevertheless, Hart is slightly more flexible than Rawls. Rawls after all holds that, from the legislative perspective, the best justification of the institution of punishment is "utilitarianism." And Rawls is not shy about the pre-eminence of utilitarianism, as he claims:

> One might say . . . that the utilitarian view is more fundamental since it applies to a more fundamental office, for the judge carries out the legislator's will so far as he can determine it (Rawls, 1999, p. 23).[5]

And he also holds that from the judicial perspective the best justification for the infliction of punishment is retributivism. Hart, on the other hand, does not claim that each question has one fixed answer; he merely suggests that the answer to each question need not be identical to the answer of the other question (except in the case when the answer to the first question is retributivism, because then the answer to the other question must be retributivism).

But Hart and Rawls (and Quinton) are equally rigid in an important respect. If we take either of the two questions in each author's deployment of the two-question strategy, the answer that each author gives is not "mixed" at all. That is, for Rawls, from the legislative perspective there is no room for retributivism at all; Rawls' answer is wholly utilitarian, and utilitarian in the logical sense in which rule-utilitarianism is composed of practice rules. From the judicial perspective, Rawls is wholly retributivist. Similarly, while Hart allows for either retributivism or utilitarianism to be the general justifying aim (or the principle of distribution) of punishment, clearly establishes that it is one or the other. These turn out to be justifications which regarding any specific aspect of punishment turn out to be not mixed at all – odd *mixed* justifications of punishment indeed.

5. THE ELUSIVE NATURE OF RETRIBUTIVISM

It is of course significant that the way in which each of the authors discussed above defines retributivism is highly revisionist and deflationary. Quinton defines it as a mere logical thesis that deals with the meaning of a word. Duff, albeit in a more sophisticated way, also distinguishes retributivism from consequentialism along logical lines; for him the relationship between punishment and its justification is logically necessary in the case of retributivism, and it is contingent in the case

of consequentialism. While Rawls' initial definition of retributivism is more robust than that of the other authors, in the end he reduces retributivism to a mere constraint of a system of rules which is justified by a logical account of rule-utilitarianism. Hart refers to retributivism as the "*simple insistence* that only those who have broken the law . . . may be punished" (Hart, 1968, p. 9, emphasis added). Progress in our attempts to understand the thorny problem of the justification of punishment requires not only that we keep in mind the phenomenon of punishment in its purest (pre-institutional) form, as we did in Section 2, but also that we endeavor to define retributivism in a way that actually makes sense. Let me briefly explain why retributivism understood as a mere (logical) side-constraint hardly makes sense.

In spite of the recent retributivist revival of late, the caricature of retributivism as a façade for barbaric vindictiveness remains regretfully frequent.[6] Retributivism is customarily seen, and it has been seen throughout history, as a terribly stern stance, lacking in nuances and in civility. Yet, if retributivism were what our authors claim it is (a humble logical thesis), it would become downright perplexing why anyone ever attacked it along the lines that it has been so frequently attacked. Why would anyone ever accuse someone who merely asserts that the innocent should not be punished of being cruel, too stern, uncivilized, or merciless? Contra Quinton, Duff, Rawls, and Hart, retributivism must be seen as the thesis that hold not only that only the deserving *can* (logically) be punished, but that they *must* (morally) be punished *and* that this punishment must in some way or another be proportional with what they deserve. It is only when we admit that retributivism is a robust moral thesis that its substance really emerges, and that the usual accusations against retributivism (which I shall seek to dispel) can at least make sense. One way to clarify the meaning of retributivism is to briefly examine all the variegated doctrines which have been dubbed retributivist, and all the different formulations of retributivism. We might begin by following Quinton's lead (Quinton's efforts to disentangle retributivism from other theories are fundamentally sound), but parting company with him before he hastily concluded that retributivism was merely a logical thesis. Quinton claims that

> the doctrine of 'annulment,' however carefully wrapped up in obscure phraseology, is clearly utilitarian in principle. For it holds that the function of punishment is to bring about a state of affairs in which it is as if the wrongful act had never happened. This is to justify punishment by its effects, by the desirable future consequences which it brings about" (Quinton, 1954, p. 135).

Quinton's argument is that the annulment theory is wholly different from his (reductionist) view of retributivism. While my view of retributivism is different from Quinton's, I still agree with Quinton's attempt to distinguish retributivism from the annulment theory. Quinton also attacks the attempt to equate *lex talionis*

with retributivism. It is perhaps the most unfortunate aspect of the received Kantian views on punishment that retaliation and retributivism are frequently seen as necessarily linked. To be sure, Kant was both a fervent adherent of *lex talionis* and a committed retributivist (see Kant, 1965, pp. 99–108). To be sure, the two theories are not inconsistent, but they do not necessarily belong together either; one can be a retributivist and oppose, for example capital punishment for even the most heinous murders. A retributivist, in my view, is merely committed to the view that punishment must fit to the crime, but he need not commit to any specific formula (if such exists) for mapping punishments onto crimes. Finally, regarding the view that offenders have a right to be punished, Quinton comments that "it is an odd sort of right whose holders would strenuously resist its recognition" (Quinton, 1954, p. 136). I agree. Quinton further claims that insofar as this sort of view makes the moral regeneration of the offender "the sole relevant consideration whether and how a man should be punished," this theory in fact "is utilitarian and it is also immoral" (Quinton, 1954, p. 136). In any case, the "right to be punished" view is not necessarily linked to retributivism – either as Quinton understands it or as I understand it.

It is not only these three theories that have been associated with retributivism. Opinions as to the essence of retributivism are very numerous. In a famous article, John Cottingham identified nine different theories typically associated with retributivism: repayment, desert, penalty, minimalism, satisfaction, fair play, placation, annulment, and denunciation (Cottingham, 1976). Cottingham's main goal is always the salutary one of clarifying the concept. Humble regarding the achievements of his paper, Cottingham would find solace if "some writers in (the) future see a mental red light flashing when they are tempted to use the phrase 'the retributive theory of punishment' " (Cottingham, 1976, p. 246). Yet, and in spite of the fact that Cottingham agrees that "etymology, of course, is no arbiter in philosophy," he believes, mostly on etymological grounds, that the repayment theory "encapsulates the basic or fundamental sense of 'retribution' " (Cottingham, 1976, p. 238). Without getting involved in the details of the repayment theory, it should be noted that it is substantially different from the theory according to which desert is the essence of retributivism.

The basic notion of retributivism, however, is desert (a view which in spirit at least is widely accepted). Desert, moreover, plays more than one role within retributivism – and neither the very existence of all these roles nor their exact scope are widely recognized. First, desert is, prima facie, a necessary condition for punishment; second, desert is, prima facie, a sufficient condition for punishment; third desert, prima facie, offers all that is needed regarding the gradation of punishment. (The "prima facie" wedges will be explained in due course.) Yet, desert is frequently seen as insufficient and vacuous. Cottingham, for example,

rejects desert as the basis of retributivism alleging that desert is an empty notion. He asks us to consider the following scenario:

> Suppose I say 'I am a retributivist: I believe that where punishment is deserved this is sufficient to justify it'. I think the initial reaction of that ubiquitous figure 'the intelligent layman' would be: 'Well, go on, explain! Where does the *retribution* come in?' (Cottingham, 1976, p. 239).

In another famous piece in the history of the philosophical treatment of retributivism, J. L. Mackie paid close attention to Cottingham's article, and agreed with this way of discarding desert as the basis of retributivism (Mackie, 1999). According to Mackie desert is "just the general, as yet unexplained" view that "one who is guilty ought to be punished" (Mackie, 1999, p. 782).

I do not think that this is a fair criticism of the view according to which desert is the essence of retributivism. The most compelling case for the view that desert is the basis of retributivism has been put forth by Michael Moore. I cannot possibly do full justice to it here, but I need to point out that this discussion, rather than being concerned with the justification of punishment, it is concerned with the justification of a justification of punishment, that is, with the justification of retributivism. The argument that seeks to show that desert is the essence of retributivism takes place one level above the classical discussion of the justification of punishment. According to Moore, retributivism based on desert is not empty, as objectors charge, because its justification is a matter of epistemological coherentism. That is, what makes retributivism true is that it coheres with a set of other deeply held beliefs (moral and otherwise). According to Moore, the coherentism that makes retributivism true has three main components: (1) it is non-foundationalist; (2) it is holistic; and (3) of all possible justifications of punishment it is the one which packs greater explanatory power. Regarding non-foundationalism Moore reminds us that "all we ever have with which to justify one belief, are other, *fallible beliefs* (Moore, 1997, pp. 108–109). So, the alleged emptiness of retributivism might simply be the result of assuming that other justifications of punishment are based on beliefs which give the appearance (given our naïveté) of foundational finality.[7] Retributivism coheres with a great number of moral beliefs and intuitions – this explains both its holism and its explanatory power.

Of the three characteristics of Moore's appeal to moral coherentism in order to defend the view that retributivism is based on desert, I wish to focus upon the last one, its explanatory power. Retributivism based on desert along the lines that Moore (and Kant) follow, is seemingly without rivals in explaining everyday phenomena related to punishment. Many a time we decide to react in this or that way just because we think that the person deserves such reaction. These sorts of attitudes and forms of behavior, widespread and visible even in young children, can hardly be explained in non-retributivist ways, or in ways which are

allegedly retributivist, but which define retributivism independently of desert. It is hard to imagine, say, a young child articulating anything resembling the annulment theory, or the repayment theory of retributivism. When confronted with another child who was, for example, gratuitously cruel, a child would simply say something amounting to, "he deserves to be punished, period."

Moral coherentism is a way of defending both retributivism (as a justification of punishment) and desert (as the basis for retributivism), but by no means the only way. G. E. Moore's mereological remarks regarding ethical wholes constitutes one such defense, an ontological, rather than epistemological, defense. G. E. Moore believed that there are objects which are good, objects which are bad, and others which are indifferent or neutral. But these different things can combine together in diverse ways, giving rise to wholes. But "*the value of a whole must not be assumed to be as the sum of the values of its parts*" (Moore, 1992, p. 28). Famously, G. E. Moore's example was that of a whole made up of: (1) a beautiful object; and (2) someone's awareness of such beautiful object. But the same argument could be made about the whole comprised by: (1) the occurrence of a blameworthy action deserving punishment (a bad thing in itself); and (2) the infliction of pain on the author of such an action (maybe also a bad thing in itself). This whole would not be nearly as bad as any of its two constituent parts taken in isolation. G. E. Moore's theory is not a dressed-up version of the "two wrongs make a right" theory – not all pairs of bad things form a better whole (and sometimes pairs of good things can form a whole which is not as good as the parts taken in isolation); in the case of deserved punishment, it is precisely desert that does the trick.

The facts that pre-institutionally we understand retributivism as based on desert, and that we appeal to it in order to justify many forms of behavior, are clearly not enough to claim that at the institutional, political level things should remain the same. We still need to deal with the problem of whether or not desert is a bona fide sufficient condition for punishment across different contexts. Some retributivists, like Kant and Moore, think that retributivism is the correct justification of punishment across contexts.[8] This attitude, the one that explains the accusations that retributivism is too severe, too blind, and too uncivilized, is closely related to the problem of legal moralism. Legal moralism is, according to Joel Feinberg, the view that "it can be morally legitimate for the state, by means of the criminal law, to prohibit certain types of action that cause neither harm nor offense on the grounds that such actions constitute or cause evils of other kinds" (Feinberg, 1988, p. 3).

The legal moralist believes that every evil, whether it causes grievances or not, must be legally punished. There is an obvious tension between legal moralism and liberalism, insofar as major tenets of liberalism, like the harm principle and its concomitant protection from paternalistic legislation, restrict the scope of what the state can punish. (The harm principle only permits criminalization of behavior

that actually harms others, and the liberal suspicion regarding paternalism seeks to prevent legislation that would protect one competent person from "harm" that she could freely inflict onto herself.) And there is also an obvious connection between legal moralism and retributivism: "more often than not," Feinberg reminds us "(legal) moralism also deploys a version of the retributive theory of punishment" (Feinberg, 1988, p. 125). As I shall discuss in the next section, retributivism can and should be disentangled from legal moralism.

6. RETRIBUTIVISM AS A MORAL THEORY: BETWEEN LOGIC AND POLITICS

Retributivism, as we have seen, is pulled in two opposing directions: either it is turned into a mere logical thesis (guilt is a necessary condition for punishment) or it is turned into a full-blown political programme, whereby retributivism determines what the state should punish. Retributivism is then seen as predominantly a logical thesis or as predominantly a political thesis (or as a combination of both). These views of retributivism are problematic, but a middle ground is not easy to find, in part because combining the two views is no solution either (for an excellent discussion of some of these problems (see Husak, 1992). I would like to argue that the middle ground is achieved by understanding retributivism as a moral thesis, and by disentangling moral theses like retributivism from logical theses and from political theses.

It does not cease to be perplexing that a contentious thesis of this paper is that, rather than a mere "logical thesis," retributivism is a moral thesis. The contentiousness is obvious: it contradicts the spirit, and sometimes the letter, of the influential accounts discussed above. For someone unfamiliar with the specialized literature presented above, my suggestion that retributivism, a normative justification of punishment, is a moral doctrine, would be to commit the fallacy of the straw man. "Who could deny this seemingly platitudinous claim?", the neophyte objector might ask, and I would answer: "Quinton (quite expressly), Rawls, Hart, and Duff (in a more roundabout kind of way) – and many others" (see Armstrong, 1961; Raphael, 1955).

But my claim that retributivism is a moral thesis is also contentious in that it contradicts the view, clearly espoused by Hart, Rawls and many others, according to which retributivism is not a moral but a political thesis. In spite of the obvious concern with the political implications of punishment in, say Rawls and Hart, several authors complain about the lack of emphasis upon the political aspect of the problem of punishment and its justifications. Jeffrey Murphy once stated that "Philosophers often write as though the only important evaluative questions with

respect to punishment are exclusively moral – that is, questions concerning the moral desirability of the state of affairs brought about as a result of punishment." And then added that

> a complete theory of punishment must concern itself not merely with the moral desirability of the goals sought by punishment (for example, deterrence, retribution, incapacitation, moral education) but also with the equally important question of whether the pursuit of these goals is part of the legitimate business of the state – whether these goals are properly realized through the mechanism of state coercion (Murphy, 1987, pp. 510–511).

A recent issue of one of the most important journals devoted to the philosophy of criminal law in the United States, an issue entitled *Punishment and Democracy*, was devoted to this problem, and it has injected Murphy's trope with new impetus (DeGreiff, 2002a). Pablo DeGreiff, the editor of the volume, bemoans the fact that punishment is, in his view, typically seen as a moral phenomenon, when it is in fact a political phenomenon:

> The issue of punishment raises interesting questions about the relationship between moral, political, and social theory. Some of the relevant links remain under-explored, given the continuing prevalence of a sharp division of labor among political and moral theorists. Under this division of labor, punishment is dealt with largely by moral theorists (DeGreiff, 2002b, p. 373).

Interestingly, DeGreiff merely refers, in a brief footnote, to the fact that in Blackwell's *A Companion to Political Philosophy* there is no entry for "punishment" (whereas an entry for "punishment" is found in Balckwell's *A Companion to Ethics*). Scant evidence indeed, to which he simply adds: "This reflects a general tendency" (DeGreiff, 2002a, b, p. 373).

DeGreiff's assessment of the general compartmentalized state of the academic discussions of punishment rings somewhat true in some cases, though of course more evidence would have been appreciated. Yet, the preceding discussion of Rawls' and Hart's views on punishment, for example, shows that things are not so simple: Rawls and Hart deal almost exclusively with punishment carried out by the state, obviously in the political context. Yet, whether the state should or should not punish this or that behavior is not purely, perhaps not mainly, related to theorizing about punishment but, rather, to theorizing about the state. Murphy and DeGreiff might be right in claiming that a complete theory of punishment would need to include not only moral considerations but political considerations as well, though it is conceivable that the idea of a single, comprehensively organic theory of punishment that would be applicable to all the variegated manifestations of punishment is itself a chimera. I will argue, in any case, that the debate between retributivism and consequentialism belongs first and foremost to the pre-institutional manifestation of punishment I have described herein.

Other authors are more daring, as they virtually deny the existence of pre-institutional punishment. Guyora Binder, for example, in a contribution to *Punishment and Democracy*, asks "is the justification of punishment a moral question?" His response deserves to be quoted in full:

> Much contemporary writing on punishment, whether by philosophers or legal scholars, treats it as such. Theories of punishment are taken to be moral theories, and the problem of justifying punishment is presented as a key battle-ground in the war between utilitarian and deontological ethics. The question of how and when the state should punish is reduced to the question of how and when particular persons should punish other persons. This question in turn is treated as just a special case of the more general question whether persons are morally obliged to govern their actions by the aim of maximizing human welfare or by rules of fair treatment (Binder, 2002, p. 321).

The question as to "how and when the state should punish" is indeed different from the question as to "when persons should punish other persons." As a matter of fact, to emphasize this distinction is precisely one of the main goals of this paper. My goal is to pay close attention to the way in which the tension between retributivism and consequentialism plays at the level of "persons punishing other persons," insofar as this might shed light as to the intricate problem of the justification of punishment. Binder, however, moves in the opposite direction. He seems to think that the solution to the equivocal use of the term "punishment" is to realize that "punishment" is only "state punishment," i.e. punishment carried out by the state in the context of political institutions. After all, immediately following this assessment of contemporary discussions of punishments, Binder categorically asserts "but surely this is an odd way to think about punishment. Punishment is not a behavior, but an institution," and then further adds,

> to punish someone is not just to harm them, nor even just to harm them because of something they have done. It is to stake a claim to a certain kind of institutional authority, even when the institution is only the family. To punish someone is to assert a right and accept an obligation to punish anyone similarly circumstanced and behaved, even if that other person be only a sibling. Punishment is never the isolated act of an individual: to punish is to act as an officer or agent participating in a system for enforcing an authoritatively promulgated norm (Binder, 2002, p. 321).

Though it is hard to know exactly what ontology of institutions Binder endorses (he is silent about this crucial issue), Binder's "paradigm shift" of sorts cannot possibly be correct. Binder is right in emphasizing the difference between the questions associated with the context of "persons punishing other persons" and the questions associated with "how and when the state should punish," and to object to those who "reduce" the latter to a form of the former. But Binder is as much a reductionist as those he criticizes, although he reduces punishment in the opposite direction. Unlike those who Binder criticizes for reducing (institutional) state punishment to pre-institutional punishment, Binder seeks to reduce pre-institutional punishment to institutional punishment. Yet surely I need not "act as an officer,"

"asserting-a-right-and-accepting-an-obligation," enforcing an "authoritatively promulgated norm" whenever I choose to slap a loud moviegoer at the movie theater. (Whether slapping someone at the movie theater is legally permissible is not important for my purposes here: a certain behavior could be a manifestation of punishment *and* a crime.)

Institutional reductionists, a group of which Binder is but a vivid example, might object to my emphasis on the basic phenomenology of punishment in three ways, but I think these objections are unsuccessful. First, they could claim that in every possible context where punishment exists, there are institutions and authorities present. I alluded to this possibility above (on Section 2). Aside from the objections to this maneuver that I presented there I would just like to add that it is doubtful that, say, the principles of non-retroactivity of penal laws, or the rule of law, or provisions regarding double jeopardy, or in general, most of the *political* principles governing the state's punitive power, would have the same (or any) force in other contexts, such as the contexts of someone slapping a loud moviegoer, or of Neanderthals punishing each other. Second, institutional reductionists might simply insist on the claim that to slap a loud moviegoer at the movie theater, when such a slap is intentionally inflicted by me insofar as I think it is the appropriate response to her blameworthy behavior, is not punishment. But this would be merely to play word games, a contrived new "institutional" rendition of the definitional stop. This is not the sort of issue amenable to be simply stipulated. And, in any case, given that my referring to these sorts of pre-institutional phenomena as punishment coheres with ordinary language and with widespread beliefs and intuitions, the onus to show that they are actually not punishment falls squarely on institutional reductionists.

There is a third possible objection to my privileging the basic phenomenology of pre-institutional punishment. Someone could argue that though pre-institutional punishment exists as a bona fide form of punishment, and though it has significant differences with institutional state-punishment, it simply is not an important manifestation of punishment. Much more important, the objection will continue, is institutional, criminal punishment carried out by the state. (Incidentally, those institutional reductionists who, like Binder, reject the very existence of pre-institutional punishment, cannot avail themselves of this objection.)

While I do believe that there are many respects in which institutional state-punishment is indeed more important than pre-institutional punishment, and, quite poignantly, I believe that state punishment lends itself much more easily to widespread abuses than pre-institutional punishment.[9] Yet, for the purposes of understanding the problem of the justification of punishment, i.e. for the purposes of resolving the tension between retributivism and consequentialism, focusing on institutional punishment as administered by the state is unhelpful, for the reasons

I have presented above. To repeat, to focus upon institutional punishment carried out by the state is inconvenient in that punishment as administered by the state is, as it should be, subject to many principles, constraints, and safeguards which seek to protect citizens from abuses of the state's punitive power. These principles need not apply in cases of "persons punishing persons," and this is precisely the reason why analyzing the details of this pre-institutional manifestation of punishment is convenient.

But simply asserting that regarding the problem of the justification of punishment it is convenient to focus on the pre-institutional, pre-political manifestation of punishment is not enough. For, as noted, if we stress too much the independence of punishment from its normative ramifications, we might end up turning the justification of punishment into a mere logical affair. If we separate retributivism from legal moralism too sharply, we run the risk of turning retributivism into a mere logical doctrine whereby, as Quinton would have it, retributivism would simply assert that guilt is a necessary condition for punishment.

I think that the solution to this very difficult problem is to insist on the strong irreducible normative element of the justifications of punishment but at the same time to insist in the fact that this normative element is exclusively, narrowly moral, and that it does not *necessarily* entail anything at the political level or even at the general level of comprehensive morality. What I have in mind is the following. The distinction between retributivism and consequentialism is typically seen as ancillary to the distinction between deontological and teleological ethical doctrines; a defender of deontological ethics has to be a retributivist when it comes to punishment, whereas a defender of teleological ethics has to be a consequentialist when it comes to punishment. I wish to argue against subsuming the debate regarding the justification of punishment entirely under the general debate regarding the nature of morality; in other words, it is not necessarily the case that a retributivist regarding punishment endorses deontological ethics, or that a consequentialist regarding punishment endorses teleological ethics. (Roughly, teleological ethics defines the right as maximizing the good, whereas deontological ethics defines the right independently of the good. Take hedonism, an example of a teleological ethical theory: the good is identified as pleasure, and the right to do simply is to maximize the good. Kantian ethics, where the right thing to do is independent of pragmatic considerations relating to what is good, is the obvious example of a deontological ethical theory.)

Now, as Moore has pointed out, while by no means a frequent maneuver, nothing prevents "deserved punishment" from entering a comprehensive moral theory as a good, and then to have this theory teleologically order the maximization of it (Moore, 1997, p. 155 ff.). The situation Moore envisages might allow a retributivist to forego the punishment of a deserving person, but only in those

cases in which by so doing, she would be able to punish many more deserving persons. Such a theory would appear to be both teleological and retributive. Much confusion surrounds this point. Some authors speak of "teleological retributivism" without really meaning the sort of Moorean combination sketched in the preceding paragraph. For example, Gertrude Ezorsky, on her valuable compilation of articles on punishment, *Philosophical Perspectives on Punishment*, has a section entitled "Teleological Retributivism." But this section contains a rather sundry list of justifications of punishment some of which are simply mixed justifications of punishment like the ones included here. In fact, Hart's mixed justification is included in this section of Ezorsky's volume, whereas Rawls' mixed justification is included in a different section, entitled "Teleological Theories." In light of the preceding discussion, it seems odd not to class these two mixed justification together. But it is even more odd to call Hart's mixed justification of punishment (or D. D. Raphael's or K. G. Armstrong's) a form of retributivism, given that it is much more accurately described as (retributively) side-constrained consequentialism (like are Raphael's and Armstrong's justifications of punishment), to borrow the useful label employed by Duff and by Nozick (Duff, 2001, p. 11 ff.; Nozick, 1974, p. 28 ff.).

The way in which I understand the teleological retributivism Moore describes is such that it is not a mixed theory of punishment at all. Rather it is a narrow ethical theory existing within a consequentialist comprehensive ethical theory. This is not an insignificant point. For mixed justifications of punishment, like the ones we have discussed above, typically try to combine consequentialist and retributive rationales via the two-question strategy, whereas the form of teleological retributivism now at hand does not seek to reconcile two different types of rationales. It simply situates retributivism within a consequentialist framework, a consequentialist framework which, moreover, seeks to maximize deserved punishment – the essence of retributivism. If retributivism is understood narrowly, as I suggest it should, and if we combine this understanding of retributivism with an emphasis upon the basic phenomenology of punishment I have advocated from the outset, then we can disentangle retributivism from legal moralism without reducing it to a mere logical thesis.

7. EPILOGUE: RETRIBUTIVISM'S PRIMA FACIE OBLIGATORINESS

As Joel Feinberg once pointed out, the legal moralist is very similar to Bertrand Russell's puritan: a "man who holds that certain kinds of acts, even if they have no visible bad effects upon others than the agent, are inherently sinful, and being

sinful, ought to be prevented by whatever means is most effectual – the criminal law if possible" (Feinberg, 1988, p. 125 ff.). I would like to suggest that puritans would not merely seek to prevent sin, but would (at the same time) seek to *punish* all sins (or evils). Puritans' concern with institutional criminal punishment inflicted by the state, is merely subsidiary to their overall attempt to punish (and prevent) every sinful act. In the end, the puritan does not care who punishes sins, provided that they get punished. But it should be obvious that to live the puritan life is almost impossible (aside from whatever substantial criticisms we could harbor regarding this way of life), and this difficulty arises quite independently of the institutional level of criminal punishment administered by the state. It is a familiar situation when we find ourselves judging that someone people's behavior is blameworthy, we in fact blame people for what they do, but we keep our judgment of blame to ourselves, and we decide not to punish those engaged in the blameworthy behavior.

If even at the pre-institutional level, it is implausible that one would ever punish everything that one thinks is punishable and to the exact extent that one thinks it is punishable, at the institutional level of state punishment it is much more implausible. At this latter level, the theory of punishment meets the theory of the state, and then the restrictions on what and to what extent ought to be punished naturally multiply. At the pre-institutional level the reasons why we frequently decide not to punish blameworthy acts are typically associated with personal considerations having to do with prudence, strategy, and even laziness. But at the institutional level of the state, the most important limitations are grounded in the rights of the citizens, and in those general principles upon which the state is founded.

Strictly speaking, retributivism does not really oppose teleological doctrines such as utilitarianism: it opposes another narrow ethical theory, consequentialism. There is a sense in which Rawls' worry mentioned above, that the retributivist would object to wholly utilitarian legislation, is misguided. For the objection to wholly utilitarian legislation would come from the deontologist, not from the retributivist – these are two different characters. One could be a retributivist without embracing a deontological moral doctrine. Obviously, there are family resemblances between retributivism and deontology, on the one hand, and between consequentialism and teleological theories like utilitarianism on the other. But the resemblances are also overstated by the contingencies of history, whereby many famous retributivists also endorsed deontological ethical views, and many consequentialists also endorsed utilitarianism. Retributivism is not deontology-applied-to-punishment and consequentialism is not utilitarianism-applied-to-punishment. The distinction between retributivism and consequentialism belongs to the narrow confines of the moral discussion of

punishment in the sense explained above. Insofar as this distinction is properly located within narrow morality, we avoid rendering retributivism virtually inert, when understood as a mere logical thesis, and we also avoid rendering it absurdly impracticable, irrational and invasive, when understood as a political thesis.

Claiming that the debate between retributivism and consequentialism is a narrow moral debate also avoids the sort of patchwork effort that leads some legal moralists to admit limitations, of dubious intelligibility and efficacy, to legal moralism. For example, Moore claims that there exist "considerations which should restrain a legislator from legally prohibiting every act that is morally wrong to perform," in such a way that criminal legislation could be "quite liberal in content" though, insofar as it is based on legal moralism, it would remain "illiberal in its theory of proper legislative aim" (Katz et al., 1999, p. 152, see also p. 154). Unlike the principled restriction to legal moralism defended here, Moore's restriction on legal moralism are neither the result of circumscribing retributivism to a narrow moral doctrine, nor the result of embracing liberalism, but incidental by-products of other considerations.[10]

Retributivism as I understand it, then, entails a prima facie obligation to punish and to punish in proportion to the gravity of the act, but these obligations are defeasible, both at the pre-institutional level and, more poignantly, at the level of institutional punishment carried out by the state. The exact import and structure of prima facie retributive obligations, and the conditions of their defeasibility are important issues necessarily beyond the scope of this paper. But the ground of these prima facie obligations is clear: they stem from the intentionality of human action and from principles of moral psychology, and they are the direct result of the moral condemnation that we pass upon each other for doing things we find blameworthy (see Zaibert, 1998a, b, 2001, 2004). Of course, ahead remains the task of explaining when these considerations are trumped by more important criteria in the (thickly) institutional context of the state, but when, even at the purely personal, pre-institutional (or thinly institutional) contexts in which we live, these prima facie obligations should be defeated by more important considerations.

NOTES

1. Some authors refer to these mixed justifications as "mixed theories," but since a theory of punishment tells us what punishment is, and these mixed "theories" do not even try to tell us that (but rather attempt to reconcile two opposing ways of justifying the infliction of punishment), I favor referring to them as justifications and not as theories.

2. See Justice Thomas' dissenting opinion on *Hudson v. MacMillan* 503 US (1992) 22 ff., and in general see *Farmer v. Brennan* 511 (U.S.) 1994, *United States v. Bailey* 444 US (1980), *Wilson v. Seiter* 501 US (1991).

3. I leave out an element typically found in definitions of punishment, i.e., that punishment be inflicted by an authority, etc., because typically such definitions do not seek to isolate pre-institutional punishment.

4. Many authors refer to the contrast between retributivism and consequentialism as the contrast between retributivism and utilitarianism. This is incorrect. Utilitarianism is the name of a comprehensive moral doctrine and consequentialism is the name of a specific view regarding the justification of punishment. More on this in Section 6 below.

5. I do not think it would be fair to accuse me of not realizing that Rawls moved away from a defense of utilitarianism later in his career. First, because, obsessed with ideal theory for the rest of his career, Rawls hardly ever discussed punishment again. Second, because there is a way in which one could see continuity between "Two Concepts of Rules" and the monumental *A Theory of Justice*, in spite of the fact that the former expressly defends utilitarianism and the latter expressly defends deontology. But just as the sort of utilitarianism defended in "Two Concepts of Rules" is idiosyncratic, so is the sort of deontology defended in *A Theory of Justice*. I am not suggesting that Rawls early utilitarianism is identical to his later deontology, but merely that they are both attempts to carve out a sort of intermediate position between the classical extremes of teleology and deontology.

6. Recall the anecdote (Armstrong, 1961) regarding C. S. Lewis' inability to publish his famous article "The Humanitarian Theory of Punishment" in England, simply because it defended retributivism.

7. Coherentism is an epistemological position and it does not necessarily entail any particular metaphysical position. Moore, for example, consistently combines moral coherentism with moral realism. For a more comprehensive (not limited to the case of punishment) combination of moral coherentism and moral realism see David Brink, *Moral Realism and the Foundations of Ethics*, Cambridge, MA: Cambridge University Press, 1989.

8. Michael Moore, while both a retributivist and a legal moralist, softens the extent of his legal moralism in his "A Theory of Criminal Law Theories" (Chapter one of *Placing Blame*, *op. cit.*). An excerpt of this article is included in Leo Katz, Michael Moore and Stephen J. Morse (Eds), *Foundations of Criminal Law*, New York: foundation Press, 1999, pp. 152–154.

9. Recall's Nozick's proto-anarchist remark to the effect that "the most pessimistically described Hobbesian state of nature" would no doubt be preferable to "the most pessimistically described possible state," in Robert Nozick, *Anarchy, State and Utopia*, New York: Basic Books 1974, p. 5 ff.

10. The headings added to Moore's original text when it was reprinted in his textbook are eloquent: The "Limits of Fair Notice," and the "Limits of Autonomy" might be (grudging) concessions to liberalism; but the "Limits of Convenience," and the "Epistemic Limits" seem either inconsistent with the amalgam of retributivism and legal moralism Moore endorses (see Katz et al., 1999, pp. 152–153).

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PHILOSOPHICAL THEORIES OF PUNISHMENT AND THE HISTORY OF PRISON REFORM

Christopher Sturr

ABSTRACT

How can philosophers contribute to the resolution of the current prison crisis in the United States, and what sorts of philosophical work should activists make use of in their efforts to address that crisis? This paper examines two periods of prison reform in the 20th century, to indicate the problematic role that traditional theories of the moral justification of punishment have had in the history of reform effects have played. I argue that moral theories of punishment are not the best vehicle for addressing the prison crisis; the approaches suggested by critical social theory are more promising.

1. INTRODUCTION: PHILOSOPHY AND THE PRISON CRISIS

There are over two million people incarcerated in the U.S., and an additional 4.6 million under supervision by the criminal justice system, on probation or parole (Bureau of Justice Statistics, 2003). The number of prisoners in the U.S. has increased dramatically over the last thirty years; the current rate of incarceration in the U.S. of 780 per 100,000 – the highest in the world – represents a six-fold increase since 1970, when the rate was 120 per 100,000 (Sentencing Project, 2003).

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The policies that have resulted in what now must be regarded as mass incarceration have had enormous costs. Federal, state, and local governments in the U.S. now spend over $146 billion annually for the criminal justice system as a whole, and over $49 billion annually for prisons and jails alone. More troubling are the often hidden costs borne by prisoners, their families, and their communities (Mauer & Chesney-Lind, 2002). There is a gender dimension to the crisis; the rate of incarceration for women has grown at nearly twice the rate for men since 1980, and the incarceration rates of African-American women and Latinas are especially high (Sentencing Project, 2003). The racial dimension of the prison crisis is particularly disturbing: over two thirds of those incarcerated are African-American or Latino; the rates of incarceration for young African-American men and young Latino men are alarmingly high; there are well-documented disparities and racial discrimination at every stage of the criminal justice system (Davis, 2001; Parenti, 1999; Wacquant, 2002). The current prison crisis is clearly one of the great problems of our age.

How can philosophers contribute to efforts to address the prison crisis, and what sorts of philosophical work can be useful and effective for prison activists and organizers? The potential contributions of other academic disciplines are clear: social, political, economic, and historical analysis and inquiry can help us understand the causes and consequences of the prison crisis. The most obvious distinctively philosophical contribution would be to expand our *normative* understanding of the current situation. But what form should such normative inquiry take? Mainstream philosophy has almost exclusively favored *moral-theoretical* approaches to punishment – in particular, inquiry into the possible moral justifications of punishment. We might think that moral theories can provide grounds on which to criticize current penal institutions and practices – indeed it seems unlikely that the penal system would pass muster by the lights of any plausible moral theory; we might also think that moral theories could provide guidance for designing alternatives to the current policies that have led to mass incarceration.

My aim in this paper is to challenge the centrality of moral theory in philosophical approaches to punishment, and to argue that activists and organizers should look elsewhere for normative guidance in addressing the prison crisis. As I hope to show, the history of prison reform in the U.S. shows that moral-theoretical approaches have had a dismal record of contributing to positive social change in the penal system. I will discuss details from two well-documented periods of prison reform in the U.S. – Progressive reforms of the early 20th century, and the radical prison movement of the 1960s and 1970s – in which reform efforts had unintended consequences. I conclude by suggesting that the normative approaches suggested by critical social theory are more promising than the standard moral-theoretical approaches philosophers have most often favored.

Recent work by Pablo DeGreiff and Guyora Binder also challenges the fact that most philosophical investigation of punishment has been limited to moral theory (Binder, 2002; DeGreiff, 2002). In his discussion of the deliberative democracy and the expressive function of punishment, DeGreiff "contests the traditional division of labor that confines theories of punishment to the domain of moral, or at most legal, theories, as if punishment did not pose a challenge to political theories as well" (DeGreiff, 2002, p. 373). Similarly, Binder asks whether the justification of punishment should be viewed as a distinctively moral question (2002, p. 321f):

> Much contemporary writing on punishment, whether by philosophers or legal scholars, treats it as such. Theories of punishment are taken to be moral theories, and the problem of justifying punishment is presented as a key battle-ground in the war between utilitarian and deontological ethics. The question of how and when the State should punish is reduced to the question of how and when particular persons should punish other persons. . . . But surely this is an odd way to think about punishment. Punishment is not a behavior, but an institution. It is part of a system that involves conduct norms, an authoritative procedure for generating these norms, an authoritative procedure for decisions to impose sanctions, and some measure of practical power over persons or resources. To punish someone is not just to harm them, nor even just to harm them because of something they have done. It is to stake a claim to a certain kind of institutional authority . . . Because punishment is part of a system of institutional authority, it is not amenable to a simple moral analysis. The legitimacy of punishment is bound up with the legitimacy of the norm it enforces and of the institutions promulgating the norm, imposing the punishment, and inflicting it.

Binder goes on to argue, surprisingly but convincingly, that unlike contemporary proponents of utilitarian or deontological theories of punishment, the progenitors of those approaches to punishment – Bentham and Kant – themselves regarded the question of the justification of punishment as a political rather than a moral question.

But DeGreiff and Binder both assume that a (normative) political-theoretical approach to punishment should still focus on the *justification* of institutions and practices of punishment; their approaches share with liberal moral and political theory a preoccupation with the *legitimation* of political authority. In my view this approach shares many of the problems of moral theories of punishment. In the two periods of penal reform I discuss here, traditional theories of punishment have provided grounds for criticizing inhumane or unjust penal practices, but have often ended up legitimizing new practices that are also morally and politically objectionable. The historical examples suggest several reasons for thinking that traditional theories of punishment are not promising vehicles for criticizing the current penal crisis or working to find alternatives to the current penal regime. I conclude by briefly arguing that normative approaches suggested by critical social theory, broadly construed, are more promising.

2. PROGRESSIVE-ERA PRISON REFORM

I'll start with prison reform in the Progressive Era. My account here relies on the historian David Rothman's classic study of Progressive reform, *Conscience and Convenience*, and on more recent historical accounts.

As was the case in other areas of social reform in the period, Progressive-Era prison reform was characterized by an underlying optimism about the possibility of curing social ills through government. There was also an emphasis on the use of "scientific" approaches to public policy. In the case of penal policy, the social problem that reformers were addressing was *deviant social behavior* (this is how they understood crime), but they were also trying to remedy brutal and unsanitary conditions in prisons, and penal practices which they considered inhumane. The hallmark of Progressive penology was an individualized approach to offenders. David Rothman summarizes the precepts underlying Progressive-Era penal reform as follows (Rothman, 1980, p. 50):

> . . . the origins of deviancy had to be uncovered through a case-by-case study, an individual approach. Ameliorative action had to be fitted specifically to each individual's special needs, and therefore required a maximum of flexibility and discretion. Finally, the State could be trusted to carry out these precepts; indeed, the State had the obligation to act in the best and mutual interest of the offender and the community.

But the policies that resulted from Progressive reforms did not achieve their intended results, as Rothman and other historians have documented.

The central focus of Progressive-Era reform was on sentencing and procedural issues. Reformers regarded fixed sentences as contributing to the inhumanity of the system, because such sentences didn't take into account the offender's circumstances or capacity for reform. On the Progressive view, procedures for dealing with offenders and sentencing ought to be tailored to the *offender* rather than to the *crime*. This rationale led to the rapid introduction into the criminal justice system of a variety of reforms, including, centrally, indeterminate sentencing policies, e.g. probation and parole. Such non-institutional forms of sentencing were intended to facilitate offenders' reintegration into the community. There were also procedural reforms such as plea-bargaining, prosecutorial discretion, and variable sentences which allowed judges discretion to determine sentences.

These reforms allowed for the introduction of scientific evidence – psychiatric, sociological, criminological – to determine appropriate sentences in individual cases. They provided a rationale for the introduction of scientific investigatory techniques at every stage of offenders' engagement with the penal system, including pre-sentencing investigations and reports, psychological and physical exams upon entry into the prison, and periodic examination over the course of

their time in prison, as a way of measuring progress toward rehabilitation, and in particular, as a way of gathering evidence for use by parole boards. Indeed, the parole boards themselves were to include scientific experts, and experts were to be consulted in the initial sentencing.

The reforms usually corresponded to an "environmentalist" view of crime, although earlier, 19th century theories about the biological basis of crime persisted and provided some justification for indeterminate sentences (Allen, 1981, p. 47; Ruth, 1996, p. 11 f). In his study of 19th century racist science, *The Mismeasure of Man*, Stephen Jay Gould calls indeterminate sentencing "Lombroso's legacy," after Cesare Lombroso, the Italian physiologist and criminologist who sought biological basis for criminal behavior. (Gould, 1996, p. 172). Whether reformers saw crime as having environmental or biological causes, they thought that the rehabilitation of the offender – if he or she was deemed capable of rehabilitation – should guide procedures and decisions about individual sentences, and this required prosecutorial and judicial discretion as well as indeterminate rather than fixed sentencing.

Thus, the goal was to *rehabilitate* prisoners – make it possible for them to return to society as *responsible citizens*; this goal was often viewed as a departure from earlier retributive or vengeful approaches to punishment. One Progressive-Era commentator explained what he viewed as the retributive character of fixed sentences as follows: "The origin of it was the native impulse to return evil for evil . . . Any penal code which attempts to inflict penalties commensurate with offenses . . . is but organized lynch law." Such sentences exemplified "the old idea . . . that it is the business of the State to take vengeance upon the wrongdoer, to get even with him, to pay him back in his coin, to take an eye for an eye and a tooth for a tooth" (quoted in Rothman, 1980, p. 68). This was not quite an accurate view, since rehabilitation – *moral* rehabilitation, in particular – had been the goal of punishment throughout the history of U.S. prisons, beginning with Benjamin Rush's reforms and the "Houses of Penitence" of the early 19th century (Allen, 1981). Still, we can regard the Progressives as intending to ground their reforms in a rehabilitative ideal, even if they didn't always recognize the historical continuity of their reforms with earlier thinking about prisons.

We can see the rehabilitative goals of Progressive reforms in more detail by briefly examining one initiative for reform *within* prisons. Thomas Mott Osborne, who was a central figure in the later phase of Progressive-Era prison reform, introduced a series of reforms at Sing Sing and Auburn prisons in upstate New York, beginning in 1913 (Haynes, 1939, pp. 296–307; Rothman, 1980, pp.119–22). Before Osborne's reforms, prisoners at Sing Sing and other prisons wore black-and-white striped uniforms, did "goose-step" marches around the prison yard, and were subjected to corporal punishment. At Auburn, prisoners were held to a "rule of silence," and could be disciplined for talking to each other

at any time; they were confined in their cells, in complete isolation, for fourteen hours a day; in general there was not "moral redemption" as was promised by the early design of Auburn, but rather brutality and indignity.

As a way of remedying such conditions, Osborne established, at Sing Sing, the "Mutual Welfare League," an association to which the majority of prisoners would belong. The League was supposed to provide a model society within the prison walls, to facilitate the prisoners' rehabilitation, and to teach the prisoners "responsibility for their own conduct." The goal was to make "citizens" and "men" of the prisoners. According to Rothman (Rothman, 1980, pp. 120–121):

> Inmates would elect a Board of Delegates, who in turn would elect an Executive Board. This Board would constitute the prison's rule-making and enforcement body, subject to review by the Delegates. Its members would supervise the inmates in the shops and the yard. It would organize various fund-raising events, and use the process to provide movies and recreation facilities. It would also select a judiciary board to hear cases of infractions and levy penalties.

There was a system of "self-government" (within certain parameters), which included executive, legislative, and judicial branches made up of and elected by prisoners. There was an "economic" system within the prison, through which prisoners earned special prison money for their labor; they had to pay for room and board and other expenses, but could also save the money, which could be exchanged for dollars upon release.

There was an end to the goose stepping, the "rule of silence," and the striped suits; prisoners now wore plain gray uniforms and were allowed – even encouraged – to talk and interact socially with one another, by being given "freedom of the yard" – time each day when they could freely interact with each other. Recreation and entertainment were introduced into the prison. Prisoners' ability to correspond with, and receive visits from, family and friends was greatly liberalized. All these reforms were designed to prepare prisoners to resume life in a "complex social environment" (Rothman, 1980, p. 112); taken as a whole, the reforms represented the redesigning of the prison on the model of a community, with the aim of making prisoners citizens and responsible members of society at large.

But the reforms did not achieve the intended results. At Sing Sing – and in prisons where some elements of the Mutual Welfare Society were copied – privileges were used as a way of controlling the inmates' behavior. As Rothman observes, "wardens manipulated the new prison privileges to the ends of discipline. They would deprive a disobedient inmate of freedom of the yard or of attending a movie or of writing his letters or of using the commissary" (Rothman, 1980, p. 151). Thus, there was a conflict between the rehabilitative justifications underlying the reforms and the fact that prisons remained, structurally, *custodial* institutions. The custodial and disciplinary interests of wardens, guards, and the State effectively

trumped the interests the community and prisoners themselves had in prisoners' rehabilitation.

Furthermore, the elimination of the official use of violence only had the effect of driving "violence out of view of bureaucratic surveillance, where it flourished" (McLennan, 2001, p. 17). The specialization of prisons (e.g. the distinction between minimum and maximum security prisons) and the ranking of prisoners (as either reformable or not) ended up serving disciplinary ends, as "convicts sought to avoid transfer to (notoriously violent prisons) at all costs," and prison officials "quickly learned the disciplinary utility of the threat of transfer to a violent prison" (McLennan, 2001, p. 17). Thus, reforms that were intended to reduce or eliminate inhumane treatment of prisoners sometimes had the effect of increasing the incidence of violence in prisons and refining its use by the State.

There were similar problems with Progressive-Era penal reforms more generally. The provisions for tailoring punishment to the offender rather than to the crime – indeterminate sentencing, probation, parole, plea-bargaining, and judicial and prosecutorial discretion – in the end often functioned more for State control and surveillance than for rehabilitation. For example: probation was used as a way to encourage guilty pleas or to elicit them through coercion (Rothman, 1980, p. 110 ff); judicial and prosecutorial discretion contributed to "dual systems of justice" – one for poor and non-white people, and another for middle- and upper-class white people (American Friends Service Committee, 1971, pp. 13–16). While sentencing provisions like probation and parole were intended to reduce the number of people in prison (the thought being that many people who languished in prison under fixed-sentencing policies could be rehabilitated and made productive citizens), in fact, in the years immediately following the introduction of probation and parole, the prison population remained stable, while a large number of additional people were on probation or parole. Meanwhile, the introduction of probation and parole increased the number of people involved in the criminal justice system, since many offenders who would have received suspended sentences under the previous sentencing regime now received probation, and many who would have received shorter, fixed sentences now received longer indeterminate sentences and parole supervision (Rothman, 1980, p. 110). Thus, the effect of Progressive sentencing reform was to increase the number of people under surveillance and control by the State.

Rebecca McLennan points out the unintended consequences of the aspirations of Progressive reformers to turn prisoners into citizens (McLennan, 2001, p. 7):

> . . . the construction of prisons in the Progressive Era presents a paradox: on the one hand, convicts were being granted greater (although ultimately circumscribed) freedom of expression, movement, and association as supposed citizens-in-training, and prisons were simulating certain political institutions in the service of habituating convicts to American democracy; on the

> other hand, the bureaucratization of punishment was gradually, if haltingly, placing prison management (and, consequently, prisoners) far beyond the reach of the means of democratic control (most conspicuously voters, the political parties, and the legislature) and into the hands of putatively "neutral" administrators whose authority was expressed in policy, rather than legislation or case law. In other words, in the first few decades of the 20th century, prisons were being remade as penal laboratories of citizenship at the same time as they were becoming increasingly estranged from *real* citizens; citizenship itself was being weakened and limited in the name of making citizens of convicts.

A fuller account of Progressive reform and its unintended consequences than I have presented here would address the larger social, political, and economic context that shaped them. Historians and sociologists have stressed the role of immigration and urbanization; the decline of machine politics and the rise of a professional civil service (and resulting bureaucratization); and the rise of the Welfare State, among other factors (Allen, 1981; Garland, 1985; McLennan, 2004; Rothman, 1980). There is considerable controversy about how to understand and explain the results of reforms to the criminal justice system in the Progressive Era, and why they did not have the results reformers intended (for a useful review of the controversy, see Cohen, 1985). What is uncontroversial – and what the examples I have been discussing bring out – is that Progressive penal reforms had consequences that reformers did not intend, and certainly did not solve the social ills the reformers set out to solve.

3. THE RADICAL PRISON MOVEMENT

The second period of the history of the U.S. prison system I will discuss is the radical prisoners' movement of the 1960s and 1970s. My account here depends primarily on accounts by Cummins (1994) and Greenberg and Humphries (1980), as well as primary documents from activists and reformers from the period.

This was a period in which there was unprecedented organizing and activism on prison issues, both within prisons and among the general public. There emerged a "highly developed radical convict resistance movement" (Cummins, 1994, p. vii) fueled by such central figures as Eldridge Cleaver, Huey P. Newton, and George Jackson, and through organizing by groups, such as the Nation of Islam, the Black Panther Party, and the Symbionese Liberation Army (Cummins, 1994, p. vii). There were secret political study groups, underground newspapers and prisoner unions. There was extensive coordination between the activities inside the walls and Left political activism on the outside. Prisoners' politicization can be regarded as a reaction to the failures of Progressive reforms; the problems with the policies of indeterminate sentencing and the reforms within the prisons, were the focus of many

prisoners' complaints and the source of much of the activism. For example, George Jackson was given a sentence of one year to life for stealing $70 in a gas station hold-up (Cummins, 1994, p. 155). But prisoners' politicization was also the product of the Progressive reforms in another sense – in that the liberties and resources the Progressive reforms did afford prisoners contributed to their radicalization.

I'll start my discussion with the period leading up to the radical prison movement. Despite the disappointing results of Progressive reforms, a distinctively Progressive "rehabilitative ideal" had taken root that led to expansion of programming within prisons through the 1960s (Allen, 1981). One such program – an educational program at San Quentin prison called "bibliotherapy" – illustrates some of what I claim above about Progressive-Era reforms. The program was in the spirit of those reforms, though more on a psychiatric/therapeutic model than Osborne's model of the prison as a community. Yet, again, the bibliotherapy program provides an example of how increased capacity for State surveillance and control resulted from reforms intended to train inmates to be independent, responsible citizens. At the same time, the program indicates how reformers could unwittingly contribute to prisoners' critique of and resistance to the prison itself.

Bibliotherapy was the project of a man named Herman Spector, who was the librarian at San Quentin, and who became supervising librarian for the whole California system; the program was soon duplicated at a number of other prisons. The goal of the program was to use reading and writing to train prisoners and thereby encourage responsible social behavior. Spector conducted Great Books discussion groups; he instituted a self-improvement discussion group called "the Seekers"; and "ran therapeutic creative writing sessions" (Cummins, 1994, pp. 17, 21). The "scientific" component of the enterprise required careful record-keeping: Spector kept detailed files of each prisoner's reading record, preferences, and needs; he also kept strict control over what reading materials were allowed.

The degree of control and surveillance over the prisoners' reading already suggests that the goal of creating independent, responsible citizens was compromised from the start in bibliotherapy. For example, the books allowed in the library were carefully screened on the basis of content; this hardly seems compatible with the goal of creating self-directed, independent citizens. But there were other serious problems with Spector's program. For example, prison administrators didn't share Spector's faith in rehabilitation; prisoners at San Quentin were regarded as incorrigible, hardened criminals, and administrators were highly skeptical of the notion that reading books could reform them. This indicates, again, a central problem with the implementation of Progressive reforms – the conflict between the custodial and disciplinary needs of prison administration and the rehabilitative goals of the reformers. Furthermore, the ways bibliotherapy was used to measure prisoners' reform were problematic. For example, questionnaires were

administered to prisoners at different stages in their tenure in prison; their answers to these were supposed to indicate their progress toward reform. But what counted as "progress" was conformity to what were deemed standard cultural norms (Cummins, 1994, p. 23).

Furthermore, while writing was central to bibliotherapy, prison officials exercised strict control over prisoners' correspondence; prisoners were only allowed to correspond with certain people; their mail and all their writings were read and censored and, if inappropriate, destroyed. Spector was to censor any writing that was "libelous, pornographic, or critical of the Dept of Corrections or other law enforcement authorities, glorified crime or drug use, or might be offensive to any race, religion or organized group" (Cummins, 1994, p. 24). The justification for such control measures was the fact that, under California law, prisoners were considered "civilly dead," and therefore did not have rights to speech or to their own writings (Cummins, 1994, p. 24 ff).

Still, the program was a success by one measure at least – the rate of prisoner participation in the program. Prisoners used the library extensively; by 1956 there were over 33,000 books in the library, and prisoners at San Quentin borrowed at a rate of 98 books per year. Some 90% of prisoners used the library, compared to a rate of library use of only 18% in the general U.S. population (Cummins, 1994, p. 28).

Prisoners' active use of the library contributed to two trends of obvious relevance to the radical prison movement. First, for the first time ever, prisoners began to engage in legal research and petitioning on their own, and each others', behalf: prisoners learned the law, and researched, wrote, and filed appeals and briefs. The famed San Quentin prisoner Caryl Chessman was a pioneer in this area in the 1950's – he taught himself the law, wrote legal writs, won stays of execution for himself, and in general forced the courts and the prison administration to expand prisoners' rights and provide greater legal resources for them. Today in many states prisons are required to have law libraries, largely as a result of the efforts of Chessman and the activists who followed him.

Second, the bibliotherapy program contributed centrally to the explosion of prisoner writing and publishing in the 1950s and 1960s. Prisoners' writing increased dramatically with the institution of the program: the number of manuscripts submitted for Spector's approval increased from 395 in 1947, to 1,989 in 1961, and continued to increase after that (Cummins, 1994, p. 28). Chessman was a pioneer in this area as well, producing several best-selling autobiographical works written in a somewhat penitent tone. By the late 1960s, writings by prisoners with more radical perspectives were smuggled out of the prisons and published; many of these works became best sellers, fueling external support for the radical prisoners' movement. Thus bibliotherapy and similar programs contributed centrally to training – and radicalizing – such activists and writers as Malcolm X, Eldridge Cleaver,

and George Jackson, and the publication of such books as *Soul on Ice* and *Soledad Brother*.

As we know, the radical prisoners' movement was in many ways a dramatic failure: legal appeals of obvious merit failed (e.g. that of Caryl Chessman); key leaders of the movement (e.g. George Jackson) were killed by prison guards; bloody riots occurred at Attica, San Quentin, and other prisons; ultimately there was a political and judicial backlash, and reforms were introduced to the prisons which made organizing more difficult. The reaction to the radical prison movement, and to the larger radical movement with which it was aligned, in many ways laid the groundwork for the current prison crisis (Garland, 2001; Parenti, 1999).

What may be less familiar are the ways in which reform efforts by people sympathetic with the prisoners' movement may have inadvertently contributed to this eventual backlash. I want to finish up my historical discussion by briefly recounting one example of such reform, as embodied in the American Friends Service Committee document entitled *Struggle for Justice* (AFSC, 1971). This document was "one of the first and most far-reaching criticisms" of the accepted consensus about prison reform (Greenberg & Humphries, 1980, p. 622). The central factors behind the Working Party's concerns were the radical prison movement; a loss of confidence in the State (e.g. skepticism about what "correction" might mean for *this* State, given the social interests it fulfills); and in general the larger radical movement.

The Working Party's report objected to the rehabilitative model of punishment along many of the lines I've been discussing: they pointed out the ineffectiveness of "treatment" attempted at prisons, and small number of prisoners who actually received it; they pointed out the existence of a "dual system of justice" which differentially punished middle- and upper-class white people, on the one hand, and poor people and people of color, on the other. They also objected to the fact that the criminal justice system ignored, or punished minimally, corporate crimes (even when they were called "crimes"), but brought "the full weight of repressive enforcement" for relatively minor crimes or victimless crimes.

The Working Party made a series of recommendations to remedy these problems: that law enforcement be directed to more serious crimes (which have larger social harm), e.g. corporate crimes; that victimless crimes (e.g. drug use) be decriminalized; that penalties for minor crimes be reduced. They advocated very short fixed sentences for the sorts of crimes most prisoners were in prison for; they advocated the elimination of discretion and plea bargaining, because of its contribution to the "dual system of justice" between rich and poor, whites and non-whites. In general, in a reversal of Progressive-Era goals, the Working Party argued that punishment should be made proportional to crime – that punishment be fitted to the *crime* rather than to the *criminal*.

As the title of the report suggests, many of the Working Party's arguments are in a retributivist spirit. Thus, they label indeterminate sentencing and the dual system of punishment "unjust," and call for proportionality in sentencing. But their analysis is complex and nuanced. In particular, members of the Working Party were wary of the "menace of good intentions," and were extremely cautious in their recommendations (AFSC, 1971, pp. 13, 19, 155). There is a striking change in tone from the Progressive Era, when reformers were optimistic about solving social problems through public policy.

Struggle for Justice was at the forefront of a series of scathing critiques of the "treatment model" and of the rehabilitative ideal as a whole (Allen, 1981; Mitford, 1971; Von Hirsch, 1976). Later critics of the penal system were more explicit in their retributivism, and grounded their critique (for example) of indeterminate sentencing in "just deserts" theory. The hope of radicals espousing retributivism to address what they saw as a prison crisis seems to have been that eliminating discretion, indeterminate sentences, and plea bargaining would require either an enormous increase in prison building (which they regarded as an unlikely outcome) *or* a reduction of sentences for most offenses (which they hoped for).

As it turned out, fixed-sentencing reforms were indeed implemented, but they were co-opted by the Right, so that the demand for fixed sentencing reform became the ideological vehicle for conservative reforms. In California, fixed sentences were initially put in place through that state's Criminal Code Reform Act of 1977; similar fixed sentences had been instituted in New York in the wake of the rebellion at Attica through the Rockefeller drug laws, which also involve fixed sentences. But the other reforms the AFSC and more explicitly retributivist radicals had called for were not carried out. Thus, plea bargaining wasn't curtailed; there was no decriminalization of minor offenses; there was no concerted effort to criminalize corporate offenses or to eliminate class biases in the criminal law; prosecutorial and judicial prerogatives and discretion were retained (and even expanded – e.g. judges' ability to hand down consecutive sentences). On the whole, the standard sentences lengthened, rather than being reduced (Greenberg & Humphries, 1980, p. 634).

We know by now that the Rockefeller drug laws and California's Criminal Code Reform Act of 1977 were but a prelude to the even farther-reaching and more conservative changes which are centrally responsible for the current prison crisis: e.g. "three-strikes" legislation, other legislation providing for fixed sentences for habitual offenders, and the expansion of mandatory minimum drug sentences to other states and to the federal government. Thus, the call for determinate sentences contributed to consequences that radicals espousing retributivism certainly did not intend. Other reform efforts of the same period, e.g. decarceration and community-based programs, also had unintended effects, but the case of determinate sentencing is particularly clear (Cohen, 1985; Garland, 2001; Scull, 1973).

A fuller account of the period would contextualize these events in the criminal justice system in the relevant social, political, economic, and cultural changes from the 1970s to the present day. Among the central factors historians and sociologists have identified are: deindustrialization; crises of capital accumulation and capital flight; the rise of the New Right, neo-conservative social policies, and neo-liberal economic policies; cultural and political reaction to the radical movements of the 1960s and 1970s; and globalization (Garland, 2001; Mauer, 2001; Parenti, 1999). My aim here has been to give details of some striking examples of unintended consequences of attempts at penal reform.

4. THE UNINTENDED RESULTS OF REFORM

By way of analysis of this historical evidence, I want to distinguish two kinds of unintended results of prison reforms over the past century.

First, reforms can be used for, or function in the service of, dominant interests, beyond the intentions of reformers. This seems to be the case in the ways in which many of the Progressive-Era reforms ended up functioning. For example, indeterminate sentencing (parole and probation) was supposed to be used to facilitate re-entry into society. It ended up being used for surveillance and control, and in the expansion of State bureaucracy, in ways incompatible with the central Progressive goals of fostering independent, responsible citizens.

A second kind of unintended consequence – one often overlooked in the literature on these periods – involves cases in which reforms promote subordinate interests, beyond the intentions of reformers. The example of bibliotherapy is clear: the people implementing the reforms, e.g. Herman Spector, clearly had no intention for prisoners to use books in the ways they did, especially in the later, more radical, phase of the prisoners' movement, in the late 1960s and 1970s. Even the most "progressive" of Progressive reformers did not intend that the "citizens" they were creating would denounce the notion that they were in need of "correction," denounce capitalism and the State as fundamentally racist, and call for the elimination of the prison system itself (Jackson, 1970, 1972).

The tendency for prisoners to use the prevailing penological rhetoric as part of their resistance was not unique to the radical prisoners' movement of the 1960s and 1970s. In fact, part of the motivation for prison reform in the Progressive Era itself was prisoners' use of the rhetoric of rehabilitation to press for change in their conditions. Indeed, there is a pattern of prisoner resistance of this sort throughout the history of prisons in the U.S. This sort of resistance – using available ideological resources – must be understood in the context of a larger history of prisoner resistance, ranging from the rowdiness of prisoners in the Walnut Street Jail, "Blue

Mondays" (when prisoners were not required to work) in the early Houses of Penitence, solidarity between convict and non-convict workers before the establishment of work contracts within the prisons, prison riots, and escape attempts. Prisoners have continually exploited the privileges they have been granted to press for further changes, adapting prevailing ideological resources along the way.

The tendency for reforms to be put to unexpected dominant uses also has a long history; this occurred not only in the case of Progressive-Era reforms, but also in reform initiatives – themselves motivated by prisoners' agitation – to remedy the failings of the rehabilitative model. The co-optation of 1970s efforts for determinate sentencing reform is a striking example.

A general observation we can make about the historical evidence I have presented is that there is little progress at all toward reform of the prison system, even though agitation for its reform has practically coexisted with the system since the beginning. This is of course one of Michel Foucault's key conclusions in *Discipline and Punish* (Foucault, 1977, p. 271; see also Rusche & Kirchheimer, 1939):

> One must not (therefore) regard the prison, its 'failure,' and its more or less successful reform as three successive stages. One should think rather of a simultaneous system that historically has been superimposed on the juridical deprivation of liberty (which includes as one of its components) the repetition of a 'reform' that is isomorphic, despite its idealism, with the disciplinary functioning of the prison – the element of utopian duplication.

The prison system has evolved to conform to dominant social interests and prevailing social trends of different eras, in many ways despite the intentions of reformers, but often using the very reforms they institute.

5. THE ROLE OF THEORIES OF PUNISHMENT IN PRISON REFORM

In order to assess the significance of this evidence and this analysis for philosophical theories of punishment, we need first to ask: What role did traditional theories of the justification of punishment – whether moral-theoretical or political-theoretical – play in the two periods I have been discussing? The answer is clearly that they provided the basis for criticism of the existing penal regime, and they informed the policy proposals reformers made for changing the penal system.

Thus for example, clearly, a rehabilitationist theory of punishment underlay Progressive-Era reforms and treatment-oriented programs in the decades that followed. Similarly, many criticisms of the "treatment model" or rehabilitative ideal, and policy proposals, e.g. for determinate sentencing, were couched in terms of a retributivist theory of punishment. Indeed, the return to retributivism among philosophers can in some ways be understood as a response to the

radical prisoners' movement and to the failings of the rehabilitative model. But the historical account I've just given does not paint a flattering picture of the role of philosophical theories of punishment in the actual practice of punishment.

One preliminary conclusion we can draw fairly directly from this historical evidence and my analysis of the evidence is this: The history of the prison system in the U.S. should give pause to philosophers whose interest in the theory of punishment derives from concern – or dismay – about the current prison crisis, and should make activists and organizers wary of employing moral theories of punishment. The prison system has remained inhumane – and in some ways has gotten more and more inhumane – in the wake of reform efforts made in the name of one or another philosophical or moral justification of punishment. If we hoped that by advancing this or that justification for punishment we can effect change by way of reform of penal policy – *even if we're saying that the justification conditions are not currently met* – these historical details should indicate that the situation is more complicated, to say the least. Appeal to philosophical theories of punishment has not brought about positive social change, and it has arguably contributed to the problematic aspects of penal policy.

One response to this view of the role of philosophical theories is that it misunderstands the aims of theories of punishment and its justification. The aim of such theories, it might be said, is not (and should not be) to have a direct influence on penal institutions or practices, but instead to help clarify our thinking about punishment in general. It might even be claimed that philosophical theories of punishment are not *about* actual institutions of punishment at all, but instead about the *idea* of punishment – punishment in the abstract. Indeed, this line of thinking seems to fit quite well with the tendency of traditional moral and normative political theory to be "ideal theory" – i.e. theory about what *would* justify punishment in an ideal society (i.e. not our own).

But the role theories of punishment have played in the history of the penal system and attempts to reform it belies this conception of theories of punishment. Theories of punishment have not in fact remained aloof from actual institutions and practices, in at least two ways. First, theories of punishment are inevitably influenced by assumptions about the actual practice of punishment, about society and politics, and about human nature and human behavior. Second, theories of punishment – taken in aggregate – have played a role in shaping and maintaining penal institutions and practices, whether their authors have intended that they have such influence or not.

There are several features of moral theory, and of normative political theory that focuses on the justification of political institutions, that suit such theory for the problematic role it has played in the history of the penal system.

First, the *individualism* often characteristic of such theories is likely to lead adherents of those theories to ignore the social circumstances in which crimes

are committed and in which punishment is meted out (Binder, 2002; DeGreiff, 2002; Garland, 1983). For example, to the extent that retributivists understand autonomy in non-social terms, retributivism *entails* that such social circumstances are irrelevant. On such grounds Marx objected to Kantian and Hegelian views of punishment, and in particular of the role that the idea of individual "free will" plays in their views (Marx, 1853, p. 55):

> . . . German idealism here, as in most other instances, has but given a transcendental sanction to the rules of existing society. Is it not a delusion to substitute for the individual with his real motives, with multifarious social circumstances pressing upon him, the abstraction of 'free-will' – one among many qualities of man – for man himself?

Furthermore, the *idealism* and tendency toward *abstraction* that are characteristic of moral theories – of which individualism is one symptom – make them especially susceptible to cooptation of the sort I have documented (Garland, 1983). Thus, while rehabilitationism does recognize (and indeed emphasize) the social context in which crimes are committed, it is apt to take an idealized, and distorted, view of social life. For example, Thomas Mott Osborne and other Progressive reformers who relied on rehabilitationist views of punishment often seemed to assume a background of social cooperation. There is a similar idealism in the tendency of both rehabilitationists and retributivists toward *abstraction*, e.g. their tendency to discuss punishment in abstraction from other social factors such as policing, prosecutorial power, and political and economic factors.

Furthermore, as DeGreiff and Binder have pointed out, standard philosophical approaches to punishment have been largely *apolitical*. Any adequately social account of punishment should also be political, but (*pace* DeGreiff and Binder) not merely by considering abstract questions of political authority and its justification, but by taking into account our actual political circumstances, in particular that we live in a society characterized by structures of dominance and subordination on the basis of class, race, and gender. Thus, the history I've just described is one in which competing groups use social, political, economic, and ideological resources to advance their own interests, but only certain groups – the socially dominant ones – have tended to prevail (though on changed terrain, with new possibilities for resistance). Ignoring social realities like structures of dominance and subordination and accompanying struggles and conflict, or reducing (e.g.) racism to a matter of morally culpable individual prejudice or discrimination, seems likely to leave theories open to the sort of cooptation we see in the history of reform efforts.

Philosophical theories and their adherents often assume *the neutrality of the State*. But the historical details I have reviewed indicate that it is of particular importance in discussions of punishment that we understand the role of the State in these structures of dominance and subordination. Philosophical understandings

of punishment, no less than efforts of reform, which assume that the State is or can be neutral in these systems, will overestimate the capacity of the State to be used on behalf of prisoners, will overestimate the possibility of successful reform, and in general are likely to misunderstand the social functions of the criminal justice system. It is implausible in the extreme to suppose that the State is currently neutral in such struggles, and it is at the very least an open question whether the State could *ever* be neutral in this way.

A related problem with the standard approaches to punishment is their *posture of impartiality*, and the actual political and social interests that posture is apt to simultaneously conceal and promote. A focus on the justification of punishment – when the central question of theories of punishment is taken to be, "When are *we* justified in punishing criminal wrong-doers?" – may easily slip into a discussion of policies and practices from the presumptive standpoint of dominant elites: legislators, policy-makers, judges, or agents of the criminal law. Looking at punishment from this point of view needn't necessarily express or promote the interests of those dominant elites, but the posture of impartiality typically assumed by moral theorists provides no safeguard. The stance of impartiality makes it difficult for theorists, activists, and organizers to recognize the social actors or groups with which they may in effect be allying themselves, despite their intentions.

This last point underscores the susceptibility of traditional theories of punishments to fulfilling an *ideological* role – their potential to function in favor of dominant social interests. The historical details I have reviewed suggest that philosophical *justifications* of punishment (in the abstract) have tended to function as ideological *legitimations* of actual institutions and practices of punishment (Garland, 1983). We might think that the uses to which prisoners have put theories of punishment belie this last conclusion. But the point is that the level of abstraction of philosophical discussions of punishment tends to rule out critical reflection on the social relations which underlie systems of punishment, and tends to (attempt to) be from no point of view, or at best from the (sympathetic) policy-maker's or reformer's point of view, rather than from the point of view of prisoners and other socially subordinate people as social and political protagonists.

6. CONCLUSION: PHILOSOPHY AND CRITICAL SOCIAL THEORY

What are the alternatives to the traditional theoretical approaches to punishment I have been criticizing? The criticisms I have raised suggest the following approaches:

(1) attention to (rather than abstraction from) concrete social, political, and economic relations;
(2) avoiding individualist and idealist approaches which distort and abstract from these concrete social circumstances;
(3) combining theory and practice by drawing on actual resistance movements and also tailoring theory for the needs of those movements; and finally,
(4) embracing rather than avoiding partiality.

What is needed instead are theoretical approaches to prisons which are *explicitly designed* for and by prisoners and other subordinate people (e.g. members of prisoners' families and communities) to use on their own behalf, in connection with larger movements against social systems of dominance and subordination.

These theoretical approaches are what distinguish critical social theory – broadly construed – from moral theory and from normative political theory in the liberal tradition. Nancy Fraser – adapting a suggestion from a passage from Marx – has proposed a simple and elegant conception of critical social theory (Fraser, 1987: p. 31):

> To my mind, no one has yet improved on Marx's 1843 definition of Critical Theory as 'the self-clarification of the struggles and wishes of the age' (Marx, 1975, p. 209). What is so appealing about this definition is its straightforwardly political character. It makes no claim to any special epistemological status but, rather, supposes that with respect to justification there is no philosophically interesting difference between a critical theory of society and an uncritical one. But there is, according to this definition, an important political difference. A critical social theory frames its research programme and its conceptual framework with an eye to the aims and activities of those oppositional social movements with which it has a partisan though not uncritical identification. The questions it asks and the models it designs are informed by that identification and interest.

Fraser's conception is useful for several reasons. First of all, it stresses the *political* character of critical social theory; critical approaches to punishment will not ignore the political dimensions of our penal system, much less their social aspects. The aim is not to find a theory or methodology that is immune to cooptation, but instead to keep sight of the fact that theoretical activity is always political, and to be self-conscious and self-reflective about one's political alliances. Fraser usefully foregrounds the connections between critical social theory and social movements, and the *partiality* that critical approaches will show toward the interests of those on whose behalf they are theorizing. This aspect of Fraser's conception helps to clarify the *normative* basis of critical social theory. Even though critical social theorists eschew the abstract, universal norms and justifications that preoccupy moral theory, a critical social theorist retains a normative basis for her theorizing precisely in the interests, values, and perspectives with which she self-reflectively identifies and commits herself to.

Finally, Fraser's conception highlights the role that critical social theory has in articulating and clarifying the "struggles of the age." This view of critical

social theory has a strong affinity with the conception of philosophy Antonio Gramsci presented in his essay, "The Study of Philosophy" (Gramsci, 1971). In Gramsci's view, everyone is a philosopher, inasmuch as philosophical views of previous eras are embedded in our very language and in our shared "common sense." Uncriticized, these received views become vehicles for the maintenance of the status quo. The task of critical philosophy is to draw on, but criticize, these received conceptions, in order to develop a coherent and critical conception of the world that is adequate to, and will help political actors to resolve, the problems of the current historical epoch. Clearly the prison crisis – and its connections with the on-going struggles against structures of dominance and subordination according to class, race, and gender – is one of the central problems of our times. As such it deserves significant – and *critical* – philosophical attention.

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PART II.
PENAL PRACTICES IN THE MODERN STATE

HITCHED TO THE POST: PRISON LABOR, CHOICE AND CITIZENSHIP

Keally McBride

ABSTRACT

The current neo-liberal trend in the United States insists that citizens must be self-supporting and are free to choose how they will involve themselves in the labor market. However, with the hardening of poverty in the inner cities, it is difficult to maintain the idea that everyone can choose to work. The collision between neo-liberal ideologies and economic crisis is evidenced by contemporary prison labor. The incarceration boom and use of prison labor suggests that work and unemployment is a matter of character, thus helping to maintain the idealization of labor as a marker of rationality, disciplined free will, and hence citizenship.

> The gods had condemned Sisyphus to ceaselessly rolling a rock to the top of a mountain, whence the stone would fall back of its own weight. They had thought with some reason that there is no more dreadful punishment than futile and hopeless labor.
>
> Albert Camus, The Myth of Sisyphus

LABOR AND CITIZENSHIP

The problem of how to make people embrace wage labor has been with us since industrialization. In order to produce surplus value, work must be separated from mere survival and valorized on its own terms. John Locke made an early attempt

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to specify how labor serves as the foundation of citizenship within the Social Contract in *The Second Treatise of Government*. Here he specified that "Labor put a distinction between them and common" – the act of labor takes nature's bounty, which is shared by all, and turns it into individual property. Because every man "has a property in his own person" – his labor – every man who labors is thereby eligible, and motivated, to participate in the Social Contract which establishes a government.[1]

In a recent article, Nancy Hirshmann explored Locke's "An Essay on the Poor Law" to see how his theories were developed in relation to the laboring classes of his time. He advocated cutting public relief to paupers, since it was through work that people developed reason and the capacity for liberal citizenship. Failure to work or poverty "was evidence of a failure to *use* their God-given rationality" (Hirschmann, 2002, p. 33). Thus, at the time Locke was developing his theory of the Social Contract he perceived that linking citizenship to labor was the way to ensure the stability of liberal forms of government. Founding the Social Contract on labor solves several problems. First, labor becomes a proof of a person's willingness to exercise rationality as well as self-discipline, both characteristics that are sorely needed in a liberal polity. Second, according to Locke's schema, labor creates property, which provides the impetus to consent to and uphold the Social Contract. This answers the question why we would ever choose to trade natural freedoms for political ones. Finally, whether intentional or not, the connection between work and citizenship also served to support industrialization in England.

In Locke's version of citizenship based upon labor, there is one exception to his rule, slaves.

> But there is another sort of servants, which by a peculiar name we call slaves, who being captives taken in a just war, are by the right of nature subjected to the absolute dominion and arbitrary power of their masters. These men having, as I say, forfeited their lives, and with it their liberties, and lost their estates; and being the state of slavery, not capable of any property, cannot in that state be considered as any part of civil society; the chief end whereof is the preservation of property (Locke, 1980, p. 45).

Here, Locke provides the philosophical basis which later helped to justify the exclusion of slaves from citizenship in the United States. Labor is the crucial step in making one fit to join the Social Contract – it establishes your *individual* stake in and claim upon the world which was previously held in common. Because as a slave you do not even own your own labor and cannot create property, you become ineligible for citizenship. Interestingly, Locke also explains that indigenous populations do not mix their labor with the soil in the same way as Europeans and therefore do not create private property for themselves either. Locke's Social Contract prefigured the racially exclusive form of American citizenship through his linkage of work, reason and the mythological foundation of the Social Contract.

In her book *American Citizenship* Judith Shklar (1991) makes a convincing argument that Locke's valorization of labor was central to the founding of the United States. She points out that the work ethic was a conscious fashioning of American identity in contrast to the aristocracy of the Old World and the chattel slavery of the New World. Aristocrats were maligned for their parasitic existence, and slavery was detested as the specter of unprofitable and underpaid work. Between these two poles, a life of leisure and the horror of enslavement, Americans glorified the reward, dignity, and character-building effects of labor.

While there are no formal work requirements in the Constitution, the United States has linked the rights of citizens to wage labor in social policy. As Alice Kessler-Harris has recently explained, "Unlike many other industrialized countries, America chose to distribute what the British social theorist T. H. Marshall called the rights of 'social citizenship' on the basis of work rather than as a function of residence or citizenship" (Kessler-Harris, 2001, p. 4). The U.S. government has developed a host of benefits that accompany wage work, such as social security and unemployment insurance. Health care is linked to wage employment rather than citizenship as well. According to Kessler-Harris, wage work has served to differentiate levels of citizenship, particularly starting in the twentieth century with New Deal programs.

> Work, wage work had long marked a distinction among kind of citizens: intimately tied to identity, it anchored nineteenth-century claims to political participation. But when the federal government linked wage work to tangible, publicly provided rewards (i.e. social security and unemployment) employment emerged as a boundary line demarcating different kinds of citizenship. (2001, p. 4).

Kessler Harris explores how women and other minorities have been and continue to be systematically denied "social citizenship" based upon their failure to participate in the formal wage market. Although originally, as Shklar points out, the ideal was to work for oneself and gain true independence, today wage labor is considered the opposite of an unhealthy "dependence." Recent debates about welfare suggest that participation in the formal workforce is still considered a mark of character in the United States (Fraser & Gordon, 1997; Mink, 1998; Munger, 2002).

Though the principle linking labor and citizenship may be traced to Locke, his original formulation is not feasible in the United States today. Shklar's and Kessler-Harris's work suggests that the connection between citizenship and work changes over time. Today, in practice, we have linked labor and citizenship not through the notion of property, but rather *choice*. When one chooses to work, labor is a sign of maturity and a capacity to self-govern. In contrast, when one is forced to labor, labor becomes a punishment, and actually makes one less fit for citizenship. Hence, examining forced labor practices in the United States

allows us to consider what populations are made unfit for citizenship as well as to investigate how the relationship between work and citizenship is currently defined. Furthermore, it is crucial to remember that forced labor is a form of *labor*, and as such, reveals contemporary economic trends.

During eras of expanding economies and full employment, the ideological connection between work, choice, and citizenship seems perfectly reasonable. But what about times of economic stress? If it becomes clear that not everyone can choose to work, then a society needs to recognize and accommodate this fact. During the Great Depression, the U.S. federal government expanded social welfare programs in order to provide political stability by meeting the needs of its citizens. These welfare programs assumed that citizens had rights independent from their status as workers and that the government owed a basic level of support to citizens. The adoption of welfare reversed Locke's assumption that citizens, as workers, will provide a basic level of support for government.

However, we live during an era when neo-liberal theories have enjoyed renewed prominence as evidenced in multiple arenas: the reduction of corporate regulation, reduction of tariffs, elimination or severe restriction of social programs, downsized taxation, and privatization. These transformations have reinforced, if not accelerated, the traditional American valorization of work, and the understanding that employment serves as the gateway to full citizenship. This ideological connection of work, choice and citizenship has become ever more insistent at a time of structural unemployment. How do we reconcile the opposing theory and reality?

This essay argues that the tensions between neo-liberal ideologies of work and contemporary realities of unemployment are clearly ascertained through the lens of prison labor. I also argue that prison labor itself has become a spectacular means by which this tension is "resolved." However, as I shall explain, I believe the ideology of free choice and work has become increasingly difficult to maintain, which has led to ever more farcical performances of penal labor.

Social theorists have frequently observed that the penal system is developed in conjunction with the needs and detritus of the economic order. Simon and Feeley (1995) and David Garland (2001) have pointed out that the penal system in the United States has experienced a shift in orientation. While one aspect of the penal system is to provide a clear moral order for a society, Simon and Feeley argue that this "New Penology" notably lacks a coherent narrative or purpose. "It has not yet succeeded in producing a viable truth about crime" (1995, p. 150). The result is increased anxiety about crime, and a lack of confidence in the institutions that deal with it. Garland on the other hand, argues that the welfare state created a form of penal welfarism. Both regimes "meshed effectively with the new mechanisms of social regulation, with government through experts, and with ideological stress upon universal citizenship and social integration that characterized social politics

in the post-war period" (Garland, 2001, p. 47). It was the decline of universal citizenship and postwar prosperity that undermined the welfare state, and alongside it, penal welfarism. Garland observes a "sharp discontinuity" in penal practices that reflects the turn towards neo-liberalism in both in the U.S. and Great Britain.

Garland offers his observations as a contrast to Simon and Feeley's. The sudden shift in penal policies *does* make sense given the larger historical, economic context. However, I think both analyses are correct. Penal policies are not coherent narratives, but that is because they reflect current ideologies and economic developments. Contemporary prison labor is an expression of deindustrialization in the United States and the loss of employment in urban and rural areas. I am not arguing that prison labor is *caused* by these shifts. Rather, this particular incarnation of forced labor practices in the United States reflects and *hides* these political, economic trends. It deliberately contests economic reality outside prison walls and this is why it becomes incoherent, and unable to produce "a viable truth about crime" as Simon and Feeley observe (1995, p. 150).

Forced Labor in Historical Perspective

In order to understand what distinguishes forced labor practices today, it is illuminating to consider how it differs from other episodes of involuntary labor in U.S. history. Because of the radically disproportionate number of minority, male inmates, prison labor today is frequently viewed as a return to slavery. This impression is reinforced by the fact that prison labor is made legal through a clause in the Thirteenth Amendment. Slavery and involuntary servitude are outlawed in the United States, "except as punishment of crime whereof the party shall have been duly convicted" (U.S. Const. Am. 13, Sec. 1). Certainly, the legality of forced labor in penal institutions has rested upon this "escape clause" in the Thirteenth Amendment. In 1871, the Supreme Court of Virginia, in *Ruffin v. The Commonwealth*, determined that a convicted felon ". . . is for the time being a slave, in a condition of penal servitude to the State," hence "civically dead" lacking rights normally awarded to citizens (62 Va. 1024. Nov. 1871). Joan Dayan (1999) has also pointed out in her work that the practice of chaining inmates together to work, tracking inmates with bloodhounds, and monitoring working inmates with armed guards, is a vivid recollection of the history of slavery in the United States. The visual references to the era of slavery are particularly disturbing when considering the racially disproportionate prison population. Furthermore, the practice in 14 states of denying convicted felons the right to vote in perpetuity does suggest the creation of a permanent caste of non-citizens and a new era of Jim Crow in the 21st century (Thompson, 2002).

Despite the ghastly family resemblance between slavery, disproportionate minority confinement, and forced labor practices today, there are crucial differences. The ruling of Ruffin no longer stands, and prisoners' rights are recognized (if not always maintained). More important for the purposes of this argument, slavery was an integral part of the early national economy. Low cost labor was essential for the agriculturally dismal territory of the South. Slavery made it possible to turn a profit from a swamp. While it was without a doubt fueled by racial animus and aristocratic fantasies, slavery was an institution that served an economic purpose. Prison labor today is abysmally unproductive, a fact I shall explore later. Incarceration is not driven by the need to extract low wage labor from inmates.

Similarly, many people would consider the convict lease system in the Postbellum South an extension of slavery. However, in his study of the convict lease system, Alex Lichtenstein (1996) argues that despite appearances, the convict lease system was not a functional equivalent to slavery. On the contrary, Lichtenstein found that convict labor was used in new industrial sectors of the economy, enabling the South's rapid industrialization following the Civil War. Rather than accept being burdened with the costs of a free labor force, nascent industrialists developed infrastructure with the use of extremely cheap labor. Convicts built the roads and railroads, stoked the furnaces, and removed the coal that marked the death of the plantation economy. Agricultural exploitation remained in force through the sharecropping system, but convict labor forged the new economy which proved to be even more profitable in the long run.

Immediately after emancipation, industrialists were faced with a recalcitrant labor force. Newly freed slaves were not eager to sign up for lengthy work weeks, even for wages (Engerman, 1992). Industrialists complained that even working freed slaves chose to work only two or three days a week preferring free time to more wages. The convict lease system solved the dilemma perfectly: industrialists were given a new captive labor force. Furthermore, Lichtenstein argues that the convict lease system provided a method of discipline for poor black families in rural areas as well. Not fulfilling sharecropping obligations led to threats of the chain gangs. "Since it reinforced, rather than disrupted, the form of social control necessary for extreme labor exploitation in the South's plantation districts, this was a form of 'modernization' acceptable to planter and industrialist alike" (Lichtenstein, 1996, p. 13).

What is important to note here is that the convict lease system provided labor discipline for those outside the purview of the chain gang as well. This fact was not lost upon workers in the industries that used convict labor. One committee issued a report to the Governor of Georgia urging him to restrict the use of the convict lease system. They argued prison labor was

> offensive to the just pride of that worthy and estimable portion of our community (the white working men). They feel that the natural effect is to degrade their vocation, by turning out from the walls of the Penitentiary the worst characters as rivals and associates in their business. (Lichtenstein, 1996, p. 30).

While the concern for competition from convicts whose wages were minimal is evident, workers also adopted elements of the rhetorical and ideological stance that had helped to defeat slavery: Republican free labor.

Eric Foner's book *Free Soil, Free Labor, Free Men*: *The Ideology of the Republican Party* (1970) explores how the ideology of free labor was used to challenge slavery. Rather than contest slavery on purely moral grounds like the abolitionists, Republicans made the argument that it was important to banish slavery from the Union because it sullied the heart and soul of the United States: free labor. In speaking of differences between the Southern and Northern sides of the Mason-Dixon line, Thomas Ewing observed, "Labor is held honorable by all on one side of the line because it is the vocation of freemen – degrading in the eyes of some on the other side because it is the task of slaves" (Foner, 1970, p. 46). Alexis de Tocqueville (1969) shared this concern in *Democracy in America*, making the argument that slavery was debilitating for the slave, but also for the master, killing his capacity for innovation and desire to work. Clearly, forced labor was viewed in relation to free labor: its presence in the United States had consequences for all. Here, Shklar's (1991) observation that the work ethic was embraced to serve as a point of contrast to slavery is well documented.

Reviewing this brief history of the convict lease system presents an interesting point of comparison to the economic circumstances of today's prison labor. Lichtenstein (1996) points out that the convict lease system was an integral element in the South's rapid industrialization in providing inexpensive, unskilled labor. Today, by contrast, the United States is suffering from de-industrialization. The only sector of the unskilled labor market that is experiencing growth is the service sector. For the most part, prison laborers are entirely unsuited to fill this niche. Telemarketing jobs are one large exception, but the vast majority of service sector jobs could not practically or cost effectively be fulfilled with prison labor.[2] Therefore, unlike the convict lease system, contemporary prison labor serves no pressing need on the part of the market.

Furthermore, convict lease labor was extremely productive. Today, UNICOR, the Federal Bureau of Prison's work program, loses money every year. In response to labor activism in the 1930s, Congress passed the Ashworth-Summers Acts which made it a felony to transport or sell prison-made products across state lines. In 1979 the Federal Prison Industries Enhancement Act (PIE) was passed allowing private companies to enter into joint ventures with prisons. In order to be exempt from the Ashworth-Summers Act, prison workers must be paid

the federal minimum wage. (It is important to note that 80% of wages paid to prisoners are passed on to prisons for their overhead expenses or to the justice system to meet the costs associated with conviction.) Joint ventures in prisons are now in place in 36 states and 80,000 workers are engaged in commercial activity behind bars. Examples of prison industries include hotel reservations, office furniture, blue jeans, lingerie, and electrical wire (Parenti, 1996; Reynolds, 1997; Whyte & Baker, 2000). The largest employer is the Federal Prison Industries UNICOR program which employs 21,000 workers, primarily making goods for the government under mandatory sourcing contracts (Bureau of Prisons, 2002).

UNICOR does not have to pay prisoners a minimum wage as it is already in compliance with the Ashworth-Summers Act because it sells to the government. Even with wages of as low as 21 cents an hour, UNICOR products are expensive, costing on average 13% more than the same goods provided by private firms (Parenti, 1999, p. 232). These products are shoddy: one study found that wire supplied by UNICOR failed at twice the rate of other suppliers. Finally, UNICOR delivered its products late 42% of the time (Parenti, 1999, p. 233). Clearly, UNICOR would not be able to compete in an open market. It seems that having a captive buyer and next to free labor would be tremendously profitable. Why isn't prison labor more lucrative?

The difficulties with doing business in prisons are numerous. Security costs are high, much higher than the wages of the workers. For example in 2001 in the Philadelphia Prison System, 350 inmates (out of the 22,124 prisoners who were taken in) were released for work assignments. In the same year, the prison conducted 2,494 security checks on these 350 inmates! (PPS Report, 2001, p. 18). Machinery installed in prisons does not tend to be the most efficient or up to date, and productivity is interrupted by lockdowns or security disturbances at the prison. There are difficulties in conducting manufacturing in prisons ill-designed for the purpose. For example, trucks delivering supplies could not fit between two security gates encircling the prison which were programmed to open only one at a time. Inmates are released from the prison creating high turnover rates and a need for constant training, particularly since those employed in prison industries are most likely low-risk, non-violent offenders. It is true that employee absenteeism is low, and companies do not have to pay payroll taxes, unemployment benefits, sick leave, or retirement, nor enforce worker safety or environmental requirements. Ultimately however, the balance sheet seems to come up even: employers would be just as well off looking for non-incarcerated workers.

This is not to say that there have not been attempts to make prison labor more market savvy. Two institutions in Texas have taken the lead in trying to reform the current prison labor system, The Enterprise Prison Institute and The Criminal Justice Center at the National Center for Policy Analysis. Knut Rostad and Morgan Reynolds have testified at Congressional Hearings and produced studies arguing

that prison labor might be used with greater profit in the United States. Both men testified at a hearing for HR 4100 entitled, "Free Market Prison Industries Reform Act of 1998" which proposed ending mandatory sourcing regulations, lifting interstate restrictions on products made in prisons, and privatizing Federal Prison Industries, making it possible to sell products on the open market.

The argument to privatize and expand prison labor profited from the labor shortage of the late 1990s. A brief entitled, "Creating Factories Behind Bars" points to the "93% unemployment rate behind the gates of American prisons" as a solution to "a workforce shortage that threatens American competitiveness" (Reynolds, 1997). The benefit of prison labor extends beyond private manufacturers to taxpayers and prisoners as well. They argue that 80% of income earned by prisoners is currently returned to the criminal justice system or help pay compensation to victims. Expanding prison labor would be one way to manage the costs of the policy of mass incarceration. Finally, prisoners who work in prisons are 24% less likely to return to prison after release. While Reynolds and Rostad (2001) imply that this is due to the training and discipline provided by work experience, this may also be attributed to the fact that only the best behaved prisoners are allowed to work.

Reynolds and Rostad cite gross public mismanagement for the underutilization of the workforce behind bars in the United States.

> However, since prison industry is usually state run rather than privately run, the output is often shoddy, overpriced merchandise that other state agencies must buy from the prison industry monopoly. The largest prison supplier was the Federal Bureau of Prisons with $433 million in output for federal agencies, yet the system employed only 16,000 inmates out of 61,000 inmates eligible to work (i.e. those not in solitary confinement, considered dangerous or being transferred) from its total of 85,000 inmates (Reynolds, 1997).

Today, the numbers of inmates has risen dramatically, but UNICOR still employs only a fraction of potential workers. The globalization of manufacturing has played a key role in hearings about prison labor, as Senator Mitch McConnell asked, "How about the apparel makers who use offshore labor? A lot of apparel is produced overseas now. Do you think we could find a way to entice them back, with some of them using prison labor?" (Prison Industry Reform Legislation Hearing, 1998, p. 63). Despite some support, the proposed reforms have not thus far been approved.

The failure to push prison labor into the free market does not seem to be due to a reluctance to privatize government functions on the part of the current administration. Nor can the strength of unions take credit in this regard. I believe prison labor is unattractive to most investors because they do not need the kind of labor that prisoners can supply. McConnell may have fantasies about recapturing a manufacturing sector in the U.S. economy through the competitive deployment of prison labor, but even at slave wages, American workers cannot compete in the

global marketplace anymore. And this may be the primary reason that so many potential workers are behind bars in the first place.

In "Postindustrialism and Youth Unemployment: African Americans as Harbingers" Troy Duster argues that the "darkening" of U.S. prisons can be directly linked to deindustrialization in American cities. In 1933 black people were incarcerated at approximately three times the rate of white Americans; in 1990, the rate was eight times that of white persons (Duster, 1995, p. 474). This shift in the pattern of incarceration can be compared to the loss of jobs in manufacturing in large cities, and the concurrent rise of service sector employment. Because service sector jobs rely on fronting the image of the company, minority youths are far less likely to be able to land these jobs that now dominate the entry level employment market. For instance, racial differences in language patterns are particularly sharp in the United States. Duster cites an experiment conducted by William Labov, a linguist at University of Pennsylvania. Labov tape recorded the voices of children at playgrounds in London and in Philadelphia. Neither he nor his English colleagues were unable to identify the race of the children recorded in London: in Philadelphia however, they could four times out of five (Duster, 1995). Because service sector jobs hire on the basis of employee presentation and the image of the store, Duster argues that significant differences in language have meant that African American youths have been displaced out of the labor market in the transition to a service sector economy (Duster, 1995; Sassen, 1998).

Continuing to look at Philadelphia as an example, the city has suffered from high structural unemployment, abysmal public schools that are primarily attended by African Americans and other minorities, and concurrently low property values. Philadelphia also has an incarceration rate that is 148% of the national average, a significantly younger (35% of inmates are 24 or under) and disproportionately African American (72%) inmate population. 68% of inmates in the Philadelphia Prison system are there for dealing drugs or theft of some kind[3] (PPS FY Report).

Two sociologists, Bruce Western and Katherine Beckett (1999), have argued that the extraordinary incarceration rate in the U.S. in the 1980s and 1990s has seriously distorted typical measurements of unemployment. Taking the incarcerated population into account, 2 million people according to the *New York Times* on May 19th, 2003, raises the overall unemployment rate for men by one percentage point (Western & Beckett, 1999). This would make the current unemployment rate closer to 7%. However, because of disproportionate minority confinement, taking incarcerated populations into account creates a rise by five percentage points in African-American male unemployment. Including frustrated job seekers and prisoners into their calculations, Western and Beckett place African American male unemployment at 38%, even during the "recovery" of the 1990s! Western and Beckett (1999) argue that penal institutions need to be understood as a labor market

institution with two general effects, the first is to hide massive structural unemployment, the second is to create decreased job performance on the job market for those exiting them.

A point of historical contrast makes this second effect all the more salient. In his book on the parole system, *Poor Discipline*, Jonathon Simon points out that during the era of indeterminate sentencing in 1960, in order to be released on parole, prisoners had to show that they had been offered gainful employment in 30 states (Simon, 1993, p. 164). Such job offers did not always materialize, nor was the system any guarantee that ex-offenders seamlessly melded back into society. But such a provision is unthinkable today, not only as a condition of release, but also given the employment restrictions that are placed upon ex-offenders upon their release. Both federal and state governments bar ex-offenders from holding jobs that require federal or state licenses. These occupations include working airport security, as aids in nursing homes or as a social worker. Those with drug convictions cannot obtain student loans (Hubbell, 2000). Prisons remove large numbers of the unemployed from public view, and further stigmatizes them. Especially in perpetuating the population's unemployment status after release, prisons play in a key role in "the hardening" of poverty in U.S. cities (Duster, 1995; Simon, 1993; Wilson, 1995). Simon (1993) argues that work provides the main method of achieving "normalization" in American society, hence unemployed persons on parole are not likely to be reintegrated into communities. He argues that given the structural unemployment in cities, to break the cycle of incarceration, we will have to develop "an understanding of the normal distinct from the discipline of the labor market" (Simon, 1993, p. 265). While I absolutely agree with him, I believe that contemporary prison labor practices suggest exactly why this is not likely to be the case. After all, if prisons are helping to mask what are extraordinarily bad economic prospects for minority youths in the country, then why have them labor in prison at all?

The Moral Economy of Work or Work as Punishment?

Two different traditions intersect in prison labor, one is the tradition of work as rehabilitation, the other is work as punishment or discipline. The residue of both traditions can be found in debates about prison labor today. The tradition of work as penance and rehabilitation has been with the institution of the prison since its inception. In Eastern State Penitentiary in Philadelphia, Tocqueville and Beaumont (1970) described prisoners who were kept in their cells in solitary confinement for the entire length of their sentence, in order to prevent criminals from further contaminating one another. The original penal institution, the Walnut Street Jail,

discovered that individuals kept in solitary confinement without activities went insane. At Eastern State Penitentiary, the Quakers improved upon the model of solitary confinement by adding handicraft activities for each prisoner to accomplish in his cell.

> It is highly remarkable, that these men, the greater part of whom have been led to crime by indolence and idleness, should be constrained by the torments of solitude, to find in labor their only comfort. By detesting idleness, they accustom themselves to hate the primary cause of their misfortune; and labor, by comforting them, makes them love the only means, which again free, will enable them to gain honestly their livelihood (Tocqueville & Beaumont, 1970, p. 57).

Work becomes the welcome respite from idleness and prisoners view work as a form of redemption, a proclivity that reformers hoped would continue after release as well. The Auburn penitentiary model also placed a great deal of emphasis upon the rehabilitative aspect of labor in prisons. By having prisoners work collectively, but in absolute silence, they learned self-discipline and obedience needed for collective production. Interestingly, as Thomas Dumm points out, the system of rehabilitation through work was developed in the U.S. during a time of an acute labor shortage (1987), so released prisoners were likely to be able to ply their trade after release. The work of prisoners was also used to defray the costs of confinement (Tocqueville & Beaumont, 1970), an advantage that is also frequently mentioned today.

Today some prison reformers advocate increasing work release programs, allowing prisoners to gain work experience, earn some money, and enjoy more humane conditions of confinement through a variation of their everyday activities. As I already mentioned, one rationale for expanding prison labor is decreased recidivism. Most prisoners today would prefer to work. Days are monotonous, and even dreary tasks are more welcome than solitary confinement. Supermax prisons that place prisoners in cells for twenty-three hours a day are finding that solitary confinement causes insanity just as it did two hundred years ago (Parenti, 1999). Dealing with overcrowded prisons, wardens and guards welcome prison work. It provides occupation for the prisoners and wears them out, making them a more recalcitrant population. Within the institution, prison work provides the sole occupation for prisoners now that educational and recreational budgets have been slashed (Hallihan, 2001).

But I believe that prison labor serves a different function outside the prison walls. David Goldberg (2000) has observed that the labor discipline provided for minority men in prisons and the workfare assignments created largely for minority women outside of prison enforce capitalist moral economy. “In the moral economy, then, prisons are supposed ideologically to represent law and order, work in the face of welfare, discipline rather than delinquency, social control

over anarchy" (2000, p. 215). Foucault also observed the intricate way that the penitentiary is closely calibrated to the economy outside of it:

> How is power to be strengthened in such a way that, far from impeding progress, far from weighing upon it with its rules and regulations, it actually facilitates such progress? What intensificator of power will be able at the same time to be a multiplicator of production? (Foucault, 1979, p. 208).

Viewed in this light, prison labor takes on a special significance considering that it is becoming more popular just at the time that structural unemployment in urban areas has emerged as a permanent reality. Today prison labor affirms that our old assumptions are still valid: those who do not labor are criminals. What more efficient way to insist upon participation in the work force, even at a time when such participation becomes more difficult?

Examining the debate over the State of Oregon's Measure 17 which was passed in 1994 requiring all prisoners to work 40 hours a week, we can see the interlacing of different, often contradictory arguments about the nature of work, choice and citizenship. Because the debate happened during a period of economic prosperity, a common argument was that requiring prisoners to work was a form of rehabilitation and would reduce recidivism. Interestingly there was also resentment on the part of taxpayers that they were paying for prisoners to remain idle while *they themselves* were required to work forty hours a week or more (Parenti, 1996). Prefiguring the Personal Responsibility and Work Opportunity Act of 1996, the popularity of Measure 17 in Oregon (it passed with 71% of the vote) suggests that voters will not endorse exemption from work. The ideological linkage between work and moral character that I began this essay by describing still remains very strong.

The problem with this logic is that the incarcerated population comes from the population least likely to find work in the first place, and is even more disadvantaged on the job market after serving time in prison. The ideology of work and citizenship in the United States dictates that all rational and disciplined people can and will choose to work. Not being able to work is a reality that our understanding of citizenship, virtue, choice and freedom simply cannot accommodate, particularly in an era of increased market discipline. To acknowledge that some people cannot work would require a fundamental shift away from neo-liberalism. Yet such a dramatic shift seems unlikely, even in the face of growing structural unemployment. The incarceration boom hides some unemployment, and prison labor maintains the fiction that unemployment is a character, not an economic, issue. This is the logic by which we pursue prison labor practices of another era, sometimes with absurd results. It is this collision of ideology and a changing economic reality that has led to some of the incoherence that Simon (1993) has noted in contemporary penal practices.

Prison Labor as Farce

In *State of North Carolina v. Clifton Frazier* (COA00-122, 6th February 2001), the State Supreme Court ruled that Clifton Frazier could not be convicted of larceny for stealing from the prison canteen where he was assigned to work. Frazier was paid one dollar a day for his labor. Over the course of three months, $665.75 worth of goods and money disappeared from the canteen. The initial conviction found Frazier guilty of larceny, but the Supreme Court overturned this conviction, arguing that he was not an employee, by definition. "Defendant did not make a wage that would have been lawful outside of prison, he could not lawfully refuse a work assignment, and he had no bargaining power or any of the other ingredients of a traditional employment relationship." Some prisoners are paid the minimum wage, but still, by law are not employees. The key distinctions here seem to be the ability to choose whether or not to work, and the sense that work is a reciprocal relationship between worker and employer.

But establishing these two precepts as the basis of free labor may be problematic, and become even more so. If one cannot find a job, is employment still a choice in any regard? If there is a shortage of jobs, do employees still enjoy a reciprocal relationship with their employers? Economic anxieties are making these questions more pressing. The case of *Larry Hope v. Pelzer* illuminates how the connection between work and choice is maintained, even in absurd circumstances.

In Alabama, prisoners who disrupt work on the chain gangs, or who refuse to work in the chain gang, are disciplined by being chained to a hitching post, outside, with their arms high above them. There are regulations of this practice: prisoners are to be offered bathroom breaks and water, and prisoners are to be released once they state that they are ready and willing to work in the chain gang. In 1994, the Department of Justice conducted a study of the Alabama Department of Corrections' use of the hitching post and found that these regulations were only sporadically followed. The DOJ advised Alabama to desist in its disciplinary use of the hitching post. Particularly because, they argued, not all prisoners were released when they said they would return to work. In short, it was acceptable for the hitching post to be used to enforce participation in prison labor, other than that it was considered inappropriate. Remarkably, the Alabama Department of Corrections replied that they would continue to use the hitching post "to preserve prison security and discipline." (*Hope v. Pelzer*).

A case decided by the Supreme Court in Summer 2002 provides a vivid picture of the use of the hitching post in Alabama. Larry Hope, a prisoner was affixed to the hitching post twice. The first time was due to a disturbance between himself and two other inmates on the chain gang working together. He was removed, and attached to the metal apparatus for two hours. The incident was well documented

in the prison records, including the times that he was offered bathroom breaks and given water. When he agreed to resume his work, he was released from the hitching post and returned to the chain gang. The second time Hope was punished with the hitching post followed an altercation with the guards of the chain gang. His shirt was removed, and he was held in the hot June sun, without water or bathroom breaks for seven hours. Guards offered him water, then poured it on the ground in front of him, taunting him about his thirst. Hope brought a civil case against the guards who were ruled to be immune from prosecution. The Supreme Court overturned this decision, ruling that reasonable persons should have known that such activities constituted cruel and unusual punishment, and that the guards were thereby liable for their actions.

The scene is striking, a man, attached to a metal bar, hands in shackles above him. He is dehumanized thoroughly, and in order to regain his "freedom" – he must emphatically state that he will choose to go work on the chain gang. Why go to such perverse lengths to make the prisoner "choose" work? On one hand, the insistence that the prisoner choose reaffirms the ideological connection between labor and citizenship. Prisoners will be punished until they are willing to use their reason, their "free will," as society would dictate. On the other hand, to enact choice in such a fashion is actually quite dangerous. It is just as easy to say that such an exercise reveals Hope's "choice" as entirely fabricated. Perhaps, after all, work is not really a choice.

Prison labor becomes a painful enactment of social normalcy in one other way as well. Now that tougher economic times have hit the state, Oregon voters do not like the idea that convicts are able to secure employment when those on the outside are finding it increasingly difficult (Steves, 2001). Voters overwhelmingly amended Measure 17 in 1998, restricting the use of prison labor, and even further restrictions were demanded by the AFL-CIO, and ultimately delivered by the State in 2002. There is little talk anymore about the rehabilitative purpose of prison labor. We want prisoners to labor, but we don't want them to compete. Hence, we have the development of spectacularly unproductive labor.

In Alabama and Arizona for example wardens have decided to pay for large boulders to be brought to prisons. Convicts break these boulders into gravel with hammers. The gravel, of no practical use, is deposited into pits next to the prison (Dayan, 1999; Hallihan, 2001). The prison pays to bring in more boulders to be smashed. This is not work as rehabilitation or training, this is not work that is generating profit. Instead this is work as punishment. In Oregon, where the most public debate about the relationship between free and forced labor has occurred, some have even suggested that convicts should be employed in pushing boulders back and forth over highways. The ultimate punishment devised by the gods for the man,

Sisyphus, who dared to scorn their rules migrates out of the underworld onto the earth's surface.

But Camus reminds us that the primary distinction between Sisyphus and other workers is the hero's consciousness of the futility of his labor.

> If this myth is tragic, that is because its hero is conscious. Where would his torture be, indeed, if at every step the hope of succeeding upheld him? The workman of today works every day in his life at the same tasks, and this fate is no less absurd. But it is tragic only at the rare moments when it becomes conscious (Camus, 1955, pp. 89–90).

To say that prison labor, particularly in this guise, is absurd, is not to dismiss the pain, both physical and mental, that such labor inflicts upon those forced to engage in it. Unlike Camus, I cannot imagine prisoners smashing boulders as happy. But as recognition of the absurd is to provide for an elevated level of consciousness, I present these final manifestations of prison labor as the absurd in precisely that spirit. The myopic view that all rational people will choose to labor at a time when structural unemployment is becoming a permanent reality is creating the need for farce. Our insistence that participation in the labor force is always a matter of rational choice, not social opportunity, becomes increasingly difficult to maintain.

Our political and economic systems have been sustained by the ideology linking citizenship and labor. But maintaining this construction is requiring that a significant proportion of our population, particularly black men, be sacrificed. The unemployed are branded as criminals, removed from public view, and permanently crippled in their attempts to participate in the workforce. Releasing prisoners from the burden of maintaining this fiction for the rest of us should be enough provocation to dismantle the links between choice, labor and citizenship. In case it is not, we would do well to remember the origins of the treadmill. Tocqueville points out, treadmills, "machines that work without producing," were developed in English prisons in 1822 to provide constant activity for prisoners without undue competition for other workers (Tocqueville, 1970, p. 157). At the time, I'm sure it was inconceivable that such a machine would find its way out of the prison. How curious, almost two hundred years later, it has become a common metaphor for understanding the experience of work and leisure, the rhythms of modern life, even outside the walls of the prison. Endorsing rock crushing, boulder pushing or any other form of labor, purely for the sake of laboring, shows how far we have traveled from labor really being a matter of rationality.

NOTES

1. Here I echo Locke's use of "man" and "his" because I believe Locke's theory was intended to apply solely to men.

2. Telemarketing is a major exception to this rule. And Christian Parenti (1996) reports that in 1994 Toys'R'Us experimented with having prisoners restock shelves in stores at night. Such examples are exceptions however.
3. See Philadelphia Prison System Fiscal Year Report (2001).

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PERHAPS ALL PAIN IS PUNISHMENT: COMMUNITY CORRECTIONS AND THE HYPERGHETTO

William Lyons

> We have for twenty-five years believed in and practiced a philosophy of "community correction," whereby a correctional center is not an isolated fortress on a hill. Rather, we are a correctional center seeking to be a contributor to the life of the community, and also welcome into the institution the positive elements and aspects of the community. Sheriff Michael Ashe, Welcoming Remarks at the Focus on Correctional Health Care Meetings held at the Hampden County Correctional Center on November 9th, 2001.
>
> We all know that an individual in a community with a criminal pattern of behavior can cost his fellow citizens a tremendous amount of money, so the community agencies and groups outside the fences certainly have a stake in successful community re-entry. They can serve the community by becoming full partners with criminal justice agencies in seeking to assure successful reentry. Sheriff Michael Ashe, as quoted in Montalto and Sheehan (2002).

COMMUNITY POLICING, COMMUNITY PROSECUTION, AND COMMUNITY CORRECTIONS: WHY THE FOCUS ON COMMUNITY?

Community policing has been around for at least two decades now and it is safe to say that it has become, in large part, more about managing disruptive subjects and virtuous citizens than preventing crime or disorder (Crank, 1994; DeLeon-Granados, 1999; Yngvesson, 1993). While the rhetoric of community may be

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succeeding where the policing policy is failing, the experience has certainly contributed to the growth of homologous efforts that include community prosecution and community correction. We see a criminal justice system pro-actively seeking to blur the boundaries between its institutions and the communities they work within and, all too often, without.

> In recent years, there has been a rapid growth in justice approaches that turn their attention toward the community. There are literally hundreds of examples of this trend, from offender-victim reconciliation projects in Vermont and Minneapolis to 'beat probation' in Madison, Wisconsin; from neighborhood-based prosecution centers in Portland, Oregon, and New York City, to community probation in Massachusetts. Of course, the most well-known version of community justice is community policing, but localized projects involving all components of the justice system have been widely promoted (Clear & Karp, 1998, p. 3).

Like community policing and community prosecution, community correction programs generally focus on partnering with service providers and community groups in order to more finely calibrate their service delivery. For community corrections the recent focus has been on delivering re-entry programs and expanding the availability of intermediate sanctioning options. The sheriff (above) focuses on re-entry, to link jails and communities in two ways: extending the correctional continuum into power-poor communities and increasing political support for expanding the criminal justice system in more affluent communities. Even as fiscal stress translates into budget cuts in education, housing, drug treatment, and other services, the reach of the criminal justice system expands outside the fences as new community-based partnerships and inside the fences as an increasingly program-rich environment. These partnerships are, not surprisingly as we shall see, dominated by criminal justice professionals and dependent on coercive control techniques. Further, their budgets are growing with funds in previous eras earmarked for providing many of the same services in a social welfare, rather, than social control, service delivery context. While these budgetary trends map a macro political trend from an old democratic New Deal toward a new republican new deal network of patronage relationships (see Lyons, forthcoming 2004), this paper examines the micro politics of community corrections developing within an increasingly punitive American political-culture.

An intake classification manager working in the Western Massachusetts Correctional Alcohol Center (WMCAC) described the Hampden County approach to community corrections as an effort to expand the correctional continuum.

> There's a continuum. It starts with maximum, next stop is minimum and that's basically you are inside of a facility that does not have a secure perimeter, there is no fence and barbed wire. Minimum, in terms of programming, are mostly in-house, they stay inside. And it is at the Pre-Release building that is outside the secured perimeter, and they either do in-house

> work or they go into the community under staff supervision and do community service. The next step from there is Howard Street (WMCAC). They come through here for their addiction treatment. When they are done with us they go (back) to Pre-Release, they start working, and earning a paycheck, putting money in the bank, and then from there they go to the Community Safety Center (for either day reporting and after release programming), which is the electronic bracelet, the monitoring . . . . For instance we know that people who have any pending legal issues that are of a violent or felony nature, they can't move through the system, that's a disqualifier. People who have been convicted of escape, arson, armed robbery, or a sex offense cannot (move through the system). That's a disqualifier, with certain exceptions that are clearly defined and have to be proven. They cannot move through the system. They stay behind the walls (Connor Interview).

"In short, the ideal of community justice is that the agents of criminal justice should tailor their work so that its main purpose is to enhance community living" (Clear & Karp, 1998, pp. 4–5). The jail takes on a series of junior partners – local service providers, employers, and health care providers – to tailor its re-entry programming partnerships according to inmate classification. These partnerships can provide a mechanism for managing both the disruptive subjects (offenders) floating between prisons and decaying communities and the virtuous citizens (law-abiding, tax-paying publics) frightened by, and frustrated with, the criminally poor who, they are persuaded, have chosen to accept generous welfare benefits while repeatedly escaping punishment from our lenient and broken criminal justice system (Beckett, 1997). At the same time, partnerships can serve as a public relations tool for political leaders seeking to better "manage the consequences of their inability to solve urban problems" (Katzneslon, 1976). Similar to the combination of disciplinary and democratizing mechanisms of social control constitutive of community policing, community correction efforts mobilize a particular mixture of professional law enforcement and social welfare discourses about protecting individuals, families, and communities, while also drawing on these discourses largely to reinforce state agency (Lyons, 1999; Maynard-Moody & Musheno, 2003).

In community policing this combination of democratizing and disciplinary mechanisms force the residents of our most victimized communities to continually choose between passivity, dependence and punishment. The "concentrated disadvantages" characteristic of these penal-community complexes that Wacquant calls hyperghettoes can be, and often are in community policing efforts, transformed into an invitation to more extreme and less accountable punishments tailored for those already most victimized by crime and deindustrialization. This paper explores the place of community correctional efforts in one Massachusetts county in this larger drama of social control. Even in this more progressive, program-rich, correctional facility, we find an expansion and evolution of control mechanisms

that exclude some from social citizenship, coercively extracting labor and narrative in ways suggestive of an emerging hyperghetto within and without power-poor communities.

Jonathan Simon argues (1997, pp. 171–173) that, "(w)e govern through crime to the extent to which crime and punishment become the occasions and the institutional contexts in which we undertake to guide the conduct of others . . ." In this paper I will argue that community corrections, like community policing, relies on a rhetoric of partnership to support a reality of professionally dominated, agency-centered, strategies "to create new techniques for acting upon the problem of crime," that in the particular mix of strategies found in this case institutional legitimacy trumps enabling power-poor communities as an enormous amount of resources are devoted to organizing political support for expanding the correctional continuum, and (like community policing) the efforts in this case also provide powerful resources for resistance to the larger dominant trends toward increasingly more punitive forms of social control. This analysis of community corrections, then, will contribute to our understanding of governing through crime by identifying specific mechanisms that link particular mixtures of disciplinary and democratizing penal practices to larger political efforts to guide the conduct of others and "rearrange the power to punish" (Foucault, 1977).

Emerging more rapidly now in response to fiscal stress, the strategies examined here characterize crime and poverty, work and education as lifestyle choices. But the explosion of our prison population is rooted in a deindustrialization process that has left large segments of our inner-city population without viable employment or education or housing or healthcare options. As McBride argues in this volume, a social context without viable employment options has combined with an enduring American tradition linking work with citizenship to displace structural with volitional explanations for crime. Referring to an Alabama case where inmates who refuse forced labor are tied to a hitching post until they choose to work, McBride concludes that "in order to regain his 'freedom' – he must emphatically state that he will choose to work on the chain gang . . . the use of the hitching post relationally transforms the labor in the gang into a choice." A similarly coercive choice-making process is found in this case study, where inmates are "forced to choose" to participate in educational programming. Offenders are told that they must choose to work and participate, to replace their life stories with official stories that mask the inconsistency of coerced choice, and that this will set them free.

In the correctional context this contradictory discourse about individual choice and collective punishment provides an opportunity to both construct offender subjectivity in ways that reinforce notions about punishment that strengthen institutional agency and build support for investing in re-entry from the first day of incarceration, thereby expanding the correctional continuum to include

targeted educational, substance abuse, vocational, and mental health programming for offenders. Current efforts to extend this continuum focus on re-entry programming, but not to the exclusion of punishment. The specifics of how this correctional continuum works, with particular attention to re-entry efforts, at the Hampden County Correctional Center constitute the bulk of the data presented in this paper.

In the policing context, fear reduction is linked to punishments as both a pragmatically effective crime control strategy and an opportunity to reassert state power – mobilized partners are made less afraid of passively participating in the reinforcement of government agency because they are made more afraid of their dangerous neighbors in urban communities. Stories about not being afraid to support the police co-exist with stories that "demonize the criminal, to excite popular fears and hostilities, and to promote support for state punishment" (Garland, 1996, p. 461). The capacity of the former to mobilize particular communities depends on the symbolic force of the latter to activate citizen outrage and direct it toward those who "choose" to be criminally poor. In the correctional context today, building support for a correctional continuum that focuses on re-entry programming involves efforts to both reassure, even calm, those publics who work with community-based offenders (local employers and service providers in particular), while balancing these stories about not being afraid to cooperate with criminal justice agencies with stories that frighten other publics by emphasizing that these offenders will be released either way and asking, rhetorically, would you rather we release them straight out of 23-hour lock up or after working on their substance abuse, educational, and vocational issues?

Like larger trends in criminal justice, the combination of strategies to be examined here represents an approach to crime control "that fits our social and cultural configuration." At the same time, however, in the correctional context the policy mixture would not be accurately described as merely "one in which amorality, generalized insecurity and enforced exclusion are coming to prevail over the traditions of welfarism and social citizenship" (Garland, 1996, p. 462). As will be examined below, I found that in this nationally recognized county jail the professional ethics, organizational imperatives, and political challenges currently combine to strengthen system attention to protecting social citizenship and advancing a social welfare approach to governance. But it is likely that even these social welfare oriented efforts, delivered as crime control strategies that prioritize institutional legitimacy, will be unable to resist pressure to gradually compromise their rhetorical commitment to social citizenship, because even the culturally driven "faces" of street-level political power (Maynard-Moody & Musheno, 2003) – local forces and individual service professionals that sometimes moderate destructive policy – remain partially constructed and powerfully constrained by

American punitive impulses (Bowers, Vandiver & Dugan, 1994), currently amplified by conservative public and private leaders (Beckett, 1997; Glassner, 1999, *Bowling for Columbine*).

The Hampden County Correctional Center (HCCC) case, then, provides evidence that while these complex and expressively punitive correctional trends are moderated by local political dynamics and a professional discourse about delivering crime control as a social welfare strategy, they continue to further weaken those communities most victimized by crime by punishing their fears and compounding their already concentrated disadvantages.

> It is a new form of governance-at-a-distance, which represents, in this field at least, a new mode of exercising power . . .. The state does not diminish or become merely a nightwatchman. On the contrary, it retains all its traditional functions – the state agencies have actually increased in size and output during the same period – and in addition, takes on a new set of co-ordinating and activating roles . . . (leaving) the centralized state machine more powerful than before (Garland, p. 454).

The rhetoric and reality of community correction in this case may, in a limited way, utilize system imperatives to address the lifeworld concerns of those communities most victimized by crime in the Hampden County area. Where managed participation in community policing (so far) has largely encouraged a more aggressively punitive state, coerced participation in this approach to community corrections may advance efforts to reintegrate more effectively. At the same time, this community corrections program remains one aspect of larger deindustrialization trends, and as such is more about coercing offenders to revise their life stories than about changing their actual employment or housing situations. Perhaps even more than community policing, this approach to community corrections primarily reinforces a particular form of state agency – a therapeutic state – that may, given the powerful constraints of democratic-capitalism (Cohen & Rogers, 1986), become increasingly disciplinary over time, since even progressive efforts to break the cycle of violence Wacquant calls a hyperghetto[1] may remain, in the end, merely the "marginalistic integration of individuals into the state's utility" (Foucault).

> It is difficult to characterize the changes that have remade the American prison in the image of the ghetto over the past three decades, not only because American prisons are so diverse, but also because we have remarkably little on-the-ground data on social and cultural life inside the contemporary penitentiary (Wacquant, 2002, pp. 12–13).

In this quote Wacquant challenges us to examine what is really going on inside correctional facilities today, but in his larger argument he is challenging us to examine how prisons, and perhaps more importantly jails, are linked with inner city neighborhoods in ways that constitute a hyperghetto as a fourth mechanism

articulating a late capitalist form of race, class, and gender subordination. It is this penal-community linkage that I propose to examine in this paper, by conducting in-depth interviews with administrators, guards, and inmates associated with the Hampden County Correctional Center in Western Massachusetts, a national leader in the development of community correction programs. When we say we are doing community corrections, what are we doing? To what degree does it articulate a new, integrated mechanism of social control that links jails and communities? Or to put it somewhat differently, to what degree can we observe more democratizing or more disciplinary mechanisms of social control in the particular combination of rhetoric and reality that is emerging under the label "community correction?" The research for this article was conducted in January of 2003 and is based on three different sources of data: interviews, documentary analysis, and participant-observation. I conducted 37 hours of in-depth interviews with leadership, staff, inmates, and community activists/partners (30 individual and several group interviews of various sizes). I read and analyzed over 1,000 pages of documents, including minutes of Community Advisory Board meetings, internal statistical studies and program evaluations. And I observed various classes at different levels of security, pod management activities, staff meetings at the different facilities, after care group and Community Accountability Board meetings.

A Widely Recognized Model of Community Corrections

The HCCC received the 2000 Innovations in American Government award from the Ford Foundation and the Kennedy School of Government. HCCC has had over 3,500 inmates complete their GED (Research and Evaluation in Corrections, 2001, p. 1) and in 1986 they were the first jail in the country to set up a day reporting system for minimum-security offenders. "Through this program an offender nearing the end of his sentence lives at home. It costs one quarter as much as incarceration behind the fences, and it also fights recidivism by providing strict supervision and support at the crucial time of community re-entry. The National Institute of Justice uses our program as a model, and delegations from over 65 different jurisdictions – from Arizon, Alabama, Texas, Minnesota, etc. – have come to study our operation. Many of these jurisdictions founded programs emulating ours" (*Springfield Union* News, "County Jail Rated Among Nation's Best"). HCCC inmates do over 80,000 hours of community restitution work each year, a powerful source of political capital that the sheriff can use to build community support. Similarly, the prison industries program (that makes inmate uniforms), Day Reporting Center, and After Care Support Services save the taxpayers a significant amount of money. In a 1998 study of the Day Reporting Center (DRC) at the HCCC, the author

concluded that inmates in the DRC "cost the county only $16.50 per client per day compared with $65.75 for a jailed inmate" (Anderson, 1998, p. 57).[2] Current negotiations with the new Republican Governor, Mitt Romney, who is faced with an enormous budget deficit, include a proposal from the county sheriffs across the state, initiated from HCCC, to expand day reporting, because this community correctional program is so cost effective (various interviews).

An Ordinary County Jail

Half a million people live and work in the Greater Springfield area, which is 90 miles west of Boston and 30 miles north of Hartford at the intersection of routes 90 and 91. Springfield is the site where Washington located our nation's first armory, where Daniel Shays attempted to reverse farm foreclosures after the war by taking that armory. It is where Dr. James Naismith first nailed a peach basket to the gym wall at Springfield College. Springfield was the home of the Springfield rifle and Indian Motorcycles, but today the area suffers from the highest child poverty rates (32%), the second highest violent crime rate, among the largest high school drop-out rate, and the highest rate of sexually transmitted diseases in the state. In October 2002 there were 1,300 pre-trial and sentenced inmates at the HCCC's Main Institution at Stonybrook, a 1,200 bed facility that was built in 1992. Forty-one percent of the inmates were Hispanic, 32% White, and 26% Black. In an average year over 7,000 inmates come through the HCCC and 70% return to one of the three largest cities in the immediate area: Springfield, Holyoke or Chicopee. There are four separate facilities that make up the HCCC. The medium security Main Institution at Stonybrook (formerly Westover Air Force Base property), the minimum security Pre-Release Center (also at Stonybrook, but outside the security fences), the Western Massachusetts Correctional Alcohol Center and the Community Safety Center that houses Day Reporting, a State Community Corrections program, and the After Incarceration Support Services (AISS) program (both minimum security facilities that are located between the South End and Mason Square, two of the communities most victimized by crime in Springfield).

> In 2002, over 20,000 people will be released from a Massachusetts jail or prison, meaning nearly 60 convicted criminal offenders per day, every day, come back and live in our communities after incarceration. Locally, here in Hampden County, nearly 7,500 convicted offenders or pretrial detainees flow through the Hampden County Correctional Center each year. After wrapping up their sentence or paying their bail to await trial, nearly all of them return to the same streets, neighborhoods, households and situations that sent them to prison in the first place. As you might guess, the neighborhoods that sent these inmates to our custody are often neighborhoods

> that can least afford to welcome them back. These areas often have higher poverty, crime and hardship than other sections of the city. For example, of the approximately 4,000 inmates that hail from Springfield each year, nearly 60% come from the North End, South End, and Mason Square (Sheriff Ashe, undated speech transcript).

The average stay at HCCC is 8–9 months; the annual budget exceeds $52 million (Research and Evaluation in Corrections, 2001, pp. 2–12). HCCC employs 794 individuals as correctional officers and caseworkers (358), counselors (56), researchers (1), residential supervisors (9), case managers (6) and 365 administrators, teachers, and maintenance personnel. Sheriff Michael Ashe has an MSW from Boston College. He was first elected in 1975 and has served continuously since that time. From 1975 to 1992 the Main Institution was located in the 19th century York Street Jail and then moved to its present location at Stonybrook, which is a modern facility divided into pods that hold a maximum of 77 inmates each and are managed by a team of one correctional officer, case workers, and counselors. The Main Institution has special pods for pre-trial detainees, for sentenced inmates with substance abuse problems, for maximum security inmates, and an Accountability Pod for inmates who refuse or fail to participate in their Individualized Service Plans (ISP). The correctional continuum, as developed in Hampden County, runs from the maximum security pod in the Main Institution, to medium security pods in the Main Institution (that include the substance abuse pod and the accountability pod), to minimum security at the Pre-Release Center, the community-based Western Massachusetts Correctional Alcohol Center (WMCAC) and the Community Safety Center. Within each of these facilities, there are further gradations of correctional supervision as well, and these are discussed below.

WHAT IS HAPPENING AT THE HAMPDEN COUNTY CORRECTIONAL CENTER?

The Community Corrections Mission at the HCCC

In a flyer announcing employment opportunities at the jail, the mission of the HCCC is described as “a balanced philosophy of corrections, which is both progressive and sensible. The Sheriff’s Department seeks to administer a safe, secure, orderly facility where staff and inmates are free from violence. The Sheriff’s Department also seeks to provide incarcerated individuals, who desire to build a law-abiding life, with the tools and directions to do so.” This philosophy was variously described in interviews as “strength with decency,” “denying privileges and providing opportunities,” “public safety and reintegration.” The

sheriff makes clear that he rejects any notion of the jail as a warehouse for the dangerously poor. “Our inmates come from the cities and towns of Hampden County and they’re going back from whence they came” (Sheriff Michael Ashe, page 1, *A Public Health Model for Correctional Health Care, 2000*). In an internal document the sheriff makes this philosophy even more explicit.

> The improvement of public safety is the driving force behind all of the activities undertaken by the Hampden County Sheriff’s Department. Following that lead, all staff involved in re-entry and release planning are mandated to aggressively seek new ways to reduce recidivism, prevent violence, reduce the spread of communicable diseases and release offenders that are better prepared to be productive members of society. Release planning begins immediately after an inmate in placed into custody. The time incarcerated in the Hampden County House of Corrections is programmed to address the needs of the inmate as a whole person, not just incarcerate them because of their crime, but look to cure the issues related to their future employability, addictions, health and values (Sheriff Ashe, *Release Planning at the Hampden County Correctional Center*, not paginated).

While the specific programs to be examined below are central components of this mission, HCCC’s efforts begin before the details of specific programs are ever hashed out. The sheriff personally interviews every job candidate and makes the final decision on all hiring, creating an unusually intense personal loyalty to the sheriff and an internalized commitment to his mission. One of the sheriff’s first changes was to transform guards into correctional officers and promote from within, so that more often than not counselors, caseworkers, and managers started out as correctional officers and have been with the sheriff for many years. The sheriff offered training, status, promotional opportunities, and professional respect in exchange for loyalty to him and to his mission. Then, in 1992 when the Main Institution moved to its new facility and more than doubled their workforce with new hires, the sheriff constructed a podular facility to enhance the utility of a decentralized system of smaller units under the direct supervision of line workers with the authority and responsibility to manage their units. Pre-Release, WMCAC, and the Community Safety Center also operate according to this system. Nearly every individual I interviewed confirmed the central importance of these hiring, promotion, and quality of workplace practices in accounting for the success of the Hampden County community corrections model.

The Main Institution

Intake and Assessment

The HCCC has a full-time researcher on staff to integrate program evaluation into program development from the start. This has resulted in the introduction

of a screening instrument at initial intake that is used by staff to develop an Individualized Service Plan (ISP) for each inmate. Having a researcher on staff has also resulted in an ongoing effort to more accurately measure and understand the factors that are likely to reduce recidivism in order to ensure that the programs mandated in an ISP deliver on the promise to provide resources and opportunities to offenders seeking to redirect their lives. The staff researcher is also developing specific evaluation instruments for particular programs, has recently produced a Bail Survey, Drug Screening Reports, a Probation Study, an analysis of the department's Victims Impact Program, and is currently working on an effort to bring available research to bear on re-evaluating the strengths and weaknesses of all department programs (*Research and Evaluation in Corrections*, 2001, pp. 4–8).

The HCCC uses the LSI-R:SV (Level of Service Inventory-Revised: Screening Version) as one of its central intake assessment tools. The LSI "is the most heavily researched risk/needs assessment and from the first validation study in 1982 has continued to show consistent predictive validity for a range of correctional outcomes" (Lowenkamp & Latessa, 2002, p. 7). Lowenkamp and Latessa find discrepancies across sites that is cause for concern, but also find the instrument is a "significant predictor of the outcome measures" and even more valuable when used at a site for a longer period of time and integrated into the case management process (p. 50), as HCCC has done since adopting the instrument in 2001. In the HCCC they use an eight-question version of the LSI and their own initial analyses support its predictive value. Looking at a 6-month window of releases that had an LSI completed over 1 year ago (p. 620), they found a strong connection between high LSI scores and the likelihood of re-incarceration for any offense, for any length of time, including technical violations (department documents made available to the author):

LSI Score	Risk Level	Incarceration Rate 1 Year After Release (%)
6, 7, 8	High	57.1
3, 4, 5	Medium	37.5
1, 2	Low	26.7

The LSI seeks to evaluate eight criminogenic factors. Its questions are integrated into the larger list of medical and organizational questions asked during the intake process. The *User's Manual* for the LSI-R:SV makes it clear, however, that this shorter instrument, while strongly corresponding to the 54-question version, "cannot be used as a replacement for the LSI-R." Because the larger instrument is a

much stronger predictor of risk and serious, programmatic planning "requires the comprehensiveness of the LSI-R for proper assessment" (p. 23). On the other hand, the manual argues that the screening version is designed to indicate when further assessment is required and this could be accomplished through the larger instrument or through the ongoing assessment process built into the HCCC continuum of care (Andrews & Bonta, 1998).

Based on their LSI scores, inmates are given an Individualized Service Plan (ISP), "which lists their needs and the programs and services available to them to meet those needs" (*Research and Evaluation in Corrections*, 2001, p. 13). This plan is shared with the inmate and then treated as an agreement the inmate must live up to in order to move from higher to lower security facilities over the course of his sentence. Failure or refusal to work your ISP can prevent movement to a lower security unit, move an inmate back into a higher security unit, or result in the inmate being assigned to the Accountability Pod for 30 days (described below). LSI scores of inmates in this facility indicate that the most important criminogenic factors in this population are substance abuse, mental health issues, and unemployment, in that order (*Hampden County Sheriff's Department, 2002 Annual Report: Research*). These are the factors that facility programming (inside and in after care programs) attempt to focus on by providing educational and vocational opportunities, employment readiness training, physical and mental health services, substance abuse treatment, work release, prison industries, and a variety of after care support systems to assist with health, employment, and housing challenges.

Education

Inmates at the HCCC read, on average, at the fifth grade level. The HCCC Education Department has a staff of fifteen that includes teachers, an educational reintegration counselor, a case manager, and a librarian. The department offers two levels of Adult Basic Education, GED, two levels of English as a Second Language, Special Education and Title 1 Reading, Writing and Math classes for those ages 17–21 who do not have a high school diploma or GED. The department actively recruits students from the inmate population, provides rewards (student of the month, perfect attendance) for students, and publishes four issues a year of a student run newsletter, *The Pen*. These programs are largely remedial, run by dedicated staff of teachers, and have long waiting lists. HCCC has had over 3,500 inmates complete their GED since these programs were first set up in 1976 (*Hampden County Correctional Center Education Department Program Description*).

Medical Care

"The U.S. has the highest incarceration rate in the world . . .. The incarcerated population is mostly poor, undereducated, and suffers a high prevalence of health

problems. Most inmates have been medically disenfranchised prior to incarceration. At HCCC, 80% of the chronically ill inmates have not received regular medical care prior to incarceration and many have been using the local hospital emergency room as their primary care provider . . .. HIV/AIDS is five times more prevalent among the incarcerated; hepatitis *C* is nine times more prevalent (30–40% of inmates were infected through drug use); tuberculosis is four to seventeen times higher than the rates in the general population. 80% of jail inmates report a history of drug and alcohol abuse, there are eight times more mentally ill Americans admitted to jails than to mental hospitals, and inmates have been the prior victims of violence at rates significantly higher than the general population" (*A Public Health Model for Correctional Health Care*, 2000, pp. 16–19).

The 2002 budget for the HCCC Health Department was $6.8 million, including $400,000 of grant funding from the Centers for Disease Control (72). In the late 1980s and early 1990s the AIDS epidemic in the Springfield area was placing an enormous burden on the jail and on the Springfield's community health centers, which estimated that "3–5% of their patient population was incarcerated on any given day." With an opportunity to move into a larger facility in 1992, and community health care providers asking the jail for permission to provide confidential HIV care to inmates, "the sheriff charged the medical department with developing a community-based system of health care that was in accordance with the overall jail philosophy that correctional facilities are an integral and important part of the extended community" (p. 2). Collaboration between the jail and the community health care facilities focused on ensuring the continuity of care by bringing in the physicians from an inmate's neighborhood health care center to care for the inmates while incarcerated (Coughlin Interview).

Substance Abuse Programs

There are three basic substance abuse programs provided for inmates at the HCCC. When intake assessments identify a substance abuse problem, those inmates receive the Beginner's Substance Abuse Education Program, which consists of ten interactive group sessions that focus on addiction as a disease that participants can recover from. Inmates (other than those with a mandatory sentence) can earn 2.5 days of good time for completion of this program. Upon completion the inmate's case manager decides whether to revise the ISP for additional treatment or refer the inmate out of the substance abuse pod to another pod or to a lower custody facility. Those inmates identified at intake as suffering from a severe substance abuse problem (and have a sentence of at least 90 days) proceed into the Intensive 28-Day Program, where inmates meet in larger classes once or twice a day and in smaller groups three times a week. Like the beginner's program, the more intensive program is an interactive, disease-centered, psycho-educational

curriculum that focuses in greater detail on the physical and psychological effects of addiction, AIDS, denial, anger, guilt and shame, drugs and crime, recovery and AA, Relationship and Relapse issues (*Intensive 28-Day Program, Hampden County Sheriff's Office*). The intensive program offers five days of good time. A 6-week boot camp for those with more serious problems, imposing a military kind of structure and routine is a parallel option (CO Interview, Substance Abuse Pod).

It is clear when observing HCCC programs and speaking with staff that the basic educational and substance abuse messages are not offered to inmates only once; these are repeated from orientation to release, from Correctional Officers and Counselors, Caseworkers and other inmates; and this overlap of program content is an intentional effort to get inmates to re-write the scripts they use to think and talk about their lives. And this intensive effort to prepare offenders for re-entry is framed within the larger institutional constraints provided by bed space, sentence duration, and inmate classification. "Our mission is to provide treatment to those folks who cannot move to lower custody. We've only got 154 beds (two pods) and a 90-day window to capture them. So we get the 20% who have the longest sentences and are least likely to go to lower custody" (Counselor Interview, Substance Abuse Pod).

Accountability Pod

This unit is a separate residential pod in the Main Institution that can hold up to 77 inmates for 30-day stints. According to the *Accountability Pod Orientation Packet*, the "goal is to reinforce full accountability of offender behavior and a willingness to accept responsibility." An inmate is classified to the Accountability Pod for failing to work their ISP. More traditional disciplinary issues are handled separately, by sending inmates into a segregation unit for 23-hour lock down. The Accountability Unit, on the other hand, is designed to coerce participation in programming by making the experience of those who refuse to participate unpleasant. "If they want to accomplish nothing, then it should not be pleasant. They can do it in the Accountability Unit" (Sheriff Ashe, as quoted in *Research and Evaluation in Corrections*, 2001, p. 14).

The purpose of this program is to get inmates into programs believed to reduce recidivism. This unit removes the television and cushioned seats, restricts telephone, visiting and other privileges, and mandates participation in programs. Since the creation of this unit, participation in jail programming has increased from 50 to 85% of inmates (*Research and Evaluation in Corrections*, 2001, p. 18). The department justifies the unit on the grounds that coerced treatment is better than no treatment, inmates with bad attitudes are not allowed to infect the general population, it is less expensive to operate, and that this unit is both politically and

correctionally innovative. "Inmate accountability is good politics . . .. Many correctional facilities for short-term offenders are operated by locally-elected officials that are pressured by both punishment-focused and treatment-focused supporters. This policy uses a unique type of coercion to get inmates to participate in programs that are need specific. Their fate is in their own hands" (*Research and Evaluation in Corrections*, 2001, p. 19). Dave Moorhouse is the staff counselor who created and now manages this pod, and he described it to me in the following terms:

> It's not a punishment pod, it is more of a re-adjustment pod. It is a chance to say 'this is what is important, this is what you need to do, get through this and move on and do what you are supposed to do.' So anyone who fails or refuses to go to programs come here. They are classified to come here because of their refusal to participate. Because it is so important to get into programs and continue with that, here and in the community, that's why we have this pod. Everything is driven from the ISP. Once the ISP is filled out, we have the offenders sign it, agreeing to participate. If they refuse to sign it, the first place they come is here . . .. The short and skinny of it is that, to get out of this program you have to participate in the classes and behave yourself. Two simple concepts . . .. They each get a book. The book really provides the ownership. We date stamp it and if they don't come to the class they lose points. For each class they need to write about it. They have to do a homework assignment for each class. We mark their journals according to their level of functioning, educational wise. If they cannot read and write, we have them draw pictures. If they refuse to come to my classes here, they never leave (the pod). So, if you want to be a non-active participant in your service plan, you can do it here.
>
> Now we encourage them every single day to participate. It's based on a point system. We say that 80% of your participation and your behavior is good. Just below that is bad. So you could actually miss one class and it is not going to screw you up for the week. You can miss two classes and be right on the edge. But that is only a piece of it. Every day we have inspections, Monday through Friday. We go through a cell like mini-shakedowns, examining what's going on. If they have anything blocking their windows, if their beds aren't made, if their rooms don't look like the picture up there for cell requirements, they lose points for cell infractions . . .. This is really a sparse environment. The only television is used for classroom activity. Everyone else (in other pods) has weekend recreation until 1 am, these guys are in at 9 o'clock, lights out at 10. They do not earn good time while they are in here (up to 7.5 days/month) . . .. We have three different levels. Level three gets you out of here. Level two, you stay in here week to week until you bring your average up. You cannot leave if your weekly points or your average are below 48. Before they leave we have them resign their service plan contract (ISP). At the end of the week we tally up the points and those below 48 don't have weekend privileges. They're locked in (their cells) over the weekend (Moorehouse Interview).

Community correctional efforts from Accountability Pods to Community Accountability Boards (discussed later) work on persuading offenders that they need to re-adjust their thinking about themselves to succeed in jail and their communities. In the Accountability Pods that persuasion is coercive, forcing inmates to participate in the programs that staff determine to be in their best interests by denying them the privileges enjoyed by other inmates. As Anna Kaladiouk argues in this volume, "the project of restructuring criminal character appears to be inseparable from the

task of training the criminal to tell his story in the appropriate language and in a particular sort of way . . . Even as the prison imposed a stringent regimen of discipline upon bodies, the penitentiary project likewise disciplined narratives . . . (And) the language of patterned penitence presupposed a subjectivity that served at once as the object of reform and the foundation of the institution that was designed to enact it."

In Community Accountability Board meetings inmates are expected to speak according to the scripts that mark their path toward re-entry; in the Accountability Pods, as Moorehouse continues, they are coerced into learning these scripts in order to re-write their own life stories, displacing their private narratives with an official narrative constructed to change the prison culture. Compliance comes to signify making responsible choices and the kind of bifurcated approach to free choice described by McBride in this volume is pre-emptively set off from racial or class profiling and insulated from critical public scrutiny as professionalized classification and individual responsibility systems.

> Anyone who gets returned from lower security is virtually violating their contract, they start here. We just started taking parole violators. Any offender that is screened out as highest risk, 6, 7, 8, (on the LSI) . . . they come here first, not for 30 days, but for 7–10 days. After the start of the Accountability Pod the list (waiting list for substance abuse programming) went up to 195 (from 20). It's really changing the culture. Where it used to be offenders saying, 'why you being a punk, why you going to school, just hang out and watch some Springer.' Now it's 'I'm going there because I don't want to go to Accountability.' The days of breaking rocks are over. So we make offenders work by learning how to read, addressing their substance abuse issues, learning how to control their anger and impulsivity. I come from a background where we used a behavior modification system. I worked with adolescent boys. We used a similar type system. It is such a valuable tool, why can't we use it with the men. And it works. We don't judge people by their race, religion, what have you, we judge behavior. Good behavior gets rewarded by getting to move out and earn good time. Poor behavior you get a consequence, which is all the restrictions (Moorehouse Interview).

Pre-Release Center

The Pre-Release Center (PRC) is the first move out of medium security and into minimum security for inmates. It is a dormitory style facility. Inmates are not free to leave the facility, but they have keys to their own rooms, which are also organized into small units like the pods in the Main Institution. When they first enter the PRC they are not immediately authorized to work in the community. The correctional continuum requires that they earn that next level of privilege. Upon arriving at the PRC inmates must complete a Victim Impact Program and a two-week Substance Abuse Program taught by a combination of in-house counselors and a community service provider.

> They come over here, they get into their normal clothes, they have more access to their families, contact visits, some people have on the weekends a family setting that consists of food (a dinner, prepared by their family, and eaten with their family in the facility). Basically, they begin to start feeling that community connection and they know that the next step for them can be PRC status, which is out into the community to get their job, to go to the programming they may need to go to, parole, DRC (Day Reporting). And if you are not following this (ISP), they know we're gonna have conversations (PRC Administrator Interview).

The PRC has one residential supervisor, a trained CO without a uniform, per unit. The West Unit is the initial unit that inmates enter from the Main Institution, so it has two counselors and two caseworkers. From West, an inmate moves over to the East unit, where there are two counselors, one caseworker, and one employment coordinator. When an inmate has shown satisfactory progress on his ISP he can be moved downstairs to one of two smaller units (North and South), where there is one case worker, one counselor and one residential supervisor and inmates can begin working outside the facility. Their paychecks are sent to the facility and placed in an individual savings account (minus 10% for rent) they gain access to upon release.

Pre-Release Center inmates are the most frequent to access the Life Skills Training Program. The Life Skills and Employment Collaborative (LSEC) is a three-year, grant funded program to reduce recidivism by providing pre- and post-release offenders with re-entry assistance in the form of the 147-hour Action for Personal Choice Curriculum. About 211 inmates were selected to participate in the program, most from the Pre-Release Center. In the first class, 171 of the 211 completed the program and 102 were successfully placed in full-time employment. The average wage earned by participants was $8.66/hour (versus minimum wage of $6.75/hour), 84% of these positions (in 45 different companies) included benefits, and 12 participants were certified in asbestos removal. An internal study found that 30 days after release 70% of participants remained employed at the same job; after 60 days the retention rate fell to 55% and after 90 days to 45% (*LSEC Year End Report*, 2002).

WESTERN MASSACHUSETTS CORRECTIONAL ALCOHOL CENTER (WMCAC)

WMCAC is a 178-bed community corrections program located about a half mile from the Main Institution. It is a residential facility that provides residents with relapse prevention, victim impact, and other educational and substance abuse programming designed to enhance their re-integration upon release. Inmates start with a seven-day orientation program followed by a random assignment to one

of four units of 40 inmates for Phase I (seven weeks) and Phase II (five weeks) programming that includes a very regimented daily schedule of substance abuse education, restitution work groups (including projects with Habitat for Humanity and in the South End Community Center building), and AA or NA meetings. There is a supervisor for each floor who manages two units (one started with the vendor initially hired to provide the services for the jail and the other manager started as a correctional officer). There is one case manager for each unit and three counselors for each unit carrying a caseload of about seventeen. Dan Hobert, the Program Manager at WMCAC provided a sense of the evolution of this facility, from problem, to legislative action, to program development.

> Back in 1985 when we first opened, it was basically mandated by legislation in response to the tough drunk driving laws that were incorporated in 1982, which was in direct response to public outcry, concern, and activism. These offenders were not being held accountable for their actions . . .. So coalitions were developed, the famous one was MADD, and they got the attention of everybody. It became politically correct to respond to this group through tougher laws . . .. We were already overcrowded . . .. We have a whole new offender in our midst and the general consensus was, 'why you putting him in with real criminals?' So we had to sort all that out . . .. We were at York Street (until 1992) and our approach was more vocational and educational . . .. The substance abuse issue was addressed individually if necessary and, if necessary, through AA meetings. But as this population started to show up we were challenged to take a look at what we needed to do (Hobert Interview).

In a political climate where more extreme punishments have been the norm, it is not surprising that high publicity cases and citizen activism contributed to redirecting criminal justice agencies to focus on drunk drivers. In the HCCC, however, this political momentum was also harnessed to direct criminal justice resources toward drug treatment as well. Hobert was one of several staffers who highlighted the political skills of the sheriff as a key variable to explain how the HCCC has been able to continue developing treatment programs in the prevailingly punitive context.

> Nobody was going to argue because he did it in a way that was not intrusive. We just went about our business and it started to develop and took on a life of its own . . .. He knows how to put these things together, he knows how to hire people that can do that, he tried to get the right people and he does well by his staff . . .. He's very visible, available, responsive, pro-active. He knows how to use the media to his advantage. He's developed a great relationship with the media. He has his own public relations man and public relations has always been a factor in his approach to things. He'd rather be proactive, so that when there is a problem, an escape let's say, he will make the phone call rather than have the press find out and he will be forthcoming and straightforward and let people know. Little things like that that the public pays attention to. I think he's been a strong member of the community. He gets involved in other concerns in the community: his gang task force, his work with the elderly, his restitution things that we have done in the community, with manpower from the population, beautification projects, the restitution approach to things (Hobert Interview).

Political skills are tested in conflicts. In the case of the WMCAC, the sheriff pre-empted potential opposition group efforts to expand the scope of the conflict (Schattschneider, 1975). Instead of dismissing citizen input, the sheriff invited the South End Community Center to join him as partners, long before this strategy would become a core of community justice efforts nationwide. "The South End Community Center was very suspicious and very leery and very concerned about what was going to happen here. And again, the sheriff's response is, 'okay, you can be part of the deal' and he developed an advisory board, he met with them frequently, and he gave them input into how we're going to do this, he gave them information, he kept people informed (Hobert Interview)." And, at least initially, these community partners had a measurable impact on local correctional policy, even getting the jail to recognize and address an example of racial bias embedded within its own mandate.

> The thing that was helpful was, their main concern was what inmate was going to come here. We had to assure them that we would not bring bad guys here. I was in charge of classification and we were mandated, legislated, to take drunk drivers. But it was a 125-bed facility at the time and as we were going on we realized some things that started to shout at us, that there are a lot more people who are incarcerated that could benefit from this type of program. So that we were being exclusionary. The fact that drunk drivers got their own jails is a kind of racist statement. Our experience was that drunk drivers are white males. We had like 90% of our population was white males . . .. Trying to work out a system that we would be upgrading, and go from exclusive to inclusive, was the way the sheriff approached it with the advisory board (Hobert Interview).

And the sheriff contributed his significant political skills to constructing the political cover needed to insulate this drug treatment program buried within the currently fashionable, and state funded, alcohol center.

> While this facility has evolved to handle substance abuse problems beyond just alcohol, the original law regarding drunk drivers stated that third offenders will spend their time in a facility like this and, according to state law, mandated inmates are not allowed to leave custody. This creates a problem for a minimum-security facility that is clearly developing programs to reintegrate offenders by sending inmates out into the community. Inmates are denied a critical element of the program, so the facility managers needed to address this obstacle. They developed community escorts. They are volunteers, but they are interviewed, reviewed, and approved to escort residents out to AA or NA meetings in the evening. And to insulate against legal challenge they approached their state representative and asked if the intention of the law was to make these individuals ineligible to attend meetings and relied on his response to clear up legislative intent. Similarly, the facility ran into an obstacle with the new school zone law (drug violations within 500 yards of a school are a minimum mandatory of two years). The legislature was just looking at this from a getting tough on crime approach and they got this picture of this dirt bag selling drugs to kids. Well there aren't that many dirt bags out there selling drugs to kids in school zones. But what happens is that normal people in the community who get busted in the general area are busted for two years for a first offense. We got 19, 20-year-old Puerto Rican guys getting scooped up by this drug zone law (Hobert Interview).

Hobert makes it clear that institutional legitimacy and control can advance along with effective re-entry and more reciprocal penal-community partnerships. At the same time, it is clear that the skillful tailoring of programs in response to shifts in available funding and political support operate as one mechanism through which larger economic, political, and cultural trends are imprinted on local criminal justice policy. For the sheriff to sell re-entry to a punitive public he had to add an "us vs. them," fear mongering component and highlight the cost saving component of the case for community corrections. Both of these rhetorical moves make him more politically persuasive; they also blur the distinctions between more and less punitive forms of community justice. This blurring is manifest when control concerns trump developing the inmate autonomy and self-determination needed for successful re-entry or when criminal justice funding comes at the expense of funding job creation or drug treatment programs on the social service side of the budget. Thomas Connor works on intake classification for WMCAC and describes a vision of community corrections building community as mini-jails that grows directly out of efforts focusing on reducing inmate autonomy and increasing staff control.

> The HCCC unit management system was first developed in WMCAC. Rather than requiring central managers make each decision about inmate movements, these and other decisions were decentralized to smaller units. Each unit is now staffed with a unit caseworker, three counselors, and a unit manager (correctional officer) whose offices are all on the floor where the residents they manage live. So weekly they have a classification meeting. The guys that are coming up for eligibility based on time for access to different programming, community and in-house, they go in front of that board – counselor, case manager, and unit manager – 'okay you're eligible for this, this, and this. We're gonna allow you this and this, and that is why we are allowing you this, because you did this and that . . ..' The notion of direct supervision gave the staff that are on the line the decision-making authority to deal with the management of inmates. Unit management is taking an amorphous, indiscriminate, huge facility and subdividing it into mini-jails to make it more manageable. The other way was an undifferentiated mass. Here we can build community. Before unit management it was hard to build community and it was untethered to any kind of locus of staff as well as geography. Once you do that you give it a mooring, and then you can develop culture and a community. And that allows you to increase chances for success in terms of creating an attitude, an atmosphere, and cutting down on in-house bullshit. Historically, in corrections, the inmates had control of the jail. Now, no. Up at the jail? Staff got control (Connor Interview).

Scripts for staff focus on localized behavioral control through unit management, the utility of an expanding correctional continuum for enhancing their control over inmates, and personal loyalty to the sheriff. Scripts for inmates focus on "Action for Personal Choice," learning to navigate the classification grid, and reframing stories about the lack of jobs in the Springfield area. The primacy of institutional imperatives and system agency is manifest in the fact that neither inmates nor staff can escape the discursive subordination of this penal-community

complex; their narratives are scripted from above and repeated in nearly identical phrasings from meeting to meeting.

> There's no blinders (in a direct supervision pod system); they can see everything. The inmates don't like that. They have a lot less freedom. They have more freedom to do the responsible thing, but a lot less freedom to do the irresponsible things. So therefore it is a lot safer, a lot secure . . .. The problems we have are people that do not have institutional memory. I have been here since we opened and I have to re-teach people all the time. They just do not have a sense of the importance, of the failures in the past that lead to these changes. They might poo-poo it, not remember it. And there are some people that are just incompetent. One of the cornerstones of unit management success is competent staff. If you don't have that, if you've got patronage, nepotism, and a high degree of incompetence, it can't work, because it is inherently unselfcentered management. It's about community. And if people are into themselves and into their paycheck, who could give a shit less about the group, because they're connected, you've got problems. And we've had that happen. The thing about this program is that it changes over every 90 days. Because of that frenetic pace, you better deliver. 'Hey you gotta make the referral for this guy'. If this guy's going to electronic monitoring you gotta get the paperwork out to them, the classification board results to them (Day Reporting staff), so that they can make a good decision prior to (moving or not). We've had nepotism hires and they just fall flat on their (face), and the inmates are in an uproar. You can't hide . . . And the other staff is pissed at you because they're carrying your load. In the old system nobody gave a shit, because it wasn't group. It wasn't team. It was individualized. So that guy could hide out for years (Connor Interview).

Community Safety Center

Day Reporting is a community corrections program that allows offenders to live in the community, wearing electronic ankle bracelets and under intensive supervision, in order to assist inmates who are ready to begin reintegrating into the community. In 1986, HCCC was the first jail in the nation to create a day reporting system. Anderson argues that this new idea started in Great Britain, came to U.S. through the Boston non-profit community corrections agency, Crime and Justice Foundation, which was concerned about prison overcrowding and persuaded the HCCC to create such a program and concluded that the HCCC Day Reporting program "may be American correction's best example" of what was then a relatively new idea. By 1994 there were 114 day reporting programs in twenty-two states (pp. 53–54).

Now this county program shares building space with a state community corrections program, which has developed a similar correctional continuum under a 1996 legislative mandate to extend the availability of intermediate criminal sanctions. The state mandate defines community corrections as "an appropriate intermediate sanctions program" and, further, defines these as "any program that has been determined to impose an appropriate sanction upon an offender

for whom imprisonment may not be necessary or appropriate, including but not limited to standard probation, intensive supervision probation, community service, home confinement, weekend jail sentences, day reporting, residential programming, substance abuse treatment, restitution, means-based fines, continuing education, including but not limited to the 'Changing Lives Through Literature' program administered by the trial court and the University of Massachusetts at Dartmouth, vocational training, special education, and psychological counseling" (Massachusetts General Laws, Chapter 211, Section 1).[3]

At the state level it seems clear that it was not a rejection of extreme punishment driving the legislation, but an overriding desire to cut the budget by expanding the correctional continuum to include treatment and education as punishments. At the local level, however, this provided a political opportunity first taken advantage of a decade earlier. According to Anderson, interest in day reporting "reflected continuing concern over prison and jail crowding as legislatures mandated more incarceration, particularly for high-volume drug offenses." In this context, Sheriff Ashe added electronic monitoring to the Crime and Justice Foundation concept paper in order to reassure the public and ensure the "political shielding" necessary to advance community-based programs like day reporting (pp. 54–60).

Participants in the Day Reporting unit work on the basis of individualized monthly contracts approved by the counselors and are held accountable at the end of each month when new goals are established for the next month. Each earns 7.5 days of good time per month. Participants must report to the Community Safety Center at least once a day, turn in daily itineraries for review twice a week, and ask the staff member at the reception desk if a urinalysis is required (staff may require these at any time). Correctional Officers working with the program do random checks of the participant's home, workplace, or vehicle (for those who have been authorized to drive) and administer Breathalyzer tests each time they complete a spot check. All participants must get and hold a full-time job or will be assigned to a community restitution work site for 40 hours a week.

Participants who are found with dirty urine or positive Breathalyzer results, committing a new crime, breaching trust (escape), possessing alcohol or drugs, bribe or extorting or threatening a staff member, engaging in inappropriate sexual conduct, assault, refusing to give a Breathalyzer or urine sample, driving without authorization, tampering with their monitors, not cooperating with checks, possessing a beeper or cell phone without permission, possessing a weapon, or violating program rules will be sent back to the Accountability Pod in medium security for a disciplinary hearing ("A" violations). A long list of "B" offenses (such as abusive language, interfering with staff duties) can result in a 7–30 day suspension of privileges. And a list of the least serious "C" offenses (such as inappropriate language and failure to wear an ID card) results in a warning, but three violations at

this level can result in the more severe penalties above. The two higher-level violations can be appealed to a Mediation Board (staff from classification, security, and treatment) that reads the report and interviews the participant. Warnings cannot be appealed. Within the Day Reporting unit participants move through five phases, each with more freedoms granted and fewer restrictions imposed. For participants to continue to move through these phases and the correctional continuum they must remain free of "B" violations for two weeks and pass a test with their counselor. In Phase I participants have a curfew of 8 pm and 3.5 hours per week to shop and do laundry. By Phase V participants have an 11 pm curfew, are allowed to schedule one activity per day (of up to four hours), two weekend visits, one weekday visit, and six hours of phone visitation. Grievances must be first discussed with the immediate supervisory staff. If this does not resolve the issue, it can be submitted for review by that staffer's supervisor, then to the Assistant Deputy Superintendent of Day Reporting, then to the Assistant Superintendent of Operations, and finally to the Sheriff (*Day Reporting Program Participant Handbook*).

After Incarceration Support Systems Program (AISS) was set up in 1996 and was servicing 465 ex-offenders by the end of 1999. This program works (in partnership with parole, career centers, and housing services in the community) with those inmates who are just about to be released and continues to work with them after their release, on a voluntary basis, to ease their transition back into their communities. This program has three components. Inside the facility, there are two sequential classes for inmates with 90 days or less on their sentence, Release Planning I and RPII, that introduce inmates to all the programs (educational counselors and community contacts) available. Staff work with inmates on their release plan as one part of assisting with their preparation for parole hearings. Upon release, offenders can access case management services through AISS and are invited to participate in groups directed by trained and paid ex-offenders that run on 12-week cycles. Ex-offenders have been hired and trained to work as mentors with these participants, again starting about 90 days from release and extending that support through release and into reintegration. (*After Incarceration Support Systems Program Information Packet*). To demonstrate the importance of developing a release plan, those inmates with a release plan on their release date are released first thing in the morning; those without are not a priority and return to their cells until the end of the day (Sordi Interview).

> Re-entry is not the Sheriff's Department any more. It's placing the ex-offenders back in the community. And how is the community going to receive them. So we wanted to work very closely with the community. We developed advisory boards in the communities most of our offenders were going back to. We had representatives from neighborhoods, community agencies, mental health, employment, career centers. We had ex-offenders on the committee. Any agency that the ex-offender would interface with, we wanted them as part of the committee.

> And they really, for the first year and a half, drove the direction that the After Care program was going in.
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> In Springfield we did a needs assessment and focused on what is the needs of the ex-offender as they are leaving jail. One of the needs that kept coming up was that offenders were not ready for employment. That there was a group of offenders, the younger ones, who did not have any kind of work history, who may have dropped out of school very early, so their educational background they did not have a great deal in that area. So, we really wanted to focus on them. We partnered with the Corporation for Public Management and we developed the Life Skills Program. That came out of our Advisory Committee and what needs they said there were. There needed to be a pre-preparation for employment . . .. (Q: what is the most common concern you hear from the community?) Right now? Housing . . .. Another issue is insurance: Mass Health. Right now, a great concern is that there is a piece of Mass Health, called Basic that is being cut . . .. If they cut that a large number of our population is going to be effected, and that's going to impact them because a lot of them, especially the women, come out on mental health medication (Sordi Interview).

The intensity of responses from female inmates I spoke with about these obstacles upon release cannot be overstated. When asked, they identified housing, reuniting with their children, and getting a job as the challenges that most often land them back in jail after release (participant-observations of group meeting for recently released inmates). When I asked the jail staff what the most serious obstacles were, they were unanimous in telling me that inmate attitude was the problem. Even after pushing for additional obstacles, such as those the inmates listed, the staff continued to focus on inmate attitude (participant-observations of staff meeting). In the end, the staff did concede that housing and employment are tough, but remained fixated on inmate attitude, which suggested to me that their efforts to assist with re-entry contained an element of coercion, perhaps central to the professionalized political machine style management characteristic of the HCCC. Recently released offenders, like inmates, were expected to accept this script about the challenges they face upon release, a script that obscures systemic failures and, arguably, institutional obligations to address these failures as part of an effective re-entry program. And, like the Accountability Pod, Community Accountability Boards, and other program elements this coerced choice to re-tell your life story in a way that shifts from scarce housing to bad attitude, from no employment to fear of crime, also allowed the staff to convince larger, tax-paying, publics that their programming was showing success. Sordi continues, highlighting this transition.

> We are a county facility, so everybody who comes through our door is going to walk out our door. We don't have any control over that. So what type of person do you want coming back in your community? Do you want them angry? Raging? Their substance abuse problem not dealt with? Their mental health issues not addressed? Because if that happens, as we know with addiction and crime, it will progressively get worse, and they will become more violent. And what type of person do you want coming back into the community? So it really is about public safety.

> It even goes as far as the Accountability Pod; if you do not want to invest in yourself, then we're going to play hardball with you, we're going to put you somewhere where there's no TV, you're in your cell, you're only coming out for programming. Because if you don't believe in yourself enough, then we are not going to give you those privileges the other inmates who are really working to make some changes for when they are released. We're going to give you the resources that you need, but you have to take advantage of it. If you don't, then you are not going to be treated the same as those inmates who are taking advantage of the resources, because you're a threat to the community when you get out.
>
> We also have our community piece, which is our after-care groups. We have them for men and for women, in English and in Spanish, in Holyoke and in Springfield. We are averaging about 11–16 phone calls a week from newly-released offenders looking for assistance from our program. You may have somebody whose calling you because they need assistance getting an identification card through the registry. We do that. You may have somebody whose calling because they relapsed and they want to get into a detox. We have people showing up at our front door who come under the influence, they don't want to go back to jail, we bring them to detox. Somebody may just come to us because we provide a letter to the local Goodwill or Salvation Army, because if they have a letter they can get clothes. You may have somebody who has a full range of needs, substance abuse counseling, mental health counseling, employment, wants to go back to school, doesn't have a place to live, their families lives in the Housing Authority and they can't go live with them because part of their contract that whoever signed the lease signs that nobody with a criminal record will come and live here and if they do you will automatically be evicted (Sordi Interview).

According to the Advisory Committee Minutes: the Holyoke Advisory Board consists of 14 agency and seven community persons, and of the agencies represented six were small community agencies, three were local health care agencies, one person was a liaison with the schools, there was a Goodwill representative, and three persons from criminal justice agencies – including the two from the Sheriff's Department: the Program Manager for AISS and the Assistant Superintendent in charge of the Community Safety Center. In 2000 Holyoke was 41% Hispanic, up from 14% in 1980, and the advisory board included thirteen Hispanics. The cities population has been falling steadily since 1930, losing 20% since 1970, and suffers from an unemployment rate that is 162% of the statewide rate. The Springfield Advisory Board consists of 19 agency and seven community persons, and of the agencies represented six were small community agencies, four were local health or substance abuse agencies, two educational institutions, one business, and seven from criminal justice agencies. The Westfield group had nine members, but the minutes did not break down the membership any further.

Community Accountability Boards

Sister Mary Quinn described these as "a group of 60 community volunteers who meet with offenders, based on a restorative justice philosophy." This program only started three years ago, offers inmates no good time for participation, but has already worked with over 200 inmates preparing to return to area communities.

In a number of cases the parole board made participation a condition of their parole.

> The idea is that all of the zip codes of residents here, those are the neighborhoods where we tried to set up the boards. Those are the areas where the highest rate of crime occurs. Ideally, the people on each one of these boards live in that geographical area, that neighborhood, or work in that neighborhood. And offenders who come to that particular group committed their crimes in that area, they are from that area, or they are returning to that area. So really it is a community connection. When I meet with the offenders before they go I say to them that the people want to talk to you about three things: your need to be accountable and responsible for your behavior, you harmed people, you harmed the community, the community is less safe because of your behavior, so they want to talk to you about that. But they also want to talk to you about welcoming you back to the community. That they want you back in the community, but they don't want you harming the community anymore (Quinn Interview).

The meetings I sat in on felt less like a community connection than an official program. There were no family members of the offender present. There were no victims present. The board of three, while dedicated and sincere, sounded like either lawyers grilling a defendant or counselors pushing a client to face his issues. Either way they sounded like professionals servicing a client more than neighbors working to separate the crime from the person who seeks reintegration. In each case they asked the offender to write a letter to either a child or partner exploring a broader understanding of the harm associated with his behavior. This is certainly an interesting idea, but observing the process and reviewing the materials did not persuade me that this was the kind of tailored response one might expect would be part of a community connection. It seemed more like a one-size-fits-all approach, relying on inmates pronouncing the right scripts to measure success, which is unfortunate, given the innovative character of this program.

HOW HAS THIS APPROACH EMERGED IN A POLITICAL CONTEXT FOCUSING ON EXTREME PUNISHMENTS?

The *Springfield Union-News* reported that Philip Johnston, outgoing state secretary for human services, called the Hampden County day reporting center a "model of what a prerelease center should look like," and added that Sheriff Ashe is "the kind of leader who has the guts to understand that we have new problems that beg for imaginative solutions" (8/8/90, "Reporting Center at Jail Applauded"). Certainly, my investigation confirms that any explanation of the approach developed here must start with the sheriff, his mission, hiring and promotion practices, respect for innovation, and the powerful political network he has developed over twenty-eight

years. While the HCCC is certainly a place where the professional discourses of social workers and criminologists prevail in a unique combination of strength and decency, there is also a very healthy amount of personalized leadership that relies on the techniques associated with a strong political machine: an exchange of patronage (jobs, restitution work, campaign support) for internal loyalty and innovation, and external support and non-intrusion.[4] This is not personalized in sense that it cannot be replicated, but in the sense that individuals are treated like responsible decision makers (in exchange for loyalty and innovation) from the hiring phase, through the unit management system that places their individual and collaborative decision making at center, and in a preference for promoting from within. Like older political machines, the sheriff devotes as much energy to managing the inputs (hiring, public relations, community connections, etc.) as he and his staff do to managing the outputs (programs, re-entry, etc.).

> Historically, many local leaders, far from being supportive of community corrections, have been hostile to the agency that manages what many citizens consider to be a threat: the former offender who lives among them. The isolated examples in which correctional leaders have reached out to community members reveal a different potential reality. Citizens can learn to understand and support the necessity – even appropriateness – of the correctional worker's job. Local leaders can take responsible roles in assisting in the supervision and reintegration of convicted offenders. Yet it seems so much more should be possible. A major impediment to offender readjustment is the suspicion and hostility of community members. A community yearning for public safety is an opportunity for justice professionals to help offenders and reduce public fears by creating supportive and supervisory links between community members and offenders (Clear & Karp, 1998, p. 11).

Sheriff Ashe makes certain that the communities he must operate within are "yearning" for what he and his staff call a common-sense approach to public safety. The sheriff's second in command described it as a process of educating the public about the risks of not preparing for re-entry.

> No one should walk out of here without a plan that is reinforced and carried and supported by the criminal justice system and the resources in the community. And you know, we are going to do that. How did we suddenly recognize this? One thing, people got up to this 2 million, 'holy shit, we got 2 million people, we're bigger than Russia,' . . . but 6 to 700,000 are coming back each year. I don't think people ever got that. They think they're gone forever. People have this fallacy that when they drive by the jail, 'good those bastards are all locked up,' and they just don't get it. So I like this idea of the 6 or 700,000, and I'm saying we're going to turn over our population twice, what do you want to do? . . . this is our talk at Holy Name, Holy Family, the Urban League, any place you go: 'here is our profile, now, we get'um for six months, what do you want us to do?' When you really get a chance to tell people that's what you got and that's what you can do, they say 'No, sure, Jesus, get his GED, make sure the son of a bitch gets up in the morning, does something productive, tries to change that profile while he's with you.' 'Okay, then we'll do that.' That's how we get our mandate. Been doing that since 1975. People understand that (J. Ashe Interview).

The sheriff describes the model as a combination of common sense, personal relationships, rare opportunities, and respecting the public.

> Back in 1992 we had an opportunity to not just build a place, we seized that opportunity to set up a whole new system. The kind of system we want here. Everyday what we are doing is trying to refine what we did back in '91 in terms of the transition . . .. This past year we just established some housing out in the community, partnerships, sober houses. You can talk about 'here's a piece of paper, they call it an after care, but what does that mean, really.' But now you can say, 'hey, you want to do something with your life, here is a house.' We just bought one of the Downey Side Homes and we've got Honor Court (another sober house). We got 30 spots, which is obviously just a beginning . . .. This isn't MIT Level 4; this is just a basic common sense kind of approach to people. The whole idea here is what's a good public safety policy. I think what has been frustrating for us is that we don't see police, courts, and the other parts of the system coming together. But we deal with that all the time and we have been blessed in terms of our own county. We've got a very honorable DA and a very nice 19 towns and 4 cities. The police chiefs on the whole, we get along with them quite well. So it's been exciting. We're together, if you will, trying to take things to a new level – which we'll share with you. People aren't stupid. They see that incarcerating someone is extraordinarily expensive. Rather than pay the $28–30,000 to incarcerate non-violent people who've got substance abuse issues, let's put them in a detox program for $2,500 bucks . . .. What's your recidivism rate? By asking that question it moves it away from the custodial, warehousing, kind of model to 'they got to do something in the can while they are there' and what is it. And the other thing is they got to have some kind of reintegration plan. It challenges everybody (Sheriff Interview).

Building an entirely new facility and hiring an entirely new staff was one rare opportunity. Another was afforded by developments in sex offender legislation.

> The sex offender law promotes re-entry. They did not realize, until they put the law into effect, how many sex offenders are living in the community. And so now that got the scarlet letter thing. You gotta label them and you post them, and you notify the police and you got levels that the community can go in and get access to that. I think that's what promotes this stuff about re-entry, negative as it is. The community is going nuts. They are just getting it. That's re-entry (J. Ashe Interview).

The HCCC has developed a model that both punishes those who refuse to help themselves and seeks to assist those who demonstrate a desire to redirect their lives; And they have done this through decades where the larger political-culture has been demanding increasingly harsh, unreasonable, and criminogenic punishments for all offenders. The sheriff built a powerful political machine that has generated enormous funding opportunities for programs that, in other contexts, would likely have been the target of critics rather than the favorite of legislators. And as the fiscal climate changes today, it is the innovative work of those at the HCCC that legislators and other correctional officials are now turning to in order to manage the inevitable budget cuts that lie ahead. And for these reasons, it is critical to examine the trajectories mapped out by the expansion of this approach to managing the social control problems associated with democratic-capitalism.

Understanding the meaning of what is going on at the HCCC only begins with the rhetoric and aspirations of its staff, or the progressive nature of its correctional programming. What is going on in this jail remains a part of our larger menu of social choices on how to organize our lives together. If we freeze this larger context, there is no doubt that the HCCC is an example of a jail that works hard to advance both public safety and human dignity. At the same time, it is also a jail that privileges institutional legitimacy over program effectiveness, system imperatives over lifeworld concerns. And to examine the significance of a more macro perspective on this jail as an ideal type raises some troublesome questions that return us to the hyperghetto. Despite all the innovative programming, or even as a consequence of these, it would not be far from the truth to argue that there is a two track social system developing, with the jail and poor communities linked as poles constitutive of the power-poor track.

On one track, there are the more affluent, largely white, residents who get their education in decent neighborhood schools, their medical care from a family physician, and whose teenage mistakes or tax-evading or inside trading run-ins with the law do not create long rap sheets and lead to extended periods of incarceration. The kids growing up on this track play safely in their neighborhoods, building forts and telling stories about summer camp and their dream of growing up to play for the Red Sox. And then there is a second track. On this track kids grow up in neighborhoods of concentrated disadvantage, where residents cycle from the "prison track" in decaying schools (Ferguson, 2001), through dangerous streets to the county jail, where they might complete their education and get their first non-emergency room medical treatment behind the fences before returning to their communities. In this sense, the programming at the HCCC contributes to relieving the pressure on elected officials to fix inner city schools, provide universal health care, and prevent rather than simply manage the layers of concentrated disadvantage that characterize our communities most victimized by crime. Instead, one track is privatized for those who can pay as you go and another integrates individuals and communities into a state order that contains them, warehouses them, recycles them. These citizens are forced to choose between freely cycling within this forgotten and festering public sphere or the same situation without criminal justice programming.

According to one prison activist with thirty years of experience from the Springfield area whom I spoke with, this larger and meaning-giving context demands that we look beyond the value of a program-rich environment inside county jails to see how these rapidly growing institutions are fast becoming alternative, inferior, and disciplinary social systems for the power-poor; a combination of punitive separation from their actual communities and coerced participation in the virtual communities reconstructed behind the walls.

> Yes, (the HCCC) has done a good job of keeping the rehabilitative model alive, with something like 94% of inmates involved in educational programming. My concern is that what is actually happening is an expansion of the criminal justice system. Judges are now more willing to send offenders to jail, because it is seen as a rehabilitative environment. They stay in longer . . .. The facility is at about 130% and they are seeking to increase the number of women by building a new women's facility, because of the ineffectiveness of programming for women. If you build it they will fill it. This will be one of the largest prison expansion ventures in Massachusetts in years, using rehabilitative language to support building new jails. A well-run jail should be a depopulating jail. But look at the people inside. They spend so much time cycling in the county system they may as well spend 15 years in state prison . . .. This county jail is turning itself into a social service agency, but it is about containment. It would be just as easy to develop these (services) in the community, community-based residential facilities without lockdowns. These would be really rehabilitative because they could maintain jobs and relationships, so reintegration would be more effective. The programs are excellent, but you have an industry here, and a whole social service industry being built up around it . . .. Prisoners need to self-determine which programs to participate in, not be channeled and told which to take and punished if they don't. Ashe is more of an ally than other sheriffs, because he believes that these people are redeemable; others do not. It is not perfect here, but it is better than 'they are trash and let's throw them away.' Hugely better than that. They are doing a good job, but they are growing and we don't want just a better containment model. The Ashe model does not enable offenders to become more self-determined. He is charismatic. People really like him. He talks about rehabilitation, but also has a 'them and us' perspective. He will say, 'we need to rehabilitate them to protect us; they are not like us.' And people respond to this. (Jamie Bissonnette, AFSC, May 16th, 2003).

While this is not precisely what Wacquant means by the hyperghetto, it remains clear that the displacement of education, medical and social support services from neighborhoods and into jails that coerce offenders into programs, punishing them when they choose not to participate, constitutes a critical part of an emerging system that extracts labor, narratives, and program participation in ways that exclude some from social citizenship. Another area activist and health care provider echoed these sentiments, highlighting, however, the way that this larger context seriously distorts the perspectives and practices of staff working within the jail, in ways that harm offenders, their families, and their communities.

> As he is an extraordinary man. He has accomplished a tremendous amount. But you can't just see the fabulous programming in the jail. You need to contrast the programs you describe with what is really going on, with the larger trends, with the hyperghetto, the war on drugs that got them here in the first place. With a more sane policy they would not be incarcerated; they would have access to drug treatment. I see the lives of these women and the only option is jail and that is disgraceful. They need meaningful drug treatment. Instead, I hear COs (correctional officers) tell me that it is too bad so-and-so is getting released, because we could have done so much for her. This may be a compassionate response to (existing) drug policy, but it is completely distorted. It is perverse and comes from building a correctional empire rather than creating drug programs. Ex-offenders have no housing, and now no jobs. Budget cuts are eliminating two area detox centers and a drug treatment program so that a relapse, which is part of the

> recovery process from a public health perspective, will send even more people back to jail. The explanation will be that there is little else available. But this is meanness. A criminal justice perspective just does not tolerate relapses (Miller-Mack Interview).

Certainly we cannot expect our jailers to make social welfare, employment, investment, educational and development policy. And places like the HCCC in their example, their presence among the local leadership, their stubborn insistence on common sense, advance discursive and programmatic resources for resistance to this larger two track trend, by repeatedly introducing a powerful rhetoric and reality that shines a light on the disadvantages concentrated in particular communities, in terms that both make sense to the system and provide resources to those struggling within this lifeworld. The jail is reducing the suffering of individual inmates, and this is itself an admirable achievement, but it also justifies this as good public safety because it reduces recidivism and strengthens those communities most victimized by crime. In so doing, we see the sheriff, his staff, and the jail's partners repeatedly educating the public about the intimate connections between educational, medical, employment and criminal justice policy choices. The HCCC is not only progressive in that it seeks to work with the inmate as a whole person, they are a positive force in the community because they take this seriously and teach by example when they develop policies and programs that work – programs that save money, advance public safety, and prioritize human decency in a way that continually highlights the concentrated disadvantages in our most troubled communities. One good example of this came when the Sheriff hosted a conference with health care partners on a public health approach to corrections and a physician at Baystate Medical Center offered the following analysis.

> In our community, we have the concentration of health problems shared by other urban areas as mentioned, and most of those problems concentrate in jail. Jails and prisons give us an opportunity though for successful health interventions . . .. They highlight the benefits of collaboration between organizations in community health, public health, and corrections. Economic analysis has shown multiple interventions in corrections to be cost-effective. For example, HIV counseling and testing, tuberculosis screening and preventive treatment, or hepatitis B vaccination is cost-savings to the health care system from a societal perspective. These need to be seen as components of an integrated health system. Our current data support that emergency room use and hospitalization after release can be prevented through health care efforts in jail . . .. I have worked at the Brightwood Health Center (a community health center in one of three high-crime neighborhoods) in the North End of Springfield for 25 years. The community is poor and mostly of Puerto Rican heritage. The health indicators are very poor and show all the discrepancies with more affluent communities that you know so well. The North End is the epicenter of the HIV epidemic in Western Mass, which has made Springfield the 18th highest metropolitan area in the U.S. for new HIV cases. At least 75% of our North End HIV infections are traceable to IV drug use. There is, therefore, a high level of incarceration of our community residents. It is clear that our community and our health center have a high stake in the health and health care of the inmates in our jail. In partnership, the HCCC and Brightwood Health

> Center are committed to working together to create a health care system for our community residents, which is consistent, whether the resident is in jail or in the community. The health center staff and medical providers see people from our community when they are in jail and when they are in the community, providing the same high quality of care in both settings. It is a difficult job to reduce disparities in health care but the only progress we can make is by creating a comprehensive system of care that is accepted by the people it is meant to serve. We currently spend an enormous amount of money on health care for people with chronic illness, whether they are incarcerated or in the community. Only if we can reorder these expenditures, putting the emphasis of spending on primary care, education, and coordination of care, can we reduce discrepancies in outcome while holding down costs. We have ample evidence from our jail program and other coordinated care programs to show this is true (Comments at the Focus on Correctional Health Care Meetings at the HCCC, November 9th, 2001).

But, as the interviews and analysis here demonstrate, the HCCC has not utilized it's discursive and political capital to leverage sufficient job creation, urban renewal, or drug treatment outside of jail. Further, there is an inherent limit to progressive reforms relying so heavily on fiscal stress to advance their mission. In Massachusetts, from 1985–2000, state spending on education increased 16% and spending on corrections increased 273%, while the national average for all states saw educational spending rise 29% and a 175% increase in correctional spending (*Justice Policy* Institute, pp. 18–19). These spending patterns will likely exacerbate the emerging two-track system, and as such, are criminogenic and unjust, even if they were to become fiscally sustainable. But this remains an empirical question that leaves the full meaning of the hyperghetto still to be determined. This case study, however, leaves us with a picture of the penal-community complex as a place where there is more health care, educational opportunities, and job training than in the ghetto alone, but at substantial cost to taxpayers and power-poor communities. It is also a place where these services are coercive, where "the process remains the punishment" (Feeley, 1979), where even education and drug treatment are part of a unique combination of coercive behavioral modification and punishment in Accountability Pods where choosing non-compliance assumes the moral equivalence of choosing to be criminally poor. What is clear is that the expansion of intermediate sanctions within the correctional continuum contributes to both the disciplinary and democratizing aspects of the increasingly intimate connections between our jails and our most victimized communities, and that the combination reinforces state agency as much as it provides resources for those most victimized to take a less passive and dependent approach to the privilege and the burden of constructing a life.

NOTES

1. After providing data on the "blackening of the carceral system," Wacquant (2002) lays out his central claim as follows: "To understand these phenomena, we first need to break out

of the narrow 'crime and punishment' paradigm and examine the broader role of the penal system as an instrument for managing dispossessed and dishonored groups. And second, we need to take a longer historical view of the shifting forms of ethno-racial domination in the United States. This double move suggests that the astounding upsurge in black incarceration in the past three decades results from the obsolescence of the ghetto as a device for caste control and the correlative need for a substitute apparatus for keeping (unskilled) African Americans in a subordinate and confined position – physically, socially, and symbolically. In the post-Civil Rights era, the remnants of the dark ghetto and an expanding carceral system have become linked in a single system that entraps large numbers of younger black men, who simply move back and forth between these two institutions." "This carceral mesh," a combination of the "prisonization of the ghetto and ghettoization of the prison," is the hyperghetto, our fourth mechanism of racial domination (Slavery, Jim Crow, Northern Ghetto, Hyperghetto) and one that continues to allow for the twin goals of "labor extraction and social seclusion."

2. In a 2002 analysis of the relative costs of incarceration and community corrections in Ohio, Marion found that the average cost of jail in Ohio was $60.47 a day, while day reporting costs $21.00 a day, electronic monitoring costs $5.43 a day, and intensive probation costs $4.34 a day (page 7, "Community Corrections in Ohio: Cost Savings and Program Effectiveness," Justice Policy Institute and Policy Matters Ohio, Marion, 2002).

3. While this state program is not the subject of this paper, the definition provided in Massachusetts law is useful for the analysis being developed here, because it highlights the slippage in community corrections from a more traditional notion of punishment toward the categorizing treatment and education as intermediate sanctions.

4. The *Springfield Union-News* reported on August 22nd, 2002 that the "politically hungry" attending Sheriff Ashe's 25th Annual Clambake included many powerful state politicians seeking the sheriff's support or endorsement. And the sheriff actively endorsed the Senate President for the Democratic nomination in the governors and then actively endorsed State Treasurer Shannon O'Brian in the general election against Republican Mitt Romney.

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Connor, Program Manager at WMCAC
Sordi, Program Manager at AISS
Quinn, Restorative Justice Liaison, Community Accountability Boards
McCarthy, Public Information Officer
J. Ashe, HCCC Superintendent
Sheriff, Sheriff Michael Ashe
Jamie Bissonnette, American Friends Service Committee
Ellen Miller-Mack, Nurse Pratitioner who works with women incarcerated at the HCCC

HOW SCIENCE MATTERS: DISCOURSE ON DETERRENCE IN A DEATH PENALTY DEBATE

Theodore Sasson

ABSTRACT

Social problems researchers have documented the role of science in identifying, typifying and shaping policy responses with respect to a variety of new social problems. Researchers have given less attention, however, to the role of science in ongoing debates over problems that are well established and contentious. This paper examines the influence of mainstream scientific knowledge concerning the deterrent effects of the death penalty on a death penalty debate in the Massachusetts House of Representatives. Mainstream scientific opposition to the deterrence hypothesis is found to influence the claims-making strategies of death-penalty proponents, leading them to draw heavily on common sense, to scale-back and qualify their claims concerning deterrence, and to reframe the debate in terms of just retribution. These effects are attributed to the cultural rules that structure debate in a legislative decision-making body.

INTRODUCTION

Social scientists appear to be drawn to contradictory conclusions about the influence of their work on public policy. Many tend toward cynicism, knowing

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that politicians report their findings out of context, misrepresent their conclusions, and manage to say just about anything under the guise of science. “If political developments depended upon factual observations” writes Murray Edelman, “false meanings would be discredited in time and a consensus upon valid ones would emerge.” Alas, continues Edelman, “that does not happen, even over long time periods” (1988). On the other hand, many social scientists continue to emphasize the policy implications of their work, consult willingly with lawmakers and the press, and exercise whatever influence they might.

As a research question, the influence of social science on policy-making has been addressed in the literature on the construction of social problems. Spector and Kitsuse (1977, 1987) argue that scientists making claims about the social problems are participants in, not disinterested observers of, the process of social problems construction. Furthermore, “(w)hether the sociologist will be treated as a scientist by other participants in the process and accorded the special status of a disinterested and unbiased expert is a problematic, empirical question.” (p. 70) Social problems analysts have since examined the role of scientists as claims-makers in the identification and construction of a number of problems, including child abuse (Johnson, 1989); elder abuse (Baumann, 1989); “bullying” (Furedi, 2001); global warming (McCright & Dunlap, 2000) and alcoholism (Appleton, 1995). Such studies demonstrate that scientific expertise carries a premium in problem definition and policy formation.[1] This is especially true for so-called “valence” problems which elicit “a single, strong, fairly uniform emotional response and do not have an adversarial quality.” (Nelson, 1984, quoted in Beckett, 1996, p. 57).

Social problems researchers have devoted less attention to the influence of scientific knowledge in contests over the framing of contentious social problems (or “position issues,” see Beckett, 1996, Nelson, 1984). In such contests, scientific claims are typically available in support of various contending frames (Aronson, 1984; Loseke, 1999; McMullan & Eyles, 1999). In some cases, however, such claims are of unequal prominence and value in the scientific literature. Under such circumstances, does the presence of claims on all sides of an issue cancel out the significance of scientific expertise? Or does the dominant scientific viewpoint nevertheless assert itself?[2]

This paper examines the influence of scientific knowledge on political discourse in the case of the death penalty. My immediate aim is to determine the extent to which the mainstream scientific consensus on the issue of deterrence influences the internal dynamics and development of the death penalty debate. The broader goal is to shed further light on the question of what social science might accomplish in the realm of policy-making. The paper is based on a discourse analysis of a debate over the death penalty that occurred in the Massachusetts House of Representatives in October, 1997.

DETERRENCE IN CRIMINOLOGY

Like many issues that remain in controversy over a long period of time, the death penalty has generated an enormous volume of social scientific research. Within this body of literature, perhaps the most heavily studied question is whether the death penalty has a greater general deterrent effect than long-term imprisonment. This body of research is readily available in academic journals, the popular press, and on the Internet – as it was in 1997. For the politically motivated observer looking for studies to advance her or his position, there are plenty to choose from, on all sides of the issue.

On the pro-death penalty side, for example, there is the well-known longitudinal study by Isaac Ehrlich (1975) examining the correlation between execution rates and homicide rates in the middle of the twentieth century. Ehrlich concludes "an additional execution per year . . . may have resulted, on average, in seven or eight fewer murders." Similar positive findings have been reported in prominent venues by Layson (1985) and by Chressanthis (1989). There are also studies that find publicity influences deterrence (e.g. Stack, 1987) and interview research with criminals that find they behave in ways that indicate fear of the death penalty (Kronenwetter, 2001, p. 29).

On the other side of the debate, there are a large number of studies that report no deterrent effect. These include statistical comparisons across "retentionist" and "abolitionist" jurisdictions (Bailey & Peterson, 1997; Sellin, 1980); longitudinal and cross-sectional studies comparing execution rates and homicide rates (Bailey, 1975; Passell & Taylor, 1977; Peterson & Bailey, 1988); and longitudinal studies of homicide rates following abolition and/or reinstatement (Cochran, Chamlin & Seth, 1994; Thompson, 1999). In addition, researchers (Bailey, 1990; King, 1978; McFarland, 1983) report that execution publicity – including massive publicity surrounding the execution of Gary Gilmore – has no influence on homicide rates.

In light of this complexity, it is noteworthy that various "gatekeepers" in criminology have acted decisively to clarify the direction in which the weight of the evidence points. In 1975, for example, a panel of experts convened by the National Academy of Sciences concluded that Ehrlich's study provided "no useful evidence" on the question of death penalty deterrence (quoted in Kronenwetter, 2001, p. 29). In 1987, the American Society of Criminology adopted a resolution against the death penalty, arguing that "social science research has found no consistent evidence of crime deterrence through execution" (*Ibid*).

This articulation of the quasi-official consensus viewpoint has since been expressed on numerous occasions. Zimring and Hawkins' (1986) review of the literature on deterrence and the death penalty reports "clear and abundant" evidence that the death penalty is not a deterrent to murder. Bailey and Peterson's (1997 p. 155) review concludes that "a significant general deterrent effect for

capital punishment has not been observed, and in all probability does not exist." Radelet and Borg (2000) document the breadth of scientific consensus:

> In a recent survey of 70 current and former presidents of three professional associations of criminologists (the American Society of Criminology, the Academy of Criminal Justice Sciences, and the Law and Society Association), 85% of the experts agreed that the empirical research on deterrence has shown that the death penalty never has been, is not, and never could be superior to long prison sentences as a deterrent to criminal violence (p. 45).

In this paper, I treat the viewpoint that the death penalty does not deter as a near-consensus position among criminologists and other social scientists.[3] By this I do not mean that research on the topic has halted, or that there are no criminologists reporting findings that support the deterrence hypothesis. Instead, I mean that opposition to the deterrence hypothesis is the predominant position among professional criminologists and that it is the viewpoint sponsored by the discipline's professional organizations and most influential scholars.

DETERRENCE IN DEATH PENALTY POLITICS

Radelet and Borg (2000) claim that contemporary pro-death penalty arguments, in contrast to 25 years ago, increasingly emphasize retribution rather than issues like deterrence and cost. They attribute the change to the findings of social scientific research, claiming that such findings are slowly turning the political tide against the death penalty. "Clearly, this is one area of public policy where social science research is making a slow but perceptible impact" (p. 57). Death penalty historian Stuart Banner, however, disagrees. Looking back on the deterrence debate in the 1980s and 1990s, he writes that the "diversity in academic opinion translated poorly into the public policy arena, where proponents of each side tended to ascribe validity only to those studies which supported their own view" (Banner, 2002, p. 281).

Galliher and Galliher (2001) studied the death penalty debates that occurred in the New York State legislature during each of the nineteen legislative sessions between 1977 and 1995. They find that deterrence is "by far the most frequent justification for reinstatement of capital punishment in these legislative debates" (p. 3). They also find that opponents of the death penalty mobilized scientific evidence against the deterrence hypothesis whereas supporters countered by repudiating science as ideological. In place of scientific argumentation, the death penalty supporters drew upon common sense to make their case. The authors explain the refusal of supporters to abandon their pro-deterrence arguments in the face of the preponderance of scientific evidence in terms of the theory of cognitive dissonance. "When faced with contradictory evidence, cognitive dissonance is

thus reduced by focusing on critiques of research and researchers opposing capital punishment as a deterrent" (p. 11).

In this paper, I will show that, like in the case of New York, death penalty supporters in Massachusetts drew on common sense to make their pro-deterrence arguments. But I will also show that, in contrast to New York, their common-sense arguments were often equivocal and ceded ground to the findings of science. Moreover, I will show that proponents preferred to reframe their support for the death penalty by making "just punishment" arguments that are immune to scientific objection. I therefore conclude that, in the case of Massachusetts, although the scientific consensus against the deterrence hypothesis has not persuaded many supporters to abandon their positions, it has helped to shift the terms of the debate.

THE MASSACHUSETTS DEBATE

In the fall of 1997 the Massachusetts state legislature debated, for the third time in a decade, a bill to establish a death penalty. The precipitating event in this case was the rape and murder of 10-year old Jeffrey Curley.[4] Reporters for local media linked the Curley killing to a handful of others and reported the story as a crime wave (Fishman, 1978). For more than a month, local news outlets headlined with the latest installment in the unfolding story of murder and mayhem.[5] Politicians responded to the killing – and attendant torrent of crime-related news – by demanding an opportunity to debate the reintroduction of the death penalty to Massachusetts. Notably, the overall murder rate for state was down from the previous year and in fact had been in steady decline for six years.

The October death penalty debate in the House of Representatives took place in two parts. The first part included 53 speeches on the merits of the death penalty and lasted more than 14 hours. It ended with passage of the bill by one vote. The second part, including another 22 speeches, occurred one-week later following reconciliation of House and Senate versions of the bill. As it happens, during the second debate one lawmaker changed his vote causing the death penalty initiative to fail. Taken together, the two debates were comprised of 75 discrete speeches on the merits of the death penalty.

THE DEATH PENALTY AS FRAMING CONTEST

This paper argues that the scientific consensus on the issue of deterrence helped to shift the terms of the Massachusetts death penalty debate. To show this,

Table 1.

	Frame	Position	Roots	Principles	Exemplars	Catchphrases	Depictions	Rebuttal
Just punishment Pro death penalty	The issue is how to justly punish the most horrific crimes.	Some crimes are so "unspeakable" that the right punishment can only be the death penalty.	The root of the problem is the wrongheaded notion that the state has no right to kill.	A just punishment must balance the magnitude of the crime.	Stories about especially egregious crimes perpetrated upon ideal victims. Stories about comfortable prison conditions.	Scales of justice. An eye for an eye. The victims cry out for justice.	Opponents depicted as sympathetic to criminals. Prisoners depicted as enjoying daily pleasures denied their victims.	The death penalty will not alleviate the suffering of victims' families.
Crime control Pro death penalty	The issue is how to reduce the volume of violent crime.	The death penalty will discourage murder and eliminate the most violent killers so they won't kill again.	The root of the problem is the reluctance of liberal politicians to permit executions.	Providing for public safety is the first responsibility of government.	Stories of killers claiming they would have been deterred by a death penalty. Stories of killers killing again.	Epidemic of crime. Society going to hell in a handbasket.	Opponents depicted as naïve believers in rehabilitation.	Research evidence shows the death penalty does not deter. Research evidence shows "brutalization" effect.
Wrongful conviction Anti death penalty	The issue is how to avoid executing the innocent.	The death penalty will eventually result in the execution of an innocent person.	The root of the problem is the inevitable fallibility of the justice system.	A death penalty law can only be just if it can be administered flawlessly.	Stories about death-row prisoners released on account of their innocence.	Sacco & Venzetti. DNA evidence.	Prosecutors depicted as politically motivated to get a quick conviction.	All things in life entail risk. New DNA evidence reduces the risk of wrongful conviction.

Discrimination Anti death penalty	The issue is how to ensure that the death penalty is administered fairly.	The death penalty will be imposed disproportion-ately on people of color and the poor.	The root of the problem is racism in the society and incapacity of poor people to mount an effective defense.	A death penalty law can only be just if it is administered fairly.	Stories about incompetent lawyers in death penalty cases.	No dream team.	Defendants depicted as powerless; prosecutors as zealous.	The law can be designed to provide adequate representation to the accused.
Uncivilized practice Anti death penalty	The issue is whether the death penalty is moral in modern society.	The death penalty is barbaric.	The root of the problem is our tendency to answer violence with violence.	The state should set an example of moral conduct for the society.	Stories of botched executions.	Iran, Iraq, Indonesia, etc. Barbaric. savage. Violence begets violence.	Opponents are depicted as motivated by anger and the desire for revenge.	Lethal injection is a humane way to implement the death penalty.
God decides Anti death penalty	The issue is whether the state has the right to take a human life.	Only God has the right to give and take life.	Playing God.		The state makes life and death decisions in instances of war and in regard to abortion.			
Policy tradeoffs Anti death penalty	The issue is whether the death penalty is the best use of scarce crime control resources.	The death penalty is not a cost-effective response to serious crime.	Root causes of crime.	Opponents are depicted as pandering to public opinion.	Justice must be done at whatever cost.			

I must be able to describe the general contours and dynamics of the death penalty debate; the frame analysis approach, described in this section, is first and foremost a method for accomplishing this task. Researchers (e.g. Ferree et al., 2002; Gamson, 1989) employing the frame-analytic approach treat such policy debates as symbolic contests among sponsors of rival interpretive frameworks. The term "symbolic contest" draws our attention to the discursive dimension of policy debates, that is, to struggles over words, images, and ideas. "Sponsors" refers to the main combatants in such contests, including public officials, social movement activists, experts, and journalists.

Among the core concepts in this research literature, the most slippery of all seems to be the concept of "frame" itself. Sorting through the various inflections of the concept is beyond the scope of this paper. For our purposes, borrowing from Ferree, Gamson, Gerhards and Rucht (2002, p. 13), a frame is a "thought organizer." Its purpose is to "organize and make coherent an apparently diverse array of symbols, images, and arguments, linking them through an underlying organizing idea that suggests what is at stake on the issue." (p. 14) Taken as the whole, the contending frames on a given issue constitute its "issue culture" (Gamson & Modigliani, 1987).

Framing contests take place in a variety of forums, including the mass media, scientific journals, legislatures, and everyday conversation (Ferree et al., 2002; Ibarra & Kitsuse, 1993). In the various forums in which framing contests occur, frames are typically displayed through "signature elements" that condense and convey the frame as a whole. Such signature elements include catchphrases and images that evoke the frame as a whole, as well as the frame's basic arguments concerning root causes, policy directions, and basic principles. Just as frames are expressed through typical arguments and condensing symbols, so too are they rebutted in conventional ways (Sasson, 1995).

To establish the issue culture for the death penalty debate, I examined the transcripts of the Massachusetts debate, as well as the advocacy literature produced by activists on various sides of the issue.[6] Table 1 describes the contending death penalty frames in terms of their varying signature elements.

CODING THE TRANSCRIPTS

The data analysis examines discourse on deterrence in the context of the overall framing contest over capital punishment. In the first phase of data analysis I identified speeches that advanced substantive arguments concerning the merits of the death penalty. In practice, the threshold measure for inclusion of a given speech in the sample was the presence of at least one of the death penalty frames, either in its assertive form or for the purpose of rebuttal. The excluded speeches

were concerned with procedural issues pertaining to the debate itself and not the death penalty. The final sample included 75 separate speeches delivered by 56 speakers.[7]

In the second phase of analysis, I treated each speech as an opportunity for the display of each of the frames, either for the purpose of advocacy or rebuttal. In practice, this meant that a given speech might be coded as displaying two frames for purposes of advocacy and one for the purpose of rebuttal. In making coding decisions, I employed a coding guide that includes a catalogue of arguments and condensing symbols for each frame.

In the final phase of analysis, I coded all discourse on the *Crime Control* frame for deployments of "science" and "common sense." In the former category, I included all references, direct and oblique, to social scientific research. These included direct citations to published studies, as well as mentions of statistics and lines of argument that are well known features of such studies.[8] In two unusual cases – discussed below – I also included the speaker's own overtly social scientific analysis. In the category of common sense, I included analogies to everyday life, taken-for-granted notions concerning science, human nature, and society, anecdotes, and experiential knowledge.[9] The next two sections report my findings.

SCIENCE AND COMMON SENSE

In their study of the New York death penalty debates, Galliher and Galliher (2001) find that, whereas death penalty opponents made ample use of scientific evidence, the proponents repudiated science as ideology, and made their arguments in terms of common sense. In the Massachusetts debate, I also find that opponents mobilized science and proponents relied on common sense. In the case of Massachusetts, however, the proponents' common sense arguments were often equivocal, highly qualified, and relatively weak.

This section examines the lawmakers' scientific and common sense claims in relation to the issue of deterrence.[10] Figure 1 illustrates the summary findings. When addressing the topic of deterrence, the opponents clearly preferred scientific arguments.[11] In the following illustration, I take the speaker's reference to a statistical analysis of correlation as a deployment of science:

> Mr. Speaker, and through you to the members, today's vote is about retribution, government sanitized and sanctioned. And let us be very clear, today's vote is about retribution and nothing else. The death penalty is not now, and has never been, a deterrent. Quite frankly, I thought long ago never to hear this argument advanced seriously again. The evidence in support of the death penalty's failure as a deterrent will be amply produced in this chamber today, I am sure. Suffice it to say there is no correlation anywhere in the fifty states between the death penalty

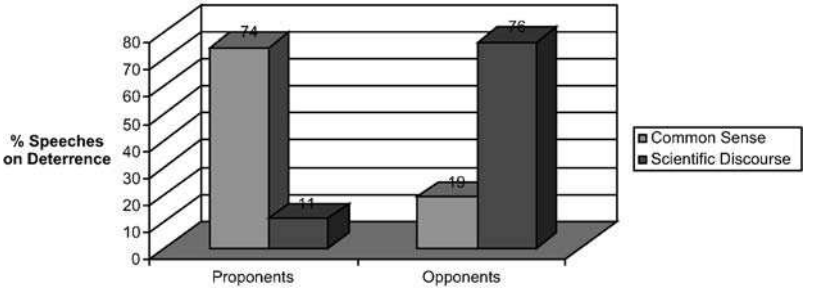

Fig. 1. Science and Common Sense in Deterrence Discourse.

> and a lower crime rate, and often times we see the anomalous situation of a state with the death penalty having an extraordinarily high crime rate. The reason for this is that many of the people who commit murder and are sentenced to death aren't capable of being effectively deterred. We all know how difficult it is to deter children. Do they see that far into the future? Do they experience time the way we do? This debate is about permitting the good, the moral, the righteous parts of human beings, and to bury forever the savage killer within all of us. And it is for these parts of all of us that I am fighting for. I implore you all to join with me and reject the killer within us. I beg you to defeat the bill before us.

By analogizing the challenges of criminal justice to those of child rearing, this speaker integrates a common sense appeal with the argument rooted in social science. This kind of rhetorical strategy is only in evidence in two other oppositional speeches that address the issue of deterrence. The others ground their arguments with references to social scientific research alone. This next extract is typical:

> The death penalty is not a deterrent. The FBI Uniform Crime Reports Division publication called "Crime in the U.S. for 1995" shows that the states that do not have the death penalty averaged 4.9 murders for 100,000 people while states using the death penalty had murder rates averaging 9.2 murders a year. Nor do statistics show that the police and prison officials are any safer in states with the death penalty than those without it. In no state has the number of murders diminished after the adoption of the death penalty. The death penalty, may even increase violence. A study of 692 executions carried out in New York between 1907 and 1964 found that, on average, the brutalizing effect of 1 or more executions in a given month added a net increase of 2 homicides to the total committed the next month.

In contrast, the death penalty proponents relied mainly on common sense argumentation. In some instances, such argumentation included anecdotal evidence, especially stories derived from first-hand experience or reported in the news. The following extract is illustrative:

> I don't agree with the argument that it does not act as a deterrent. Of course it acts as a deterrent and I would like to read something to you, Mr. Speaker, from the Washington Post. An article in which a man entered a warehouse complex in Landover, M. D., and then forced several hostages to lie down on a bathroom floor. Five, five, Mr. Speaker, of those hostages were shot. Eleven

> had been shot in the throat. One of the victims testified that one of the robbers said you better hope that there's a God, because you are going to need one. And then he stood on the stomach of another victim, Mr. Speaker, and said: die bitch. He also told us he had a hand grenade and was going to blow us all up. He said it didn't matter to him who dies since the worst thing that could happen to him is that he'd be taken care of for the rest of his life in prison.

In many instances, the proponents' common-sense arguments on behalf of the deterrence hypothesis were either equivocal or highly qualified, suggesting a concession to the scientific consensus. In the following extract, the speaker begins with a quasi-scientific argument and then immediately acknowledges its common-sense nature. He concludes with the limited claim that the threat of execution will deter violent crime at least "once in a while."

> (W)e can all make statistics say virtually anything we want them to say. But let me throw this one out, since deterrence has been kicked around. You notice that in the argument, the opponents say that states with capital punishment have a higher crime rate than we do. And they forward that as an argument that there is no deterrent value in capital punishment. Think about it for a second. What they don't tell you, for example, is that in the state of Texas, which as we all know has executed more people than any other state in the United States, the murder rate has dropped since they reinstituted capital punishment, from 12.2 persons per 100,000 in 1976, to 7.7 in 1996. Now, that's still higher than ours, but there seems to be some correlation between the reinstitution of capital punishment in Texas and the dropping of their murder rate. Now, are the two things directly linked? I don't know. There's a lot of causes for murder. There are a lot of things that go into a murder rate. But to stand here and say that capital punishment has no deterrent value – you can quote all the statistics you want, but I will say this to you, my common sense tells me that at least once in a while, somebody will think about the potential loss of their life before they take another human life. Now do I have statistics to back that up? No, I don't, other than those I just gave you. But common sense tells me that's the case.

In the next extract, the proponents' tendency to combine common sense with relatively modest pro-deterrence claims is again in evidence:

> The question of deterrence – As I mentioned last week, common sense tells me that at least occasionally, the death penalty will serve as a deterrent. Now perhaps opponents wouldn't be satisfied unless capital punishment deterred every murder. I, on the other hand, would be pleased if it deterred just one.

Notably, the death penalty advocates did not make use of the dissident scientific literature that purports to discover a deterrent effect. Thus, the two instances in which a particular pro-death penalty speaker deploys scientific arguments are exceptions that might be regarded as consistent with the general rule. In these instances, the speaker does not draw on published research or well-established lines of scientific argument. Instead, citing his credential as an engineer for doing data analysis, he presents his own idiosyncratic study of the deterrent effects of capital punishment. He presents the same material in separate speeches, one on each day of the debate. Here's one extract:

> I just wanted to read some statistics that I took from the Boston Globe last week . . . It just shows that the four states – this has to do with deterrence – but it shows that the four states that have had the most executions, have 11.61 murders in 1976, it went up in 1981 to 15, from 1981 to 1995, the murder rate in these four states declined by 40%, straight line declination, declined to 8.38 per thousand . . . In the other death penalty states, in . . . 1980, they had 10.2 deaths per hundred thousand. In 1995, 8.64, a decrease of 20%. The states with no death penalty was almost flat, from 5.57 in 1975 to 4.90 in 1995 . . . So, Mr. Speaker, I think those figures indicate to anybody who will read or can understand English or reads figures, that the death penalty is a definite deterrent.

But this extract is an exception. As a general rule, pro-death penalty speakers avoid scientific knowledge claims and the scientific literature that might advance their case, preferring instead to craft arguments grounded in popular wisdom and the discourses of everyday life. And the arguments they advance through common sense are in many cases equivocal, advancing only modest claims about potential deterrent effects.

CRIME CONTROL VS. JUST PUNISHMENT

In New York, Galliher and Galliher (2001) find that deterrence is far and away the most important issue dividing death penalty supporters and opponents, and that the issue has played this key role in every death penalty debate over a period of 19 years. This finding fits well with those of other students of the death penalty debate, including Banner (2002), Radelet and Borg (2000, p. 44), and Kaminer (1995, p. 100), who all contend that deterrence has historically been the basic pivot in death penalty politics. In the case of Massachusetts, however, the proponents preferred to shift the terrain of debate from deterrence to retribution. This shift, moreover, appears to me to have been motivated in large measure by a desire to advance an argument that is immune to scientific refutation.

Table 2 describes the speeches of death penalty supporters, showing the relative salience of pro-death penalty frames (for advocacy) and anti-death penalty frames (in rebuttal). Table 3 describes the same for the speeches of death penalty opponents.

The death penalty proponents preferred *Just Punishment* to *Crime Control*, and their preference assumed several forms. In comparison to *Crime Control*, the proponents conjured *Just Punishment* in a larger share of their speeches (90% vs. 51%). They also devoted more verbiage to *Just Punishment*; discourse on the frame commands more than a third more space in the transcripts than discourse expressing *Crime Control*.[12] Finally, as the extracts below demonstrate, the discourse on *Just Punishment* was typically delivered with far greater emotional intensity.

Table 2. Frame Salience in Pro-Death Penalty Speeches.

Advocacy Displays	% Pro-Death Penalty Speeches
Just punishment	90
Crime control	51
Rebuttal Displays	**% Pro-Death Penalty Speeches**
Wrongful conviction	30
Discrimination	0
Uncivilized practice	19
God decides	14
Policy tradeoff	11

The following extracts illustrate the *Just Punishment* arguments. In the first one, the speaker insists that the degree of severity in punishment must balance the degree of offensiveness in crime. This is a basic requirement of justice. Moreover, for some crimes – and this discourse typically includes graphic illustrations of horrible attacks on innocent victims – the only just punishment is the death penalty:

> What is justice? The constant and perpetual disposition to render every man his due. Now I look at you, those of you who are here, and I say to you – what do you think the human being who suffocated Jeffrey Curley with a gasoline soaked rag so that he could have sex with his dead body, what do you think he has as his due? His family, the families of other victims, and Jeffrey Curley himself, cries out for justice. You look at those people, and it's offensive frankly, to call the families who stood on the grand staircase the other day and demanded justice for their relatives mean spirited. Jeffrey Curley will never see another sunset. He'll never get up in the morning and read the (Boston) Globe. He won't get to watch a movie or his favorite television program. He won't get to go to college on the tax payer from in prison. His killers will. Is that justice? Does that qualify in your book as justice?

Table 3. Frame Salience in Anti-Death Penalty Speeches.

Advocacy Displays	% Ant-Death Penalty Speeches
Wrongful conviction	61
Discrimination	29
Uncivilized practice	45
God decides	24
Policy tradeoff	32
Rebuttal Displays	**% Anti-Death Penalty Speeches**
Just punishment	29
Crime control	56

This extract also expresses a second common theme, namely that it is unfair that the killer should continue to enjoy small pleasures in life long after his victim is dead and buried. "They're warm, they're fed, they're dry," argues another speaker. "What are the victims doing? The victims are moldering in the ground and they're turning to dust." This concern is the basis for rejecting mandatory life imprisonment as an alternative to the death penalty.

A third theme in the *Just Punishment* discourse emphasizes the law's obligation to the victims and their families. Such claims are briefly illustrated above, in the form of the common trope "the victims cry out for justice." The following extract provides an additional illustration of this sort of discourse.

> I sat at church the other day with my two young children and nothing has given me greater pleasure than sharing those moments with my children. And I have the highest respect for the Speaker of the House, because I know how dearly he loves his family, and I know how difficult he has wrestled with this issue. But as I sat in that church, I prayed for those two young boys, whose father, with an evil heart, shot their mother. I thought of the young boys that were placed in a car in South Carolina and allowed to role away into a submerged car and into oblivion. And I say what a wicked heart. I can't imagine how someone could do that. And I thought of the families of other victims and all of the victims have families. And all of those precious moments are gone because of somebody's cruel, atrocious act. Because somebody, premeditatedly decided that this person's life was going to end because of their twisted scheme. And as a parent, God forbid anything should happen to a loved one of mine. But I would want to be able to stand up, as many parents have asked me, to make sure that in this provision, they would have the opportunity to stand up and say if you steal my loved one's life, your life may face definite end.

Finally, an additional *Just Punishment* theme, albeit less common, argues that the death penalty is necessary to shore up a weakening moral order. This Durkheimian rhetoric is related to, but district from, claims about deterrence. The death penalty is not held to directly deter individuals from committing homicides. Instead, it is a mechanism for making the general point that society is ready and able to defend its moral borders. For individuals making this argument, the hope is less that the death penalty will deter murder than that it should reinforce the general moral order of society, discouraging all manner of moral and criminal offending. Consider the following illustration:

> You ask why in the United States, why in Massachusetts murder and crime is so rampant? Well let me give you just one person's opinion. It's because we have given our children everything. As one gentleman pointed out to me just a few minutes ago, a pastor in a church, he said we have given our children everything, the best that science can offer them: technology, education, all kinds of knowledge, except the knowledge that bad behavior results in serious consequences. We have to send out the message that discipline is back in fashion. That's the message that capital punishment will send out.

In contrast to these vigorous, fully developed and passionate arguments, much of the *Crime Control* discourse expresses a weak version of the frame, one that tacitly recognizes the problematic evidence for deterrence. For example, in the following passage, the speaker argues that the death penalty might deter one homicide – and that would be enough. He then goes on to make a *Just Punishment* argument.

> We are told that the statistics show that the death penalty is not a deterrent to murder. However, the statistics also tell us that crime has dropped dramatically in the Commonwealth. Yet, for many of our constituents, and I'm sure for many of your constituents, the fear of crime remains high. And, most importantly, I have seen that fear in the eyes of the children of my district. We have to send a message to society, to parents, and most importantly to our children, that we are here to protect them. It is impossible to tell how often the death penalty has deterred a person from committing murder, but if the death penalty deters only one person from murdering another, it has a necessary effect. And if the person saved is a member of your family, how can you not agree. Yet it is not only that the death penalty may be a deterrent, it is also justice that society affords from those who take an innocent life.

Moreover, much of the *Crime Control* discourse avoids the issue of deterrence altogether, arguing instead that the death penalty is a way to ensure that convicted murderers do not kill again:

> If they escape, how many times can they kill again? And what's to prevent them from escaping and killing to escape? We are putting many, many people at risk when we put these horrendous murderers in prison. The fellow prisoners are at risk. The guards are at risk. The management of the prison is at risk. How many prison counselors have been raped, have been assaulted, have been badly hurt by the prisoners they were talking with, the prisoners they were trying to help, the prisoners they were counseling? Nobody seems to care about the innocent victims. Everybody seems to care about the vile murderers.

DISCUSSION

Faced with mainstream scientific opposition to the deterrence hypothesis, the death penalty proponents pursue three distinctive rhetorical strategies.

- They avoid empirical science and make a deterrence argument on the basis of common sense alone.
- They tacitly admit to the weak scientific basis for the deterrence hypothesis but insist that there is space, at the interstices of what is and is not provable by empirical science, for a small or occasional deterrent effect.
- They avoid the issue of deterrence altogether and instead make a *Just Punishment* argument.

In contrast to Galliher and Galliher's (2001) study of the New York death penalty debates, I therefore note a modest but potentially significant consequence of the scientific consensus.

To explain the capacity of scientific knowledge to precipitate a reframing of the death penalty debate, we must examine the broader rhetorical context. Framing contests occur in a variety of forums, each operating as a distinctive cultural system, with its own norms and dynamics (Ferree et al., 2002; Ibarra & Kitsuse, 1993). Studies of framing contests in the mass media, for example, emphasize the significance of norms concerning sourcing and objectivity (Gans, 1987; Gitlin, 1980). Studies of framing contests in everyday political conversation emphasize the priority assigned to first-hand knowledge (Gamson, 1992).

Turning to the political arena, the case of the Massachusetts death penalty debate suggests that politicians seek to frame public policy in a fashion that both resonates with popular values and appeals to reasoned judgment (cf. Garland, 2001; McMullan & Eyles, 1999).[13] (These sensibilities they share with all good orators; cf. Billig, 1987.) On both sides of the death penalty debate, lawmakers appeal to the popular sense of justice. Death penalty proponents appeal to popular outrage over the most outrageous killers. The opponents, meanwhile, invoke the specter of unjust punishment of the innocent.

On both sides, as well, lawmakers try to appeal to reason. In making such appeals in political debate, credible references to scientific consensus are highly prized (Loseke, 1999, p. 115). Such references might not "work" in everyday conversation or media discourse. In the former, claims concerning scientific truth might seem pretentious; in the latter, they might appear to lack balance. In legislative debate, however, such appeals are effective, especially when they can be advanced at little risk of contradiction.

Fear of contradiction is, however, precisely what seems to have discouraged the death penalty supporters from mobilizing the dissident science in the course of their arguments. Such concern appears quite reasonable when one considers the organization of legislative debate. Whereas television coverage of political debate is crafted to balance each "side," and typically provides little opportunity for challenge and rebuttal, the legislative debate under examination was open and freewheeling. Speakers that mobilized scientific claims on behalf of the deterrence hypothesis, as a result, could reasonably expect to face an avalanche of ridicule. Such scientific discourse is available, to be sure, but the National Academy of Sciences and 85% of leading criminologists describe it as bad science. To defend it in a lengthy public debate – in a contest in which dozens of speakers will be allowed opportunities for rebuttal – is to risk coming off as foolish.[14] Thus, for many death penalty supporters, shifting the debate to the issue of retribution makes good rhetorical sense.

How science matters, in this case, is also significant. The influence of the scientific consensus on the death penalty debate is a consequence of the political influence of scientists rather than their technical capacity to render truth

transparent and compelling. Given the rules and assumptions that constitute the legislative arena as a cultural system, scientists that can establish an official viewpoint (a task that no doubt requires considerable political effort in its own right)[15] are able to exercise some degree of political influence. There are therefore grounds for greater optimism with respect to the influence of scientific knowledge than Edelman (1988) and other radical skeptics allow.

CONCLUSION

Whether scientific consensus exercises similar influence in other issue domains and in other legislative forums is a topic for further analysis. McCright and Dunlap (2000) describe the role of "skeptic scientists" in conservative counter-rhetoric on the issue of global warming. Judging from recent statements of the Bush Administration, however, it appears that the scientific mainstream has managed to establish the facts of global warming notwithstanding the skeptics' dissent.[16] Similarly, the scientific discourse on the dangers of smoking has deeply influenced the political discourse and common sense. However in other cases, such as the influence of sociological knowledge on the debate over welfare policy in the 1980s and 1990s, the line of argument developed in this paper might prove more problematic. Similarly, the extent to which the norms governing political debate in a legislative body are specific to local political culture rather than broader national political culture can only be ascertained through comparative analysis.

In conclusion, I should note that this case study reveals not only the influence of science on a policy debate but also the limits of such influence. Confronted with rhetorical obstacles to making a strong case for *Crime Control*, the death penalty opponents did not surrender; instead, they constructed *Just Punishment* arguments. This appears to be the general pattern in more recent death penalty discourse (Kronenwetter, 2001). Moreover, as Sarat (2001) observes, and nothing in my transcripts gives me any reason to disagree, the *Just Punishment* frame is quite viable on its own. In fact, it tends to be expressed in discourse that is more emotionally intense and compelling than any of the oppositional frames. Therefore, although Radelet and Borg (2000) appear to be correct in their assessment of the influence of science on the death penalty debate, they are not necessarily right in their optimism for the future. Whether under the banners of *Uncivilized Practice* and *Wrongful Conviction* the opponents can roll back the death penalty is still far from clear. By mobilizing science against the deterrence hypothesis, the opponents have succeeded in shifting the terms of the debate, but not yet in winning it.

NOTES

1. Loseke's (1999, p. 35) argues that scientists and other academic experts are at the top of the "hierarchy of credibility" for social problems claims-making.

2. Media discourse and scientific discourse are similar in this respect. As Gamson (1992) points out, the mass media typically provides visibility for a wide range of social problems frames, while systematically preferring one or two over the others.

3. By the term "near-consensus" I aim to identify a standard of knowledge just shy of "scientific fact," where the latter is defined as "an account given by scientists to explain why they no longer consider it worthwhile to dispute a colleague's knowledge claims." (Aronson, 1984, p. 6).

4. Regarding the kinds of criminal happenings that trigger policy debates on the introduction of new punitive sanctions, see Garland (2001, p. 133), and Best (1999, pp. 28–47).

5. For example, the October 22nd, 1997 issue of the *Boston Herald* carried the headline, "ENOUGH!" The story began: "A killing season has settled hard on New England, offering up a harvest of murders that have followed each other without let-up for two months" (p. 1).

6. For a more detailed discussion of techniques for cataloguing an issue culture, see Sasson (1995, p. 13).

7. Several speakers spoke more than once.

8. My approach here is analogous to the one used by Gamson (1992) to identify instances of media discourse in peer group conversations. To familiarize myself with the scientific literature on the death penalty, I examined several literature reviews (e.g. Bailey & Peterson, 1997), sourcebooks (e.g. Kronenwetter, 2001) and websites (e.g. Death Penalty Information Center – http://www.deathpenaltyinfo.org prodeathpenalty.com).

9. Gamson (1992) treats "experiential knowledge" and "popular wisdom" as discrete analytical categories; in this paper, I collapse the two together.

10. Here I examine the subset of *Crime Control* discourse that deals with deterrence. Excluded in this phase of analysis is *Crime Control* discourse emphasizing incapacitation, as when a speaker claims that the death penalty will foster public safety by preventing killers from killing again.

11. In eight speeches, four on each side of the issue, speakers declared their conviction on the question of deterrence without advancing any sort of argument. Such cases are reflected in the denominators for Fig. 3 and explain why the bars sum to less than 100%.

12. *Just Punishment* is expressed in 721 lines compared to *Crime Control's* 461 lines; moreover, much of the latter has nothing to do with deterrence per se but instead expresses the other related themes of *Crime Control*.

13. Garland (2001, p. 11) writes, "For *political actors*, acting in the context of electoral competition, policy choices . . . must be penologically credible but, above all, must maintain political credibility and popular support . . . In the choice of policy responses, those that can most easily be represented as strong, smart, and either effective or expressive are most attractive . . . The problem is one of political rhetoric and appearance as much as practical effectiveness."

14. Notably, Aronson (1984) argues that concern about the possibility of coming-off as foolish also underpins consensus in the scientific community: "The collective goal of scientific activity is to move claims along a spectrum of statement types from cautious, carefully qualified speculation to taken for granted fact. This is accomplished, from the

viewpoint of the individual scientist, by arguing so persuasively that others are convinced that they have not been persuaded, but that the facts of nature speak for themselves and it would be foolhardy to challenge them" (p. 7).

15. On the social construction of scientific facts within the community of scientists (see Aronson, 1984, especially p. 5).

16. For an account of the Bush Administration's turn around on this issue, see U.S. Sees Problem in Climate Change, by-line Andrew Revkin, New York Times, June 3rd, 2002, p. 1.

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PART III.
REPRESENTING PUNISHMENT IN LITERATURE AND POPULAR CULTURE

EXECUTING SENTENCES IN *LOLITA* AND THE LAW

Susan Elizabeth Sweeney

> "Let the jury consider their verdict," the King said, for about the twentieth time that day.
>
> "No, no!" said the Queen "Sentence first – verdict afterwards."
>
> "Stuff and nonsense!" said Alice loudly. "The idea of having the sentence first!" (. . .)
>
> "Off with her head!" the Queen shouted at the top of her voice. Nobody moved.
>
> Charles Lutwidge Dodgson (1866–1960, pp. 160–61)

SENTENCE FIRST

A "sentence," according to the *Oxford English Dictionary*, is a pronouncement of opinion, a pithy statement, an authoritative decision, or an idea expressed in a grammatically complete, self-contained utterance. Notice that these definitions all emphasize thought rather than action. Of course, sentences – such as "Let there be light," "Keep off the grass," "You shall be hanged by the neck until dead," and "Notice that these definitions all emphasize thought rather than action" – may command or recommend an act. Some philosophers even maintain that "certain classes of utterances, in certain situations . . . bring about, rather than refer to, a new state of fact" (Hollander, 1996, p. 178). J. L. Austin, whose book *How to Do Things with Words* established the field of speech-act theory, argues that "performative" statements can have the effect of actions (1962).[1] And yet the words in a sentence – whether it is an ordinary linguistic unit or the judgment in a criminal case – are still distinguishable from the deed they

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describe. The differences between pronouncing and executing sentences even led Justice Antonin Scalia to assert, in *Wilson v. Seiter*, that restrictions against "cruel and unusual punishment" should apply only to pain "formally meted out *as punishment* by the statute or the sentencing judge," or meant to be cruel and unusual by the inflicting officer (1991, p. 2325). He is assuming, of course, a legal system that "guarantees – or is supposed to – a relatively faithful adherence to the word of the judge in the deeds carried out against the prisoner" (Cover, 1992, p. 225).[2] As Scalia's remarks demonstrate, however, the distinction between a sentence's pronouncement, on the one hand, and its execution, on the other, raises disturbing questions about intention, interpretation, agency, and responsibility.

LADIES AND GENTLEMEN OF THE JURY

Vladimir Nabokov's novel *Lolita* offers a provocative case study in which to explore such questions (1955–1989b). Unlike "execution novels" based on actual cases (Guest, 1997, p. 8) – such as Dreiser's *An American Tragedy*, Wright's *Native Son*, Capote's *In Cold Blood*, or Mailer's *The Executioner's Song* – *Lolita* takes the form of a fantastic memoir that a man charged with murder writes for his attorney.[3] The narrator, Humbert Humbert, stages his confession as a grandiose rehearsal of his upcoming trial, while depicting courtroom procedures with the same absurdity as Charles Lutwidge Dodgson's *Alice's Adventures in Wonderland*.[4] Humbert's text not only anticipates and attempts to control the proceedings, but actually replaces them: he dies soon after completing his confession but before his case can be heard. He is never tried in a court of law, leaving the novel's readers – the sole witnesses to his confession, apart from a fictitious lawyer and editor – stuck with the tasks of both judge and jury.

Nabokov designed his novel, in other words, so that readers feel compelled to resolve its convoluted narrative structure by finding a verdict and pronouncing sentence on the narrator.[5] *Lolita* thus exemplifies the kind of tautological, circularly constructed, morally ambiguous narrative – whether legal or literary – described in Peter Brooks's *Troubling Confessions*. Brooks explains that

> confessions activate inextricable layers of shame, guilt, contempt, self-loathing, attempted propitiation, and expiation. Unless the contents of the confession can be verified by other means, thus substantiating its trustworthiness, it may be false – false to fact, if true to some other sense of guilt (2000, p. 6).

As a performative declaration, the sentence "I confess" seems to demand forgiveness but may lead to other profound, even irreversible consequences

(p. 21). And yet it seems nearly impossible to determine the legitimacy of such a statement, let alone decide what a just response would be.

In *Lolita*, several factors make judging Humbert's case particularly difficult. Humbert concludes his confession by announcing that he is not guilty of murder, but rape; and that his victim is not the man he killed, Clare Quilty, but his own stepdaughter, Dolores Haze.[6] Initial concerns about the validity of this statement – for example, that he may be "copping a plea" to a lesser offense, since rape is rarely prosecuted as a capital crime – spiral into a series of seemingly insoluble ethical dilemmas.[7] Does it matter that Humbert claims to love Dolores, and that most readers (or at least those in my classes) tend to believe him? If he loves her, are his actions more or less reprehensible? Since he apparently cannot control his desire for prepubescent girls, to what extent should he be held accountable for his behavior? (This question is especially pertinent now that sex offenders are presumed incorrigible by ordinances such as Megan's Law.) And how should his references to nervous breakdowns, hallucinations, fugue states, and psychiatric treatment affect readers' assessment of either his criminal liability or his narrative reliability? Indeed, there is little evidence of Humbert's guilt apart from his confession – a situation that underscores the crucial difference between criminal thoughts and criminal acts. His narrative, in effect, is his most immediate crime in the novel.[8] Nabokov emphasizes this point by inviting readers to decide whether *Lolita* is pornographic, and therefore whether they are complicit in Humbert's wrongdoing.[9] The matter of pornography leads to other vexing questions of artistic expression and free speech, which Justice Scalia, in a courtroom exchange on virtual images of children engaged in sex acts, linked specifically to *Lolita*.[10] Determining whether *Lolita* is obscene involves even more subtle distinctions among thought and action, intention and execution, representation and actuality. Humbert's mock trial, in fact, seems to anticipate the obscenity charges that Nabokov expected to be brought against the novel itself.[11]

Readers of *Lolita* must not only confront such tricky moral and aesthetic questions but must also unravel the knotty connections among them. The novel's intricate design incorporates all of these factors, moreover, so that readers experience overwhelming pressure to pronounce judgment even as they are forced to acknowledge everything such judgment entails. Humbert's narration reminds readers of this task, too, by directly addressing them as "ladies and gentlemen of the jury," "Jurors!" "winged gentlemen of the jury!" or "Frigid gentlewomen of the jury!" (Nabokov, 1955–1989b, pp. 9, 70, 125, 132), and as "my judges" or "your Honor" (pp. 40, 185). At one point, while sketching a possible defense based on his mental status, he even alludes to the outcome of their deliberations: "If and when you wish to sizzle me to death, remember that only a spell of insanity could ever give me the simple energy to be a brute" (p. 47). And yet it turns out

that the man on trial – Humbert Humbert, molester, rapist, murderer, and author of "Lolita, or the Confession of a White Widowed Male" – is already dead. This fact, of course, makes it harder to determine a just solution to his case.

The necessity of distinguishing between word and deed permeates every aspect of *Lolita*. Humbert's narrative depicts various stages of a criminal trial – indictment, plea, examination of evidence, summation, verdict, and sentence – not only as verbal utterances but also as highly self-conscious soliloquies in an imaginary courtroom.[12] He presents a case riddled with instances of grandstanding, special pleading, and leading witnesses, but there is no one to object. He claims on the very first page that "You can always count on a murderer for a fancy prose style" (p. 9). He admits the falsity of his confession even as he articulates it.[13] He craftily inverts the structure of traditional detective stories, acknowledging "whodunit" from the outset but obscuring the victim's identity – except for strategically placed clues – until the crime's final reconstruction. When Humbert first names his victim, for example, he does so only obliquely, through apparently offhand wordplay: "Guilty of killing Quilty. Oh, my Lolita, I have only words to play with!" (p. 32). This distinction between word and deed becomes particularly urgent in the novel's ending. Two parallel scenes in the last two chapters – one in which Humbert sentences and executes someone else, and one in which he pronounces sentence on himself – make his confession still more "troubling," and make judgment of his case even more complicated than it was before.

POETICAL JUSTICE

In the novel's penultimate chapter (part 2, Chap. 35), Humbert considers his actions and finds himself guilty. He does this, moreover, by recounting an episode in which he first projects his guilt onto someone else – Quilty, another child molester who stole Dolores away from him – and then tries, convicts, sentences, and executes that man for offenses he himself committed. In terms of plot, this episode depicts the actual crime with which Humbert is charged. At the same time, it shows how much he has changed since first meeting Dolores; abducting, raping, and enslaving her; losing her; seeking her in vain; and finding her again. Humbert now seems less driven by desire for her than by a need to confess his guilt and symbolically punish himself. He therefore makes Quilty his scapegoat as well as his Doppelgänger.[14] Indeed, Humbert's preparations for murder – discovering Quilty's identity in part 2, Chap. 29, pinpointing Quilty's whereabouts in Chap. 33, and casing the joint in Chap. 34 – are interspersed with admissions of his own previously unacknowledged wrongdoing:

> I reviewed my case. With the utmost simplicity and clarity I now saw myself and my love. (. . .) Alas, I was unable to transcend the simple human fact that whatever spiritual solace I might find, whatever lithophanic eternities might be provided for me, nothing could make my Lolita forget the foul lust I had inflicted upon her (Nabokov, 1955–1989b, pp. 282–283).

Such comments suggest that the murder, although essential to the novel's structure in many ways, functions most crucially as Humbert's first attempt to represent his guilt – initiating the gradual psychological and narrative process that culminates in composing and reading his confession.

Quilty's murder, the last incident in the novel's plot, thus serves as a rough draft of Humbert's account of his criminality. The "execution," as Humbert calls it, is an instance of vigilante justice in which he proclaims Quilty's guilt, decides his punishment, forces him to "read his own sentence" in the form of a poem, and then carries out that sentence (pp. 293, 299).[15] The scene's darkly comic travesty of legal proceedings leads directly to Humbert's subsequent staging of the entire narrative as another mock trial. Reading this episode as a draft of Humbert's written confession seems appropriate, moreover, because he implicitly compares the murder to a Hollywood screenplay, a piece of "fancy prose" (p. 9), and a skillful demonstration of legal or literary rhetoric.[16] That is, he represents it as an utterance, not an act.

Humbert opens his kangaroo court by interrogating Quilty about his relationship to the victim – "do you recall a little girl called Dolores Haze, Dolly Haze?" (p. 296) – but then skips over presenting, examining, and weighing evidence to arrive at the penalty phase. Clearly, he follows the Wonderland precedent of "sentence first – verdict afterwards" (Dodgson, 1866–1960, p. 161).[17] When Quilty interrupts the questions about Dolores to complain that he is "dying for a smoke," for example, Humbert counters that he is "dying anyway" (Nabokov, 1955–1989b, p. 296), adding: "I want you to concentrate. You are going to die in a moment. [. . .] You smoked your last cigarette yesterday" (p. 297). Humbert's nod to the familiar cliché of a condemned man's last cigarette – one of several allusions to death-penalty folklore in this scene – emphasizes that he has already decided Quilty's fate. Indeed, he fires his first ineffectual, poorly aimed bullets at Quilty a moment later. Although the execution is now underway, Humbert still feels that something is missing: "It was high time I destroyed him, but he must understand why he was being destroyed." Only at this point does he simultaneously accuse Quilty and find him guilty: "Concentrate [. . .] on the thought of Dolly Haze whom you kidnapped . . ." (p. 297).

Throughout this scene, Humbert pretends to follow due process even while acknowledging the illegitimacy of the proceedings. Noticing Quilty's inebriated condition, for example, Humbert observes that it is "evident to everybody that he (is) in a fog and completely at my so-called mercy" (p. 295). The adjective "so-called," inserted into the familiar phrase "at my mercy," emphasizes

Humbert's fallacious discourse as well as the trial's fundamental dishonesty. (In judicial terms, "mercy" refers to leniency for a criminal and, more specifically, to a sentence of life imprisonment rather than death as penalty for murder.) Humbert quizzes Quilty about his preferences, in the tradition of the "last meal" and other death-row rituals, but makes it clear that the actual sentence is a foregone conclusion. He even asks Quilty "whether he want(s) to be executed sitting or standing" and "if he ha(s) anything serious to say before dying" (pp. 298, 301). Humbert's adherence to the letter, if not the spirit, of these legal formalities recalls the torturer's insistence on following rules – no matter how meaningless – while interrogating a victim. In *The Body in Pain*, Elaine Scarry argues that the purpose of such speech is not to elicit information but rather to lend specious legitimacy to the torturer's crude display of power (1988). Humbert's discourse is even more fraudulent than that, however, because it glosses over the very murder that he is using – instead of words – to signify his own guilt.

Among the speech acts in a criminal trial, Humbert particularly emphasizes sentencing. He not only predetermines Quilty's punishment, decides what form it will take (death by gunfire), and makes it "the main item in the program," but also insists that it be verbally expressed (Nabokov, 1955–1989b, p. 299). His pronouncement of Quilty's sentence is rhetorical in more ways than one, however. To begin with, it fails as a performative declaration because both speaker and circumstances are illegitimate.[18] Consider Sandy Petrey's illustration of a similarly "infelicitous" utterance – "An escapee from the adjoining jail who steps in front of the judge's bench and pronounces court in session" (1990, p. 12) – or, better yet, Judith Butler's – "when I say, 'I condemn you,' [. . .] if I am not in a position to have my words considered as binding, then I may well have uttered a speech act, but the act is, in Austin's sense, unhappy or infelicitous: you escape unscathed" (1997, p. 16) – or, best of all, Timothy Kaufman-Osborne's examples of individuals who might tell him "I sentence you to death," but are not authorized to do so (2003, p. 26). In Humbert's case, at any rate, uttering the sentence seems a mere formality because he has already begun carrying it out. He uses its pronouncement, in fact, to "fill in the pause" while he catches his breath, checks his ammunition, and ensures that his pistol is "ready for use on the person" (Nabokov, 1955–1989b, pp. 299, 301). Finally, he adds to its rhetorical force by deciding that Quilty should "read his own sentence" and literally pronounce it aloud (p. 299).

Humbert therefore hands him a "neat typescript" of the sentence rendered into verse, telling the reader, in a painfully obvious pun, that "The term 'poetical justice' [. . .] may be most happily used in this respect." In its "poetical form" (p. 299), Quilty's sentence recalls two poems from the trial in *Alice*: the charge against the defendant, expressed in rhyme, and the anonymous doggerel that constitutes the evidence against him (Dodgson, 1866–1960, pp. 46, 158–160). It also parodies

T. S. Eliot's "Ash-Wednesday" – a litany that pleads for God's mercy – and thus underscores the mock trial's literary derivations and pretensions.[19] Humbert's poem is not a prayer, however, but a first person singular accusation directed toward Quilty in the second person: "because you took advantage of my disadvantage" (Nabokov, 1955–1989b, p. 299). Given this grammatical construction, the fact that he makes Quilty read it aloud – as if *he* were Humbert – emphasizes the convoluted rhetorical situation whereby Humbert uses Quilty to signify his own guilt.[20] The sentence's ending makes such doubling even more explicit:

> because of all you did
> because of all I did not
> you have to die (p. 300)

However, Quilty does not respond to this utterance as a threat, accusation, or death sentence, but as a poem – a kind of speech that Austin claims cannot be performative (1962, p. 104). After reading the sentence aloud, interjecting critical comments such as "Didn't get that," "A little repetitious, what?" and "Getting smutty, eh?" Quilty even pronounces judgment on it: "Well, sir, this is certainly a fine poem. Your best as far as I am concerned" (Nabokov, 1955–1989b, p. 300). He ignores the fact that it sentences him to death.

Throughout this scene, in fact, Quilty refuses to heed Humbert's warnings, follow his orders, accept his blame, or stick to the script of his "pistol-packing farce" (p. 301). Quilty pointedly remarks that he is "not responsible for the rapes of others" and that "really, my dear Mr. Humbert, you were not an ideal stepfather, and I did not force your little protégée to join me" (pp. 298, 301). He denies Humbert's literary authority and brags about his own superior writing skills: "My dear sir, [. . .] stop trifling with life and death. I am a playwright. I have written tragedies, comedies, fantasies. [. . .] I'm the author of fifty-two successful scenarios. I know all the ropes. Let me handle this" (p. 298). And when Humbert invites his last words, Quilty produces a torrent of boasts, bribes, puns, threats, and jokes culminating in the offer of an unusual reward for sparing his life: "moreover I can arrange for you to attend executions, not everybody knows that the chair is painted yellow . . ." (p. 302). Defiantly, he refers not only to the death penalty but to electrocution, in particular – also evoked in Humbert's description of the sun "burning like a man" (p. 293) – which was the most common form of capital punishment in America at the time.[21] He refuses to acknowledge that Humbert is already attending, and attending to, his own execution.

Humbert, meanwhile, is so eager to finish the job that his bullets cut short Quilty's last words. He chases him through the house, firing repeatedly as the other tries "to talk (him) out of murder," until he determines that Quilty is dead (pp. 301, 303). Humbert discovers, however, that his sense of guilt has only

increased: “Far from feeling any relief, a burden even weightier than the one I had hoped to get rid of was with me, upon me, over me” (p. 304).

Accordingly, Humbert tries once more to rid himself of that burden. Hearing distant voices and music, he realizes that others have “arrived and (are) cheerfully drinking Quilty’s liquor” (p. 304). He goes downstairs, enters the crowded drawing room, and announces: “I have just killed Clare Quilty” (p. 305). This statement clearly acknowledges Humbert’s culpability.[22] If reported by a credible witness during his trial, it would implicate him and make a guilty verdict likely; the fact that he reports it himself suggests a probable guilty plea. As a performative utterance, then, this confession should lead to various consequences: arrest, indictment, trial, verdict, and either punishment or absolution. Within the novel, however, Humbert’s announcement is utterly misinterpreted: “ ‘Good for you,’ said the florid fellow. [. . .] ‘Somebody ought to have done it long ago,’ remarked the fat man. [. . .] ‘Well,’ said [. . .] ‘I guess we all should do it to him some day’ ” (p. 305). In Austin’s terms, the declaration misfires because circumstances are wrong (in the drawing room, there is no evidence of Quilty’s death) and other parties don’t respond appropriately.[23] The house guests refuse to take Humbert’s confession any more seriously than Quilty took his accusation. And as it turns out, Quilty is not quite dead – an allusion to Rasputin’s protracted assassination that might remind contemporary readers of how hard it is to kill Jasons or Freddies in horror movies. Indeed, because he dies only after Humbert’s confession has been uttered and misunderstood, he seems to get the last word.[24] Humbert even imagines, in one final instance of double talk, that it was not himself but his rival who scripted the mock trial: “This, I said to myself, was the end of the ingenious play staged for me by Quilty.” Humbert’s wrongdoing thus remains unexpressed and unacknowledged, and he leaves the crime scene still burdened with “a heavy heart” (p. 305).

Quilty’s murder serves, then, as a rhetorical device by which Humbert tries to articulate his own guilt indirectly. In other words, he crudely represents his rape of Dolores with another crime that is more final, absolute, and universally condemned. Humbert claims, of course, that Quilty deserves to die. Nevertheless, the fact that he depends on a murder, planned and carried out under similar circumstances, to approximate Dolores’s rape suggests his awareness of how much she suffered.[25] And although he depicts Quilty’s death as farcical and belletristic, it is actually quite violent – thus suggesting, by analogy, the cruelty, savagery, and relentlessness of his own assaults on Dolores, even as he punishes Quilty for those very deeds.

The murder also enables Humbert to confess his guilt aloud, although he cannot bring himself to identify the initial crime. In this chapter, then, he acknowledges his wrongdoing at two removes: first, he accuses, sentences, and executes Quilty for what he himself has done; second, he admits to Quilty’s murder, but not the crime that precipitated it. In one instance, he names the right crime but the wrong

criminal; in the other, the right criminal but the wrong crime. Nevertheless, this sequence indicates progress (from violently "acting out" guilt to expressing it aloud), suggesting that he is now ready to become the narrator who has recounted the novel from the beginning. Indeed, Humbert's subsequent arrest leads to another rhetorical situation – the necessity of recording his version of events for an attorney, at length and in writing – which prompts him to compose his memoir and, at last, directly acknowledge Dolores's rape. This slow, spasmodic, agonizing effort to represent and assess his own criminal behavior anticipates the difficulties that confront readers when they, too, attempt to judge Humbert at the novel's end.

LAST WORDS

As Humbert concludes his narrative, at the end of the final chapter (part 2, Chap. 36), he tries once more to confess his initial crime. But this time he expresses his guilt in writing, rather than enacting it in physical brutality or proclaiming it to a disbelieving audience, and he cites his own memoir as evidence of his wrongdoing. Within his imaginary courtroom, then, Humbert finds himself guilty – an unusual judicial outcome, although implicit in such procedures as the confession or the guilty plea. Individuals, presumably, can decide for themselves whether their conduct is wrong, but only a duly constituted civil authority may determine that it is criminal. Humbert also imagines sentencing himself. People can figuratively "punish" themselves, of course – with ascetic, masochistic, or self-destructive behavior, for example – but only a duly constituted civil authority may impose actual punishment, whether just or unjust. According to H. L. A. Hart, punishment "must be intentionally administered by human beings other than the offender," under the auspices of "a legal system against which the offense is committed" (1968, p. 5). And yet Humbert, who in the previous chapter tried to punish another for his own misdeeds, now seeks to become someone else in order to pronounce his own sentence.

He begins by claiming that he has already examined the confession still being perused by the novel's readers: "This, then, is my story. I have re-read it" (Nabokov, 1955–1989b, p. 308). In contrast to the preceding chapter – which implicitly compared Quilty's murder to a rhetorical device – Humbert here describes the text itself as a corpse or piece of forensic evidence: "It has bits of marrow sticking to it, and blood, and beautiful bright-green flies." Suddenly, his words bear tangible traces of his actions. But if his writing now offers incontrovertible evidence of his guilt, he still does not name a specific crime. He admits that his narrative remains disturbingly ambiguous: "At this or that twist of it I feel my slippery self-eluding me, gliding into deeper and darker waters than I care to probe" (p. 308). That

even the purported author finds this memoir opaque and impenetrable is indeed troubling. Humbert's confession, apparently, can even deceive Humbert himself. And since he is its first reader, his profoundly ambivalent judgment of this text – especially with regard to how reliably it indicates and documents his guilt – anticipates the various responses that actual readers might have.

To add to the text's elusiveness, Humbert explains that its purpose changed during the fifty-six days that he spent composing it. Originally, he intended to "use these notes in toto" at his trial; now, although he "still may use parts [. . .] in hermetic sessions," he realizes that he cannot possibly "parade living Lolita" in the courtroom (p. 308). He again describes the text in corporeal terms, associating it with Dolores's "living" flesh – a rhetorical strategy that recalls the blazon, a device by which Petrarchan love poems emblematized women's bodies (Vickers, 1981, p. 277). The decision not to display that body at his trial reverses his previous tactics. Earlier he appealed to phantom jurors when describing Dolores's rape – for example, "Frigid gentlewomen of the jury! [. . .] it was she who seduced me," or "Sensitive gentlewomen of the jury, I was not even her first lover" – but now he resolves not to mention her before a real jury (Nabokov, 1955–1989b, pp. 132, 135). It is not clear whether the decision to keep Dolores's textual incarnation (and presumably her physical body) out of the courtroom is a last-ditch effort to defend himself against murder charges,[26] another example of his inability to admit the rape in public, or a sign of genuine remorse because he wishes to spare her further pain and notoriety. At any rate, readers now know that his confession will never be read by an actual jury.

Immediately after judging his narrative – by evaluating its reliability and deciding its role in his defense – Humbert shifts to assessing his legal case. Meanwhile, his allusions to the text's ambiguous corporeality, which evokes both dead Quilty and living Dolores, yield to concern about the fate of his own body. Speculating about the trial's outcome, he worries about the punishment he will receive, not the verdict. Despite his exhortations to imaginary jurors in the preceding narrative, he now assumes that a real jury will find him guilty; instead, he wonders only what penalty the judge will mete out. (In the early 1950s, a jury established the verdict in capital cases and a judge determined the sentence.) Humbert presents this concern about a possible death sentence as if it were a philosophical position, rather than the dread of his own imminent death: "For reasons that may appear more obvious than they really are, I am opposed to capital punishment; this attitude will be, I trust, shared by the sentencing judge" (p. 308).

Once he has eliminated the jury and invoked a make-believe sentencing judge who shares his attitude toward punishment, Humbert announces the sentence that he considers appropriate for his behavior: "Had I come before myself, I would have given Humbert at least thirty-five years for rape, and dismissed the

rest of the charges" (p. 308). This statement acknowledges its illegitimacy as a performative declaration from the very beginning, even as it introduces another imaginary Doppelgänger that recalls Quilty's earlier role. The sentence indicates this doubleness with a subtle shift from first person ("Had I come before myself") to third-person singular pronouns ("I would have given Humbert"). It also manipulates both mood and tense. Humbert's statement employs the subjunctive, as required in clauses describing wishes, requests, and recommendations, or speculating about conditions contrary to fact. Indeed, this grammatical form is predicated on the distinction between an assertion made within a sentence and the feasibility of executing it.[27] Although Humbert correctly uses the subjunctive to formulate his imaginary case, he chooses the phrase "Had I come before myself" instead of "If I were to . . ." or "If it were possible to . . .." "If" is often only implied in such statements – in the phrase "had I but known," for example – but even so, its omission here makes the situation he describes seem less farfetched.[28] The sentence's construction suggests that he simply did not happen to appear before himself, not that it would be physically and legally impossible to do so. And whereas the subjunctive mood demands the past tense for conditions contrary to fact, Humbert uses the past perfect – "I had come" and "I would have given," not "I came" and "I would give" – as if describing a completed action. No trial has occurred, but the past perfect implies that he has already been tried, judged, and sentenced by someone else. Nevertheless, despite such conditional qualifications, grammatical elisions, and slippery temporal markers, this sentence provides the most direct statement of Humbert's guilt in the entire narrative. He finally admits to rape and recommends that he receive an extensive punishment for it.

Humbert's use of the past perfect, in pronouncing his hypothetical lengthy sentence, also adds to a sudden compression of time in the novel's last two paragraphs. By commenting on his narrative, he has already dissolved the implicit gap between the past events that he recounts and the present moment in which he records them. Now he reveals that when readers encounter the text, not only will his trial be over but both he and Dolores will be dead:

> The following decision I make with all the legal impact and support of a signed testament: I wish this memoir to be published only when Lolita is no longer alive. Thus, neither of us is alive when the reader opens this book (pp. 308–309).

Since its publication entails her death, the text inevitably becomes identified with Dolores's dead body as well as her living flesh. Earlier, Humbert calls her "my American sweet immortal dead love; for she is dead and immortal if you are reading this. I mean, such is the formal agreement with the so-called authorities" (p. 280). He also wrongly surmises, in another instance of temporal telescoping, that her probable lifespan means his manuscript will not be published until the

twenty-first century: “In its published form, this book is being read, I assume, in the first years of 2000 A.D. (1935 plus eighty or ninety, live long, my love)” (p. 299). When he addresses Dolores in the last paragraph – “while the blood still throbs through my writing hand, you are still as much part of blessed matter as I am, and I can still talk to you” (p. 309) – the effect is especially uncanny because she not only is absent, and already deceased, but according to Humbert’s own stipulation could never have read the memoir anyway.

Strangely, Humbert is already dead as well. His reference to “a signed testament” suggests a will, one of Austin’s primary examples of a performative utterance (1962, p. 5) – that is, a more legitimate and legally binding statement than the sentence he tries to pronounce on himself, because it concerns matters over which he does have jurisdiction, such as his manuscript.[29] In an interview, Nabokov explained that he wanted the novel’s final sentences “to convey a constriction of the narrator’s sick heart, a warning spasm causing him to abridge names and hasten to conclude his tale before it was too late” (1973–1990, p. 73). The foreword reveals, in fact, that soon after completing this memoir Humbert dies “in legal captivity, of coronary thrombosis, on November 16th, 1952, a few days before his trial [is] scheduled to start” (Nabokov, 1955–1989b, p. 3). His narrative thus resembles not only a confession, a trial, and a sentencing hearing, but also the traditional last words spoken by a condemned criminal before his execution and immediately preserved in written form.[30] Indeed, the novel’s ending seems to occur simultaneously with the death of its fictitious author – as if that mysterious body, repeatedly evoked in the text’s final pages, turns out to be his own corpse.

Earlier, Humbert ignored his actual trial, jury, and sentencing judge to describe the sentence he would impose on himself. Now, at the very moment when readers feel most pressured to assess his case, they learn that he is already dead. Turning the novel’s final pages, readers may still be deciding whether they find him guilty or innocent – not to mention hopelessly regenerate, sufficiently repentant, or somehow redeemed by either his love for Dolores or his literary achievement. In the midst of this interpretive process, the sudden revelation of Humbert’s death may seem like a *fait accompli*. Although no verdict has been reached and no sentence determined, the death penalty has effectively already been administered to him by God, or fate, or Nabokov, or the necessities of the plot. At the same time, however, the circumstances likely to result from his death – the dismissal of charges, the discontinuance of the trial, the failure of any judge or jury to hear his case – mean that now only the novel’s readers can find a verdict or pronounce a sentence.

Nothing remains at the end of *Lolita*, in fact, except the readers and the text. In the final sentences, Humbert suggests that he and Dolores will continue to live solely within the memoir his readers have almost completed:

> one wanted H. H. to exist at least a couple of months longer (than Quilty), so as to have him make you live in the minds of later generations. I am thinking of aurochs and angels, the secret of durable pigments, prophetic sonnets, the refuge of art. And this is the only immortality you and I may share, my Lolita (p. 309).

The text now transcends the physical deaths of both Dolores's body – variously described as living, dead, or immortal – and his own, which he pictures as a posthumous "specter," "like black smoke" (p. 309). Meanwhile, the novel's time frame shifts to an increasingly remote future, when his narrative will preserve "the living record of (her) memory [. . .] even in the eyes of all posterity," as Shakespeare puts it in his Sonnet 55 (1609–1983, p. 188).

This ending reminds readers that Quilty, Humbert, and Dolores died before the confession was published; that the trial never took place; that nothing remains, even in the world of the novel, except the text itself; and that the only "sentencing judge" Humbert will ever face is a reader of *Lolita*. Nabokov's novel thus urges readers to pass judgment on Humbert even as it reveals the utter impossibility of imposing any sentence in his case. After all, is there any point in sentencing someone who is already dead? That question underscores the vexed relationship between words and deeds when establishing blame, pronouncing sentence, and administering punishment in both literature and law.

UNFINISHED SENTENCES

Or, to ask a related question, is there any sense in pronouncing a sentence that may never be executed? Nabokov's novel has anticipated this inquiry by consistently exploring the differences between speech and action. *Lolita* concentrates on two forms of ambiguous discourse, the obscenity and the confession; it recounts Humbert's ludicrous attempts at sentencing, which utterly fail as performative declarations; and, finally, it prompts readers to find a verdict and determine a sentence themselves, even though no sentence can be enacted. *Lolita* is a work of fiction, however. The imposition and administration of sentences in an actual legal system is another matter – but not entirely, since real criminal cases also involve speech acts, texts, stories, and "that quasi-literary genre, the judicial opinion" (Petrey, 1990, p. 186). Indeed, a capital sentence that is never performed, while it may have other palpable effects, can seem as rhetorical and essentially conceptual as the end of Nabokov's novel.

Sentencing dramatizes the tension between words and deeds at the heart of American criminal law. The inherent "violence of the act of sentencing," Cover explains, "is most obvious when observed from the defendant's perspective" (1992, p. 212). Timothy Kaufman-Osborn notes that "*sentence* can be employed

as a noun but also as a transitive verb" (2003, p. 36). Scarry points out, more precisely, that in a criminal trial each of the state's speech acts

> becomes a verb that acts on the defendant. An accusation is made and the defendant becomes the accused. A verdict is reached and the defendant becomes the verdicted, or, as we more often say, the convicted. A sentence is announced and the defendant is sentenced. To be sentenced, to be physically punished, is to be directly acted on by a verbal sentence, a connection that calls to mind the etymological kinship between "sentence" and "sentience" (1996, pp. 166–67).

Although Scarry's analysis of the verbal force of state utterances is persuasive, it elides a crucial distinction between two phrases that she assumes are equivalent: "to be sentenced" and "to be physically punished." In capital cases, in particular, someone condemned to death may never be "physically punished" – or at least, not by execution. Even if death does occur, it is seldom "directly." As Petrey observes, one cannot necessarily "demarcate certain deaths from a jury's classically performative 'We find the defendant guilty' and a judge's equally classic 'I sentence you to be hanged by the neck until dead.' " Nevertheless, even if death does not always follow, condemning someone to death remains "a speech act that can't be convincingly separated from the events it authorizes" (1999, pp. 18–19). Both legally and linguistically, death sentences are beset by problems of performativity.

This ambiguous relationship between sentencing and punishment haunts recent analyses of the death penalty by Robert Cover, Austin Sarat, and Timothy Kaufman-Osborn. Cover's essay, "The Violence of the Word," has influenced many subsequent studies of legal rhetoric.[31] Although the law generally "considers words to be deeds and construes utterances as acts" (Hollander, 1996, p. 178), Cover argues that it tries to distinguish between speech and action where punishment is concerned:

> We have rigidly separated the act of interpretation – of understanding what ought to be done – from the carrying out of this "ought to be done" through violence. At the same time we have, at least in the criminal law, rigidly linked the carrying out of judicial orders to the act of judicial interpretation by relatively inflexible hierarchies of judicial utterances and firm obligations on the part of penal officials to heed them. Judges are both separated from, and inextricably linked to, the acts they authorize (1992, p. 235).

Accordingly, he describes sentences as "performative utterances in an institutional setting for violent behavior" that are enacted by other individuals: "The judicial interpretive act in sentencing issues in a deed – the actual performance of the violence of punishment upon a defendant. But these two – judicial word and punitive deed – are connected only by the social cooperation of many others" (p. 212, note 4; p. 227).[32] The interconnections among words, deeds, and roles become more complex in the case of the death penalty – "the most profound act of sentencing," even though its grammar "is as simple as that of any other criminal

sentence" (Cover, 1986, p. 8). As judicial opinion or as performative declaration, this sentence is unique because it sets "in motion the acts of others which will in the normal course of events end with someone killing the convicted defendant" (Cover, 1992, p. 229). The judge, however, neither witnesses nor participates in the execution. Such separation of word from deed is crucial, Cover argues, because "it means that someone else will have the duty and opportunity to pass upon what the judge has done" (p. 234). He points out, in fact, that in capital cases, precisely because the deed "is extreme and irrevocable, there is pressure placed on the word – the interpretation that establishes the legal justification for the act" (p. 230).

Sarat suggests, in *When the State Kills*, that this disjunction also applies to jurors in capital cases: "those who authorize violence, in this case the death penalty, do not themselves carry out the deed that their verdict allows. The juror is asked only to say the words that will activate a process that at some considerable remove may lead to death" (2001, pp. 134–135). But whereas Cover claims that judges remain "intensely aware of the deed their words authorize," even if they do not attend or enact it (1992, p. 229), Sarat argues that the gap between sentence and execution allows jurors to evade the implications of their words. If jurors understood their speech's performativity, they might be less likely to announce a guilty verdict: "Were they required to witness the full consequences of their verdict or were they required to pull the switch on those they condemn to death, the law would find it radically more difficult to get their authorization to kill" (2001, p. 135). When Sarat interviewed jurors in capital cases, however, he discovered that they "knew, or at least believed, that their decision was not the last word" (p. 145).

In his book *From Noose to Needle*, Kaufman-Osborn argues "that word and deed, imposition and infliction, sentence and execution, cannot be separated quite so neatly" as judges and juries imagine (2003, p. 22). Unlike Cover, he rejects "any account of the interconnection between sentence and execution that is parasitic on an untenable distinction between word and deed, a distinction that serves all too well the interest of the judiciary" (p. 23). Instead, Kaufman-Osborn claims that imposing the death penalty is inseparable from administering it, because the announcement already presupposes and justifies the execution. He argues that death sentences not only occur in an institution that practices violence, as Cover suggests, but that their force derives directly from "the *institution* of capital punishment, that is, the network of practices that encompasses judge as well as executioner and, indeed, the larger structure of domination in which that institution is embedded and by which it is authorized" (p. 27). This structure is inherently self-justifying.[33] Whereas Cover considers the social roles linking sentence to execution as a safeguard that allows due deliberation, Kaufman-Osborn, like Sarat, sees them as diffusing individual responsibility:

> At the imposition end, prosecutors represent themselves as agents who seek but do not determine the death sentence, jurors represent themselves as citizens who simply do what the law requires, judges represent themselves as officials who merely do the bidding of jurors, and all know that their efforts are merely provisional given the state and federal appeals that invariably follow any given death sentence's pronouncement (p. 21).

Kaufman-Osborn claims, too, that in capital cases the defendant's sentencing and subsequent incarceration are part of his punishment.[34] Given that "imprisonment on death row is a sort of living death that culminates in, but is not neatly distinguishable from, the act of execution proper, then in some important sense the pronouncement of a death sentence is itself an act of violence and the speaker of that sentence, a judge, is its agent" (p. 16). In this sense, execution begins at the moment of sentencing. As a performative utterance, then, the death sentence "is not merely continuous with but also partly constitutive of" the defendant's death (p. 35).

Although Kaufman-Osborn studies the knotty relationship between a death sentence and its execution – both in literal and linguistic terms – he doesn't address those instances in which it is never carried out. But what happens when an execution is endlessly delayed, protracted, or made increasingly unlikely? This essay's epigraph from *Alice* sums up the situation: although the Queen condemns Alice to death in an unambiguous, even imperious way – "Off with her head!" – her performative declaration has no effect. What does it mean when an authorized individual utters a death sentence, but "nobody move(s)" (Dodgson, 1886–1960, p. 161)?

Invitation to a Beheading, another novel by Nabokov, answers that question by describing an unconsummated sentence from the defendant's perspective. This dystopian fantasy, which concerns a man condemned to death for "gnostical turpitude" in a world where everyone else is shallow and unthinking (1938–1959, p. 72), begins with his sentencing:

> In accordance with the law the death sentence was announced to Cincinnatus C. in a whisper. All rose, exchanging smiles. The hoary judge put his mouth close to his ear, panted for a moment, made the announcement, and slowly moved away (p. 11).

The plot recounts Cincinnatus's torment as he awaits his execution and attempts to learn when it will occur. He tries to express his thoughts in writing, like Humbert, but mostly produces incomplete statements such as "In spite of everything I am comparatively" (p. 12). Although these unfinished sentences result from the state's interruptions and annoyances,[35] they also reflect the agony of not knowing when or if he will be put to death. Cincinnatus is further harassed by the cruel jokes and coy attentions of a prisoner in the next cell, who eventually turns out to be "the performer of the execution" (p. 176). His executioner, in fact, seeks to create an "atmosphere of warm camaraderie between the sentenced and the executor of the sentence" – rather than "the barbarity of long-gone days, when these two, not

knowing each other at all, strangers to each other, but bound together by implacable law, met face to face only at the last instant" (p. 173). This grotesque relationship subverts those social roles that usually mediate between word and deed, according to Cover, and that makes an execution seem impartial, even impersonal.

In *Invitation to a Beheading*, however – as in many actual cases – the execution never takes place. At the novel's end, after Cincinnatus has taken off his shirt, arranged himself on the chopping block, and waited for the axe to fall, he realizes that the world is disintegrating.[36] Despite the entreaties of the executioner's assistants, he climbs down from the scaffold and, in the final sentence, "amidst the dust, and the falling things, and the flapping scenery," makes "his way in that direction where, to judge by the voices, (stand) beings akin to him" (p. 223). Whereas *Lolita* dissolves its fictive world before the announcement of verdict or sentence in a criminal trial, *Invitation to a Beheading* does so after the defendant is found guilty and condemned to death, but before he is killed. Cincinnatus's death sentence seems to remain merely a rhetorical statement, an unheeded command in the subjunctive mood, or a proposed future performance that can still be postponed – or better yet, skipped, as the title's allusion to an "invitation" implies.

Linguistic philosophers and analysts of legal rhetoric have also speculated on the significance of unexecuted sentences. Fittingly, Austin calls such declarations – produced by authorized speakers under appropriate circumstances, yet not carried out – "misexecutions" or "non-executions," depending on whether their performance is somehow flawed or simply incomplete (pp. 18, 35–36).[37] *Alice* illustrates both linguistic and literal "misexecution" when the royal headsman is ordered to behead the Cheshire Cat (a creature who keeps progressively appearing and disappearing), but cannot figure out how to do it since only the Cat's head is visible.[38] *Invitation to a Beheading* exemplifies "non-execution," because the imaginary world ends before Cincinnatus's death sentence can be administered. To apply Austin's analysis to actual death sentences, one might imagine an appeal on the grounds that a defendant did not receive due process – making the initial sentence a case of misexecution. If this appeal prevented death from ever taking place, the sentence would become an instance of non-execution.

The legal scholars cited in this essay are divided on the implications of actual misexecutions and non-executions. Cover acknowledges in passing that sentences might not be enacted – "The judicial word is a mandate for the deeds of others. Were that not the case, the practical objectives of the deliberative process could be achieved, if at all, only through more indirect and risky means" (1992, p. 216) – and cites one judge who sentenced a defendant to time served because of doubts about the legal system's integrity.[39] Sarat implies that the failure to enact sentences leads to cynicism and bad faith. The government may seek speedy executions, he explains, because "a state unable to execute those it condemns to die would seem

too impotent to carry out almost any policy whatsoever" (2001, p. 18). Jurors, may meanwhile assume that capital sentences result in life on death row rather than death (pp. 147–149); as one said, "Just because someone is sentenced to the death penalty doesn't mean he'll ever die" (as cited in Sarat, 2001, p. 150). Once Kaufman-Osborn has defined a death sentence's utterance as continuous with its execution, he doesn't speculate about those instances – presently the rule rather than the exception – when it is never carried out. He observes, however, that if the death sentence is not consistently enacted, then "its power to do what it says is more contingent, less unilateral, than we usually assume" (2003, p. 44).

Indeed, the fact that guilty verdicts in capital cases usually lead to misexecutions and non-executions suggests that the death sentence itself is frankly untenable. A legal system in which individuals are condemned to death, but nobody moves, evokes either Wonderland or the bleak nowhere of *Invitation to a Beheading*. It also recalls the nightmarish situation of the Cold War, which produced hyperbolic, hypothetical, presumably (and yet never completely) fictitious scenarios of extreme, irrevocable, absolute death for which no one was clearly responsible. In a more just system, individuals would only receive sentences that could be actually be administered and, if necessary, revoked. In such a system, judges and juries would not need to shy away from contemplating the deeds sanctioned by their words.

As long as death sentences are imposed, however, anyone who is authorized to utter or enact them – or who authorizes others to do so, on her behalf – must accept responsibility for them. Nabokov makes his readers acknowledge such responsibility, in *Lolita*, by prompting them to find a verdict and pronounce a sentence even though no sentence can be carried out. His readers determine the final judgment – a dénouement that demonstrates the ultimate performativity of fiction. Works of literature, after all, are "quasi-speech-acts" that "require readers to give the substance of fully operative conventions to language that lacks it" (Petrey, 1990, p. 72). Readers, in effect, execute a text's sentences by enacting them in their imaginations. In *Lolita* and *Invitation to a Beheading*, readers must even provide the assessment of the protagonist's case that is withheld by the text. In *Invitation to a Beheading*, for example, the last sentence – in which Cincinnatus moves toward other beings who are, "to judge by the voices, [. . .] akin to him" (1938–1959, p. 223) – not only alludes to the process of evaluating evidence and arriving at judgment, but hints that he is about to encounter his true peers, the novel's readers, who will assess his story fairly. It doesn't matter that the novel is over, and that even within its imaginary world it would now be impossible to either behead Cincinnatus or pardon him. Pronouncing a sentence still matters, whether or not it can be carried out – just as receiving the death penalty remains an extreme form of punishment, even if the execution never takes place.[40]

NOTES

1. Austin posits various factors that make such statements legitimate (or, as he says, "felicitous") and therefore effective. In addition to his lucid, witty analysis (1962), see Petrey (1990) on performative utterances and literary theory, and Butler (1997) on hate speech. On death sentences as performative declarations, see especially Kaufman-Osborn (2003, pp. 23–29).

2. Cover adds that doubts about the system's integrity can affect sentencing: "A judge may or may not be able to change the deeds of official violence, but she may always withhold the justification for this violence. She may or may not be able to bring a good prison into being, but she can refrain from sentencing anyone to a constitutionally inadequate one" (1992, p. 229, note 48).

3. On these four execution novels, see both Guest, who focuses on "diagnostic biography" in the real cases and their fictional adaptations (1997, p. 3), and Algeo, who compares the novels' representations of actual trial scenes (1996). For the general similarity between a jury trial and "Anglo-American plot structures and narrative procedures," see Clover (1998, p. 99).

4. Similarities between Humbert's mock trial and the one in *Alice* (1866–1960, pp. 143–162) are probably deliberate. Nabokov knew Dodgson's fantasy well, having translated it into Russian in 1926. He alludes to *Alice* elsewhere in *Lolita* and thought of its pseudonymous author, Lewis Carroll – who may have been a pedophile – as "Lewis Carroll Carroll [. . .] because he was the first Humbert Humbert." However, "some odd scruple" prevented Nabokov from explicitly mentioning Dodgson's "wretched perversion" in *Lolita* (as cited in Appel, 1991, pp. 381–382).

5. The novel consists of symmetrical parts – the first leads to Dolores's rape, the second to Quilty's murder – and doubled incidents or characters. Its narration comprises several levels: the events of the plot; Humbert's unreliable memory of them; their misleading representation in his confession; his ambivalent response to that representation; and the editing of his manuscript.

6. Humbert's opening paragraphs identify Dolores, lists her various nicknames, and explains: "But in my arms she was always Lolita" (Nabokov, 1955–1989b, p. 9). Although most critics follow his lead – using the sobriquet that he repeats throughout his narrative, from first word to last, and reiterates in its title – I prefer to call her Dolores. Since she never identifies herself as "Lolita," using Humbert's pet name seems to deny her subjectivity and minimize his unreliability.

7. Humbert's admission that he is guilty of raping Dolores, but not "the rest of the charges," implies that he is indicted for rape but tried only for murder (Nabokov, 1955–1989b, p. 308). He also commits other sex crimes on the books in the 1940s and 1950s: kidnapping; statutory rape; transporting a minor across state lines for immoral purposes; sexual slavery; Peeping Tomism; corrupting a minor's morals; engaging in prostitution; and sodomy, which included oral-genital contact in some states. He reveals knowledge of these laws, too, by mocking legal terms like "lewd and lascivious cohabitation" and dismissing the Mann Act, which prohibits interstate transportation of minors for immoral purposes, as "lending itself to a dreadful pun" (p. 150).

8. Humbert composes his narrative behind bars, "writing under observation" (Nabokov, 1955–1989b, p. 4) first in a "psychopathic ward" and then a "tombal" cell (p. 308). On

pornography and other "crimes of writing," see Stewart; on pornography as performative, see MacKinnon.

9. *Lolita* often elides, obscures, or delays description of actual sex acts, including Dolores's rape – thus prompting readers to anticipate and imagine those scenes.

10. During *Ashcroft v. The Free Speech Coalition*, Scalia asked what masterpieces we would be denied "if we couldn't see minors copulating." The petitioner's attorney, taken aback, said, "Well, the movie *Lolita*" – to which Scalia sarcastically replied, "A great work of art!" (as cited in Greenhouse, 2001). Indeed, producers of this 1998 film hired a lawyer to assist in the editing and ensure that it conform to the 1996 Child Pornography Protection Act (Van Voris, 1998).

11. The novel's most extended allusion to actual jurisprudence, which appears in the foreword, cites Judge Woolsey's 1933 decision that Joyce's *Ulysses* is not obscene. The foreword adds that "not a single obscene term" occurs in Humbert's narrative (Nabokov, 1955–1989b, p. 4), and that any scenes "a certain type of mind might call 'aphrodisiac' [. . .] are the most strictly functional ones in the development of a tragic tale tending unswervingly to nothing less than a moral apotheosis" (pp. 4–5). Nabokov, like his protagonist, has prepared his defense ahead of time.

12. On legalistic protagonists who construct "complex narrative structures to avoid relatively simple central realities," see Weisberg (1984, p. ix).

13. Humbert repeatedly implies that his confession is coerced or fabricated. At one point, promising "to tell (his) tormentors" about a scheme for gaining access to Dolores, he says:

> This I confess under torture. Imaginary torture, perhaps, but all the more terrible. (. . .) Humbert Humbert sweating in the fierce white light, and howled at, and trodden upon by sweating policemen, is now ready to make a further "statement" (*quel mot!*) as he turns his conscience inside out and rips off its innermost lining (Nabokov, 1955–1989b, p. 70).

He even warns his inquisitors to "take down the following important remark" (p. 71). Elsewhere, describing prior romances that he invented or exaggerated for his wife's "morbid delectation," he observes: "Never in my life had I confessed so much" (pp. 79, 80). He also mocks the jury for expecting reliable testimony from a criminal: "Being a murderer with a sensational but incomplete and unorthodox memory, I cannot tell you, ladies and gentlemen, the exact day" (p. 217).

14. A Doppelgänger, according to a literary convention exemplified by Stevenson's *Strange Case of Dr. Jekyll and Mr. Hyde*, is an antagonist who embodies an aspect of the protagonist's divided self. Thus, Humbert seems to split himself in two: Dolores's protector, who says "I am her father" and "She was my child" (Nabokov, 1955–1989b, p. 296), versus her rapist, this "semi-animated, subhuman trickster who had sodomized my darling" (p. 295). Earlier clues suggest that Humbert and Quilty resemble each other (pp. 69, 218). Now, in this scene, Quilty wears a purple bathrobe much like Humbert's; views Humbert as a "familiar and innocuous hallucination," such as a mirror image; and mistakes him for another man's brother, although "the resemblance is not particularly striking" (pp. 294, 295). When they come to blows, Humbert compares them to "two large dummies" that are almost indistinguishable, as his shifting pronouns suggest: "he rolled over me. I rolled over him. We rolled over me. They rolled over him. We rolled over us" (p. 299).

15. Humbert plans a similar "execution" of Dolores's young husband, even conducting target practice at which "The carrying out of the sentence was a little marred by [. . .] a

certain stiffness in the play of the trigger." He refers to the target – a piece of his own "dead" clothing – as "the corpse of the executed sweater" (Nabokov, 1955–1989b, p. 267). Dolores's husband is "instantly reprieved," however, when Humbert realizes that he is not the man who stole her away (p. 270).

16. This view of Quilty's death reflects Humbert's indifference, but also echoes Nabokov's other attempts to explain death in rhetorical terms. The narrator of *The Real Life of Sebastian Knight* describes a novel in which, "By an incredible feat of suggestive wording, the author makes us believe that [. . .] the truth about death" is written on the world, like a "page in a book where these mountains and forests, and fields, and rivers are disposed in such a way as to form a coherent sentence" (Nabokov, 1941, pp. 178–179). In *Bend Sinister*, the narrator says of his hero's murder:

> I knew that the immortality I had conferred on the poor fellow was a slippery sophism, a play upon words. But the very last lap of his life had been happy and it had been proven to him that death was but a question of style (Nabokov, 1947–1989a, p. 241).

17. Most readers of *Alice* recall the Queen's response to anyone who annoys or contradicts her: "Off with his head!" During the trial, however, the King is equally eager to pronounce sentence: he asks for a verdict as soon as the charges are read and tells the first witness, "Give your evidence [. . .] and don't be nervous, or I'll have you executed on the spot" (Dodgson, 1866–1960, p. 147).

18. Quilty dies a few minutes later – but not because of this pronouncement. That Humbert knows his declaration is illegitimate qualifies it, in Austin's terms, as an "abuse" (1962, p. 18).

19. Eliot's poem is a fitting subtext because it borrows, in turn, from Catholic prayer, repeating words and phrases in a series of apologies, explanations, and pleas for merciful judgment:

> And pray to God to have mercy upon us
> And pray that I may forget
> These matters that with myself I too much discuss
> Too much explain
> Because I do not hope to turn again
> Let these words answer
> For what is done, not to be done again
> May the judgment not be too heavy upon us (1930–1967, p. 84)

20. These ambiguous referents recall the obscure pronouns in the nonsense verse introduced as incriminating evidence in *Alice*, as illustrated by its last stanza:

> Don't let him know she liked them best,
> For this must ever be
> A secret, kept from all the rest,
> Between yourself and me. (Dodgson, 1866–1960, p. 158)

21. These images of electrocution suggest Humbert's pervasive guilt and anxiety about his fate. He makes other odd allusions to capital punishment, describing a man who "eliminated" Dolores' mother in a car accident as "looking like a kind of assistant executioner" (Nabokov, 1955–1989b, p. 102), speculating that his next-door neighbor might be a "retired executioner" (p. 188), and comparing his own wish to revisit the hotel

where he raped Dolores to "that swooning curiosity which impels one to examine with a magnifying glass bleak little figures – still life practically, and everybody about to throw up – at an early morning execution" (p. 262).

22. Humbert has already made a similarly stark admission to his readers, emphasizing that he alone is "responsible for every shed drop" of Quilty's blood (Nabokov, 1955–1989b, p. 304).

23. He is arrested soon afterwards for running red lights and driving on the wrong side of the road: "since I had disregarded all laws of humanity, I might as well disregard the rules of traffic" (Nabokov, 1955–1989b, p. 306). Perhaps Humbert repeats his declaration – "I have just killed Clare Quilty" (p. 305) – to the police, and this time, in other circumstances, it is taken seriously.

24. His last appearance is heralded by "a sudden noise on the stairs. [. . .] Quilty of all people had managed to crawl out onto the landing, and there we could see him, falling and heaving, and then subsiding, forever this time, in a purple heap. 'Hurry up, Cue,' said Tony with a laugh. 'I believe, he's still – ' He returned to the drawing room, music drowned the rest of the sentence" (Nabokov, 1955–1989b, p. 305). Still what? Tony probably means that Quilty remains drunk from the night before, but the word also connotes both his persistent animation and his final stillness. The metaphor of drowning, meanwhile, links Tony's unfinished sentence with death.

25. Since the murder signifies Dolores's rape, it is fitting that this scene's framing, sequence, setting, and imagery echo elements of that crucial night at the Enchanted Hunters Hotel.

26. By minimizing references to Dolores in court, Humbert could presumably avoid alienating the jury and make it difficult for prosecutors to establish his motive for Quilty's murder.

27. For the subjunctive's relevance to narratives, like *Lolita*, that focus on a protagonist's mistaken assumptions, see my essay on " 'Subject-Cases' and 'Book-Cases' " (Sweeney, 1999).

28. Earlier, in a similar construction, Humbert uses the indicative mood: "if I ever commit a serious murder." He warns readers to "Mark the 'if,' " but his failure to employ the subjunctive ("if I were to commit . . .") implies that killing someone is a possibility, not a hypothesis contrary to fact. Clearly, he does not consider Quilty's murder "serious" (Nabokov, 1955–1989b, p. 47).

29. According to the novel's foreword, Humbert's will includes a clause relating to "the publication of *Lolita* for print" (Nabokov, 1955–1989b, p. 3).

30. Banner explains that "The crowd went home, the condemned person was cut down and usually buried, the gallows was dismantled, and everyday life picked up where it had left off, but the execution lived on in three generations of literature: the sermon, the last words, and the account of the prisoner's life of crime and public death" (2002, p. 48).

31. To represent Cover's position, I cite both his initial lecture on "The Bonds of Constitutional Interpretation" (1986) and its eventual revision as his essay on "Violence and the Word" (1992).

32. The necessary actors include "police, jailors or other enforcers who will restrain the prisoner (or set him free subject to effective conditions for future restraint) upon the order of the judge, and guards who will secure the prisoner from rescue and who will protect the judge, prosecutors, witnesses and jailors from revenge" (Cover, 1992, p. 225).

33. See Butler: "The performative speaking of the law, an 'utterance' that is most often within legal discourse inscribed in a book of laws, works only by reworking a set of already

operative constraints. And these conventions are grounded in no other legitimating authority than the echo-chain of their own reinvocation" (1993, p. 107; as cited in Kaufman-Osborn, 2003, p. 29).

34. Kaufman-Osborn describes Clarence Lackey's unsuccessful appeal of his death sentence on the grounds that he had already been punished by imprisonment on death row; since then, similar appeals have been called "Lackey claims" (2003, pp. 13–16).

35. At one point, Cincinnatus tears up a pile of apparently meaningless bureaucratic documents, only to learn that "Perhaps there was a pardon in there"; he gathers the scraps and attempts "to reconstruct at least one coherent sentence, but everything was mixed up, distorted, disjointed" (Nabokov, 1938–1959, p. 38). Trying to distract himself with a book, he keeps "reading the first sentence over and over" (p. 87). He repeatedly asks to finish his writing and have it preserved:

> Save these jottings – I do not know whom I ask, but save these jottings – I assure you that such a law exists, look it up, you will see! (. . .) my last wish – how can you not grant it? I must have at least the theoretical possibility of having a reader (p. 194).

Shortly before his beheading, he writes:

> "But now, when I am hardened, when I am almost fearless of . . ." Here the page ended, and Cincinnatus realized that he was out of paper. However he managed to dig up one more sheet. ". . . death," he wrote on it, continuing his sentence, but he immediately crossed out that word; he must say it differently, with greater precision." (pp. 205–206)

He is interrupted once more – leaving behind a "blank sheet with only the one solitary word on it, and that one crossed out" – and led to his execution, which will be broken off as well (p. 206).

36. Like *Bend Sinister*, *Invitation on a Beheading* ends with a *deus ex machina* whereby Nabokov intercedes to rescue his doomed hero. Cincinnatus's escape does not reflect his unreliable perceptions, however (as in Bierce's "An Occurrence at Owl Creek Bridge" or Borges's "The Secret Miracle"), but the tale's essential unreality. Its ending thus evokes *Alice* once again: threatened with decapitation, Dodgson's heroine finds that she has regained her full size and that the other characters, scattering through the air and "flying down upon her," are "nothing but a pack of cards" (1860–1966, p. 165).

37. See Gould, who applies the terms "illocutionary suspense" and "perlocutionary delay" to authorized utterances that are not enacted because other parties reject their premises (1995, p. 31).

38. Dodgson wittily conveys the difficulties of executing such a performative declaration:

> The executioner's argument was, that you couldn't cut off a head unless there was a body to cut it off from: that he had never had to do such a thing before, and wasn't going to begin at his time of life. The King's argument was, that anything that had a head could be beheaded, and that you weren't to talk nonsense. The Queen's argument was that, if something wasn't done about it in less than no time, she'd have everybody executed, all round. (It was this last remark that had made the whole party look so grave and anxious.)

At length the Cat disappears entirely, so the execution never takes place (1866–1960, pp. 116–117).

39. Sentencing "to time served" is also problematic. How can a statement command an action that is not only already being performed but, by the terms of that same statement, has now been completed?

40. This essay is dedicated to the memory of my father, who graduated from Harvard Law School but never practiced law. I want to thank my fellow participants in a 2002 NEH summer faculty seminar on "Punishment, Politics, and Culture," and especially Austin Sarat, the director, without whom this essay would have been neither conceived nor executed.

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THE PSYCHIC LIFE OF PUNISHMENT (KANT, NIETZSCHE, FREUD)

Klaus Mladek

ABSTRACT

This article seeks to recover and uncover the non-utilitarian excess (jouissance) in crime and punishment since Kant. Jouissance is sharply contrasted with Nietzsche's account of ressentiment. The latter is analyzed as the predominant sensation of our penal system which until today structures the subjects and institutions of punishment from within. Jouissance, on the other hand, is obscured in philosophies of punishment that attempt to account for the will to punish but ultimately fail to cover over the excess that constitutes penal theories and practices. Whether it is visible in Kant's punitive fervor, in the exploration of perversion in de Sade and E. A. Poe, in theories of deterrence and prevention or punitive convictions in our contemporary legal culture, Freud's discovery of a realm beyond the pleasures principle remains crucial for the understanding of the motives for crime and punishment. The essay concludes with a discussion of Nietzsche and his exploration of the ramifications of recognizing the role of new affects in crime and punishment.

> Qu'est-ce que c'est la jouissance? Elle se réduit ici à n'être qu'une instance négative. La jouissance, c'est ce qui ne sert à rien. Je pointe là la réserve qu'implique le champ du droit-à-la-jouissance. Le droit n'est past le devoir. Rien ne force personne à jouir, sauf le surmoi. Le surmoi, c'est le impératif de la jouissance – *Jouis*! (Lacan, 1975, p. 10).
>
> Even guilt and punishment do not tell us what the law is, but leave it in a state of indeterminacy equalled only by the extreme specificity of the punishment (Deleuze, 1991, pp. 82–83).

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> (O)ne need only to look at our old penal codes to discover what amount of effort it takes to breed a "people of thinkers" on earth (G 38).

PUNISHMENT AND *JOUISSANCE* (KANT, NIETZSCHE, FREUD)

Our politics, our history and our fantasies are bathed in the *jouissance*[1] of law and punishment. Surprisingly few have noticed that Nietzsche's second treatise in the *Genealogy of Morality* is predominantly about this *surplus-jouissance* in the history and theory of law and punishment. The question of *jouissance* arises once we become aware of the stark difference between usefulness and enjoyment, between the officially legitimized ends and the non-theorizable surplus of punishment. Lacan has traced the concept of *jouissance* back to its juridical etymology. In law, it is nothing else but the legal notion of "usufruct" (*ius utendi fruendi*), the right to temporarily enjoy the use of certain rights of others. In Roman law, it is usually associated with the enjoyment of someone else's property. Nietzsche, on the other hand, systematically extends the legal concept of usufruct to the enjoyment of rights over someone else's body. Punishment for Nietzsche derives from the contractual right to enjoy the power over another body.[2] However, the legal concept of usufruct also introduces limits into *jouissance*, for one is allowed to enjoy this power, but not abuse or squander it: "Precisely this is the essence of law – to divide, to distribute, to spread out that which is *jouissance*" (Lacan, 1975, p. 10).

Without mentioning the term usufruct (*Nießbrauch*) explicitly, Nietzsche links the notion of usufruct to the origin of debt or guilt (*Schulden*). "Schuld" itself has its roots not in penal but in contract law. To guarantee the payment of the debt, the debtor pledges to the creditor something that he possesses, "for example his body or his wife or his freedom or even his life (. . .), finally even his peace in the grave" (G 40). The creditor thus has *legally established* power over the debtor's body, rights and possessions. The creditor is "granted a certain feeling of satisfaction as repayment and compensation – the feeling of satisfaction that comes from being permitted to vent his power without a second thought to one who is powerless, the carnal delight '*de faire mal pour le plaisir de le faire*,' the enjoyment of doing violence." Nietzsche concludes that the idea of compensation and *Schuld* originates in the establishment of a "right to cruelty" (G 41). It is important to notice that Nietzsche is not so much interested in the means or ends of cruelty (to enforce the validity of contracts or to deter one from breaking promises), but rather in the "senseless" satisfaction of legally inflicting pain "without a second thought," for the mere pleasure of doing it. Punishing *jouissance* is thus to enjoy

the violation of someone else's body without guilt: to commit violent acts in the name of law and morality. This particular constellation of usufruct reminds one of de Sade's enjoyment of crime as universal law – the crime as end in itself, where the law functions solely as support for the *jouissance* of transgression.[3]

The law may distribute, domesticate or prohibit *jouissance*, but something escapes from this, something that is not useful or utilitarian and which has no reason or determined origins and neither clear means nor ends. For Nietzsche, the good is not determined at the level of use, its "goodness" is rather decided upon by the notion of control and power. Thus, the good of punishment does not reside in its various goals (betterment, deterrence, etc.), but in the creation and manifestation of power. Outside of use value and the notion of good, Nietzsche emphasizes something radically new which could be called, with Lacan, the "*jouissance* use" (Lacan, 1992, p. 229):

> The judgment 'good' does *not* stem from those whom 'goodness' is rendered! Rather it was the 'good' themselves, that is the noble, powerful, higher-ranking, and high-minded who felt and ranked themselves and their doings as good, which is to say, as of the first rank, in contrast to everything base, low-minded, common, and vulgar. Out of this *pathos of distance* they first took for themselves the right to create values, to coin names for values: what did they care about usefulness! The viewpoint of utility is as foreign and inappropriate as possible, especially in relation to so hot an outpouring of highest rank-ordering, rank-distinguishing value judgments: for here feeling has arrived at an opposite of that low degree warmth presupposed by every calculating prudence, every assessment of utility – and not just for once, for an hour of exception, but rather for the long run (G 10–11).

Nietzsche reveals that the domain of the good marks the birth of power, difference and distinction. The notion of *control* of the goods and the *creation* of values is crucial, not their use value. The contemplation of goods and uses only keeps us in the mediocre "warmth" of pleasure but prevents us from our confrontation with *jouissance*. The mere fact of exercising control and exacting punishment is thus infinitely more important than the actual use or regulation of goods and bodies. The "high-minded" must therefore not be concerned with defending their goods, but with inventing them and naming their own values instead. Both Nietzsche's will to power and Lacan's *jouissance* are directed against the ideology that persuades us of the link between pleasure and the good – the pleasures of good or the good as pleasurable. Instead, a "hot" and enduring "feeling" ("not just for once") lies at the very heart of Nietzsche's "will to power" (see Deleuze, 1983, p. 62). The "outpouring" of pure will is thus nothing else but the surge of *jouissance*, a "feeling" and a principle so "hot" that they compel us to move beyond the calculus of pleasure. Both will to power and *jouissance* recognize acts of destruction and aggression as potentially joyful.[4] Accordingly, the "*pathos of distance*" treats the dull warmth that flows out of the nexus of pleasure and good

with the greatest possible contempt. This pathos itself is a certain sensibility; it is the capacity of being affected by a particular sensation of willing and rejects the substitution of the goods for the principle of *jouissance*.

The "highest rank-ordering" of the will with its differentiating force includes the sovereign right to deprive others of them ("the low-minded, common, and vulgar") who draw ordinary pleasures from their rights and goods. This passage of the *Genealogy* has a decidedly hostile undertone. *Jouissance* and will to power are no doubt "evil"; they are immoral because they necessarily involve "suffering for my neighbor" (Lacan, 1992, p. 184). When Nietzsche fundamentally detaches the good from utility and pleasure, he is therefore also driven by another impulse: to analyze and accept the forces of suffering, aggression and death. Their continued insistence throughout the genealogy of morality urges us to consider the instances of good as "evil," the acknowledgement of man's innate tendency towards and enjoyment of cruelty, punishment and destruction. However, whether it is in the transgressive ("criminal") or punishing ("lawful") *jouissance*, Nietzsche's project situates those tendencies within a historical dimension that is both memorable and remembered as it is registered in files as well as in the embroidered fantasies of legal and poetic texts. This very historical, or better, genealogical thrust is another instance that connects Lacan's analysis of *jouissance* (see Lacan, 1992, p. 209) to Nietzsche's uncovering of the will to power. In Nietzsche, Freud and Lacan, drives and affects enter into a history of profound transformation whose critical juncture is regularly the path from activity and aggression to reactive modes of self-control.

What are the similarities and differences between Lacan's notion of *jouissance* and Nietzsche's will to power which permit us to draw parallels or even exchange their places? While it is impossible here to elaborate exhaustively on the minute comparison between both or to ignore, for example, the importance of the particular logic of the signifier and trauma in Lacan's *jouissance* or the notion of corporeality and willing in Nietzsche, the correspondences are nevertheless astonishing. Both are inscribed in an unfathomable aggression from which man flees towards more acceptable pleasures and goods. In both concepts, man turns the inherently active forces (aggression, destruction) against himself and restructures them as reactive sentiments (bad conscience and guilt). Neither point to determinable objects of pleasure and are vehemently averse to the satisfactions of particular needs; rather, they are faithful to the impossible satisfaction of a will or drive that is dangerous and unmasterable.

It was Deleuze who demonstrated most unmistakably that the will to power is not interested in any particular power, rather "power is *the one that* wills in the will" (Deleuze, 1983, p. 85). The acts of power, of willing and creating themselves, their genetic and differential force, not the desire to have power, are

crucial. Like *jouissance* in Lacan, Nietzsche's will to power *gives* significance to goods and creates the value of values in the first place. The genealogist is not concerned with the enjoyment of power in any given order, but rather evaluates how the passage to a certain order was smoothed out. Values and sentiments have a particular genealogy and invite us to tie together believing, judging and feeling in a very specific way. Both *jouissance* and will to power have therefore a "critical" (Deleuze, 1983, p. 86) and "historicizing" (Lacan, 1992, p. 209) function. The displayed forms of enjoying, willing and punishing guide the psychoanalyst or genealogist in their endeavor to decipher the ways in which moral forces take hold of thought and body in an exceedingly durable manner. Nietzsche's genealogy of punishment in the second treatise lies at the heart of his whole genealogical project. It could be read as his key attempt to crack open the very foundation of morality and at the same time to hint at different routes of thinking and feeling in moral and legal judgment.

What, again, is *jouissance* and why would we want to think in terms of *jouissance* rather than will to power? *Jouissance* – more than will to power – maintains the intimate link to the law with its particular affects and sensations and rests on the traumatic realm beyond the pleasure principle. Stronger than the will to power, *jouissance* is anchored in the body and is intimately tied to the field of pain, death and suffering – the results of punishment. The notion of *jouissance* in Lacan moves along the outer and inner limits of the law and explores its grounding in modes of nonsensical enjoyment. On one hand, *jouissance* is like punishment, utterly useless. On the other hand, the Western tradition has desperately tried to legitimize and rationalize pain, suffering and punishment as much as it has attempted to distribute *jouissance* and find laws, means and ends for different kinds of "enjoyments." This becomes all the more clear in Nietzsche's counterutilitarian exploration of the traditional justifications of punishment.

But what is the use of exploring the useless? What at first sight seems completely useless, a concept such as *usufruct* or *jouissance*, could possibly turn out to affect the very essence of legal culture. Did the criminal enjoy his transgression too much? Of course, someone must pay for having enjoyed forbidden fruits as the violation of a law or the enjoyment of an unlawful possession must be "paid back." Who can measure a free-flowing *jouissance*, for example, the indulgence and delight of crime stories or legal dramas in the moment of *dénouement* or when the jury or judge has reached the verdict? The pursuit of the monster-criminal, whether it is the sniper, the child killer, the terrorist or the fictional evildoer, compulsively reenacts a familiar pattern initiated by the supreme spectacles of Greek tragedy: the place where the nexus of law, guilt and crime with *jouissance* was first knitted together. Avital Ronell showed that on television, prime time is more than ever crime time. But while television enacts *and* conceals its

disturbed relation to law, another police excess on video appears like a specter on the TV screen, thereby interrupting for a brief moment the discourse of moral outrage and "effacement of violence." (Ronell, 1992, p. 72) Where the state of emergency, i.e. the suspension of law, becomes normal,[5] the rationality of police intervention has triumphed: dysfunctionality must be governed, *jouissance* must be regulated.

From its inception in the sixteenth century, the police have been the prime mover in the governing of *jouissance*. TV's policing function as the prime time shock absorber has its parallel in state craft as stage craft: the carefully composed portrayal of the ultimate villain (whether external or internal "enemies of the state") that must be brought to justice. This theatricalization of the law for the sake of affirmative state craft was so exasperating to Hannah Arendt in the trial of Adolf Eichmann that to her it endangered the more than legitimate quest for justice (see Arendt, 1977, pp. 3–12). "It is so ordered" is the imperial performative speech act of the law so profoundly suffused with *jouissance*, yet at the same time so charged with the attempt to heal the wounds of crime. *Jouissance* is bound to the wound. It is one of the most crucial challenges of Nietzsche and psychoanalysis, and perhaps also their closest tie, to have recognized this intimate relation of *jouissance* to trauma and death. Everything after the highly dramatized act, the instance when "justice has been served" enters the prosaic aftermath of the epilogue, the daily life of punishment not covered by the penological intent. Once the law has firmly distributed *jouissance*, the deflation of interest and attention is truly remarkable. Only certain regimes of punishment, as we will see below, can maintain the tension of *jouissance*.

If legal theory and culture were to focus their curiosity on the overflowing presence of *jouissance* in law and punishment, *jouissance* would also *have to be dismissed* immediately as "rummaging in some of the ugliest corners of the human heart. That cannot be good for healthy politics" (Whitman, 1998, p. 1091). This "rummaging" would not be the way to maintain a healthy relationship with the law; thus Nietzsche and Freud never preached the credo of health, adaptation and happiness. However, the exploration of what in law and punishment goes beyond the pleasure principle can possibly be of crucial "use" by highlighting a repetition compulsion through which the ethical, the legal and the political spheres move. Furthermore, the all-encompassing matrix of law and punishment on which much of Western culture hinges reaches deeper than the question of the juridical or the political. Nietzsche demonstrates that the interlacing of the law and punishment also governs our very thinking, feeling and acting.

It is Nietzsche who reminds us that the underground genealogy of modern punishment is consistently organized around the amalgam of concept and affect. "Guilt," "justice," "punishment," "good and evil," "retribution" as well as the

complex of "pain and pleasure" haunt the purity of philosophical, ethical and political distinctions since their inception in Plato and Aristotle or the Judeo-Christian tradition. Nietzsche, the theoretician of Greek tragedy, saw, for instance, in Aristotle's theory of "tragic pity" (G 43) a delicate trickery of a hypocritical conscience at work: a voyeuristic spectator who thoroughly enjoys the exquisite pleasure of cruelty from a safe distance under the cover of moral and therapeutic purgation. The cleansing effects of terror and compassion ultimately result in the "joy without harm or loss" (Aristotle, 1961, VIII, 1342a) while unnamable sufferings unfold on the stage. The cathartic machine or the Christian "secret salvation machinery" (G 44) have given punishment and suffering a new sense, one who is "full of tender considerations for the spectator" (G 45).

It proves utterly impossible to ascertain whether complexes like "shame" or "guilt" originate in thought or sensation; they are sensual-conceptual compounds that seem to resist conceptualization but nevertheless necessitate and propel thinking. Through pain, humans are "*made* to think" (G 35) and making-suffer is thus "an actual seductive lure *to* life" (G 43) which has been negated and thrust back into the imagination and thereby richly adorned through the whole discourse of *ressentiment*. Theories of punishment are therefore profoundly intertwined with the basic interdictions of the psyche and charged with an "entire synthesis of 'meanings' " (G 53). The practices of punishment are so intensely entrenched in our history that, according to Nietzsche, we cannot tell for sure why we actually punish: "Thus one also imagined punishment as invented for punishment" (G 51).[6] Modern civilization retroactively rationalizes the divergent practices of punishment, reifying the penal concepts and thus justifying certain customs and rituals after the fact. Our theories of punishment are, however, *preceded* by the actual practices of punishment. Executions without apparent reason other than for the communal spectacle thus become gradually meaningful through the invention of guilt, free will, accountability and its link to suffering (see G 41).

In legal history the nexus of punishment and guilt is generally dated to about 1200 A.D. (see Lüderssen, 1995, p. 42). Nietzsche describes it as a gradual and often discontinuous strengthening of the guilt-punishment complex along with an intensification of rationalization and inwardness. But the body continues to think parallel to reason and reveals through its affects and symptoms (the "sting of conscience") the secret genealogy of punishment, "the very long, difficult-to-decipher hieroglyphic writing of the human moral past!" (G 6). Nietzsche asks how, conversely, thinking and feeling could have materialized themselves in embodied institutions and concrete practices of punishment. Nietzsche poses this question with respect to cruelty as it is so difficult for civilization to admit to the "pleasure in cruelty" (G 43): "(H)ow can making-suffer be a satisfaction? (. . .) Seeing-suffer feels good, making-suffer even more so – that is a hard proposition,

but a central one, an old powerful human – all-too-human proposition (. . .)." (G 42) But *jouissance* is not simply pleasure and the fact that suffering itself can turn into a source of *jouissance* is related to a particular weakness in Nietzsche's exploration of pleasures. Nietzsche does not have the vocabulary to clearly analyze the trauma inherent in the cycle of pain and pleasure. Its effects are unbearable and they force into flight, for example, the self-denial of the priestly *ressentiment*.

Even if seeing-suffer triggers contrary reactions such as disgust and repulsion, as in Camus' father after having witnessed the execution of a murderer, a certain *jouissance* remains. This sentiment we cannot get rid of no matter how hard modern society tries through increased modes of distantiation and detachment with modern means of punishment. Something within law and punishment affects the very core of our psychic apparatus which cannot simply be captured by what psychoanalysis often explains as the "collective desire to punish." Confusion arises when lust and sadistic enjoyment are invoked, particularly with regard to punishment. As Lacan in *Encore* points out, *jouissance* has little to do with the sexualized forms of sadism or with a phallic understanding of *jouissance*, which he calls the classic shortcut of male sexuality – the "enjoyment of the idiot" (Lacan, 1975, p. 75).[7] This sexual "phallacy" is the most common misinterpretation of *jouissance* as it reduces *jouissance* to the phantasm of sexual fulfillment.

Do we find *jouissance* also in the mere fulfillment of duty, in the neutral compliance of the law or in dry bureaucratic proceedings? Lacan's continuous invocation of de Sade and Kant, a tradition that begins with Adorno's and Horkheimer's *Dialectics of Enlightenment* and continues onwards to Deleuze or Zizek, is no surprise. It was de Sade who demonstrated that no passion, whether for love, politics or justice "is free from 'lust' " (Deleuze, 1991, p. 118). But more importantly, de Sade insists that there is no law, no institution or concept that is not, in some way or another, charged with the repetition of drives and fully suffused in *jouissance*. It is precisely the seemingly driest, most bureaucratic, and automatic exacting of punishment that entails some kind of excess which goes beyond and escapes its sober means and ends. De Sade's brothels are thus places of bureaucratic regimentation and are highly regulated; his pleasure palaces resemble penitentiaries rather than brothels. It is not the romantic places of love, but the invisible control of anonymous institutions that direct the perverse pleasures of the libertine. Within those charged bureaucracies, de Sade's cold and dispassionate executioners only fulfill their solemn duty and they do not "enjoy" punishment for their own satisfaction, but work for the *jouissance* of the Other (the republic, the community of libertines, the "supreme crime," the "delirium of reason," or the "idea of evil"). Recent "relapses" into more affective theories of punishment, as in the return of shame sanctions (Alter & Wingert, 1995) or the recent obsession with

theories of angry punishment (particularly, but not exclusively in victimology),[8] are only the most blatant demonstrations that the times of *jouissance* are running high. It is thus not about "how emotions worm themselves into law," but how law is inhabited by and, above all, constituted by desire and *jouissance*.

But coming back to the ties among neutrality, distance and *jouissance*, it is, for example, one of the greatest omissions of Arendt's analysis of the banality of evil not to have accounted for the central importance of *jouissance* in Eichmann's "mindless" execution of orders. As Zizek demonstrated, Arendt portrays Eichmann as deprived of *mens rea*, as a boring bureaucrat just doing his job, without thought or imagination, completely absorbed in his murderous mission. For Arendt the banality of evil is personified by a dull failure and a boaster, an average civil servant who was able to express himself exclusively in the Nazi bureaucratic jargon ("Amtssprache," Arendt, 1977, p. 48) without the slightest capacity to reflect. As proof of her conclusion that there is nothing inherently "monstrous" or "sadistic" about Eichmann, Arendt mentions the incident of a young police officer who lent the book *Lolita* to Eichmann while he was prisoner. Eichmann quickly returned the text with indignation: Eichmann's drives are less sexual and infinitely more dangerous than Humbert Humbert's. Here again, *jouissance* is confused with pleasure. Eichmann of course, does not fall into the transparent perversion-trap; he is more radical than *Lolita*'s "H.H." and his desire follows crueler delights with a much more devastating impact. Arendt dismisses Eichmann's fantasies as examples of his chronic vice of bragging, as seen in the following example: "I will jump into my grave laughing, because the fact that I have the death of five million Jews (or 'enemies of the Reich,' as he always claimed to have said), on my conscience gives me extraordinary satisfaction" (Arendt, 1977, p. 46). Is this laughter from beyond the grave solely another instance of Eichmann's boasting?

Eichmann's fantasy parallels uncannily the confessions of Poe's "spirit of perverseness," the "absolutely irresistible" force of doing evil for evil's sake, the place where the "defiance of all consequences" (Poe, 1992, p. 639) can be indulged. In Eichmann, however, "the extraordinary sense of elation to think that (he) was exiting from the stage in this way" (Arendt, 1977, p. 47) also comes from having committed murder "legally," in the name of bureaucratic efficiency and as a matter of duty in order to "eliminate" the enemy from the "pure" *Reich*:

> It is especially important to bear in mind how the very 'bureaucratization' of the crime was ambiguous in its libidinal impact: on the one hand, it enabled (some of) the participants to neutralize the horror and take it as 'just another job'; on the other, the basic lesson of the perverse ritual also applies here: this 'bureaucratization' was in itself a source of an additional *jouissance* (does it not provide an additional kick if one performs the killing as a complicated administrative-criminal operation? Is it not more satisfying to torture prisoners as part of some

> orderly procedure – say, the meaningless 'morning exercises' which served only to torment them – didn't it give another 'kick' to the words satisfaction when they were inflicting pain on their victims not by directly beating them up but in the guise of an activity destined to maintain their health?) (Zizek, 1997, p. 55).

Does this (perverse) psychic economy perhaps apply not only to Hitler's "willing executioners" (Goldhagen), but also to "ordinary men" (Browning)? Can we find a similar psychic economy in modern democratic imprisonment? Sykes' *The Society of Captives*, for example, repeatedly mentions motifs similar to those of the camps: the detailed regulations, the imposition of senseless rules along with the refusal to give reasons for them, the "sheer stupidity" and "apparent pettiness" of the prison regimentation which give the suspicion that regulations have "no other purpose than the domination of the prisoner for the sake of domination. Why, for example, must inmates pass two by two through the Center?" (Sykes, 1999, p. 23). For the sake of internal order and absolute subjugation of rebellious instincts, the prisoner's entire symbolic universe is sacrificed. The complete regulation of desire is sublimated as the desire for regulation. Even the prisoners mimic this desire by inventing ever more refined rules among themselves as well as in relation to their guards.

This excess of regimentation does not remind only Sykes of the "calculated atrocities" (Sykes, 1999, p. XV) of the camp, where a "different calculation" is at work than outside the prison walls. Within this climate of total social control, inmates always suspect that behind every well-meant purpose is actually the "officials' wish to punish the prisoner," a wish to which they cannot openly admit. What is inflicted "in the name of custody and internal order is simply viewed as a rationalization" (Sykes, 1999, p. 32). The act of recognition which is a decisive step for Hegel's theory of all societal relations is deliberately bypassed: "Providing explanations carries an implication that those who are ruled have a right to know – and this in turn suggests that if the explanations are not satisfactory, the rule or order will be changed" (Sykes, 1999, p. 75). Once the rift between recognition and legitimacy opens, *jouissance* enters the stage. Where orders "don't make sense," where cleanliness becomes a "pointless gesture of authoritarianism," where inmates are purposefully "left in ignorance" and "are not told why" (Sykes, 1999, p. 74), the power theater between custodians and inmates develops into a pantomime of ruses. An intense drama of observation begins where gestures and projections mean everything and simultaneously are evacuated of any sense.

Wherever the tautology "the law is the law" is implicitly or explicitly invoked, the mystique – and absurd violence – of authority is touched. One does not comply because it makes sense or because one recognizes the validity of rules. Obedience is to a certain degree the most nonsensical occurrence in the social world. The

theological tradition more than the legal one is well aware of that. It was Tertullian who coined the famous phrase *credo quia absurdum* and it was Kierkegaard who discovered that finding reasons for the worship of Christ would be a completely absurd endeavor and, above all, blasphemy. An irrational leap of faith is also essential for all primordial attachment to authority. Senseless obedience precedes the deliberate act of recognition. Of course, this senselessness creates rebellion but Foucault has shown how power generates its own mode of resistance and in fact needs this particular resistance to survive and legitimize itself. This attachment to authority already anticipates this kind of resistance: the "intense hostility" (Sykes, 1999, p. 73) of the inmate and his/her fantasies of retaliation or revenge. However, the instances of non-sense that are "the most galling" (Sykes, 1999, p. 73) must be processed, deferred, sublimated or dissimulated. Withdrawal, apathy or "seeking gratifications of sublimation" (Sykes, 1999, p. 80) are thus the most typical responses to total regimes of bio-political control.

The art of governing and of self-governance are the pivotal means by which to repress *jouissance* which, as senseless excess, streams beyond and within the rationalization of the punishing intent. Nietzsche was fully aware of the various sublimations and dissimulations of this cruel theater of power, particularly with respect to the theory of retribution. Nietzsche sees in one of its founding fathers, Immanuel Kant, the clear indication that the "certain odor and torture" survived even in the seemingly pure theory of duty and moral law: "the categorical imperative smells of cruelty" (G 45). He thereby anticipates Freud who modeled the cruelty and severity of the super-ego after Kant's categorical imperative.

Re-reading Kant's metaphor of the court of conscience, where an entire stage within the subject is erected, reveals how Kant's ethics can easily serve as a handbook for the coldness and cruelty of sadomasochistic rituals. This first complete and entirely internalized courtroom drama stages a zealous and severe judge (the pure moral subject) who sits in judgment on itself (the inherently evil empirical subject). Nothing is missing: the rituals of submission, the omniscient gaze, the "terrible voice," the formal accusation, the full knowledge of all transgressions (nothing escapes this judge, not even the smallest sins as in "*peccatillum*") the fearful trembling of the accused, the vindictive verdict, the spatial separation, the distribution of very humble awards ("*praemium*," see Kant, 1993, pp. 575–576) if found innocent. But the punishment is all the more cruel if one is pronounced guilty. The judge possesses extensive files which can be closed or reopened at any given moment.

The cold and obscene neutrality of the Kantian judge within oneself enjoys the helpless struggle of the empirical subject that tries to live up to the absurd demands: "You can, because you ought" (*Du kannst, denn Du sollst*) is consistently Kant's formula for this overwhelming command. This bureaucratization

and incrimination of inner nature is filled with *jouissance* and the voice resounds unmistakably, the empirical subject is ordered: *Jouis*! (Enjoy!) while the subject understands *j'ouis*! (I hear/listen). The subject in Kant's court of conscience is condemned to enjoy (the evil, the pleasures or the crime) and expected to listen and obey.

What is the flow of energy between Kant's intrapsychic "prison" scene and real camps and prisons? Is Kant's internal panopticon anticipating a certain practice of incarceration like Bentham's panopticon? Is there a simple relation of "mirroring" or could this striking parallel be explained by what psychoanalysis has called projection, where the borders between inside and outside soften? In Kant, the empirical subject is inherently evil, only waiting for an opportunity to transgress, and is thus constantly engaged in a battle with the pure subject who serves as his most attentive and overly conscientious prison guard. But both are also inseparably attached to each other in their contentious battle over the rights and prohibitions of *jouissance*. However, there is no partnership or exchange as the relation is completely unbalanced. In Kant, the empirical subject is maneuvered into the role of the defendant. Within an overwhelming array of court decorum the accused is held under the presumption of guilt. The hierarchical division is made abundantly clear as not the slightest arguing with the supreme judgment is tolerated.

The subject is not only submitted to the pure moral law but to the whole court with its presiding judge. Something moves in between the accused subject and the law: it is the *jouissance* of the judge who serves as the anonymous and yet highly personal executioner of law. The judge is always right, the accused is and will always be wrong/evil. An entire rhetoric of accusation and incrimination holds the subject in infinite contempt. The "proper" place of the "pathological" subject is under the constant custodial watch that keenly detects the slightest arousal of pleasure. It never entered Kant's mind to turn the tables and question the absolute authority of the judge[9] or to explore the *jouissance* of prosecution and duty.

Do these metaphors of the court of conscience serve only as mere illustrations of an abstract moral theory (as philosophers like to claim) or does this imagery also strike a cord for the center of Kant's legal theory of retribution? Certain passages of the *Metaphysics of Morals* (including the very peculiar final pages where Kant dismisses *and* enjoys divine justice) are a good example of how the absolute focus on guilt and penal justice alone[10] not only reintroduces a theory of societal values. This absolute justice also allows for a massive return of *jouissance*. The radical purity of his concept of justice becomes the source of a sublime charge whose energies (respect, contentment, pain) will inexorably come to be felt by the criminal transgressor as well as the law abiding citizen.

Beyond all considerations for the good and the useful, retribution, according to Kant, must occur even if a given society were to dissolve: the very last murderer in prison must be executed or justice would not be served. Kant then unleashes the ultimate rhetorical weapon: "If justice disappears then it is worthless that men inhabit earth" (Kant, 1993, p. 453). This radical threat of *fiat justitia pereat mundus*! for the sake of justice alone, as Hegel noticed, is inherently violent and unjust.[11] Justice in Kant is beyond any determinable value and utterly unattainable; its pure formality crushes all opposing aspirations of individual self-realization. Nothing, neither God nor the *summum bonum* of Aristotle's ethics nor humankind nor happiness could ever, in this or in any other world, justify compromising justice. This concept of justice is "absolute" in the etymological sense of the term – "let loose," unleashed, running amok. And as sovereign instance of punishment this justice can absolve or condemn. In allegorical terms, the goddess of justice merges with the goddess of victory and of the hunt.

The impossible *jouissance* of this absolute justice beyond all utilitarian ends is, according to Kant, the best humans (do not) have. Kant's enthusiastic descriptions of the sublime moral law in *The Critique of Practical Reason* render visible why his radical concept of justice can serve as an eccentric point of gravity around which the most divergent affects (pain, respect, contempt) in the Kantian edifice are grouped. Although the subject ought not to strive for happiness, compliance with the law can make the subject "worthy" of happiness (*Glückwürdigkeit*). The unconditional passion for justice and for one's duty is accompanied by its own powerful sentiment. Kant often calls it an intellectual feeling (*Geistesgefühl*); it is a pure and non-pathological feeling which strikes out against all "pathological" desires. A certain "contentment" and "satisfaction" (Kant, 1992, p. 67) flow from victory over the narcissism of the empirical subject. This particular satisfaction is the highest reward for the subject who acts in accordance with the moral law. The subject can admire the majesty of the law inside itself, but only from a carefully guarded minimal distance.

The enormous impact on subsequent literature, philosophy and psychoanalysis of Kant's rhetoric of sober enthusiasm and passion for justice can be fathomed only by noticing how libidinally charged questions of law had become. In order to measure the radical difference between Kant himself and the watered down Kantianisms in modern legal theory one need only consider Kant's linkage of law with the sublime and compare this energized law with that of his contemporary successors, from Rawls to Dworkin or Habermas. In the latter, the *jouissance* of justice has been converted into a mere procedural matter of the distribution of losses, gains and rights.

SELF-PUNISHMENT AND THE QUESTION OF THE PALE CRIMINAL

Another question could be asked of the addressee of the law: what is the effect of this kind of law on the subjects being legally threatened, deterred or punished? Already in Kant's empirical subject, we encounter an odd mixture of rebellion and obedience, reserve and attachment. Hence, let us now turn to the *receiver* of deterrence and punishment. Kant himself compromises the *jouissance* of justice quite frequently. In the *Critique of Practical Reason* Kant gives the example of a lecher who announces that certain of his sexual desires are simply irresistible. Kant cannot stop amplifying his example: What if we were to erect the gallows right in front of the lecher's house so that he will be strung up upon satisfaction of his lust? This fantasy, as Lacan has frequently pointed out, is the affinity of Kant to the Marquis de Sade: "One should not guess for long what he (the lecher) would respond" (Kant, 1992, p. 53). The reader of this example might wonder who the true lecher is. In this example Kant unexpectedly resorts to the means of deterrence and, in an odd turn, suddenly trusts the economy of the pleasure principle. Is it not surprising that Kant who obliges man to follow the moral law regardless of the painful consequences relies here on the inhibiting power of pain?

Considering the naivite of much of penal theory after Kant, it is certainly not surprising that this trust in the basic principles of deterrence still lies at the bottom of many theories of punishment up to today. What are those principles? The Kantian Anselm Feuerbach most explicitly elaborates the framework of deterrence:

> This sensible impulsion (the desire to break the law) can be annulled by the fact that each man knows his criminal act will ineluctably lead to an evil greater than that of the loss of pleasure occasioned by the non-satisfaction of the impulse to perform the act (Feuerbach, 1801, p. 38, quoted from Pasquino, 1991, p. 240).

According to Feuerbach, the criminal act will not occur because humans weigh the relative amounts of pleasure and pain. Should a person foresee that pain will be the inevitable consequence of a criminal act that pleases him, his attention will be diverted, the repulsive threat will be greater than the temptation and the crime will not occur. This theater of deterrence and punishment is addressed not only to the possible transgressor, but to all legal subjects. It is enacted in order to discourage one from breaking norms (*negative Generalprävention*) or to encourage and train one's loyalty to the legal order (*positive Generalprävention*).[12]

In the theory of positive prevention, the legal subject is urged not only to abstain from the criminal act, but to embrace gladly the normative order. The enjoyment of compliance (the theory of positive prevention) is the productive mirror image of deterrence (negative prevention) and invents another regulation of *jouissance*.

We expect, for example, the convicted criminal in the courtroom to consent to the verdict. Nietzsche, in his chapter "On the Pale Criminal," also found this particular moment to be crucial for modern modes of punishment: "You do not want to kill, O judges and sacrificers, until the animal has nodded? Behold, the pale criminal has nodded: out of his eyes speaks the great contempt" (Z 37).

The "nodding" criminal is essential for the goal of rehabilitation. In theories of special prevention since Franz von Liszt, the penal focus is on the rehabilitation and therapy of the individual criminal[13] and not so much on the societal repercussions of crime and punishment. Resocialization and therapy are commonly described as an attempt "to ease the criminal into legal behavior," to liberate the offender "from his specific external and inner forces" or as an aid in analyzing "the constricting, mostly painful past" (Jacobs, 1983, p. 20).

Once the offender is freed from unhealthy psychological constraints, he is expected to comply gladly with the normative order and thereby become capable of free enjoyment. This behaviorist and "liberal" model is typical of modern ego-psychology (or vulgar psychoanalysis) and of much criminal psychiatry. It is primarily interested in particular modes of conformity. Furthermore, in this model the state begins to play the role of a giant educational-therapeutic institution with the desire of forcing the offender to conform to customary societal rules. All three goals of punishment (deterrence, prevention and rehabilitation) congeal into what the Italian criminological school since the late-nineteenth century has called "social defense" (Pasquino, 1991, p. 241). This theory of defense has since developed into a whole discourse network where criminological, medical, political, societal and ethical goals become almost indistinguishable and change quickly according to ever new psychological convictions and political goals. In particular, the continuous instrumentalization of modern social defense strategies for certain political goals turns the offender into a plaything of fleeting governmentalities.

But let us pause for a moment and listen to another theorist of deterrence, Jeremy Bentham. He more clearly than Kant and Feuerbach establishes the link between prison and the psychic apparatus through a whole theater of deterrence;[14] his spectacle of instilling fear consists of a hybrid of intrapsychic imagination, public mobilization and materialized prison practice:

> The penal scene is located in the neighborhood of a metropolis, the place which contains assembled the greatest number of men, including those who most need to have displayed before their eyes the punishment of crime. The appearance of the building, the singularity of its form, the walls and moats that surround it, the guard at its gates, all of this serves to reinforce the idea of malefactors confined and punished: the ease of admission could not fail to attract a great number of visitors (. . .) What a most striking spectacle for the most numerous class of spectators! What theme for conversations, allusions, domestic lessons, useful stories! (. . .)

> And yet the real penalty is less great than the apparent one (. . .) The punishments being visible, the imagination exaggerates them (Bentham, 1811, pp. 75–76, quoted from Pasquino, 1991, p. 240).

This quotation is a perfect example of what penal theorists somewhat euphemistically call the "expressive function of punishment." According to Bentham, the actual deterring spectacle of punishment occurs inside the imagination. The prison is a zoo and the true animals are the "numerous class of spectators." The "lesson" is performed exclusively for them and is intensified within their psyche. As we well know from Kant, Nietzsche and Freud, inside our psyche we are not alone. The psychic apparatus is a very public place and the ego is far from being the master of its own house. A watchful judge, prison guard or super-ego is always there to strike as well as some lecher who cannot help but wait for the perfect opportunity to enjoy. Within the architectural topology of the imagination (walls, gates, moats) is a full prison staff (guards) at hand. This inner voice or the gaze of the inner eye has always already seen or called us: a sense of guilt announces itself without ever being publicly witnessed.

Theorists of deterrence like Feuerbach and Bentham know that guilt, shame and the ornaments of the imagination are supremely effective tools of deep inner control. It is thus not quite accurate to talk about the gradual abolishment of and embarrassment about public exhibitions of punishment. On the contrary, one could argue, those spectacles are proliferated, exhibited and intensified everywhere through a superb dramatization of the entire penological discourse, in conversations, allusions, domestic lessons or pop culture. A brief look into newspapers, TV or the internet can only confirm this mode of dramatization of crime and punishment. Punishment or shame sanctions no longer take place in the marketplace; its function has been replaced by other modes of public proliferation.

However, does deterrence really work? Is this public dissemination of the nexus of crime and punishment with its calculus of guilt, pain and pleasure a successful preventative measure? Or could this spectacle possibly even breed a different kind of sentiment and new sorts of pleasures – this time for the addressee of the law? As if, just to mention one example, "crimes of passion" ever had much to do with Feuerbach's calculus of pain and pleasure. Is this legal threat also not highly problematic for the constitutional right of "human dignity?" Since the punishment of criminal acts in theories of deterrence or prevention is used as a message to demonstrate the authority of norms, the punishing theater develops into a showcase for all legal subjects. The prisoner functions as a mere vehicle for that message. Most importantly, this meticulous calculation of human desires with all its naïve anthropological presuppositions (that all crimes are the result

of a rational calculus of consequences, for example) overlooks the enormous provocation it presents to the human psyche.

The theories of deterrence and prevention not only divulge a simplified view of the complete development of the criminal deed but, more importantly, discount the forces "beyond the pleasure principle." Does it still surprise social theorists that the efficacy of deterrence and prevention cannot be empirically proven? Consider the anecdote from the eighteenth century according to which the highest number of pick-pocketings occurred during the public execution of a pick-pocket. Furthermore, there is a certain specimen of characters, as Lacan repeatedly notes, who take this legal challenge as a matter of pride and who could not find a better reason to violate a law – precisely *because* it carries the ultimate punishment. Because committing a certain crime is against all "normal" reason and the computation of pleasures, one could be all the more tempted to do evil. De Sade's libertines actively search for such strictly forbidden fruits in order to maximize their crimes[15] and willingly sacrifice their life and even their afterlife for the pure pursuit of evil:

> I have discovered myself, while thinking of crime, while surrendering to it, or just after having executed it, in precisely the same state in which one is when confronted by a beautiful naked woman (. . .) now, if pleasure-taking (*jouissance*) is seasoned by a criminal flavoring, crime, dissociated from this pleasure, may become a joy in itself; there will be a certain delight in naked crime (. . .) Thus, let me imagine, the abduction of a girl on one's own account will give a very lively pleasure, but abduction in the interest of someone else will give all that pleasure with which the enjoyment of this girl is improved by rape (. . .) I have accustomed my senses to being moved by the rape of some girl *qua* rape (. . .); from this moment on, one tastes the greatest pleasure in everything criminal, and, by every imaginable device, one renders simple enjoyments as criminal as they can possibly be rendered (Sade, 1990, pp. 680–681).

According to Sade, rape is not about sex and rape is also not about having power; it is about "rape *qua* rape." This violation of somebody else's rights is usufruct in its original sense and as such bereft of sense. The most delicate enjoyment is always the enjoyment of crime *as* crime. A virtuous person (like Justine) is thus an outlaw in de Sade's criminal universe; she consistently violates the criminal codes that de Sade's citizens live by. Justine betrays the pure principles of *jouissance* and therefore must be punished while her evil sister Juliette will be rewarded for her "crime-abiding" conduct. A more radical reversal of Kant is hardly imaginable. What if the lecher would have followed a "categorical imperative of lust" as unconditionally as Kant commands for *his* law? What if the lecher elevated evil to the status of moral duty and experienced the Kantian "satisfaction" – not fear – while climbing up the gallows?[16]

The confessions of the narrator in Poe's "The Black Cat" strictly follow such a pure "spirit of PERVERSENESS" – the compulsory drive to do evil for evil's sake.

The finer senses can notice that even the following passage is despite its horror fully immersed in *jouissance*:

> I loathed, and dreaded, and would have rid myself of the monster had I dared – it was now, I say, the image of a hideous – of a ghastly thing – of the GALLOWS! – oh, mournful and terrible engine of Horror and of Crime – of Agony and of Death! (Poe, 1992, p. 481).

The narrator who shortly before his execution sits down to pen "the most wild yet most homely narrative" (Poe, 1992, p. 476) (along with Poe himself) sets free the energies of writerly *jouissance*. Foucault has shown how the confessional self-observation unearths new forms of sexuality. Here, however, the confessional activity itself becomes libidinally charged and gives rise to a satisfaction of its own. "Can I mime this crime one more time!" appears to be the dearest desire of the perverse confessional subject. "H.H." in *Lolita* yearns for such a repetition of transgression through confession. The very first lines of the book read: "Lolita, light of my life, fire of my loins. My sin, my soul. Lo-lee-ta: the tip of the tongue taking a trip of three steps down the palate to tap, at three, on the teeth. Lo.Lee.Ta." Repetition, criminal act and sexualized confession become in this passage one and the same thing.

As in the disintegrated narrative of the spirit of perverseness in Poe, the uncontrollable "engine" of language itself is governed by a highly peculiar repetition compulsion. While the massive outpouring of confessional speech since the eighteenth century tended to serve the regulation and administration of desire, confession increasingly takes the risk of developing into an uncontrollable engine of *jouissance*. Instead of the traditional function of confession as a "police of the heart," this narrative can be inhabited by the sometimes sudden, sometimes gradual, discharge of bits and pieces of *jouissance*. In order to understand why, for example, someone might confess that he has committed a crime while there is no evidence for this, we possibly need recourse to this *jouissance* in confessional language.

The narrator in Poe's "The Black Cat" cannot hold himself back when the police officers search his house. He is compelled to direct their attention directly to the wall where his murdered wife is buried, to the gaping wound or crypt in his own house. A thorough interpretation of this remarkable passage at the end of the story reveals how the irresistible urge to confess is inextricably coupled with the desire for punishment: "I delight," "I wish," "rabid desire," "mere frenzy of bravado," "half of horror, half of triumph," "terror and awe" (Poe, 1992, p. 483). The narrator perversely revels in the revelation of horror to the police. He must revisit the wound with witnesses and is secretly lured by the voice "from within the tomb." But how does confessional *jouissance* (rebellion) go together with the pressing urge to confess the crime and thus to desire punishment (submission)?

A small detour to Freud and Nietzsche may elucidate this oblique complex. In *The Ego and the Id*, Freud elaborates on a curious metaleptic reversal. He states that an unconscious sense of guilt can turn an innocent person into a criminal. When the sense of guilt becomes so pressing and unbearable, as Freud observed particularly with many young offenders, they commit a crime in order to attach this sense of guilt to an actual and real event (see Freud, 1969–1975, Vol. III, p. 319). The crime is thus the consequence and not the cause of the sense of guilt.

In another short article, Freud warns his criminological colleagues not to overwhelm the suspect with an array of intimidating strategies of interrogation (see Freud, 1924–1934, Vol. 10, p. 208); sometimes, as he argues, neurotics appear as if they were guilty although they are completely innocent of a particular crime. Many neurotics incriminate themselves and feel guilty, and they blame themselves for another, unrelated deed and display all signs of guilt. Suspects struck by this super-egoic guilt feeling thus can never, according to Freud, be distinguished from the actual perpetrator and his criminological methods. The criminal who acts out of a sense of guilt, a desire for self-punishment or moral masochism will always escape the intelligibility of criminological science. The psychoanalytic "Thing" operates beyond the pleasure principle and has to always count with the silent workings of the death drive. Freud mentions, moreover, that while the neurotic openly reveals his sense of guilt in gesture, affect and miming, a perpetrator in an interrogation will mobilize his conscious resistance to conceal his feelings and outwit the police with all means of deception: a realm of intentional cunning and mutual suspicion that psychoanalysis rarely has to face.

What is at stake in Freud's comparison of psychoanalysis to criminology is nothing less than the radical distinction between psychoanalytic truth and "factual" truth, psychic reality (the "real") and criminological reality. What in law is a factual lie can be simultaneously the revelation of a psychoanalytic truth. The rift between psychoanalysis and criminology could not be more radical, here the binary system of truth/lie, guilt/innocence, imprisonment/freedom and there a continuous variation of singular symptoms, psychic constellations, repetitions, masks, experimentation ideally without judgment. Psychoanalysis is a realm where the deduction of truth from its theatrical performance in symptoms is not rule-governed, but achieved through irregular, unexpected devices. The labyrinthine ruses of desire could be staged in puns, forms of speech or corporeal movements and cannot easily be transcribed or judged, but must be read and deciphered.[17]

Freud complicates this line of investigation by adding that the sense of guilt originates in the fantasies of two crimes, the parricide and the mother incest. These two original crimes stain our entire existence. They occurred only in fantasy but are nevertheless universally despised and cause profound unconscious guilt:

"In comparison to those two (big crimes), the crimes committed in order to fix the sense of guilt were certainly relieves for the tortured criminal" (Freud, 1969–1975, Vol. X, p. 253). By means of assuming responsibility for an actual crime, the guilt-ridden subject attempts to efface the two original crimes. The sense of guilt and the actual criminal act are thus strategic distractions of the ego to deceive the super-ego, to divert attention away from the primal crimes onto a different stage. The masochistic version of this dynamic is that the subject accepts a punishment in advance that is required by the super-ego for an imagined crime. The spectacle of punishment serves the purpose of taking the super-ego off guard and making it an accomplice in one's own game plan.[18]

It was Deleuze who discovered in "Coldness and Cruelty," that in the masochistic play the victim regularly remains the active part and arranges the whole scene according to his controlling desire; he even educates his own torturer and is the actual director of the performance. The passivity of the masochistic subject is concealed activity. Masochism preserves agency, even in rituals of submission and punishment. Masochistic and sadistic rituals, however, go further. Sadomasochistic fantasies mimic and ultimately mock practices of punishment. They restage and expose the "real" of pain and punishment by subtly zooming in on the *surplus-jouissance* that is left over (as nonsensical ritual and repetition) after all reasonable goals are subtracted. De Sade and Poe mock the Kantian court of conscience by *externalizing* Kant's court staff. The inherent compulsion of the law is turned inside out like a glove whose stitches become visible. What in Kant is the battle within the subject turns into de Sade's scene of an executioner torturing his victim and Poe's drama of the spirit of perverseness wrangling with God himself. De Sade and Poe repersonify the seemingly neutral procedure within an actual *mise-en-scène*. Freud similarly employs the topological structure (Ego-Id-Super-Ego) of the psychic apparatus for more than only a metaphorical illustration. The externalization and re-enactment of classical constellations of punishment allow for the "real" of punishment to expose themselves and to return – compulsively: there is no punishment without *jouissance*.

The cunning practice of masochistic contracts between mistress and slave is, according to Deleuze, a deceptive gesture. The slave signs his life away by making his torturer the accomplice of a parricide. The masochistic subject can subtly maintain its aggression by shifting places once again. In the cunning theater of pain and pleasure, neither the child nor the self is being beaten by the father, but the father himself is beaten:

> The masochist feels guilty; he asks to be beaten, he expiates, but why and for what crime? Is it not precisely the father-image in him that is thus miniaturized, beaten, ridiculed and humiliated? What the subject atones for is his resemblance to the father and the father's likeness in him. Hence the father is not so much the beater than the beaten (Deleuze, 1991, pp. 60–61).

The child is beating the father-image within himself. It needs the father to continue beating him and achieves this counter-aggression through a seemingly humble and submissive gesture. However, Deleuze takes another step. What, according to Deleuze, is the true guilt? It originates in having internalized the father-image, the super-ego, as having betrayed and compromised one's own desire – for the sake of a contentious struggle with the father. The talk about the aggressive father, and conversely, about the child's aggressions towards the father in conjunction with the sense of guilt, might be simply a ploy to distract from a more unsettling fact. The sadomasochistic fantasy theater of aggression, crime and punishment might serve to elude the trauma that there is no father and never was a father; thus, there may be no judge, God or guard to whom an ego, a criminal or a child can address its aggression. Moreover, no longer can an external agent serve as an excuse (as prohibition, guilt or obstacle to fulfillment) for the subject's betrayal of desire. The father was not killed and he did not beat; rather, he should be beaten and killed so that sovereign subjects, as in Nietzsche's will to power, could begin giving themselves laws and new pleasures.

The masochist reaches the limits of this insight: "The masochist thus liberates himself in preparation for a rebirth in which the father will have no part" (Deleuze, 1991, p. 66). The projection of a "new man" allows also for a retroactive murder; perhaps the father was already always dead? Thus, nobody was ever there to stabilize the symbolic order or guarantee the proper regulation of pleasure and pain?

Now it is possible to understand why the narrator in the "Black Cat" commits a crime in order to get rid of this "mournful and terrible engine of Horror and of Crime." No sense of guilt, as Freud thinks, drives him towards imagined or real crimes. This terrible engine of crime is an absolute, crazed and senseless machine of repetition gone wild. It has neither purpose nor sense nor goal and it develops into an awesome, independent force driven by *jouissance*: "sudden, frequent, and ungovernable outbursts of a fury to which I now blindly abandoned myself" (Poe, 1992, p. 481). This compulsive engine is utterly unbearable and the machine of repetition must be stopped. A real crime must provide reasons for this madness and alleviate the piercing torment of this engine. A punishing father or God must be invented. Could one possibly ascertain retroactively from the punishment and the pain what this crime-inducing repetition is all about? The confessional *jouissance* is supposed to revisit and recover the crypt around which the aberrations of mourning circle. Could this revisitation also stake out the territory after the murder of God? But the confessional narrative itself runs amok and overflows the recovery attempt. The criminal is drawn to the location of improper burial and to confession because neither any past nor future confession can adequately process *jouissance* which, as Lacan wrote, "does not stop to not

write itself." Whether the confessing subject is actually guilty or not does not matter for the question of confessional *jouissance*. The insufferable trauma is so pressing that every confession, no matter what content, exudes an enormous sense of relief.

As we know, Nietzsche knew all about the death of God and the drives of the "pale criminal." While Freud in *The Criminal out of Sense of Guilt* alludes to Nietzsche's chapter in *Thus Spoke Zarathustra* as a similar model which supports his own thesis, he nevertheless dulls Nietzsche's provocative theory of criminality by defending a primordial sense of guilt. Nietzsche has killed God without guilt because he was never there. The pale criminal does not act in the service of or against God or guilt:

> That he judged himself, that was his highest moment (. . .) (b)ut thought is one thing, the deed is another, and the image of the deed still another: the wheel of causality does not roll between them. (. . .) An image made this pale man pale. He was equal to his deed when he did it; but he could not bear its image after it was done. Now he saw himself as the doer of one deed. Madness I call this: the exception now became the essence for him (. . .) Thus speaks the red judge: 'Why did this criminal murder? He wanted to rob.' But I say to you: his soul wanted blood, not robbery; he thirsted after the bliss of the knife. His poor reason, however, did not comprehend this madness and persuaded him: 'What matters blood?' it asked; 'don't you want at least to commit a robbery with it? To take revenge?' And he listened to his poor reason; its speech lay upon him like lead; so he robbed when he murdered. He did not want to be ashamed of his madness (. . .). What is this man? A ball of wild snakes, which rarely enjoy rest from each other; so they go forth singly and seek prey in the world. Behold this poor body! What it suffered and coveted this poor soul interpreted for itself: it interpreted it as murderous lust and greed for the bliss of the knife (Z 38).

The parallels between the pale criminal and the narrator of "The Black Cat" are so striking that it almost seems as if Nietzsche modeled this chapter after Poe's perverse criminal. However, neither a sense of guilt nor the aggression towards a father as in Freud, neither a God nor an evil principle as in Poe, motivates the crime of the pale criminal. Nietzsche would see those reasons as retroactive rationalizations of "madness." Criminal motives are usually interpreted onto the murder after the fact. The criminal and the judge invent motives after the crime in order to make the murder understandable and to bring this "ball of wild snakes" under control. The pale criminal even robs his victim only so that he himself and his judges can find a rational motive for the criminal frenzy.

Crimes without apparent motive are the most disturbing challenges for modern criminology. At the beginning of Foucault's article about the criminological concept of the "dangerous individual," he quotes the exchange in 1975, between a judge and the accused in a serial rape case:

> 'Have you tried to reflect upon your case?' – Silence. 'Why, at twenty-two years of age, do such violent urges overtake you? You must make an effort to analyze yourself. You are the

> one who has the keys to your own actions. Explain yourself.' – Silence. 'Why would you do it again?' – Silence. (. . .) it happens that the machinery jams, the gears seize up. Why? Because the accused remains silent. (. . .) The accused evades a question which is essential in the eyes of a modern tribunal, but which would have has a strange ring to it 150 years ago: 'Who are you?' (Foucault, 1978, p. 1).

The pale criminal, along with many "real" criminals, cannot answer this modern question. Hence, the answers of criminological and psychiatric studies up to today appear quite helpless. The darker motives for punishment are as unclear as the motives for crimes. The detective or the criminologist reconstructs the deed according to a particular narrative order with a clear beginning and an end. The neat juridical separations and narratives of the crime (motive, plan, intent, deed, etc.) are unable to explain the primary union of doer and deed: "He was equal to his deed when he did it" (Z 38). What criminology can divine nowadays are only simplified fixations on an isolated criminal act, which is an idea completely foreign to Nietzsche and to psychoanalytic exploration.

What was only an exceptional occurrence "now became the essence for him." The pale criminal is now reduced to the symbolic assignment of a judicial site: "you are a murderer!" The body and madness think and act fast, they match the speed of the deed; reason and speech, on the other hand, lag behind: the speech of reason "lay(s) upon him like lead" (Z 39). Speech and reason are too slow for the rapid outbursts of crime which are inextricably tied up with the person of the criminal. And the "wheel of causality" is a meager spare tire that only derails the "highest moment" of autonomous judgment.

Surprisingly, the criminal is more ashamed of being perceived as a mad and unreasonable killer than of being a murderer with a particular motive. It is apparently much more important to be punished as a rational being with comprehensible motivations and free will than to be discarded as a psychotic killing machine. In the former case the punished is still seen to share the same symbolic universe as "healthy" people. Although he is sentenced to death as a robber and murderer he is given a recognized place as a legal subject. He is not an "unlawful combatant," or an insect ("worm," Z 39) without legal address. Punishment also always acknowledges that he is a legal subject worthy of being punished.

For Nietzsche, however, this re-entrance into penal rationality and societal morality means a betrayal of *jouissance*. The absence of deliberate intent and reason are the moments of the closest proximity to the terrible engine of repetition. In the brief event of outburst, the criminal is the closest to his actions. Then, after a lucky moment of self-judgment, his thoughts and actions become heteronymous, fully overcoded by the dominant ideology of morality and virtues. After the deed, nothing in him remains like himself. For a fleeting instant during the act of judging himself, the "sublime" speaks; immediately after the murder (with his

robbery) he crosses the threshold to compromise: "he could not bear the image after it was done." From then onwards he becomes permanently fixated upon this one deed which now develops into the defining instance of his life. This is already a diversion from the traumatic encounter with *jouissance*. Why is the "burden" of himself much more horrendous to the pale criminal than the "guilt" (Z 39) of murder that now lies upon him? Why does the pale criminal interpret his suffering and coveting as "murderous lust and greed?" The torment of his madness is so pressing and his pain so great that he finds no other escape route than to fasten the insufferable energies of drives to a lust for murder and crime. The urge finally to tame *jouissance* by committing murder becomes overwhelming. But "there is no redemption for one who suffers so of himself" (Z 38). For the pale criminal, prohibitions, regulations and punishment are not the obstacles to obtaining *jouissance*, they are relieves from its crazy demands.

The "red judge" attempts to creep into the soul of the criminal but can ultimately respond only with the traditional moralization of criminology and punishment. "Villain," "scoundrel," "sinner" and intense hatred are the unspoken thoughts and feelings of the judges. "He wanted to rob" are the explanations, reducing the crime to baseness and to what is commonly circumscribed as "evil":

> (T)hey want to hurt with that which hurts them (. . .) they suffered and wanted to inflict suffering (. . .) I wish they had a madness of which they might perish like this pale criminal. Verily, I wish their madness were called truth or loyalty or justice: but they have their virtue in order to live long and in wretched contentment (Z 39).

Nietzsche sides with *jouissance* against *ressentiment*, precisely because it runs counter to contentment, pleasure or happiness. "I suffer, therefore I am. I exist and I affirm life" could be Nietzsche's counter-manifesto against the negating forces of guilt and punishment. At least the pale criminal had *his* evil, something that is more his own. This criminal act was not the heteronymous evil imposed upon him by the reactive underpinnings of virtue. Nietzsche's aggression, however, does not fall victim to the later compromises of the pale criminal or to the antagonistic politics of hatred in modern modes of "governing through crime." The fateful direction of modern politics, according to Nietzsche, has to be re-examined; it requires the abolition of the penal law along with the entire politics of hostility.

THE POLITICS OF HOSTILITY AND *RESSENTIMENT* (NIETZSCHE)

Derrida's *Politics of Friendship* demonstrates that the political theories in the Western tradition since their inception are haunted by a central figure, the enemy

(see Derrida, 1997, pp. 112–137). Carl Schmitt expresses that tradition unequivocally: "For as long as a people exists politically, it must determine by itself the distinction of friend and enemy." Even the most intimate working of the psyche is structured along those antagonistic lines. As we saw particularly with the example of Kant's internalized trials, the politics of self-governance constitutes itself by delimiting a hostile topology inside the subject. This idea is not foreign to Carl Schmitt: "The enemy is the embodiment of your own question."[19] Although Carl Schmitt's concept of the political is primarily concerned with external politics, on warfare of "Us" against "Them," the quotation shows that the matter of the political is also addressed to us. We have to ask ourselves what this enemy means for us and why, to speak with Nietzsche, ressentiment and infinite hatred (even in the guise of love) have become our own questions. The militarization of politics in Schmitt fantasizes the submission or the murder of the enemy. Does the enemy in this case not turn into the victim? Would this murder not impact ourselves as well since the enemy is constitutive of us and the political in general?

Everything returns to the question of crime. Schmitt remarks that the aggressor of another country in recent international law has become the delinquent, the evildoer. In international law, according to Schmitt, the enemy and the aggressor have been declared criminals and placed under the rule of penal law. Schmitt describes this recent criminalization of external politics as a moralization of war that amounts to a threat for the essence of the political (see Schmitt, 1963, p. 103).

Criminology since the social defense theory of the Italian school, on the other hand, has politicized the criminal man. The criminal is now the true enemy of the polity. Garofalo writes in the preface of his *Criminology* from 1887: "Who is the enemy who has devastated this land? It is a mysterious enemy, unknown to history, his name is: the criminal." (quoted from Foucault, 1978, p. 12) Criminology has made the figure of the criminal man the prime enemy of the polity while external politics has turned the external enemy into the criminal. The intimate ties between politics and crime are established; between both is a relation of mutual exchange. The problem of crime is now more than ever a genuinely political question as all concepts of the political move through the issue of crime. This can be observed in contemporary foreign politics which have become a matter of police intervention and prosecution. In short, crime, politics and the inner workings of the psyche form a discursive network of dense crossovers and interrelations. The endless procedures of blaming, accusation, imputation and persecution determine the intrapsychic battle as much as the structure of external and internal politics. Are trials, prisons (camps) and battlefields the places where the fate of modern politics and democratic participation will be decided? Will the histories of politics and crime continue to be littered with corpses? Derrida in *The Politics of Friendship* thus urges:

> But it will have been necessary to endure the crime (. . .) Between these incriminations and recriminations, between these forms of *grief* in which accusation mingles with mourning to cry out from an infinite wound. As if nothing could happen or be thought elsewhere than between these imputable crimes, between sentiments of guilt, responsibilities, compassions, testaments and specters: endless processions and trials (Derrida, 1997, p. X).

What is at stake is the possibility of thinking and acting otherwise. Through a re-examination of the nomo-penological complex that nowadays governs the space of the political, a contest and protest could be launched. Derrida insists that crime must be endured, a view that Nietzsche shared in his chapter on the pale criminal. It may be useful to note on a more practical matter that the fantasy of the elimination of crime would create such strong collective sentiments that the smallest deviations would be perceived as crimes. Could the fantasy theater of crime and punishment be rewritten? Nietzsche, as Derrida points out (see Derrida, 1997, pp. 26–48), certainly hopes for such a complete revolution in our psychic economy.

Could there be a social life with crime but without enemies and a penal law with responsibility but without punishment? He who is absorbed in combating an enemy, according to Nietzsche, threatens his own life forces. The abandonment of a political model of hostility means simultaneously breaking company with the "hostility to life" (G 50) in *ressentiment*. But instead of a politics of friendship, Nietzsche contemplates a "productive" politics of aggression that is neither a reactive politics of *ressentiment* nor a communitarian vision of community nor a liberal theory of distribution of rights and duties. In Nietzsche, this new politics would do justice to a vision of "*self-cancellation of justice*" (G 47) (see also below).

What determines the politics of *ressentiment* and crime? Slave morality, above all, "always first needs a hostile world," the "evil enemy" (G 21). The imputation of wrongs and the perpetual machinery of accusation are interiorized forms of aggression. But *ressentiment* is not satisfied with merely denouncing criminals; it needs sinners in order to make guilt and indebtedness eternal. The reactive thought inverts active aggression, thereby triggering modes of self-blaming and producing guilty legal subjects and the internal space of bad conscience. A whole system of punishment is already in place to enforce this morality. Morality is only the raised finger but punishment the iron fist behind all morality. This implies a reversal: morality did not precede the development of institutions of punishment. It is the obverse, that concrete and existing practices of pain and punishment prompted the invention of reasons for senseless suffering and pain.

Nietzsche discovers the birth of morality out of the spirit of penal practice. A new sense must be found for pain, an internal sense that could explain suffering. I follow here Deleuze's analysis of this nexus of pain, free will and punishment

(see Deleuze, 1983, pp. 129–135) Pain is made the consequence of a sin and a fault and becomes the result of a punishing intent. Pain is thus interpreted as punishment and the self becomes so charged with guilt that no punishment can ever compensate the violation. But pain also carries with it a promise, that of salvation. The turning back against itself in bad conscience and guilt is the artificial manufacturing of more pain in order to become worthy of salvation.

There is thus an extremely *humiliating* promise inherent in pain: "this uncanny and horrifying-pleasurable work of a soul compliant-conflicted with itself, that makes itself suffer out of pleasure in making-suffer" (G 59). The self becomes the enemy of itself and hides its hatred of others under the lure of love. But at the same time the self gains a system of ideals, a divine mechanism that conceals its utilitarianism. *Ressentiment* invents goods and ideals that are disinterested in essence – they turn into values *in themselves*. The legal subject and free will are such goods. According to Kant's imperative, each subject should always be treated as if it were an end in itself, never only the means for another end. Nietzsche demonstrates that this fiction of the legal subject as value in and of itself is the pinnacle of governing subjects through crime – the triumph of a politics of hostility.

This exclusionary discourse of *ressentiment* produces the serialized confirmation of, as Nietzsche would say, judgment (richten), execution (hinrichten) and revenge (rächen). Nietzsche's account of the moralizing view of the subject relies moreover upon the theory of free will. That the criminal could have acted otherwise is the basic premise of legal subjectivity. Paradoxically Nietzsche tries to liberate modern subjects from their free will: "the will is still a prisoner. Willing liberates" (Z 139). Freedom as acting and willing has to be defended against the legal theory of free will. Nietzsche called the modern invention of free will and the "soul" the best self-deception in the genealogy of thought as it allows the priest caste to interpret the mental imprisonment as freedom and as desert. Modern man is condemned to his own "freedom" and thoughts. A similar "forced choice" is placed on the much cherished independence and freedom of legal practice: "all accusation is presumed to be a search for truth but, technically, it is a search for a decision and thus, in essence, it seeks not simply truth but a finality: a force of resolution" (Felman, 1997, p. 738).

What does Nietzsche suggest to counter the all-encompassing politics of *ressentiment* which holds at its core the interlacing of hostility, guilt, crime and punishment? What could break the compulsion to repeat and throw sand into the smooth machinery of pain and punishment? There are several escape routes that can be outlined briefly:

(1) Michael Hardt introduced a crucial dimension with respect to understanding Nietzsche's analytical approach. Nietzsche's dramatized attacks against

"neutrality," "substance" or "subjectivity" are not external to his concepts but structure them from within; it takes Nietzsche's "style" into account.

> The central question for Platonic inquiry, Deleuze claims, is 'Qu-est-ce-que?': 'What is beauty, what is justice, etc.?' Nietzsche, though, wants to change the central question to 'Qui?': 'Who is beautiful?', or rather, 'Which one is beautiful?' (. . .) In effect, the two questions point to different worlds for their answers. Deleuze will later call the materialist question 'the method of dramatization' and insist that it is the primary form of inquiry throughout the history of philosophy (except perhaps in the work of Hegel). The method of dramatization, then, is an elaboration of perspectivism as part of a critique of interest and value: 'It is not enough to pose the abstract question 'what is the true?'; rather, we must ask 'who wants the true, when and where, how and how much?' (Hardt, 1994, p. 30).

Nietzsche's radical perspectivism counts with the particular position of the subject in the moment of enunciation. He is interested in the subject of speech, not of language. What is freedom? or What is free will? are for Nietzsche empty questions; only freedom for whom, to do what? interests him. Nietzsche's analysis of punishment is such an exercise in multiperspectivism. The multiple practices of punishment in the history of humankind demonstrate par excellence Nietzsche's mode of genealogical investigation. It becomes visible "how accidental 'the meaning' of punishment is and how one and the same procedure can be used, interpreted, and arranged with respect to fundamentally different intentions" (G 53). Why and how do we punish, when, with what means and under what circumstances? The answers reveal the state of ourselves: "tell me how we punish and I tell you who you are." According to Nietzsche, our state is the state of *ressentiment* and our system of punishment demonstrates that we live in a politics of hostility and crime. Perspectivism is a first diagnosis and critique of this state.

(2) Nietzsche pledges for the abolition of penal law for the sake of a civil law solution. This includes the detachment of punishment from guilt and free will. It is imaginable that there was a time in legal history where punishment took place without guilt and "guilt" (accountability) without punishment (see G 47)? The criminal and his deed must be isolated from each other, not to construe the fiction of a neutral legal subject behind the deed, but to consent that the exception of crime does not become the lone essence of the offender. Ultimately, as Nietzsche suggests, every offense is "*capable of being paid off*." A unique "self-cancellation of justice," a suspension of the legal hostility, is *possible*. The "mercy" ("what pretty name") of the strong who are powerful enough to absorb and able to integrate the crime into their universe without eternal *ressentiment*, could suspend law and justice. This "beyond-the-law" (G 48) is a break with the ban and fate of law. In more psychoanalytic terms:

the strong are strong enough to bear (the trauma) of *jouissance*. To accept the excess of strength – itself traumatic – allows for the power of mercy. Mercy is a crucial marker that affirms willing and power. And anger can be held within bounds as it can be a spontaneous action (like parents punishing their children, see G 39) rather than a calculated, sustained energy as in the charge with legal and moral guilt.

Nietzsche attempts to uncover a stage in legal history where such civil law solutions of "purchase, sale, exchange, trade, and commerce" (G 40) were still in place: " 'the criminal has earned his punishment *because* he could have acted otherwise' – is in fact a sophisticated form of human judging and inferring that was attained extremely late" (G 39). Nietzsche is correct, the first strong indications of this idea goes back to the sixteenth century (*The Carolina Criminalis* from 1532) and only with the scientification of law and intent in the nineteenth century is this link between free will, punishment and desert firmly established. Once the public administration of violence completely loses its sense there may be a chance for the disconnection of guilt from retribution. The will must learn how "to will backwards" and to "unlearn the spirit of revenge" (Z 141); it is the task of the will to recreate the past, including the past of punishment. This past must be redeemed and recovered: "To redeem those who lived in the past and to recreate all 'it was' into a 'thus I willed it' – that alone should I call redemption" (Z 139).

(3) Nietzsche insists on the force of a doing without legal subjectivity and on an exteriorized thought as affect and body: an active, corporeal thought which thinks against reason: "There is more reason in your body than in your best wisdom" (Z 35). To unleash the force of doing and thinking is to drive thought towards its corporeal and affective limits to the point where affects, will and acting seize thought and force it to think. What does this new theory of action mean for legal thought? First, law must completely rethink its own theory of action based on causality and a certain narrative order. Instead, Nietzsche advocates another concept to demarcate and connect the forces of doing, thinking and feeling based on a different physiological, grammatical and narrative order. Secondly, this new theory of action and thinking means abandoning "the battle and battlefield of virtues" (Z 37). That is, it is necessary to interrupt the relation to the fantasies of crime and punishment – in the psyche, in law and in politics through acting, thinking and feeling actively. The whole system of hostility must yield to the life-affirming forces. Affirmation means that the self and the concept of the political ought not to move through the figure of the enemy.

The self and a polity have traditionally defined themselves via the detour of the hatred of an opponent (criminal, foreigner, "Black," "Jew") who serves as an obstacle to fulfillment. Thirdly, the mandate to "become what you are" in Nietzsche means that the self must endure the burden of itself and embrace senseless suffering without divining a salvation or justification-machinery into pain. The "highest moment" of the pale criminal is his self-judgment; this is Nietzsche's model of self-accountability and sovereign law-giving. The self bears the consequences of its deeds without blaming a father, a god or another obstacle: "It must become the judge, the avenger, and the victim of its own law" (Z 114). The self posits its laws and is being posited by its own laws. The self in Nietzsche is the crucial site of activity, the body's active forces: "A most powerful being, an unknown sage – he is called Self. He inhabits your body, he is your body" (Z 42). Its activity is beyond consciousness, it consists of creating, willing, dominating and appropriating. A future legislation would stay faithful to this self, the drives of *jouissance* and does not surrender its administration to the public authorities, laws or morals.

(4) Finally, modernity, and Nietzsche in particular, has brought forth the challenge of a "singular justice" (see Menke, 1996, pp. 111–136) which is radically opposed to the way the law addresses the individual as a person. The legal address remains abstract in comparison to the self-relation of the individual. Criminology, the theories of deterrence, prevention and rehabilitation presuppose that the self must adjust to the basic rules of the normative order. Nietzsche reverses the question: perhaps the normative order (the law) does not fit the demands of the self? We would acknowledge this reversal with respect to totalitarian regimes but hesitate to pose the same demand for democratic orders. We assume (and this is Nietzsche's line of attack) the clear privilege of the "voluntary" legal and communal orders over the singular. But singular justice (the right to individual self-realization, the accordance of the self with its particular wishes, desires, limits or values) is neither compromisable nor simply subordinate to the demands of abstract legal subjectivity.

The collision between both must be acknowledged rather than merely addressed as a matter of law (Lyotard's idea of the *differend*). The moral subtext of punishment and, conversely, the violent subtext of morality force the betrayal or sacrifice of one's own principles and obsessions. Nietzsche insists on the radical incompatibility of individual desires and legal address. For example, the legal demand of equality and universality puts a particular constraint on thinking and acting. Legal subjects adjust their plans and goals to the legal requirements of equality, or better, what subjects require from themselves in the name of equality. To live only in a legally and morally determined universe would be a life of

slavery and reaction. Solidarity with others (a social contract) constricts individual sovereignty; the adjustment to others and to the "Other" holds back one's inherent possibilities.

This insistence on the integrity of the self and its expressions is much more radical than the capitalist idea of self-fulfillment. It is not about adjustment and pleasures. It invents new possibilities of life and entails the active destruction of the extra burden of a certain nomo-moral tradition. This new life is non-utilitarian, aggressive and without teleological goal. It acknowledges the force of repetition in drives in *jouissance*. There are three crucial teachings of Nietzsche that demarcate the future of man, the overman (Übermensch), the will to power and the eternal return. The teaching of the will to power and the eternal return (see Z 155–160, 216–221) are the most enigmatic and remain the closest to the psychoanalytic discovery of the drives and of *jouissance*. And it remains crucial to decipher their importance for any philosophy of punishment.

NOTES

1. For Lacan's exploration of *jouissance* see the beginning of Lacan's *Encore* (1975, pp. 9–16). For a somewhat simplified and incomplete, but nevertheless useful account of the difference between the psychoanalytic notion of desire and *jouissance*, see Zizek's *The Ticklish Subject* (Zizek, 2000, pp. 290–306). Lacan writes: "For desire is a defense against going beyond a certain limit in *jouissance*" (Lacan, 1977, p. 322). From the standpoint of *jouissance*, desire as such is already a compromise and a defense formation against the circular force of drives. Desire is ruled by the economy of lack (at its place) and of (pure) loss. In the late Lacan however, the movement of drive (repetition, circulation of failed attempts) shifts to the foreground. It would, however, be foolish to oppose one emphasis against the other without acknowledging that they are two different perspectives on a similar imperative: How to be faithful to one's desire, that is how to not compromise *jouissance*.

2. Lacan sees in this move from property to body the slippage into the sexual underpinnings of usufruct since this right also regulates the concubinal rights of a husband over his wife (Lacan, 1975, p. 10). The reduction of *jouissance* to "phallic jouissance," however, belongs for Lacan to the most common misunderstandings.

3. "Anyone can see that if the moral law is, in effect, capable of playing some role here, it is precisely as a support for the *jouissance* involved; it is so that the sin becomes what Saint Paul calls inordinately sinful. That's what Kant on this occasion simply ignores" (Lacan, 1992, p. 189).

4. This insight into the joyfulness of the will belongs to Zarathustra's pivotal teachings: "(M)y will always always comes to me as my liberator and joy-bringer. Willing liberates: that is the true teaching of will and liberty – thus Zarathustra teaches it" (Upon the Blessed Isles, Z 87).

5. See the flagrant indication of that development in Cable News, the "News Alert," "Breaking News," "Special News Report."

6. Nietzsche unloads the entire garden variety of shifts in the wildly divergent theories of punishment: "To give at least some idea of how uncertain, how after-the-fact, how accidental 'the meaning' of punishment is and how one and the same procedure can be used, interpreted, arranged with respect to fundamentally different intentions: I offer here the schema that offered itself to me on the basis of a relatively small and random body of material. Punishment as rendering-harmless, as prevention of further injury. Punishment as payment to the injured party for the injury (. . .) as isolation of a disturbance (. . .) as instilling fear (. . .) as a kind of compensation for the benefits the criminal has enjoyed up to that point (. . .) as elimination of a degenerating element (. . .) as a means for preserving the purity of the race or for maintaining a social type (. . .) as festival, namely as mocking and doing violence to a finally defeated enemy (. . .) as making a memory, whether for the one who suffers the punishment – so-called improvement – or for the witness of the execution" (G 53). Nietzsche does not stop here, he continues to enumerate more and other goals of punishment. It is utterly surprising that Nietzsche mentions the most prevalent 20th-century theories of punishment before their actual institution. Nietzsche anticipates the theory of special prevention of Franz von Liszt (rehabilitation or elimination), the theory of general prevention (the negative as well as the positive version) of the Italian criminological school, particularly of Enrico Ferri.

7. See also Lacan's "The subversion of the subject and the dialectic of desire in the Freudian unconscious" for a distinction between desire and *jouissance*. In this remarkable article, Lacan explains how the sexualized form of *jouissance* is only a reduced and domesticated version of the barred impossibility of another, much more foundational *jouissance*: "But it is not the Law itself that bars the subject's access to *jouissance* – rather it creates out of an almost natural barrier a barred subject. For it is pleasure that sets the limits on *jouissance*, pleasure as that which binds incoherent life together, until another, unchallengeable, prohibition arises from the regulation that Freud discovered as the primary process and appropriate law of pleasure. (. . .) It is the only indication of that *jouissance* of its infinitude that brings with it the mark of its prohibition, and, in order to constitute that mark, involves a sacrifice; that which is made in one and the same act with the choice of its symbol, the phallus. This choice is allowed because the phallus, that is, the image of the penis, is negativity in its place in the specular image. It is what predestines the phallus to embody *jouissance* in the dialectic of desire" (Lacan, 1977, p. 319). The traumatic, unbearable disturbance of *jouissance* is tamed as pleasure, sexuality or as the pleasure-pain nexus in perversions, usually symbolized in the phallus and embodied in the penis.

8. On the crucial societal role of anger in punishment see Walter Berns' defense of capital punishment. In Berns, the legitimation of capital punishment has to draw from the dramatizing energies of literary examples and reappropriate their modes of angry punishment for a genuine American version of capital punishment. Satisfaction through fierceful revenge on the criminal fortifies and enhances "the majesty of the moral order that is embodied in our law" (Berns, 1979, p. 172).

9. Kant firmly states that "a mistaken conscience is impossible" ("daβ nämlich ein irrendes Gewissen ein Unding sei," Kant, 1993, p. 532). This impossible "Un-" of the "no-thing" is precisely the mark of repression.

10. This lies at the center of Kant's attempt of purification from all contaminating utilitarian goals such as prevention, deterrence, rehabilitation.

11. See for example the "infinite violation of being" and the concept of "total injustice" in §127 of the *Philosophy of Right* (Hegel, 1972, p. 117).

12. German penal theory nowadays is widely dominated by the theory of *positive Generalprävention*: "Punishment charges norm-breaking behavior with the consequences of costs and increases therefore the chance that this behavior is not commonly learned and accepted. Therefore punishment is exacted in order to practice faith in law (. . .) it is about the training of the acceptance of consequences (. . .) the model for the task of punishment is *general prevention through the practice of recognition of norms*" (Jacobs, 1983, p. 8).

13. §2 S.1 of the German *Strafvollzugsordnung* (StVollzG) from 1977 explicitly inserts the goal of rehabilitation into the proceedings of punishment: "Through the term of imprisonment the prisoner ought to learn how to lead a life in social responsibility without criminal offences."

14. Pasquino discusses this new theater of *Abschreckung* without analyzing the psychological effects of this new theory of deterrence (see Pasquino, 1991, p. 240).

15. Sade's libertines multiply the crimes and ideally violate a maximum of laws in one instance (murder, adultery, incest, debauchery, blasphemy, etc.). The double life, to commit crimes under the guise of honesty and law-abidance, gives their transgressions another "kick": "Dolmance: (A)sk them (my contemporaries) what they think of Dolmancé, and they will all tell you that I am an honest man, whereas there is not a single crime whereof I have not gleaned the most exquisite delights. (. . .) Madame De Saint-Ange – 'Oh, let's fuck! fuck! . . . I can bear such language no longer; we'll return to it. But save your confessions for later, Dolmancé' " (Sade, 1990, p. 279).

16. How little effects the doctrine of deterrence had on the real De Sade, himself a fervent opponent of the death penalty, can be seen in his stunning letter to his wife from prison. Sade's passion of resistance is remarkable; it is the elevation of evil to a principle and a duty with its own kind of delights: "If then, as you tell me, they are willing to pay for it by the sacrifice of my principles or my tastes, we may bid one another an eternal adieu, for rather than part with those, I would sacrifice a thousand lives and a thousand liberties, if I had them. These principles and these tastes, I am their fanatic adherent; and fanaticism in me is the product of the persecutions I have endured from my tyrants. The longer they continue their vexations, the deeper they root my principles in my heart, and I openly declare that no one need ever talk to me of liberty if it is offered to me only in return for their destruction" (Sade, 1990, p. IX).

17. It is not by chance that Freud suggests to his criminological audience to suspend judgments and decision during a trial and error stage where his new insights could be tested thoroughly (see Freud, 1924–1934, Vol. 10, p. 208).

18. I follow here Zizek's and Deleuze's analysis of this particular masochistic constellation (see Deleuze, 1991, pp. 69–80; Zizek, 2000, pp. 280–283).

19. See the curious development of this famous quote in Bredekamp (1999, p. 248).

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VICTIM STORIES: DOCUMENTING PAIN, PUNISHMENT, PRISON AND POWER

Alexandra Juhasz

ABSTRACT

Can the crisis of women's victimization in prison be represented in ways that challenge this harm without its self-perpetuation? As a documentary scholar and maker, this was my overriding concern for an activist video project about women and prison. Certainly, documentary and prison tell us much about each other in their shared capacity to weaken some and strengthen others, by way of technologies of vision and distance, while buttressing hegemonic power. Our project was to minimize the possibility of documentary as prison by taking responsibility for the victim documentary itself as a system of power and pain, objectification and punishment.

> Unless people have the chance to tell the stories of their pain and suffering, they are diminished and, yes, victimized. Yet telling one's story as a victim story risks reducing oneself to stereotypes of suffering. Describing yourself as a victim has a self-fulfilling and self-perpetuating feature; and yet, failing to acknowledge or assert one's victimization leaves the harm unaddressed and the perpetrators unchallenged.
>
> Martha Minnow, "Surviving Victim Talk"

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REPRESENTING THE VICTIM

The dilemma addressed by Minnow (1993) – the contradictions inherent in representing victimhood – is the concern of my paper. Namely: given that female inmates of American prisons are victims of state, social, and ideological systems (such as prison, welfare, racism, sexism, and physical, emotional or drug abuse) that punish them for their usually victimless crimes; and given that a special condition of their punishment is a near black-out of representations of their pain and suffering in and out of prison; and given that the most common response to such a predicament is the unleashing of that too-familiar form, the victim documentary; and given that the victim documentary must perform the work of re-victimizing in the manner detailed by Minnow, and in other ways to be listed shortly; can the crisis of women's victimization in prison be represented in ways that challenge this harm without its self-perpetuation?

As a documentary scholar and maker, this was my overriding concern as I organized the activist video project about women and prison that produced *RELEASED*: *5 Short Videos about Women and Prison* (30 mins, 2000):[1] I simply could not be responsible for another *victim documentary*. This original and still dominant form of documentary focuses its attention on the talking-head testimony of one who has experienced victimization. In the process, her weakness is confirmed: it must be based in a prior pain or punishment meted out for her pitiful difference. It is the victim's very fragility (through her inferior position attributed to race, class, gender, sexuality, health, nationality, and the like) that makes her the documentary's subject; it is the documentarian's very potency (due to economic, technological, social, national superiority) that allows him to record her pain; it is the viewers' curiosity, their hunger for knowledge, founded in and protected by their distance from the scene/seen, that elevates them from the victim.

You've seen it before: Nanook of the North, struggling to make fire from moss, reminding us how very warm is the West; the only two survivors of the Chelmo concentration camp, persuaded to revisit long sublimated horrors, while the documentarian coaxes, we watch, and they weep; Duran Ruiz, prostitute and junkie, shooting up in her neck in a public bathroom, or leaning into a car window to proposition a potential customer, her too-tight mini-skirt riding up her legs to reveal too-much of her privates. Ruiz and another featured prostitute "gave *20/20* producer Anna Sims Phillips unprecedented access to their lives, allowing her to record and document their every move," according to ABCNEWS.com about its expose on prostitution, *Women of the Night*. "Phillips' unusual approach to her stories enables the people she covers to reveal the most intimate parts of their lives." But this is hardly unusual. In my three sample victim documentaries, as is true for them all, the poor, the brown, the female, the hungry get our undivided

attention at last, thanks to the documentarian: "It was the first time she felt she was worth something . . ." says Phillips of Ruiz. "I brought humanity to her."

Deviations from such lofty or low positions are likely, and even expected, in the victim documentary. Shifts and alterations in arrangements of power can occur between all participants in such scenes: in *Women of the Night*, Ruiz turns the table on Phillips and starts interviewing her about where *she* lives and how *she* works: how does Phillips expect Ruiz to get a job if she has nowhere to sleep or shower? Then a few years after its airing, Ruiz makes her own short video, *Gram O'Pussy, her* expose of the victimization she suffered at the hands of *20/20* (this is one of the five shorts in *RELEASED*). Perhaps some viewers of what is considered the first documentary, *Nanook of the North* (Robert Flaherty, 1922) recognize Nanook's dignity, captured in Flaherty's stark and haunting images of his rugged survival, rather than the "lovable, happy-go-lucky Eskimo" who Flaherty introduces through inter-titles. And, a great many believe that repeated exposure, witnessing, testimony about the unbearable atrocities of the Holocaust (as is done in Claude Lanzmann's 1985 *Shoah*) is an essential component of a public knowledge that will ensure the impossibility of future mass genocide.

Documentarians also experiment with formal methods developed for the precise purposes of re-thinking or re-reorganizing power relations. Reflexive, collaborative, personal or autobiographical strategies are often used to represent an (other's) suffering. When a Holocaust documentary is made by a survivor, power moves differently; as is true when a viewer identifies across difference to recognize mutuality. Yet, it is definitive of the victim documentary form that we easily and frequently return to our familiar and dominant documentary positions for re-equilibrium. ABCNEWS.com tells us: "Phillips stresses the important role the women assumed in her life as well. Just as she witnessed deeply personal moments in their lives, she says they saw her when she faced difficulties of her own. However, she underscores an important distinction: 'I (always) remembered that I am the journalist.' " Needless to say, remembering one is the journalist and not the junkie is the most comfortable arrangement, one where a re-equilibrium of disequilibrium is reasserted. The customary and unbalanced power relations embedded in the documentary impulse, activity, and machinery simply reflect and then naturally re-establish those in the world it so mechanically reproduces. As hard as it is to learn something new, we need a familiar place to repose!

How then to represent the pain and punishment of prison, its tactics and purpose often the dehumanization of its charges, through a technology that functions similarly? For the documentary scene, like that of any debasement that leads to claims of victimization, is structured on an irrefutable power imbalance: an unequal exchange between a subject and his object. Pat Loud, one of the "subjects" of "An American Family" – a documentary series that broadcast a year

of her family's life (including her husband's frequent infidelities that led to their televised divorce) to a hungry American audience – complains succinctly about a documentary experience defined by "the treatment of us as objects and things instead of people" (quoted in Rabinowitz, 1994). In the first few minutes of the nine-plus hour *Shoah*, Lanzmann introduces us to Mordechai Podchelebrik, one of the two, sole survivors of Chelmo. In a long, excruciating take, Lanzmann, off-screen and in French prods Podchelebrik, in Hebrew and then in translation. His face fills the screen. A hand on his shoulder, clearly there in support, makes it into frame's edge. We hear: "He thanks God for what remains and that he can forget. And he won't talk about that." "Does he think it's good to talk about it?" "For me, it's not good." "Then why is he talking about it?" "Because you're insisting on it." "He survived, but is he really alive, or . . ."

Loud describes, and Lanzmann cruelly intimates, both an unpleasant victim feeling and the documentary practice that records and recreates it: being treated as an object or thing, something dead. Yes, most participants in such projects – from documentarians to subject to viewers – agree ("because you're insisting on it") to engage in the enterprise, this in the name of the social good that is agreed to come from seeing more, knowing more. And undoubtedly knowledge is gained: "Ultimately, Phillips says that after hanging out with prostitutes, instead of feeling pity, disappointment or revulsion, she is grateful for the time they gave her. 'They teach me about life,' she says. 'They are my greatest teachers' " (ABCNEWS.com). Epistephelia has been theorized as the primary psychoanalytic impulse driving documentary (Nichols, 1991). We watch (and even testify and shoot) to learn; learning feels good; learning tells us more while reminding us who we are and what we already know. This can be contrasted to narrative's scopophilia and its associated sadism and masochism (Cowie, 1999).

What a few subjects of documentary beg us to consider is what feminists have more vehemently flagged about narrative: how badly it feels to be the object of such an impulse. The objectified remind us that from where they sit, there is a cost to any knowledge so gained. Once you hear this, it's hard to ignore; the hidden part of the victim documentary equation surfaces. This is, of course, no secret to documentarians. In fact, in symposia, workshops, and roundtable discussions, documentarians again and again admit to the pain they have inflicted on their beloved subjects. Just part of the job . . . This is always a cathartic moment, expressed in the confessional mode, a private shame revealed, but never understood as a structural precondition. Viewers are less circumspect. Empathy blocks out responsibility. Thus, highlighting, and then re-thinking the costs of re-victimization is the focus of this paper, as it was for *RELEASED*. As a radical documentarian who has taken other's images to be used in the service of political projects that I share with my subjects, I know that even my comrades become

something like my victims when I take, edit, show, own, and leave them as images. As much as I make documentaries about issues that are important to me – so that different kinds of knowledge and its associated action can be mustered – I simply could not be responsible for doing this through yet another *victim documentary*.

Thankfully, there is an equally long history of the victim documentary's re-evaluation and critique, and it is to this I turned. Writing within a legal context, Minnow (1993) reminds us that there are rewards associated with victimhood: "obtaining sympathy, relieving responsibility, finding solidarity, cultivating emotions of compassion and securing attention." Here again is the contradiction with which I began: to speak, even as a victim, is better than to be silenced; to speak as a victim creates the possibility of collaboration with others to work against such conditions; to hear a victim speak allows for witnessing, which affirms and marks publicly that the victimization occurred. The counter-tradition of victim-critique forefronts, makes visible, such contradictions, always set in play, yet typically repressed, when affinity, pleasure and danger are mobilized by arts of punishing that objectify one and subjectify the other in the name of knowledge and control.

No matter how hard a victim-system may try to maintain its boundaries, there is permeability between guard and inmate, documentarian and subject, inside and outside; there is reciprocity, friendship, deceit, and collusion. Even in prison, the institution can not absolutely silence prisoners nor fully control what and how they see. Prisoners communicate between themselves, with guards, and the outside world. They make prison art, file briefs against unjust prison conditions and employees, and plan insurrections large and small. No victimhood is total; as none is merely pathetic. On the other side of the divide, there is the possibility of empathy, recognition, and political affinity. Sometimes the guards collude. So, collaboration also defines this scene. In the same way, documentarians in the collaborative tradition exploit the instability underlying the most rigid victim-relations. They attempt – in production, text, reception and analysis – to dis-align and realign the rigid positions of subject and object, victim and perpetrator, set out above, and they attempt to recognize and mobilize the punishment and power charging all positions in the documentary scene.

Such strategies have also been called "continuity of purpose" and "third voice" (Mascia-Lee et al., 1989) in feminist anthropology, "collective ethical accountability" (Waugh, 1988) in queer film scholarship, and "radical reportage" (Rabinowitz, 1994) and "committed documentary" (Juhasz, 1995, 2000) in film studies. All of these traditions have been built upon politicized challenges to both longstanding structures of knowledge acquisition, and the assumptions about difference and power that permit them. "The researcher-filmmaker seek to locate a third voice – an amalgam of the maker's voice and the subject's voice, blended in such a manner as to make it impossible to discern which voice dominates in

the work – in other words, films in which outsider and insider visions coalesce into a new perspective," writes Jay Ruby (2000) about the work of ethnographic filmmaker and anthropologist, Barbara Meyerhoff. Like many postmodern theorists, her ideas about feminist anthropology admonish documentarians to undo binaries that have served best to control, separate, and discipline – on both sides of the wall – by instead creating hybrid positions from which we can see the world newly. Such tactics do not undo power and punishment as much as try to see them. Collaboration is always at their core.

Since the mid-1980s, I, too – enabled by these multiple and linked traditions – have been engaged in making and writing about committed documentary (about AIDS, feminism, queerness) that attempts to realign political women through collaboration. In 2000, I produced the activist art video, *RELEASED*. Nearly 15 people collaborated on our video – male and female, straight and gay, people of color and white people, ex-prisoners and non-prisoners. We wanted the images we created to be one step towards revealing the psychic and social consequences produced by a nation increasingly bent upon incarceration as a solution to social problems inspired by vast inequities of wealth and privilege. Certainly, working with women who have been imprisoned and using production strategies that acknowledge them as artists, activists, friends, and comrades – as well as victims – seems a more ethical and empowering way to represent the experiences of female incarceration.

However, it is my contention that any collaboration that takes place through acts of representation should also remain painful for all participants: makers, subjects, viewers. The radical victim documentary takes account of this pain, and does not lose sight of it. Rather than returning to a place of comfort, it maintains its focus on the power imbalances that structure both the inequitable institutions under scrutiny and the documentaries that record them. Perhaps the radical victim documentary even manages moments of equilibrium, friendship, or political collectivity. But it will never forget, or erase, the cost of its own knowledge production: every documentary – like every prison – is an arrangement founded on pain and disequilibrium. Our project was to minimize the possibility of documentary as prison.

THE PRISON AND DOCUMENTARY VICTIMS

> The art of punishing then must rest on a whole technology of representation.
> The undertaking can succeed only if it forms part of a natural mechanics.
> Michel Foucault, *Discipline and Punish: The Birth of the Prison*

How is victimhood in prison different from that in documentary? Certainly, documentary and prison tell us much about each other in their shared capacity to weaken

some and strengthen others, by way of technologies of vision and distance, while buttressing hegemonic power. In both the prison and the documentary, the one charged with vision wields power. Distance and difference, in both scenes, force or coerce silence and testimony in turn. Class, race, and gender relations structure these interactions and are so solidified. The classic victim documentary scene, demands (at least) two players, separated by power but drawn by desire, who agree to engage together in an art of punishing that re-enacts the object's previous victimization through a procedure of representation. Produced to reveal and heal injustice and pain, such performances also reproduce the systems of domination, suffering, and pleasure that form the natural mechanics of both the original punishment and its depiction. Both prison and documentary are sanctioned responses that reconfirm an original disalignment and debasement. If most women are in prison because they have been abused by individuals and the systems that support them (men and patriarchy, teachers and schools, employers and welfare, pimps and sexism, drug dealers and poverty), prison serves merely to maintain these divides and the violence they inspire. Finally, in both cases, the victim is returned to and held in the very state of weakness that is the problem seeking redress. The victim best serves to maintain and confirm hegemonic social relations when kept in check, when kept a victim.

But, the systems' dissimilarities are as revealing as are their parallels. First off, many consider the target of the prisoner's crime to be the actual "victim." Prisoners (usually male) are often institutionalized for engaging in criminally violent behavior toward another, for victimizing an innocent citizen. While there is a large movement in our country for victim's rights, one that demands that courts and prisons are hard on inmates in the name of crime victims' suffering, there is no similar movement for aggrieved documentarians and their audiences who have been forced to endure the endless accounts of slight personal indignities that infuse reality programming. Or isn't there? In "I'm Dysfunctional, You're Dysfunctional: The Recovery Movement and Other Self-Help Fashions," Wendy Kaminer (1992) complains that the prevalence of testimony about personal victimization in talk shows and self-help groups relativizes degrees of suffering: "being raped by your father is in the same general class as being ignored or not getting help with your homework." Kaminer's documentary victim's right movement might fight for the viewers' right to demand that some stop sniveling on TV and get on with it.

More seriously, the victim of a documentary is not, in fact, *punished*, as is the prisoner. According to philosopher H. L. A. Hart (1968) a thin definition of punishment must involve "pain or other consequences normally considered unpleasant," that must be "for an offense against legal rules," meted to the actual offender by someone other than the offended who is an authority of the legal system against which the offense was committed. In our society, punishment

of this sort often happens in prison through approved deprivations of the body, and sometimes their associated psychological effects, in amounts sanctioned by sentence and controlled by the cruel and unusual punishment clause of the Eight Amendment of the U.S. Constitution. The subject of a documentary is not, in fact, punished, as there is no actual deprivation to the body, and there is no offense to nor agent of any legal system. Instead, the victim of the documentary could be said to receive some sort of blow to the psyche meted out by another who is sanctioned by dominant systems of difference for some offense to that very ideological system. Victim documentary presents testimony about a previous physical (and perhaps emotional) pain; but the new pain it creates is entirely psychic. To here distinguish between bodily and mental suffering is neither to value one over the other nor suggest their isolation. However, it does demand registering the specificity of victimization in documentary and its relation to the other arts of punishing; it does demand different sorts of questions about victimization and its remedy. (It may also demand the same kind of victim rights movement that Kaminer values – one that measures the relative degrees and kinds of pain suffered by victims.)

Here is one such victim question: "What is the boundary between society's right to know and the individual's right to be free of humiliation, shame, and indignity?" So asks Calvin Pryluck (1988), one of a small handful of documentary scholars who challenge the victim tradition. In this limited body of documentary theory, written largely through a discussion of ethics, other terms are used that further reveal the discongruities between punishment in prison and documentary: the victim of documentary's unethical tradition is also taken advantage of, deceived, manipulated, given false impressions, stereotyped, intruded upon, made the object of voyeurism and its related sadism, objectified, stolen or profited from, exploited, controlled, silenced, and dominated. "A serious ethical question is hereby raised," writes Brian Winston (1995), "since the tradition of the victim inevitably requires that some measure or other of personal misery and distress be if not exploited, then at least exposed."

Personal misery and distress noted, there are particulars of the prison missing: torture, rape, hunger, unsanitary conditions, overcrowding, forced isolation, filth. While such cruel and unusual bodily debasements have inspired a history of prison reform as lengthy as is the history of prisons, there is no such lengthy or rich tradition in documentary. The stakes are simply not the same. While every documentary – like every prison – is an arrangement founded on difference and maintained through disequilibrium, no documentary victimization is corporeal, as is all punishment in a prison. Importantly, this distinction – the ephemeral nature of representation rather than the corporeality of the body – allows for particular forms of contestation. So attests prisoner, political activist, and artist, Elizam Escobar (1990): "even under extreme repression, individual freedom is unavoidable as we

must keep on exercising our decisions and responsibilities. Here again art comes to the rescue, because it has the inventive power and wit to deride, deceive, and betray censorship as well as self-censorship." In the spirit of inventive power and personal autonomy, the documentary scene can be re-envisioned as a fruitful site for realignments of pain and punishment. I will conclude by showing how, in *RELEASED*, we reworked the typical victim documentary into a communal prison project about representation, difference, collaboration, and abuse.

UNDOING VICTIMHOOD IN *RELEASED*

From the outset, I imagined a unique documentary format to address the complex social crisis of women and prison, and its associated crisis of representation. I commissioned short pieces from five political artists who I knew would approach this topic with diverse styles while covering varied content. I thought that five discrete videos would point towards both the immensity and the intricacy of this issue all the while undoing singular documentary authority. At the same time, formal ruptures between discrete pieces would reinforce our intended disavowal of ownership and its associated objects. And, I am certain that because we were representing the particular victim-experience of incarceration this collaboration again multiplied itself. Very quickly, all but one of the original participants independently chose to combine forces with an ex-prisoner. In two pieces, the artist I selected went on to invite a close friend to work with her. Carol Leigh invited Duran Ruiz, a fellow prison-rights and AIDS activist, to work jointly on their contribution, "Gram O' Pussy" (except when Ruiz was incarcerated). Enid Baxter Blader chose to make "Sheltered" about and with her childhood companion, Christine Ennis. For "Unyielding Conditioning," Sylvain White decided to work with a female producer, Tamika Miller, and then the two interviewed three activist, ex-prisoners, one of whom, photographer Tracy Mostovoy, went on to become a project participant. Irwin Swirnoff, in "Making the Invisible Invincible: Cheryl Dunye and the Making of *Stranger Inside*," chose to document a female artist who was in the process of shooting a feature narrative film about women in prison for which she had collaborated with prisoners.

Our collaboration enlarged and complexified the position of the victim. In *RELEASED*, the "victim" of documentary often makes victimization itself the subject of her testimony. She analyzes prison or documentary as pain-systems rather than or alongside with her own personal suffering. Furthermore, she is often linked (visually or through shared authorship) with another, the "documentarian," so that she is not left isolated and vulnerable. The ex-prisoner and non-prisoner alike testify to feelings of discomfort, responsibility, distance, and friendship.

Fluctuating between stability and instability of documentary position becomes both protective tactic and cautionary tale. For instance, "A Gram O' Pussy" is an account of Duran Ruiz's experience of being the subject (classic victim) of the mainstream victim documentary described earlier. "Pussy" is initiated by Carol Leigh's voice-over as she explains that it was she who had suggested to the *20/20* staff that her friend Duran might be a good subject for their documentary as Duran, too, "likes to be represented." While Duran's testimony about her victimhood in the initial victim experience is a significant part of their piece, as are selections from the *20/20* documentary re-contextualized and now under the artists' scrutiny, the video also highlights Carol's quest to understand her culpability for Duran's first documentary odyssey, as well as Duran's articulate critique of the punitive representational and prison systems. Duran and Carol explore Myerhoff's "third voice" as it is their (threatened) friendship – and the possibility of together crafting a better representation of Duran, as artist and activist – that is their video's "subject." Fellow performers, and activists, Duran and Carol realize an anti-victim video that focuses less on the victim than the victimization: observation and friendship's role in the related arts of punishing and pleasure.

"Gram O' Pussy" is most centrally about the perils and easy abuses of representation: the necessary consequences of the victim documentary and always a possible end-result of collaboration as well. And so, for that matter is "Making the Invisible Invincible." Irwin Swirnoff begins his piece by asking, "how do you tell a story that is not completely yours?" He asks this in a double sense. How can he make art about another artist's process; how can she make art about an experience she has never had? "This is their story, not mine," echoes Dunye. She is, like Swirnoff, represented solely in voice-over in this, his women's prison video that illustrates her ruminations about representing women and prison with his gritty Super-8, black and white film footage of her feature film shoot of a women's prison. The divide between authorship and subjecthood becomes as unclear as does responsibility and blame: all players are accountable. "Invincible" is multiply voiced, experimental in visual style, and reflexive in content so that it can make clear the unclear: the impossibility of knowing or showing another's painful experience. Instead, Swirnoff displays the austere and repetitive architecture of the prison (set), while exposing the apparatus of the film machine that tries to capture it: we see massive lights, expensive cameras, and director Dunye, as she manipulates her actors' bodies into the shapes she needs. The "subject" of this short is the complexity of representing prison, and while Dunye admits that what she knows about this experience comes primarily from "workshopping her script with women inmates," she also suggests that as a black lesbian in American society she shares something of the prison experience in its invisibility and politicized unrepresentability, and in its status as raced, classed, sexed and gendered site. "Who's going to give ourselves a voice but

us?" she wonders at the end of the short, linking herself and her representational plight to that of all others – women inmates, too – held outside the parameters of what the mainstream deems acceptably visible. Dunye – and Swirnoff – uses her representational authority to stem the abuse of mis- and under-representation for "all stranger babies: those the society deems unacceptable, those the society disregards." They seem to suggest that self-identified victims of social violence can join together – at times, in representation, through affinity – as long as they keep relative the cause and conditions of their personal suffering.

"Sheltered" and "Unyielding Conditioning" are also about violence, specifically the sanctioned offenses of sexism and the sexualized injustice it demands, poverty and the boredom, drug and alcohol addiction, and other forms of self-abuse it requires, and racism and its emotional and economic injury. More traditionally organized around talking-head testimonials of four ex-prisoners – Angela Davis, Claudia Timmin, Tracy Mostovy, and Christine Ennis – the subject of their joint testimony is the identification and analysis of the larger social problems that lead to and explain women's incarceration, occasionally amplified by their private experiences. "Unyielding Conditioning" is comprised of two visual elements: talking head interviews in color, and Mostovoy's photographs of women prisoners in black and white. Women prisoners' faces and words are its sole material. However, White and Miller shoot and edit the interviews with the visual style and rhythmic pacing of a music video. They cut abruptly and quickly from eye to hand to mouth; they blur in and out of focus. The effect undoes stability, access, and immediacy on the visual register. Meanwhile, the women's words solidly testify to the inseparable links between drugs, prison, and violence. The instability of this "unyielding condition," and the viewer's inability to access it through representation, are formally reaffirmed. Their testimony leads to only partial knowledge. These subjects are protected because we can never assume to know (and own) them, and so, transform them into objects or things.

"Sheltered" sanctions Ennis' testimony about the links between (her) drug abuse and incarceration. Structured in part like a confession, Ennis explains that not talking about this, and more specifically her repeated rapes by a half-way house employee with HIV, "is keeping me sick." Sexism – in its invisibility and inevitability – repeatedly determines her course, and the depression, post-traumatic stress disorder, and incarceration that inevitable follows; from her first arrest for a crime that her boyfriend commits but for which she is jailed, to her first experience in prison, where leering male prisoners become punishers in their own right. Unlike more traditional talking-head testimonials, Blader inserts two highly-personal registers of her own into Ennis' private tale. Blader's "art-video" visuals – haunting drive-bys of deserted, desolate, rural and urban streets, train tracks leading nowhere, boarded-up tenements with the doors kicked in – illustrate

Ennis' words as Blader's poetic voice-over returns as a refrain, making this their shared-and-private story of rural, white, middle-class boredom. Documentarians, friends, artists, Blader and Ennis tell of a shared history that leads one girl to art, the other to drugs, prison, and then, this art. Again, we are reminded to keep relative their distinct experiences of power and suffering while also understanding how these images and worlds can be related and linked, in this case through documentary.

RELEASED focuses upon women and prison: female ex-prisoner's testimony, faces, and analysis are always its subject. But, there are no images of prison. That is to say there are no documentary images of prison. We do see Dunye shooting a movie on a prison set. And images of prison are visible through the illustrations of the artist, Joe Saito, in "Breathe." We go "inside" through his imagination alone. We watch his dialogue-free vision of a place of slightly, subtly, permeable boundaries. An inmate's dream of release opens his story and becomes literalized when a leaf – soft and lilting – enters into her cold, hard cell accompanied by a gentle laugh at video's end. Breaking out of the cycle of objectification set in place when any victim testifies to her caged state, Saito undoes this restraint by relying on the face and words of no person in his contribution to *RELEASED*.

Since prison is rarely visible in *RELEASED*, neither is its day-to-day life or totalizing structures. These images are too easily sensationalized and consumed; they are what we usually see, what we, non-prisoners, long for, when prison is represented. The violence of these images feeds on and creates victims. In *RELEASED*, we instead make apparent, through women's voices speaking about prison, a formidable strain, a more general fatigue, and a wariness. Our video's voices testify to drugs, sexism, racism, and alienation – all facilitate big business, violence, and victimhood. But the women in *RELEASED* resist being reduced to prison, even as they describe what happened to their bodies and minds in this place that (some) others can never know. They expose their once-imprisoned bodies through images and words to which they have agreed. Their voices are not fearful, are notably undidactic, and are rarely pathetic. Instead, these women and their friends present themselves as well-qualified judges of a systematic condition that they have experienced personally. So, in our video, the viewer or documentary is not set up to judge the victim. Rather, the victim judges the system(s). And they do so in collaboration with others who wish to know and seek to understand.

Our project does not suggest that the pain of prison is healed in its representation, or owned and controlled as it is viewed. It stays what and where it was – painful and violent, in and of the prison, difficult to see, harder to know. And, while we show prisoners and ex-prisoners relating together, we also display that representing prison together does not mean that we share, in exactly the same ways, the burden of its experience. Responsibility, pain, and power remain

relative, while also mobile. Our collaborative video seeks to both represent and revise terms of power while taking responsibility for the consequences.

NOTE

1. For more on *RELEASED* see http://www.strangerbaby.com

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REMOTE JUSTICE: TUNING IN TO SMALL CLAIMS, RACE, AND THE REINVIGORATION OF CIVIC JUDGMENT

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ABSTRACT

Small Claims Court Television Shows offer spectators an opportunity to re-envision their relationship to legal and civic judgment. Through presenting racial and regional judges, these shows re-imagine legal judgment as a necessary and inclusive component of everyday citizenship. Reflecting Reality TV, Tabloid TV Talk Shows, and the History of African-American representation on television, shows like Judge Mathis and Judge Judy demonstrate the contradictions inherent in racial representations on television. By showing the ways in which television performance reflects the performative aspect of legal discourse already operating upon us, the judges use stupidity as a way to pedagogically energize a lower class, disenfranchised viewership into newly rehearsing their roles as active citizens.

Do you Think I'm Stupid? Judge Judy
I Wasn't Born on a Plantation! Judge Mathis

In the wake of the current political apathy we have seen in low voter turnout and a widespread passive engagement with our democratic political structures,[1]

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television has presented us with a curious arena of participatory judgment for our citizenry: Televised Small Claims Court Shows. These shows, which focus on legal (and moral) dispute resolution, invite spectators to enter the realm of legal judgment alongside the judges presiding over the cases. Filmed in courtroom-like decor, these shows are as staged, or as authoritative as are other performative forms of legal discourse which enlist us daily in deferring to legal authority. The cases we viewers see are taken largely from cases already filed and ready for trial in Small Claims Courts across the nation. Indeed, the representations are boundaried by the televisual medium which displays them and provides viewing for their audiences. And yet, these pseudo- Reality TV Court events offer a new form of public arena for citizens to rehearse the virtues of deliberate and communicative democracy[2] as they flex and strengthen their capacities for judgment. Though these televised programs do not themselves present us with an authentically civic arena of exchange, they nevertheless do create conditions of possibility for the common citizenry to engage in exercises of self-governance fundamental to the democratic state.

The proliferation of Small Claims Court Shows currently include 11 airing across a range of networks: Judge Judy, Mathis, Joe Brown, Hatchett, Mills Lane, Texas Justice, and the longer running Divorce Court and People's Court are the most popular. Televised Court shows, beside the entire channel of Court TV, also includes in some areas, "Moral Court" and "Wapner's Animal Court," adding to the list of shows which historically aired for short times like "Power of Attorney," where famous attoneys like Christopher Darden defended clients. In each of these shows, plaintiffs and defendants are brought to the show in largely one of two ways: either the litigants themselves request to appear on the show through a form offered on the show's website or by phoning the particular show, or the show itself phones litigants who have filed cases in State Small Claims court, and asks if they would like to appear. Litigants' incentive for appearing on these shows is that they are compensated for their appearances, whether they win or lose. The shows generally pay the entire damages award, as well as each participant's nominal appearance fee. Additionally, litigants may receive roundtrip airfare to the city of taping, as well as hotel fare for one or two nights.[3] Though the cases are State based, Judge Judy, The People's Court and Judge Mills Lane being taped in New York, for instance, Texas Justice taping in the Houston area, and Divorce Court with Judge Mablean Ephriam currently filming in Los Angeles, litigants may be flown from one state to another for purposes of taping, and arbitration judgments do not necessarily rely on State law in which the show is taped. The arbitration agreement for Judge Joe Brown, for example, states that

> . . . the Arbitrator is not required to decide the Claims under the laws of the State of California or the laws of any other jurisdiction. In arriving at his Decision, the Arbitrator, in his sole discretion, will be free to apply the laws of any jurisdiction as he interprets them, or he may

> apply general concepts of equity and fairness as he believes they relate to the Claims. It is also further understood and agreed by the parties hereto that the Arbitrator is not bound to follow any particular courtroom or arbitration procedures, including, but not limited to, the California Code of Civil Procedure, or any other state's code of civil procedure . . .. It is also further understood and agreed by the parties hereto that the Arbitrator will, in his sole discretion, determine which witnesses, if any, will be called to testify and determine which evidence will be considered in making his Decision.[4]

Despite their decisions being legally binding on these shows because, for purposes of television, these judges serve as legal arbitrators in their respective states,[5] the judges themselves are well trained, having been members of the judiciary or involved in law for numerous years. Judge Judy, for instance, was appointed to the Judge's bench in Family Court in 1982, and has served as Judge in various capacities since then. Judge Joe Brown has been a Criminal Court Judge in Memphis, Tennessee, since 1990; Judge Mathis was elected as a District Court Judge in Michigan in 1995; Judge Hatchett was Chief Presiding Judge of Atlanta's Fulton County Juvenile Court System for nine years; Judge Mills Lane has 25 years courtroom experience as District Attorney and Judge, and Divorce Court's Judge Ephriam has experience as a Trial Attorney and Mediator, and was the Deputy City Attorney in Los Angeles.[6] Thus, these judges are not mere actors, but are legitimate legal performers.

The bailiffs, similarly, are experienced courtroom bailiffs, many of whom worked with these Judges in prior courtrooms. Bailiff Petri Hawkins-Byrd, Judge Judy's bailiff, worked with Judge Judy previously as a Court Officer in Manhattan Family Court. Bailiff Holly Evans for Judge Joe Brown is qualified as a Court Bailiff for the City of San Diego. Court Bailiff Tom O'Riordan for Judge Hatchett has been a Court Officer for New York City for many years, and Bailiff Joseph Catalono, Sr., working for Judge Emphaim's current incarnation of Divorce Court, worked in law enforcement previously as a police officer and Deputy Sheriff for San Bernardino County. So, the bailiffs as well are similarly situated as trained and legitimate legal figures.

Despite the legal training and authority attending to the Judges and Bailiffs in the shows, as the article will later discuss, the proceedings of the cases aired on television resemble pedagogical events with far more frequency than typical courtrooms. The shows create legally binding decisions which do not necessarily need to be based on precedent, as the arbitration agreement shows. And, the litigants are reimbursed for travel and hotel expenses, as well as damages awarded. So, the shows do demonstrate a disparity between themselves and typical courtrooms. Nevertheless, as the article will explain, this disparity functions to highlight the performative and complex ideological nature of legal discourse already operating upon us.

Neilsen Ratings from 2002 reveal that in the top 9 markets, these shows are most popular in the Atlanta and Washington D.C. areas, followed by Dallas, Philadelphia, and Chicago. In Atlanta, for instance, Divorce Court with Judge Mablean Ephriam has a 16% share of all people currently watching television (as recorded by Nielsen) at 4:30 p.m., as does Judge Judy at 4 p.m.[7] These numbers reflect demographic trends in viewing audiences, and are used by advertisers to market their products. Ads typically running during these time slots include ads for job training and education as Medical Assistants and Criminal Justice Workers. Additionally, numerous ads for personal injury and workman's compensation lawyers air. Ads for restoration of phone service after non-payment of bills similarly run during commercial time. These ads seem to be targeting the unemployed, uneducated sector of the U.S. population – the disenfranchised who by watching these shows functionally attempt to reassert themselves into a system which seems to have, at least temporarily, excluded them from the logics of success.

In the highly visual era in which we find ourselves, where media demonstrates war to us through images, television provides an avenue, albeit an arguably contested one, to examine the way the populace organizes itself around social, and legal judgment. The contradictory nature of television, along with its contested modes, has been well documented since Fiske's *Television Culture*. Fiske's claim that television is polysemic and flexible (Fiske, 1987, p. 84), neither reflecting nor creating a homogenous mass, supports his compelling suggestion that TV is a complex medium replete with "contradictory impules" (Fiske, 1987, p. 20). For Fiske, while television works ideologically and discursively to promote certain meanings of the world, it can both promote the ideology of a few while also profiting the oppositional cultural capital of subordinated groups (Fiske, 1987, p. 20). TV can, according to Fiske, create resistances to its own power networks. Then, when studying television shows, it is useful to observe the competing ideological forces at work in the medium. And, for televised small claims court cases, these competing forces are particularly important to locate in order to understand the multiple ways in which "the real" gets conveyed to the populace through the discursive operations of law. Understanding the discursive conventions by which the reality of legal subjectivity gets multiply constructed in shows like Judge Judy, is essential for uncovering the ways in which the televisual represents the performative nature of legal discourse already operating throughout the public sector. TV, as Fiske maintains, can aid or delay in changing the material realities of social existence (Fiske, 1987, p. 45). If we accept the premise, then, that we act in this nation out of a knowledge of a social witnessing of our tacit legal subjectivity – that is, we behave in response to knowing that our actions are generated and monitored by the legal apparatuses of discipline and surveillance so that we, for instance, slow down when we see a speed limit posted, or remember a sign might

be posted, or an officer lurking in wait for us – then exploring the unspoken dictates around legal subjectivity which get voiced in televisual representations is especially useful for understanding the silent parameters of behavior in which many of us unwittingly participate.

As a way of considering the discursive conventions of law which we are already tacitly consenting to, this article is first interested in the ways legal authority and judgment get performed on these shows. As an alternative to the stereotypical dry legal reasoning we imagine occurring in courtrooms, televised Small Claims Court shows like "Judge Judy" and "Mathis" present viewers with images of judges and judging which create opportunities for television spectators to conceive of the American system of justice, and their relationships to it, anew. By highlighting judges who invoke the presence of race and region – indeed demand its inculcation into legal process as part of judgment – these shows re-imagine the process of legal judgment. As this article will argue, televised Small Claims Court shows offer the disruptive notion that race – as a discursively and historically socially constructed phenomenon – can be integrated into legal authority. Although these shows do problematically draw on racial stereotypes in the judges' racial references – as the public hears, for instance, accents, flare, and loud voices on our TV screens from these judges – the judges open up possibilities for affect playing a role in the exercise of judicial authority. Moreover, as the article will suggest, not only do judges offer newly invented images of legal judgment on these shows, but television spectators shift positions between judge, jury, and litigants. This shifting movement forms new modes of legal subjectivity which offers public spectators a reinvigorated relationship to the multiple ways in which legal discourse and judgment operate. As this article will suggest, popular culture has created not merely a form of entertainment, but a vehicle for law to reinforce its legitimacy by cunningly inculcating the evolving imagination of its utility and the possibilities for participatory citizenship into the popular discursive will.

TELEVISION, RACE, AND JUDGING

Television Small Claims Court Shows participate in televisual history in a variety of ways. They reflect the genres of Reality TV and Tabloid Talk Shows, while also attending to the ways in which African-Americans have been portrayed throughout television history. As scholar J. Fred MacDonald has commented about television's historic role in representing race:

> Television (at its inception) had the potential to reverse centuries of unjust ridicule and misinformation. In terms of utilization of black professional talent, and in the portrayal of African-American characters, TV as a new medium had the capability of ensuring a fair and equitable

> future . . .. Now, more than four decades after TV first established itself as an integral part of American popular culture . . . what emerges . . . is a picture of an association that has been, at best, ambivalent. On the one hand, it is the story of a genuine effort by some to treat blacks as a talented and equal part of the citizenry, to employ them fairly, and to depict them honestly. On the other hand, it is the tale of persistent stereotyping, reluctance to develop or star black talent, and exclusion of minorities from the production side of the industry (MacDonald, 1992, p. xvii).

Televised Small Claims Court shows draw from the paradoxical ways, and ambivalence in which African-Americans have been represented throughout television history in order to portray the Judges as the site of intersecting, and contradictory notions of race which are circulating in contemporary American discourse. While we don't see Uncle Tom's or Mammies, we do nevertheless see these Judges performing what seem to be adverse and contradictory roles even within single cases. Those performances are especially poignant given the very troubled historic relationship of law to race in the United States. Scholar Herman Gray comments on the ways in which portrayals of race on television reflect power hierarchies:

> . . . black representations in commercial network television are situated within the existing material and institutional hierarchies of privilege and power based on class (middle class), race (whiteness), gender (patriarchal),and sexual (heterosexual) differences . . . (T)he very presence of African Americans in television discourses appeals to this normative "common sense," this working knowledge of the history, codes, struggles, and memories of race relations in the United States (Gray, p. 10).

It seems more than an accident that with disenfranchised television viewers watching from large minority population centers, in a nation whose highest incarceration rate is of African-Americans, and whose legal system is plagued by the problem of eradicating racial profiling,[8] four of the most popular of these Court TV Judges, Judges Mathis, Joe Brown, Hatchett, and Ephriam (from Divorce Court) are African-American. As questions of systemic suspicion, observation of, and incarceration of certain ethnic or racial groups have risen in the United States, it seems unsurprising that popular culture has focused some attention on racial justice. Yet, what is intriguing is the ways these daytime small claims court shows do not directly attend to the arguable racial injustices occurring throughout our streets; rather, by the gesture of including the figures of African-American judges as purveyors of justice, television seems to occlude the problematic ways in which African-Americans have been represented throughout television history, while simultaneously subtly highlighting the ways contradictory notions of race, and racial identity, are circulating in contemporary American discourse. If, as has been argued, the emergence or absence of African-American roles on television are linked with cultural-historical conditions, so that for example, "directions in TV programming tend to relate to the values popular in American political life" (MacDonald, 1992, p. 121), we can explore the ways in which television

representations mimic not only the prevailing political conditions, but also create sub-currents of thought, or differing ideological positions.

What then, do African-American judges on Small Claims Court television shows contribute to our understanding of the current cultural-legal climate surrounding race? Under the contemporary Republican neo-liberal leadership, these judges first demonstrate an ironic relationship to the discursive construction of race in order to "normalize" racial difference as a potential site of authority; yet, they also simultaneously alert us to how ideological power structures have historically operated through legal apparatuses to create and oppress racial difference. As this paper will later discuss, these shows, moreover, use race not only for marketing popularity, but also as a vehicle through which the exercises of legal judgment, and the capacities for an interested, and morally improved citizenry, get rehearsed in ways which account for class difference.

Televised Small Claims Court shows which feature upper-middle class African-American judges have first arguably evolved out of sitcoms like The Cosby Show which depicted, and were criticized for representing, professional upper middle class African-Americans who demonstrated white American values. The Cosby Show's success during the Reagan era has been partially attributed to its depiction of responsible family life during a time of conservative value; its criticism has originated in a concern that the show represented to America that American systems were working well for minorities (MacDonald, 1992, p. 271). Doctor and lawyer Huxtable were read by some as revealing that African-Americans were overcoming the entrenched white power structures which had been oppressively dominating minority groups for centuries (MacDonald, 1992, p. 282). Henry Louis Gates, for instance, criticized the Cosby show for "reflecting the miniscule integration of blacks into the upper middle class, reassuringly throwing the blame for black poverty back into the impoverished classes" (Gates, 1989, p. 40). Then, for scholars Jhally and Lewis, black viewers of the Cosby show were either "complicit partners in an image system that masks deep racial divisions in the United States, or they (were) forced to buy into the fiction that 'there are black millionaires all over the place,' thereby accepting the Cosby Show as a legitimate portrayal of ordinary African-American life" (Jhally & Lewis, 1992, p. 138).[9] The Cosby Show arguably mapped race onto class, and was flawed for presenting an African-American family as too white because of its upper middle class values (Jhally & Lewis, 1992, p. 82).

In the renewed heightened conservatism of the early 2000s, it behooves us to examine the way race is being mapped onto class again, as African-American judges are suddenly presiding nationally on television over lower, and lower-middle class litigants, delivering moral, and legal lessons from the legal pulpit. African-American televisual judges, empowered not only as "actual" agents of the

law who are licensed to enact binding legal decisions, but also as television performers, certainly impact the history of African-Americans on television. These judges, many of whom have themselves risen up from impoverished and violent backgrounds, administer justice not only to Blacks, but across races. Despite diverse racial litigants, though, what unifies these shows is a continual return to educating the lower classes. These shows are so popular, in part, because of the legal guidance these judges proffer – as lower class citizens get urged to adopt a new form of class morality by re-examining the way their reasoning performs personal, and civic responsibility. Unlike an earlier show like "The Prince of Bel Air," which highlighted the ways in which wealthy Blacks must reform their inner city brethren (while maintaining a connection to them), television court shows use African-American judges to teach generally lower class, morally impoverished citizens of all races how to better proceed in their affairs. The African-American televised judge represents the ways in which race has been discursively and socially constructed in United States legal history by standing as a signifier of the problems of and ways to overcome racial and class oppression.

Besides standing for the ways in which racial and class oppression have often been fused, these judges also remind viewers that race *is* an issue in the legal system, and cannot be rendered invisible. The judges' presence and behaviors fulfill Critical Race Theory's mandate that liberalism's insistence on the notion of color-blind justice is insufficient; "race" must be accounted for and noticed for the ways in which it has historically functioned and still does affect our everyday institutions; it impacts the ways in which our lives operate in relation to our judicial processes.[10]

These shows function to include "race" in the judicial system differently than the populace has previously been able to observe it: through the demonstration of "racial" judging[11] which reminds viewers of the ways in which judgment and oppression have, and are still operating within the United States. Judge Mathis, for instance, has called forth the history of race relations in this country by invoking slavery in his conversations with litigants. In rebuking litigants for being less than truthful, for instance, Mathis has defiantly proclaimed, "I wasn't born on a plantation!" This first and immediately highlights the way in which an uncertainty about Mathis's authority is already operating. Mathis must assert his difference from the historically, and arguably currently, racially subordinated Black man, in order to continually reclaim his legal authority. Against this backdrop, though, this forceful comparison of current judging to the historic forced subjugation of slaves, achieves several contradictory goals: First, despite Mathis's assertion of differentiation, his proclamation does work to reiterate Mathis's legal authority as a judge and a citizen by refusing a living alignment with the discourse of racial subordination. Secondly, Mathis's declaration reminds the viewer that the conditions of slave ignorance forced upon slaves by slaveholders were never, and

are currently not an acceptable model of citizenry. The Judge's invocation of the slave image uses racial history to re-imagine a more keen sense of citizenship: one bound not by subjection or ignorance, but by an affiliation with and demand for a finer sense of civic participation and reasoning. As this paper will later discuss, this insistence on reasoning is key to the sorts of active judgment these shows request and rehearse.

Judge Hackett (formerly of Divorce Court) similarly invokes race by calling forth the historic image of the caretaker Black woman. Noted on her website for her "interventions," and the fact that she has had former litigants back to the program to see how their lives have changed since the program, Hackett has been taped with, for instance, a male client back in her private chamber. In this "private" meeting, she explains to him gently that he should not populate the world with so many children if he cannot afford to raise and care for them. This sort of intimate justice seen through African-American judges functions to recall race as a formative discursive element of legal judgment. It is counterbalanced by the regional – particularly Southern – devoutly tough White men we see and saw in the shows "Texas Justice" and "Judge Mills Lane."

Southern White Justice

Judge Mills Lane and Larry Joe Doherty of "Texas Justice," as they present strong Southern accents and Southern phrasing in their judicial pronouncements, offer a regionalized sense of local judgment to appeal to their audiences, and in so doing, recall historic and contemporary practices of Southern swift and stern judicial enactments. Judge Mills Lane's webpage, inventing its own "place" of judicial authority outside the sole reaches of American precedent, claims for instance that "Justice will never be the same . . . This is Mills country;" likewise, the "Texas Justice" website taunts us that "There was a time in Texas when stealing a Man's horse Was a Hangin' Offense" (while silently ignoring the large Death Row Texas currently maintains in a similar but unironic tradition.) These two shows particularly work to engage the viewing spectator in a localized sense of judicial decorum – one which appeals immediately to a culturally geographically-oriented juridical subject. Larry Joe Doherty, in one case, invoked a Western sense of both judicial style and fashion by suggesting that a litigant might use cowboy boots to boot the defendant out the door and make them leave the premises. This local regional appeal, as does the racial appeal, functions to lure the spectator into an allegiance with the model of legal reasoning presented. Instead of abstracted, distanced legal rationales, judges present legal discourse as immediately applicable to local environs and legal subjects.

Though not reducible as directly to region as the Southern White Males, Judge Judy joins the cadre of judges who appeal to a local population by presenting herself as either Italian or Jewish with her mannerisms. She speaks loudly, gestures wildly, and looks disgusted by the litigants before her with regularity. Judge Judy participates, with these other judges, in the reincorporation of racial discourse and affect into legal judgment.

Judges and Affect

What each of these shows reflect, and a glimpse at their websites unveils, is that one of their critical missions is to demonstrate the affective elements of law through racial (and regional) figures while also re-imagining the national landscape through a reinvented sense of judicial reasoning. The familiar phrase "No Nonsense" appears on both Judge Joe Brown's and Mills Lane's sites, as well as "Tough Love" being advertised on Judge Hatchett's site. Both remind the viewing audience that these shows appeal to bottom-line approaches while offering unconventional affective understanding. Judge Mathis's website offers "Inspirational Solutions" and "Empowerment Network" links, and his website explains his rise from high school drop out to Judge in order to motivate others to overcome obstacles based in racial and class discrimination. Towards re-imagining legal judgment, these judges present a self-conscious judicial performativity, wherein they subvert stereotypical notions of dry and unemotional judging through their own stereotypical racialized behavior towards claimants. As this section of the essay will explore, largely treating litigants as naïve or bad children in need of either gentle or tough education, these parental figures of authority wield their legal judgments in ways which create new functional images of the reasonable and the foolish.

In drawing from the parent-child model of authority, these Small Claims Court shows participate in a larger contemporary phenomenon echoed by other Reality TV shows – and so it is useful to think about these shows not only in the context of the history of African-Americans on television, but also within the backdrop of current Reality TV programming which offers a new public arena for confession. Scholars have suggested that Reality Television often utilizes the confessional mode. Mimi White, for instance, has claimed that shows like Divorce Court (among the earliest of the small claims daytime court television shows) "rely heavily on the ongoing participation of real people willing to disclose deeply personal matters in a frankly public, mediated forum. They deploy confessional discourse, divide and multiply the positions of confessor and interlocutor, and address them, along with studio and television viewers, in terms that are variously serious and

trivializing, often even at the same time" (White, 2002, p. 321). Considering these shows as confessional forums helps understand the reasons for which litigants get so frequently chastised for being stupid in Small Claims Court shows. If one reads these shows as confessional opportunities for individuals to purge and be healed by the restorative cure of legal judgment, then creating the image of the stupid litigant enables the judges to open new opportunities for readings of legal subjectivity: spectators, plaintiffs, and defendants, as they shift subject positions and acknowledge the presence of affect in judging, elevate their forms of civic judgment. While we certainly do not wish our legal system to function by humiliation, and this article is not suggesting that courtrooms should move to the model of treating lower class litigants as if they are children, it is useful to examine Small Claims Court television as a potential theoretical reinvigoration of our processes of democratic judgment. We can explore the ways in which the pedagogical, and confessional models we currently see on television might be useful for noticing both how our legal discourse is already operating upon us at least in part through a parent-child punishment model; also, we can re-envision how our discourse might be changed to better enable citizens to participate in democratic judgment.[12]

THE STUPID

The compulsion to disavow today's fool in our neo-liberal climate is strong. We chide the fool, scorn him, and show the stupid to be extraneous and ridiculous to ourselves and our stern systems of order. This insistence on ridding ourselves of the stupid certainly belies our anxieties about *being*, or *being read as* stupid, and, in the case of Small Claims Court Television, reflects back on the ways in which minority groups *have* historically been read as stupid in service of expelling them from positions of power. So, we should read the prominence of stupidity in television, or the overt expulsion of it, with some curiosity and attention. Nowhere do we see the prevalence of stupidity articulated more explicitly than in the abundance of small claims court shows which so overtly place the viewer in positions of superiority to the subjects we gaze upon. Judge Judy's oft reiterated refrain "Do you think I'm stupid?" resounds as a reminder of the way in which being a fool or being made a fool of won't be tolerated or promulgated by the justice system. One recent episode of Judge Judy highlighted two boys – one of whom had thrown the other into a pool at a pool party damaging the electronics in the boy's pocket – and Judge Judy quickly said that she had wanted to see what kind of idiot would write a defense like the defendant wrote. Judy read the written defense aloud to the court, stating it claimed "when you go to a pool party you are going to get wet," and asked the boy to lucidly explain how he could possibly have reasoned that way.

Judy said, "this will only take a minute," indicating the rapidity of her judgment. After the defendant said that he did not know what "lucid" meant, and Judy shook her head disgustingly and said "this is the youth of America," Judy's repeated point about stupidity became self-evident. The boy seemed completely befuddled by her refusal of his logic. She went on to explain that she was speaking loudly to him, however, because some people are so stupid that they can only understand loud monosyllables. The implication was, of course, that he was that stupid. These vociferous, and arguably inappropriate, accusations of stupidity within the legal framework are echoed by the other judges who similarly glance at the bailiffs in disbelief, or at the litigants with utter contempt. Judge Mathis, for instance, said to defendant Tamee Johnson who accused Mathis of not taking her case seriously, that "You're the joke here," and to Defendant Malcom Ruff he ultimately declared, "I'm not going to sit here and talk crazy with you any longer."

After having tried and failed to render pedagogical lessons, the judges on Small Claims Court shows tend to dramatically and impatiently exclaim the hopelessness of the litigants; they render their verdicts by slamming their gavels to say they want nothing more to do with this sort of poisoned reasoning. Their actions expel both the litigants and the forms of polluted reasoning from the courtroom. The participants in these shows thus often amount to clear liars or deniers, or pathetic figures who at the very least do not comprehend courtroom protocol and often seem to lack any understanding of social or familial responsibility. They are comic figures, and we, as spectators, laugh at their expulsion. The imagined threat to rationality gets squelched in the service of strengthening the imagined foundation of our legal community of reasoning. When we laugh we are both disavowing and identifying with parts of the legal logics operating: we engage with the degradation and demeaning of certain legal subjects to bolster the notion that they are Other to us.

Because they engage in public confession and degradation, these televised Small Claims Court shows have been compared to Tabloid TV talk shows for the way they create difference. Judge Judy could potentially be seen as the Jerry Springer of the Small Claims circuit. Like the lower class status of many Jerry Springer participants, certainly plaintiffs and defendants articulate obvious class positions on Small Claims Court Television while they squabble defiantly over relatively small amounts of money. And they certainly may subscribe to what Elizabeth Birmingham has suggested in her article "Fearing the Freak" – that tabloid talk shows rely on engendering and resolving insecurity in the viewer like old freak shows to provide a scapegoat other through which we can behold the misfortune of others (Birmingham, 2000, p. 135). We could certainly see these Small Claims Court shows as ways to differentiate between credible and preposterous legal *subjects*, as well as claims. By deciding that certain litigants *are* "stupid" or

nonsensical, the television viewer can readily dismiss the claimant without questioning the underlying meaning of legal stupidity in contemporary culture. Plaintiffs and defendants appear ludicrous. But if in fact these shows DO disavow certain bodies from the legal norm, relegating them to the exclusionary realm of legal excess – that which gets systematically expelled from the reproductive logics of legal discourse in the service of maintaining a fallacious sense of objective normative reason – then we should inquire into why we receive these rejections in Small Claims shows from predominantly racialized or regionalized figures.

The invocation of foolishness and stupidity certainly seems an anchor for the sort of judging occurring in these Small Claims Court shows, and even a banner for why the shows have public utility. Spectators love to become the judge, to observe and critique the legally stupid. Avitall Ronell, in her book considering the elusive and slippery nature of definitional Stupidity, has said that some claim that stupidity mutes, and that the stupid cannot see themselves because no mirror has been invented in which they might reflect themselves (Ronell, 2002, pp. 8, 18). Television, though, provides a theoretically charged reflective apparatus, where, if individual subjects do not see themselves as stupid, then the discursive practices by which they, and legal codes are generated, perhaps *DO* get reflected back to the viewer. The televisual jettison of the stupid in these Small Claims shows, then, gets linked to the enunciation of how our civic judgments are founded. To the degree that Judge Judy vociferously proclaims the negation of her stupidity when confronted by plaintiffs or defendants she believes are lying or conniving, she enforces the notion that legal decisions, and the personnel deployed to enact them, will not tolerate the silencing of certain forms of judgment. Her denunciation of stupidity resides first in her refusal to be categorized as one who will quietly accept nonsense, and second in her contention that in the view of the legal gaze, plaintiffs or defendants must rise to the vocalization of legal judgment themselves. The bubbling well of subterranean nonsense which so loves its own logic must be quelled through seeing itself; like Narcissus, it can be eliminated by becoming enchanted by its mirror image. So, these shows provide the mirror by which stupidity gets reflected and even defined and constructed, as it is forced into the alternate lens of judgment. Stupidity's image gets placed on display in the bodies of unreasonable litigants, both for spectator juries, and judges – as a barometer against which the terms of social contract get evaluated. When Judge Mathis claims that Tamee Johnson's counterclaim for $100.00 for food reimbursement is ludicrous by asking if her landlords took the food "before or after she burned their trailer down," Tamee Johnson stands as the image of stupidity. In judging this image, we rehearse how we might bring our civic evaluations to more potent public spheres of deliberation. Though judging a Small Claims Court show from home can certainly be differentiated from the public responsibility of attending or encouraging public

debate, in this era of high unemployment the television certainly provides an outlet for those at home to consider the origin of their judgments.

If, as legal scholar Peter Goodrich has suggested, law is experienced through the power of visual culture, as "a system of images, not a system of rules" (Goodrich & Hachamovitch, 1991, p. 159), then by looking at how stupidity is deeply implicated in institutional directives on how and what to see as "legal," and "reasonable," we can also begin to question the ways in which we have assumedly relied on culturally generated visual images of the legally rational as indices of "normality." Small Claims shows engage in precisely that questioning of the assumed role and function of the imagined judge and litigant in the process of judgment. Using the televisual media, Small Claims shows presume, as their underlying methodology, a reliance on legal authority as occurring at the site of the image; these shows display legal images which either demonstrate or deny access to authority based on their allegiance to forms of judgment. Mathis calls attention, for instance, to the "twisting" defendant Cindi Christenson who must admit, both discursively and through her body motions, that she stopped accepting the plaintiff's calls *only after* she owed him money. And so, the viewer sees that stupidity twists, corporeally, and stylistically. Thinking about the ways in which legal logics of visuality proliferate particular ways of considering our world, we can query how to process what legal scholar Richard Sherwin had deemed the "jurisprudence of appearances" – a jurisprudence which relies on appearance as a foundation for some of its motivations and propulsion (Sherwin, 2000, p. 141). The image of stupidity, then, plays perhaps the sole most important legal function for these shows: to generate appearances both in judges and litigants so that television viewers are afforded the possibility of forming new relationships to the process of judgment. The down-home logic and advice with which these judges infuse judicial reasoning, as it gets uttered through their racialized or regional mannerisms, can and does affect the lower and middle class spectators watching the shows. Their expulsion of the stupid through the *inclusion* of racialized justice leaves a new placeholder for a form of affective judging which embodies contradiction: it both reasons and yells, reasons and chides, and reasons and sympathizes contemporaneously. This sort of reinvention of judicial reasoning opens up new space for spectator involvement by linking individual with public judgment, and in so doing, preparing a bridge between the self and the civic which seems largely absent today. By watching the ways in which public (legal) decrees can appeal both to individual affect and community standards, the spectator can see, as Mimi White has suggested, the ways in which "public and private experience are equally permeated by institutional and impersonal strategies of power – including . . . law . . .. These programs . . . invite individual viewers to share in this formation of social subjectivity as a performative, consuming, and consumable therapeutic spectacle. In the process, these

reality-based television programs contribute to a larger process of redefining what it means to be real" (White, 2002, p. 322). Small claims court shows, in their reflection of Reality-TV programming, help redefine viewers' understandings of "real" legal subjectivity, authority, and judgment. By seeing the contradictions inherent in legal discourse – that authority is performative, that reasoning can be vulgarized yet responsive, and that legal discourse functions as both punitive yet pedagogical – viewers can begin, as spectators, to more attentively consider themselves not as outsiders to, but as participant jurists in everyday civic forums.

SPECTATORS AND JURIES

The relationship between American juries and judges has a long and mutable history, and essayists as early as Tocqueville have commented on the pivotal link between the two. Carol Clover, citing Tocqueville's historic comment on the relationship between American juries and judges, explains that "It is first and foremost to the institution of the jury that he (Tocqueville) ascribed the peculiar and widespread interest of Americans in lawsuits and legal logic." According to Tocqueville, Clover recites, "the language of the law becomes . . . a vulgar tongue . . . the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends into the lowest class, so that at last the whole people contract the habits and tastes of the judicial magistrate" (Clover, 2000, p. 101). This trickle-down description of ideological reach suggests that institutional norms generated by the elite tastes of the judiciary permeate all classes, in a sort of ultimate reflection. Small Claims Court shows might be said to respond to Tocqueville's reflection on the American citizenry, as we can see the judgments of Judges pedagogically delivered to the citizenry. Arguably, the increasing bodies of spectators polled immediately outside the "courtroom"/television studio by television reporters in these shows evokes a heightened sense that the entire nation stands as jurists in these cases. They too, alongside home viewers, can decide who should be rewarded or denied for their actions, and share or disagree with the Judge's ruling. As if huddling together to rid the nation of the threat of an irrational and dishonest element, spectators of Small Claims Court shows participate in the fantasy of a newly invented legal judgment which includes the jury of spectators who identify as judge, jury, and litigants.

What sorts of judgments are generated, then, by the sliding subject positions these pseudo-reality shows offer their viewership?[13] Unlike *America's Most Wanted*, where, according to Margaret DeRosia, evidence is produced based on the axiom, "I feel, therefore I judge" (Derosia, 2002, p. 245), Small Claims

Court television shows produce judging which combines affect with reason. The consequence results in a challenge to the ongoing threat of democratic despotism and passive democratic participation which DeTocqueville warned about centuries ago.[14] De Tocqueville feared that:

> (E)very day renders the exercise of the free agency of man less useful and less frequent; it circumscribes the will within a narrower range, and gradually robs a man of all the uses of himself. The principle of equality has prepared man for these things; it has predisposed men to endure them, and oftentimes to look on them as benefits . . .. The will of man is not shattered, but softened, bent, and guided; men are seldom forced by it to act, but they are constantly restrained from acting . . . it does not tyrannize, but it . . . extinguishes, and stupefies a people, till each nation is reduced to be nothing better than a flock of timid and industrious animals . . ." (De Tocqueville, 1956, p. 304).

As if in answer to the problem of individuals being lulled into a somnambulistic legal trance wherein they focus on small ambitions instead of active civic critique, Small Claims Court shows awaken the viewers to the possibilities of their own agency by inviting them to rehearse active judgment. Despite being subject to the quick judgments we see as the edited products of television, spectators are stunned into identifying with numerous subject positions in these shows, as they relate to plaintiff, defendant, judge, and jury. This shocking identification with the spectrum of positional difference in these representations, alongside the invitation to behave as judge, offers the potential to startle citizens out of their coherent sleep, and awaken them to their abilities to critique everyday democratic living. By seeing the ways in which legal judgment already affects each participant, viewers can potentially enliven their sense of civic agency for a moment by noticing how institutional legal discourse already impacts the ways we live in the world. Watching these shows can prepare the way for citizens to more actively assert willed judgment towards the fulfillment of a more inclusive state because abstracted, distanced law gets transformed into identifiable concepts impacting everyday subjects.

Paul Gewirtz's underscore of the tension between law as abstraction and the everyday helps illuminate the ways in which these Small Claims shows bridge the divide between a distanced and identifiable law. Gewirtz says of the distinction between courts and the everyday that "maintaining the boundary between the courtroom and ordinary life is a central part of what legal process is all about . . .. But there is always a struggle between this idealized vision of law . . . and the relentless incursion of the tumult of ordinary life" (Gewirtz, 1996, p. 135). Small Claims shows work to mediate between these imagined two worlds, so that the elements of everyday life become part of the systems of abstracted judgment itself. By watching these courtroom shows from our homes, we are, in a sense, made more comfortable and familiar with the performative nature of legal discourse within and outside the home. Viewers can see the ways in which law permeates

and gets enacted across different social registers. As John Fiske has suggested, the TV viewer is primarily a socially situated subject, reading the television show as a dialogue between the text and their social position (Fiske, 1987, pp. 62, 66). The routines of TV viewing are part of the domestic labor by which home life is organized for many, for instance (Fiske, 1987, p. 72). A houseparent may watch daytime television as part of the culture of domestic labor (Fiske, 1987, p. 74), or an unemployed citizen may watch a courtroom enactment as a projection of agency into a realm from which they are otherwise excluded. In this way, the distinction between public and private arenas melt in part, as public judgments can be rendered in the privacy of one's home. While this certainly may deflect the act of judgment away from public utterance, it nonetheless practices the exercise of participating in civic decisions.

Though arguments have historically been made that television viewers are less likely to vote or participate in civic affairs because TV promotes a depoliticized view of the world,[15] the recent emphasis on shows which rely either on participant or audience votes, like *American Idol* and *Survivor*, do seem to be re-focusing public attention on the importance of participatory judgment as a practice. While it is easy to dismiss these voting practices as irrelevant or unimportant because of the issues they decide, or even think upon them as dangerous because of the ways in which they deflect our will to agency into arguably wasteful modes of energy, we should examine the sorts of displacement and redirection which are occurring at this moment to result in seemingly innocuous or banal voting. The current prodigious use of televisual voting and participation does seem to be insisting on re-evaluating the ways in which judgment is being organized and disseminated in contemporary culture. In the legal realm, while the numbers of individuals who have "violated" the legal order, and hence have been excluded from the rights enjoyed by those inhabiting its parameters continues to rise, Small Claims Court television shows work towards a more inclusive understanding of legal discourse which offers an ironic sort of legitimation to law: a legitimation which arises from the blending between abstracted and personally identifiable legal judgment otherwise absent in other social spheres. This reinvigoration of legal legitimacy offers the potential for rewriting the ways in which power positions are maintained by legal discourse outside of the televisual arena.

LEGAL LEGITIMATION

This legitimation seems itself to be significant, especially at a time when if there is anything to be learned from the last electoral affirmations over and about the legitimacy of our legal process, it is that there is considerable fear about legal

legitimacy. Despite this fear no doubt being a displacement of more difficult conversations about race relations and multi-national capitalism's effects here in the United States and abroad, this fear of legitimation circulates beneath the legal process nonetheless. Richard Sherwin's recent caution about legal legitimacy, that law is becoming dangerously delegitimized due to television and film representations, reflects a trend of what he considers to be foreboding consequences resulting from shows like Judge Hatchett. He warns, for example, that "the expansion of law's domain to include the complexities and multilevel ambiguities of everyday life must be accompanied by enhanced vigilence toward new dangers . . . including the consequences of transforming legal into televisual reality, a process that includes sensationalization, subjectification, and the fragmention of authority. It is as a result of this development that law is being transformed into a mosaic of increasingly plural, particular, and context-dependent signs." "Taken too far," Sherwin says, this threatens to "erode law's authority, delegitimize its power, and further the breakdown in shared norms for social conduct and belief that is now well under way in society at large" (Sherwin, 2000, pp. 38–39).

Whereas Sherwin is appealing to an idealized history where the utopia of shared norms ever existed in this nation, Small Claims shows actually ironically enhance legal legitimacy. Concerns abound that we are struggling to maintain a monolithic legal structure in fear of collapse, despite multitudes of evidence that legal structures operate at so many cultural levels that they are well embedded into the social norms by which we behave. They are well inculcated into our discursive environments. Nevertheless, if legitimacy must be pondered, then an appeal to common sense justice delivered through the racialized body and to the middle and lower classes is precisely the shield legal regulations need to be maintained. The common sense justice of Small Claims shows engages both in representing varied groups of citizens in ways not previously seen, and also by constantly undermining the efficacy and potency of those representations by alerting us to their stereotypical potential. Judges Mathis and Judy become comedic placeholders for a racialized justice – one replete with potential as a system of inclusion rather than racial exclusion, and one which disrupts itself by self-consciously alerting the viewer to the dangers of racial stereotyping in our legal system.

The bodies put before us in these Small Claims court shows do seem to be thought through boundaries of race and regionalism which already circumscribe and define the participants. This is disconcerting, and is certainly not an uncomplicated part of the television shows. The re-imagining of legal judgment gets performed in disturbing ways as the images of legal racial bodies on these shows offer a perplexing commentary on the law's relationship to race. While progressively highlighting the importance of recognizing the role of race in legal authority, and in so doing challenging the too oft misguided conflation between blind justice, and white justice, these shows nonetheless draw from racial stereotypes to insert

race into the legal gaze. We do see wild and loud gestures; we do hear street slang; and we have even seen Judge Joe Brown deliver his decision in rap. Moreover, the shows conflate image with function, as the very same processes of snap judgment which have been understood to lead to racism, operate in these shows towards the delivery of legal judgment. It seems, at least in the edited version spectators see, that the judges frequently make their decisions about litigants and cases rather quickly. And, of course, it is from the position of quick stereotyping that harmful judgments based on race have been historically and continue to be currently rendered. Viewers often do see judges render snap judgments, decreed with some frequency seemingly too early without reasoned justification. These judgments seem to originate in the judges' early decisions about litigants' ethical characters, and by using affect which seems to singularly identify a litigant as reasonable or ridiculous. These same judgments are rendered from what could be called the stereotyped racialized, or regionalized judges we see before us on Small Claims shows: decisions emerging from hackneyed and oversimplified images of African-Americans or Southerners "being" black or southern.

Yet, the stereotypes portrayed are so obvious as to be laughable; they function to self-consciously disrupt a belief in the veracity of the stereotype being put forth on the screen. Ultimately, these shows, far from delegitimizing a monolithic external law, move us forward through irony to a more self-aware and inclusive law. The lens of legal control is itself at work in these representations, as it revises itself through the popular medium to maintain its authority through a racialized, regionalized sense of legal inclusion. Moreover, these shows are pedagogical in nature, as they are invested in teaching a certain sort of legal subjectivity. These shows are not ultimately about punishment, but rather about the discipline of being a good citizen. They teach how to read legal images, alongside showing how to re-envision the legal judgment as a shifting mode which can at once expel stupidity, incorporate affect, acknowledge difference, and practice the tenets of civic participation. As such, in an era otherwise dominantly marked by apathy, these shows offer inventive legal moments which propel Americans to rehearse the exercise of civic judgment in preparation for what will hopefully soon be a moment of more active public participation.

NOTES

1. DeTocqueville commented on citizens' passive engagement with politics even at the inception of this nation. Even then, he questioned the degree to which this sort of passivity was endemic to democratic life.

2. See Seyla Benhabib "*Toward a Deliberate Model of Democratic Legitimacy*" and Iris Marion Young, "*Communication and the Other: Beyond Deliberate Democracy*" in Democracy and Difference. Princeton: Princeton University Press, 1996.

3. See, for example, details listed in "Cover Letter" from Adam Spiegelman, Judge Joe Brown Producer, September 7th, 2001. Reprinted with permission of Benjamin Treuhaft, participant on Judge Joe Brown's show.

4. Judge Joe Brown Arbitration Agreement, No. 4. Reprinted with permission of Benjamin Treuhaft, participant on Judge Joe Brown's show.

5. The Judge Joe Brown Arbitration Agreement stipulates in No. 3, for example, that "Both parties agree to immediately dismiss their existing Claims with prejudice . . . The Arbitrator's decision, and his interpretation and application of laws and principles he uses in arriving at this Decision, shall be final and binding upon the parties hereto and they shall not have the right to appeal under any circumstances nor shall they have the right to attack the Decision for any reason whatsoever."

6. For more details on each judge, visit each show's website.

7. See "Nielsen Household Ratings in the Top 15 Markets for the February 2002 Sweeps," at http://www.feblocalsweeps1.qxd

8. Not altogether different from the ways in which profiles, portraits, and pictures served as indices of racialized and criminalized character in the 19th century, it is no coincidence that the recent spur of "racial profiling" cases have problematically used appearance as a reading for interiority. Courts have begun, though, to reject appearance as a plausible reason for suspicion. The 9th Circuit majority decision in *U.S. v. German Espinoza Montero Camargo*, and *U.S. v. Lorenzo Sanchez Guillen*, for example, held that "hispanic appearance" may not be considered as a factor in deciding whether to stop motorists for questioning near the U.S.-Mexico border. In that case, racial profiling was held to be unjust when two border patrol agents improperly considered racial appearance when deciding to stop two hispanic looking men after they made a "sudden u-turn" approaching a reopened checkpoint in El Centro, California. The 7–4 majority held that "stops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone . . . and that those who are not white enjoy a lesser degree of constitutional protection – that they are in effect assumed to be potential criminals first and individuals second." This sort of reasoning is also echoed in California's recent DWB (Driving While Black) cases, where attention has been placed upon noticing the large number of motorists stopped simply for allegedly "driving while black."

9. For a more detailed discussion of the Cosby Show, see Sut Jhally & Justin Lewis, *Englightened Racism: The Cosby Show, Audiences, and the Myth of the American Dream*, Westview Press, 1992.

10. See, for instance, Richard Delgado and Jean Stefancic, *Critical Race Theory*, where they cite Justice Harlan's and Judge Posner's opinions surrounding the accountability of race (pp. 21–23).

11. Though there have not been numerous judges subjected to public spectatorship, we can look to the O. J. Simpson trial, where public spectators were presented with Judge Lance Ito, the Japanese-American judge presiding. Ito was ridiculed, as Brian Locke has commented on in "Here Comes the Judge," on several TV shows, including the Jay Leno show. As Locke has argued, folks were trying to find what Ito was hiding underneath or between his robes. Public viewers witnessed "The Dancing Itos," a group of chorus line dancers who were marked by Ito's Japanese features (Locke, 1998, p. 240). While the mocking of public figures is nothing uncommon to late night talk shows, the particular racial depiction of Ito is significant when thinking about the judges who preside over Court television shows.

12. See, for example, Wendy Brown's model argument that, because theory can be separated from politics, studying Nietzsche's theories can reinvigorate Democracy. Wendy Brown, "Democracy Against Itself: Nietzsche's Challenge," in *Politics out of History*. Princeton: Princeton University Press, 2001.

13. Publics have of course been historically construed as participatory spectators before in the legal arena. Paul Gewirtz's work on voyeurs in criminal trials, for instance, has suggested that in America the public has vitally functioned as a voyeuristic audience in four ways: the public is a target of a trial for deterrence purposes, the public is a watchdog, the trial expresses public morality to embody moral condemnation of the community, and the public is a constituent of trials as it sees them as an expression of public values (Gewirtz, 1996, p. 150). Among the many other examples of public engagement in legal judgment, mob lynchings, and the very process of the witnessing of marriages as being inherent to their legal recognition, further highlight the ways in which legal judgment hardly exists solely within the realm of an isolated legal order. Rather, it relies in part for its authority on repeated public interpellation.

14. As Margaret DeRosia reminds readers, Paul Gewirtz has noted that most elements of a trial refute the notion "I feel, therefore I judge." See Paul Gewirtz (1996). "Some stories about confessions and confessions about stories." In: P. Brooks & P. Gewirtz (Eds), *Law's Stories: Narrative and Rhetoric about the Law* (p. 152). New Haven: Yale University Press.

15. See Justin Lewis, *The Ideological Octopus*, p. 20.

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