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# HOFSTRA LAW REVIEW

Volume 6, No. 4

Summer 1978

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

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† I wish to thank the following persons for assistance in developing the perspective set forth in this article: Dr. James Bull; Vivian Goldstein; James Hermann; Associate Professor Eric Lane of the Hofstra University School of Law; Roger Manus; Jerome McElroy, Associate Director of the Vera Institute of Justice; Associate Professor Robert Pugsley of the Southwestern University School of Law; Dan Rossner; and Dr. Matthew Ies Spetter.

I dedicate this article to Gerhard O.W. Mueller and to the memory of Edmund Cahn, illuminating teachers and persistent advocates of a more humane law.

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*Human culture taken as a whole  
may be described as the process of man's  
progressive self-liberation.<sup>1</sup>*

#### INTRODUCTION

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

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

The principal justifications of punishment are general deterrence and retribution.<sup>3</sup> These justifications, along with a dominant

1. E. CASSIRER, AN ESSAY ON MAN 228 (1944).

2. Compare B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971) with S. FREUD, A GENERAL INTRODUCTION TO PSYCHO-ANALYSIS (1935) and C. ROGERS, ON BECOMING A PERSON (1961).

3. This article does not deal with two prevalent justifications of punishment: rehabilitation and incapacitation. For books containing worthwhile critiques of rehabilitation, see AMERICAN FRIENDS SERVICE COMM., THE STRUGGLE FOR JUSTICE (1971); M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973); N. KITTRIE, THE RIGHT TO BE DIFFERENT (1971); A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976). Incapacitation does not appear to be a separate

conception of the role of the central elements in traditional prudence, and its underlying examples of what Edmond Cahn believed that this perspective or official perspective, Cahn believed that this perspective, lawyers, judges, politicians view an imperial or official product of "rulers, government the world.<sup>6</sup> It is a perspective quo. In an American context for Presidents, for the C Association of Manufacturers for the professional and school civics and history officially sanctioned dreamers of the Communist Party for the censors, for the novel and writers, for the new perspective is for all those beneficiaries of social, produced by elite groups.

General deterrence imperial perspective. General calls general prevention, ences emanating from the

justification; it is descriptive not by itself a justification for is included in general deterrence discussed in this article), and is c

4. Cahn, *Law in the Courts*. Cahn elaborates in E. CAHN, "imperial or official perspective all past eras":

The old political, social, over millennia of time and dominant interests of rulers, philosophers of government their theories while observed, tyrannies, or oligarchies. shift of as much as 180 degrees. *Id.* at 28.

5. E. CAHN, *supra* note 4.

6. *See id.* at 28.

7. Andenaes, *The General*

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conception of the role of the criminal law in society, comprise central elements in traditional criminal law jurisprudence. This jurisprudence, and its underlying network of presuppositions, are vivid examples of what Edmond Cahn aptly characterized as "the imperial or official perspective" for viewing the problems of society.<sup>4</sup> Cahn believed that this perspective "controls the thinking of most lawyers, judges, politicians, and businessmen."<sup>5</sup> He terms this view an imperial or official perspective because it is largely the product of "rulers, governors and other officials" in every part of the world.<sup>6</sup> It is a perspective for those committed to the status quo. In an American context, it is for the affluent and successful, for Presidents, for the Chamber of Commerce, for the National Association of Manufacturers, for the leadership of the AFL-CIO, for the professional and technical elites, for the authors of high school civics and history textbooks—for all of the purveyors of the officially sanctioned dream. In a Soviet context, it is for the members of the Communist Party, for the military, for the secret police, for the censors, for the managers, for the official poets, painters, and writers, for the new Communist bourgeoisie. In short, this perspective is for all those who are, or who hope to be, primary beneficiaries of social, political, and economic arrangements dominated by elite groups.

General deterrence theory is an excellent example of the imperial perspective. General deterrence, or what Johannes Andenaes calls general prevention, has been defined as the "restraining influences emanating from the criminal law and the legal machinery."<sup>7</sup>

justification; it is descriptive of one technique of punishment—imprisonment. It is not by itself a justification for that form of punishment. As a technique, incapacitation is included in general deterrence, in individual deterrence (which is also not discussed in this article), and is often emphasized in rehabilitation.

4. Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1, 4-9 (1963). Cahn elaborates in E. CAHN, *THE PREDICAMENT OF DEMOCRATIC MAN* (1961), on an "imperial or official perspective." It is the "fixed and habitual attitudes of virtually all past eras":

The old political, social, and legal perspective, developed and reinforced over millennia of time and continents of space, was determined by the dominant interests of rulers, governors, and other officers . . . . The classic philosophers of government, at least after the death of Aristotle, developed their theories while observing the ways of empires, kingdoms, landed aristocracies, or oligarchies. Consequently, to achieve a consumer perspective a shift of as much as 180 degrees is called for.

*Id.* at 28.

5. E. CAHN, *supra* note 4, at 30.

6. *See id.* at 28.

7. Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L.

It includes the threat of penal law enforcement—what Andenaes calls “mere deterrence”<sup>8</sup>—as well as what he calls the general preventive effects of the penal law—its ripple effect in “moral or socio-pedagogical influence.”<sup>9</sup> “[M]essages’ sent by law and the legal processes [to the public] contain factual information about what would be risked by disobedience [as well as] proclamations specifying that it is wrong to disobey.”<sup>10</sup>

Belief in the theory and practice of general deterrence is experiencing a renaissance. Legal commentators, and others, are engaged in many new analyses and studies. Norval Morris describes deterrence as the “primary and essential postulate”<sup>11</sup> of “every criminal law system in the world.”<sup>12</sup> H.L.A. Hart describes it as the primary task of the criminal law.<sup>13</sup> Johannes Andenaes says it “has occupied and still occupies a central position in the philosophy of criminal law, in penal legislation, and in the sentencing policies of the courts.”<sup>14</sup> These modern commentators agree with many of the older authorities. In the words of C.S. Kenny:

According to the most generally accepted writers, as for instance Beccaria, Blackstone, Romilly, Paley, Fueuerbach, this hope for preventing the repetition of the offense is not only a main object, but the sole permissible object, of inflicting a criminal punishment . . . . [The prevention of crime is a] paramount and universally admitted object of punishment . . . .<sup>15</sup>

General deterrence is important not only as a favorite paradigm of penal theoreticians; it is immensely influential and popular among Presidents, governors, legislators, and administrators, who often urge it as the justification for far-reaching programs in criminal law and criminal justice and even as the answer to the crisis of crime.<sup>16</sup>

REV. 949, 949 (1966). General deterrence should be distinguished from special deterrence, which refers to the “threat of further punishment of one who has already been convicted and punished for crime.” N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN’S GUIDE TO CRIME CONTROL* 255 (1970).

8. Andenaes, *supra* note 7, at 950.

9. *Id.* (emphasis deleted).

10. *Id.* (emphasis deleted).

11. N. MORRIS & G. HAWKINS, *supra* note 7, at 254.

12. *Id.*

13. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 27 (1968).

14. Andenaes, *supra* note 7, at 953.

15. C.S. KENNY, *OUTLINES OF CRIMINAL LAW* 27-28 (1907).

16. The daily newspapers abound in illustrations. For example, former President Nixon stated in a position paper on crime that “[i]f the conviction rate were doubled in this country, it would do more to eliminate crime in the future than a quadrupling of the funds for any governmental war on poverty.” R. HARRIS, *THE*

The first thesis of the repugnant justification for the twentieth century of the person and society. The problem of crime, its moral problem, can be considered bankrupt. It formulates the issue of sacrifice to the common good. Its conception of responsibility and its conception of sentencing is a conception of sentencing which does not violate justice—“social interest” weighted against a justification of punishment of the status quo and its

The second thesis of the unlike general deterrence mandating general suppression exists, and are often blended and criticizes the work of Herbert Morris. In addition, the two theses are analyzed. As with

FEAR OF CRIME 73-74 (1969) (*ward Freedom from Fear*). The formal justifications offered, for example, a coalition of Democrats defeated a bill in May 1975 which would have made it possible to grant parole as much as five years for prisoners already fearful of the criminal justice system. Such comments by modern legal theorists of the function and purpose of punishment emphasizes that “[a]s an historical matter, who provided the basic idea of the deterrence of potential crime.” 687, 690 (1937). Justice Holmes’ universal purpose of punishment is discussed in *ed.* 1963). Influential English legal thought of the great end of all legal severity is the *guilty*, has no other intent. EXECUTIVE JUSTICE 12 (LORD OF ENGLISH CRIMINAL LAW 24). Punishment is not the satisfaction of PALEY, *PRINCIPLES OF MORALITY* quoted in L. RADZINOWICZ,

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The first thesis of this article is that general deterrence is a repugnant justification for the criminal law process in any segment of the twentieth century world committed to humanistic views of the person and society. Its presuppositions, its formulations of the problem of crime, its mode of analysis, and its conclusions, should be considered bankrupt. General deterrence is repugnant because it formulates the issue of crime solely as an individual phenomenon and rests on a characterization of the offender as an “indispensable sacrifice to the common safety,” an “example,” and even a “scapegoat.” Its conception of crime and crime control is reductionist; its conception of responsibility is inherently scapegoatist; and its conception of sentencing is inevitably highly politicized and lawless. It does not violate justice—it displaces justice with a “calculus of social interest” weighted against the individual. Indeed, it is not really a justification of punishment, but a rationalization and weapon of the status quo and its ideological and material structures.

The second thesis of this article focuses on retribution, which, unlike general deterrence, does not lend itself to a definition commanding general support. An array of retributive conceptions exists, and are often blended with utilitarian ideas. This article presents and criticizes the retributive theories of Kant, Hegel, and Herbert Morris. In addition, certain popular approaches to retribution are analyzed. As with general deterrence, retribution is impor-

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FEAR OF CRIME 73-74 (1969) (quoting President Nixon’s position paper entitled *Toward Freedom from Fear*). Deterrence-based reasoning also frequently dominates the formal justifications offered by governors and legislators for severe penalties. For example, a coalition of Democratic and Republican legislators in New York State defeated a bill in May 1975 which would have made certain long term inmates eligible for parole as much as five years earlier than at present by arguing that the change “would erode the deterrent effect of sentences and would spark anger in a public already fearful of the criminal problem.” *N.Y. Times*, May 13, 1975, at 70, col. 1. Such comments by modern legal theorists and others echo traditional interpretations of the function and purpose of general deterrence. To illustrate, Herbert Wechsler emphasizes that “[a]s an historical matter there is fairly strong evidence that those who provided the basic ideas . . . held that the dominant ends of the law *should* be the deterrence of potential offenders.” Wechsler, *Book Review*, 37 *COLUM. L. REV.* 687, 690 (1937). Justice Holmes defines general deterrence as the “chief and only universal purpose of punishment.” O.W. HOLMES, *THE COMMON LAW* 40 (M. Howe ed. 1963). Influential English theorists in the past stressed that “[p]revention is the great end of all legal severity nay, the exerting that severity, by making examples of the *guilty*, has no other intention but to deter others.” M. MADAN, *THOUGHTS ON EXECUTIVE JUSTICE* 12 (London 1785), *quoted in* L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW* 240-41 (1948). Others have indicated that the object of all punishment is not the satisfaction of justice but the prevention of crime. *See, e.g.,* W. PALEY, *PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 407 (London 1785), *quoted in* L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW* 250 (1948).

tant not only as a favorite paradigm of certain philosophical and legal theorists; it is also immensely influential and popular among judges, legislators, and the public. A triumph of the revival of retribution is the constitutional approval of the death penalty by the United States Supreme Court, principally on retributive grounds. In the words of Justice Stewart, concurring in *Furman v. Georgia*:<sup>17</sup> "[T]he instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law."<sup>18</sup> Moreover, in *Gregg v. Georgia*,<sup>19</sup> the Court stated: "Retribution is no longer the dominant objective of the criminal law . . . but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men."<sup>20</sup>

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

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

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

17. 408 U.S. 238 (1972).

18. *Id.* at 308 (Stewart, J., concurring).

19. 428 U.S. 153 (1976).

20. *Id.* at 183 (citation omitted).

21. W. FRIEDMANN, *LEGAL THEORY* 174 (5th ed. 1967) (citing C. FRIEDRICH, *PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* (1958)).

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

The third, closely related, thesis of this analysis is that the traditional, fundamental role of the criminal law—to support the dominant moral and social status quo—is also objectionable from a humanistic perspective. Criminal law support for current arrangements should be explicitly contingent upon a status quo which is just. The inadequacy of the traditional articulation of this role is succinctly exemplified by Roscoe Pound's statement that the "criminal law exists to maintain social interests as such,"<sup>22</sup> and in Justice Holmes's similar assertion that "[f]or the most part, the purpose of the criminal law is only to induce external conformity to rule."<sup>23</sup> This inadequacy is also manifested in a Soviet context by an official characterization that "[c]riminal law is designed to provide protection for the Soviet social and state system, socialist property, and the person and rights of citizens against criminal encroachments."<sup>24</sup> This inadequate conception of the role of the criminal law makes it easier for the criminal law to become the tool of any group that possesses power, whether it be theocratic or capitalistic, fascist or Marxist. The criminal law system and the "social interests" protected should be judged, not assumed to be, valid.<sup>25</sup>

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

22. Pound, *Criminal Justice and the American City*, in *REPORTS OF THE CLEVELAND FOUNDATION SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN CLEVELAND, OHIO, CRIMINAL JUSTICE IN CLEVELAND* 559, 576 (1922).

23. O.W. HOLMES, *supra* note 16, at 42.

24. SOVIET POLITICAL SCIENCE ASSOCIATION, *INSTITUTE OF STATE AND LAW ACADEMY OF SCIENCES OF THE U.S.S.R., THE SOVIET STATE AND LAW* 258 (V. Chkikvadze ed. & Y. Sdobnikov trans. 1969).

25. *See id.* at 19.

If the theory and practice of deterrence and retribution, and of the traditional role of the criminal law, are examples of an imperial perspective on the problems of society, the analysis offered in this article emerges from an antithetical, humanistic perspective. With significant historical antecedents, a humanistic perspective has emerged in the twentieth century as an influential current in philosophy, theology, psychology, and sociology.<sup>26</sup> Although by no means monolithic in character, this humanistic view is founded on a commonly shared myth: that the person and humankind are the source of value, the focal point in determining purpose, policy, and practice. As Cahn notes:

Only when we put the old [imperial] view aside . . . are we able to perceive the practical significance of our institutions, laws, and public transactions in terms of their impacts on the lives and homely experiences of human beings. It is these personal impacts that constitute the criteria for any appraisal we may make. How, we ask, does the particular institution affect personal rights and personal concerns, the interests and aspirations of individual, group, and community? We judge it according to its concussions on human lives.<sup>27</sup>

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

26. Philosophers, religious thinkers, sociologists, and psychologists who have influenced the humanistic perspective presented in this article include the following: W. BARRET, *IRRATIONAL MAN* (1958); W. BARRET, *WHAT IS EXISTENTIALISM?* (1964); E. BECKER, *ESCAPE FROM EVIL* (1975); E. BECKER, *THE STRUCTURE OF EVIL* (1968); P. BERGER, *INVITATION TO SOCIOLOGY: A HUMANISTIC PERSPECTIVE* (1963); J. BONDURANT, *CONQUEST FOR VIOLENCE: THE GHANDIAN PHILOSOPHY OF CONFLICT* (1958); M. BUBER, *I AND THOU* (1970); E. CAHN, *THE MORAL DECISION* (1955); E. CAHN, *THE PREDICAMENT OF DEMOCRATIC MAN* (1961); E. CASSIRER, *2 THE PHILOSOPHY OF SYMBOLIC FORMS: MYTHICAL THOUGHT* (R. Manheim trans. 1957); J. FEINBERG, *SOCIAL PHILOSOPHY* (1973); E. FROMM, *THE ART OF LOVING* (1956); A. HESCHEL, *WHO IS MAN?* (1965); I. HOROWITZ, *THE NEW SOCIOLOGY* (1964); *HUMANIST MANIFESTOS I AND II* (1973); K. JASPERS, *EXISTENTIALISM AND HUMANISM* (1952); K. JASPERS, *THE FUTURE OF MANKIND* (1961); R.D. LAING, *THE POLITICS OF EXPERIENCE* (1967); H. MARCUSE, *REASON AND REVOLUTION: HEGEL AND THE RISE OF SOCIAL THEORY* (2d ed. 1954); A. MASLOW, *THE PSYCHOLOGY OF SCIENCE* (1966); A. MASLOW, *TOWARD A PSYCHOLOGY OF BEING* (1968); C.W. MILLS, *THE SOCIOLOGICAL IMAGINATION* (1969); *PROCEEDINGS OF THE TEILHARD CONFERENCE* (Human Energetics Research Institute 1964); W. RYAN, *BLAMING THE VICTIM* (1971); T. SZASZ, *THE MYTH OF MENTAL ILLNESS* (1961); P. TEILHARD DE CHARDIN, *THE PHENOMENON OF MAN* (1959); P. TILLICH, *THE COURAGE TO BE* (1952); P. TILLICH, *LOVE, POWER AND JUSTICE* (1954). The humanistic movement in Marxism also is noteworthy. See, e.g., E. FROMM, *SOCIALIST HUMANISM* (1965); M. HARRINGTON, *SOCIALISM* (1972).

27. E. CAHN, *supra* note 4, at 30.

primary task of life. Humanists reject the ground of reality that is rooted in status quo social arrangements. They substitute another ground of reality—human liberation and service to humankind in this quest. The shift in ground of reality is basic: It gives rise to radically different modes of perception, imagery, and thought—a different consciousness which is expressed in a radically different network of master beliefs.<sup>28</sup>

\* seen taught our school

28. Master beliefs expressing different forms of consciousness play a central role in societal legitimation. Max Weber writes that each type of "domination" in a society (i.e. (1) charismatic; (2) traditional; and (3) legal) manifests a need to justify itself: He who is more favored feels the never ceasing need to look upon his position as in some way "legitimate," upon his advantage as "deserved," and the other's disadvantage as being brought about by the latter's "fault." . . . . . Every highly privileged group develops the myth of its natural, especially its blood, superiority. . . .

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

M. WEBER, *ON LAW IN ECONOMY AND SOCIETY* 335-36 (1954). Other social theorists describe this process in different language. C. Wright Mills suggests that "[e]very society holds images of its own nature—in particular, images and slogans that justify its system of power and the ways of the powerful." C.W. MILLS, *THE SOCIOLOGICAL IMAGINATION* 80 (1959). Mills also suggests that "[t]hose in authority attempt to justify their rule over institutions by linking it, as if it were a necessary consequence, with widely-believed-in moral symbols, sacred emblems, legal formulae." *Id.* at 36. Peter L. Berger and Thomas Luckman stress that all institutional orders require "legitimation," a process of explaining and justifying. P. BERGER & T. LUCKMAN, *THE SOCIAL CONSTRUCTION OF REALITY* 93 (1967). These explanations and justifications include proverbs, moral maxims, legends, and folk tales as well as "explicit theories," *id.* at 94, and "symbolic universes," *id.* at 95, which are "bodies of theoretical tradition that integrate different provinces of meaning and encompass the institutional order in a symbolic totality." *Id.* "[T]he symbolic universe provides the ultimate legitimation of the institutional order by bestowing upon it the primacy in the hierarchy of human experience." *Id.* at 98. It provides "sheltering canopies over the institutional order as well as over individual biography." *Id.* at 102. McDougal and Lasswell refer to the

dominant beliefs, assumptions and loyalties (the myth) of any given society . . . .

Each value-institution pattern has a specialized system of myth and of operational technique. The myth falls into three parts: doctrine, formula, folklore. Political doctrines, for instance, include the prevailing philosophies of politics and law. Economic doctrines include theoretical justifications of capitalism or socialism. Respect doctrines either justify social class discrimination or the opposite. And every other value has its doctrinal myth.

McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1, 13 (1959).

It should be noted that recognition of the function and significance of the symbolic universe or mythological structure is not inconsistent with sharp conflict among different social interests in the society. For example, in Soviet Russia, there may often be such conflict among representatives of the party and the military and industrial managers over the relative priorities of party, military, and industrial projects in

A contrast of key master beliefs illustrates the differences in the two competing structures of thought presented in archetypical form:<sup>29</sup>

*Key Master Beliefs in Imperial Consciousness*

*Key Master Beliefs in Humanistic Consciousness*

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| <ol style="list-style-type: none"> <li>1. Society (culture and institutions) is viewed as a product of             <ul style="list-style-type: none"> <li>— God</li> <li>— History</li> <li>— Nature</li> <li>— Cosmic Laws</li> <li>— Biology</li> </ul> </li> <li>2. Society is viewed as valid because it is grounded in God, History, and Nature.</li> <li>3. Society is viewed as objective.</li> <li>4. The future is viewed as an organic development from the past and present, a largely predetermined unfolding.</li> <li>5. Societal mystification and obfuscation of phenomena are necessary instruments of social control.</li> <li>6. Society can validly use the individual as a means for societal benefit (e.g., social control).</li> <li>7. The political and social responsibility of individuals should be to con-</li> </ol> | <ol style="list-style-type: none"> <li>1. Society (culture and institutions) is viewed as a humanly-created social reality, a result of political, social, and ethical choices.</li> <li>2. Society is viewed as valid insofar as it serves its members and humankind in attaining realization.</li> <li>3. Society is viewed as embodying and fostering clusters of values, ideologies, and social interests.</li> <li>4. The future is viewed as a social reality which is shaped by human choice.</li> <li>5. Mystification and obfuscation are not seen as necessary for social control.</li> <li>6. Societal benefits (including social control) should not be achieved by instrumental use of individuals.</li> <li>7. The political and social responsibility of individuals should be to conform to</li> </ol> |
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apportioning the national budget; in the United States, there is often conflict between the leadership of the National Association of Manufacturers (NAM) and the leadership of the AFL-CIO over economic issues. But all this conflict is at a particular level and generally presupposes the validity of the underlying social interests and the related symbolic universe or mythological structure. The Soviet groups, for example, are committed to a general Marxist position and the NAM and the AFL-CIO are committed to a neo-capitalist position. The contrast is with dissenters who reject the reigning social interests and symbolic universe and suggest a fundamental change (e.g., Solzhenitsyn in Soviet Russia and Michael Harrington in the United States). In this analysis, the dominant principles of legitimation, the symbolic universe, or the mythological structure are referred to as the master beliefs.

29. The following chart in text emphasizes the dichotomy of these key master beliefs. The items in the humanistic column obviously are primarily normative in contrast to the items in the imperial column, which are both normative and empirical.

*Key Master Beliefs in Imperial Consciousness (continued)*

*Key Master Beliefs in Humanistic Consciousness (continued)*

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>8. Traditional philosophy should be used mostly to rationalize existing cultures, institutions, and norms.</li> <li>9. Education should inculcate youth in the available norms, roles, and opportunities; it socializes youth to respect existing institutional arrangements.</li> <li>10. Traditional psychologies and sociologies present conformist self-identities and criteria for self-esteem.</li> <li>11. The criminal law should be primarily directed against dissidents and crimes committed by the poor.</li> <li>12. Competing interests and values should be resolved by balancing.</li> <li>13. Justification should be on a means-ends basis in which the ends justify means and the means are seen as separate from ends.</li> <li>14. Theories and concepts, if considered valid, are viewed as essentially objective, value-free, and neutral.</li> <li>15. Social research is objective, neutral, and value-free.</li> <li>16. Social research should focus on the problems of people who do not meet society's expectations (e.g., poor, offenders, Blacks, Hispanics, workers, and women).</li> <li>17. Social policy should be determined by pragmatic research to determine what works.</li> </ol> | <ol style="list-style-type: none"> <li>societal institutions and authorities which foster humanistic norms and to resist those institutions and authorities which violate humanistic norms.</li> <li>Philosophy should provide a basis for assessing fundamental premises; it should be a critical philosophy.</li> <li>Education should foster human realization by assisting youth to live authentic moral lives in the community and to develop a critical consciousness about themselves, the institutions, and the culture.</li> <li>Psychologies and sociologies which foster human realization by helping individuals to overcome inner and outer barriers should be stressed.</li> <li>The criminal law should be directed equally against the powerful and powerless, against the crimes of the rich, the middle class, and the poor.</li> <li>Competing interests and values often should be resolved by value ranking according to humanistic principles.</li> <li>Initial and intermediate stages are as important as ends of processes. Justification should occur at each stage. Means are ends in themselves.</li> <li>Theories and concepts inherently have political, social, and ethical implications.</li> <li>Social research inherently reflects values, interests, and ideologies.</li> <li>Social research should investigate the rich and powerful as well as the powerless (e.g., executive, legislative, judicial, corporate, and professional behavior).</li> <li>Pragmatic measures should be subordinate to a humanistic political, social, and ethical framework.</li> </ol> |
|---|--|

\* not if society is grounded in God!

Key Master Beliefs in  
Imperial Consciousness (continued)

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

*or God's principles!*

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

Key Master Beliefs in  
Humanistic Consciousness (continued)

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

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

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

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

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

Part One of this article contrasts the imperial metaphysical, epistemological, and ethical presuppositions underlying the princi-

30. Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1, 3-4 (1963).

pal justifications of punishment with humanistic presuppositions. Part Two presents a critique and assessment of the humanistic thinking of Heidegger. Part Three presents a humanistic critique of general deterrence within its framework of utilitarian philosophy. Part Four critiques Kantian, Hegelian, and contemporary retributive theories. Finally, Part Five outlines a humanistic theory of criminal law.

## PART I

### IMPERIAL AND HUMANISTIC PRESUPPOSITIONS

#### *An Imperial Metaphysics and Ethics*

A fundamental and traditional ontological view underlies criminal law theory and the dialectic of the modern advocates. In this view, social reality tends to be fixed, composed of predetermined structures. Human nature, social institutions, norms, and morality are all given this status. They are not provisional, contingent, and evolving; rather, they are identified with reality—"being"—in the most profound and fixed sense. They are reified. A closely-related theory of value identifies this ontological position with the valid or the good. What *is* is what *should be*. What *is real* is also what *is good*. Thus, existing institutions, norms, morality, and definitions of human nature take on special status: They are identified with transcendent being and value.<sup>31</sup>

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

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

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

*Id.* at 96. If we seek immortality through culture, reification of culture is an imperative. We shall die as individuals, but we shall live on in our membership in a particular ideological, ethnic, religious, social, or party grouping.

*Call MPC*

"human nature," "moral codes of society," and the "legal system" with transcendent being and value reinforces imperial interests.<sup>32</sup> What is seen as not simply rooted in humankind's past and present activity. Social reality is not seen as a human product. An existing social reality, a particular arrangement of human existence, is transformed into the "social order," which "appears to merge with the world of nature . . . necessity and fate."<sup>33</sup> The "basic recipe for this reification" is to "bestow" on the social order an ontological status independent of human activity and signification. What is forgotten is that the "social order exists only as a product of human activity" and "no other ontological status may be ascribed to it without hopelessly obfuscating its empirical manifestations."<sup>34</sup> However, this obfuscation of the human authorship of current social arrangements, including the "legal system," is essential to the imperial identification of what is with transcendent being and value.

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

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

32. P. BERGER & T. LUCKMAN, *THE SOCIAL CONSTRUCTION OF REALITY* 89 (1966).

33. *Id.* at 90-91.

34. *Id.* at 90.

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

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

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

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

*Id.* at 158, 162.

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affair  
Marxism

economic, political, and social arrangements but also of their rightness and legitimacy.

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

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

"What sort of story?"

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

"We shall," I said, "address our citizens as follows:

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

silver or bronze.' That is the story. Do you think there is any way of making them believe it?"

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

"Even so it should serve to increase their loyalty to the state and to each other. For I think that's what you mean."<sup>36</sup>

The mystification and obfuscation process for identifying social reality with a Cosmic Plan or Order or an otherwise exalted ontological status is both explicit and implicit in the writings of many of the advocates of retribution. Crime, in Morris R. Cohen's words, is a "violation or disturbance of the divine or moral order. When Cain kills Abel, the very earth cries for vengeance. The moral order can be restored, or the violation atoned for, only by inflicting evil . . . . The sentiment of just vengeance or retribution is . . . deeply grounded in human nature . . . ." <sup>37</sup> Sir James Fitzjames Stephen, comparing the passions of vengeance and love, states: "The forms in which deliberate anger and righteous disapprobation are expressed, and the execution of criminal justice is the most emphatic of such forms, stand to the one set of passions in the same relation in which marriage stands to the other."<sup>38</sup> For Kant, the failure to punish for murder results in a "bloodguiltiness . . . upon the people."<sup>39</sup> Reification is the common premise underlying these diverse retributive expressions; punishment has an express or implicit "ontological status independent of human" choice and significance.<sup>40</sup> Punishment is an imperative of God, of the moral order, of human nature, of the need to restore cosmic equilibrium.

The advocates of deterrence postulate a series of core premises as givens which are not subject to analysis. These givens, if not reified, are given an exalted ontological status. The vocabulary used and the meaning expressed manifest this process: Pound's attribution of exalted status to "civilized society," "social interests," and the "system of duties";<sup>41</sup> Andenaes's "human natures," "moral codes of society," and his neat division of humankind into "crimi-

36. PLATO, *THE REPUBLIC* 159-61 (Lee trans. 1955) (footnote omitted).

37. Cohen, *Moral Aspects of the Criminal Law*, 49 *YALE L.J.* 987, 1009-10 (1940).

38. Stephen, *Of Crimes in General and of Punishments*, in *CRIME, LAW, AND SOCIETY* 17, 23-24 (A. Goldstein & J. Goldstein eds. 1971).

39. Kant, *Justice and Punishment*, in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* 102, 106 (G. Ezorsky ed. 1972).

40. See text accompanying notes 33 & 34 *supra*.

41. See Pound, *supra* note 22.

nals," "potential criminals," and the "law-abiding";<sup>42</sup> Packer's image of the criminal process as legitimate "public rituals" and "rites";<sup>43</sup> Zimring's "solemn commands of a legal system" and "loyalty to the parent society";<sup>44</sup> Henry M. Hart's conformity-oriented "theory of social justice" stressing "training of an adult in the larger circle of the community";<sup>45</sup> and Mark DeWolfe Howe's use of "nature" and "Man's nature" to legitimize the law's "respect" for the "strong," and his approval of the "law's willingness to allow a measure of oppression to prevail."<sup>46</sup>

The prevailing ethical and moral code for individuals usually derives from this ontological and axiological position. In simplified statement, since the individual is defined by existing social structures and norms, his ethical obligation is clear: He must conform to the roles and duties which these institutions prescribe. The individual derives social value and personal meaning by fulfilling his or her destiny of subordination and service to existing social forms. Morality and ethics also are reified or otherwise exalted as givens. Just as social organization is identified with transcendent being and value, ethical and moral obligations undergo the same transformation. They too are given an ontological status independent of human activity and signification. Their human authorship is obscured. If not reified, existing ethical obligations are given a preferred, a priori status or are otherwise one-sided, a weapon of the powerful against the weak. John Rawls' *A Theory of Justice* illustrates a sophisticated form of status quo ethical reasoning.<sup>47</sup> Rawls, in Peter Singer's words, "thinks that moral philosophy should take the firmest" of our "moral judgments" as "data" and "unify our particular intuitions about justice." These moral intuitions are givens and are not subject to "rigorous criticism."<sup>48</sup> Not surprisingly, Rawls' conclusions justify a society comparable to that which exists in the United States and say almost nothing about "the demands of justice in distribution between nation-states."<sup>49</sup> There is a circular-

42. See Andenaes, *supra* note 7.

43. See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

44. See F. ZIMRING, *PERSPECTIVES ON DETERRENCE* (National Institute of Mental Health, Public Health Service Pub. No. 2056 (1971)).

45. See Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROB.* 401 (1958).

46. See Howe, *Introduction to O.W. HOLMES, THE COMMON LAW* (1963).

47. See J. RAWLS, *A THEORY OF JUSTICE* (1971).

48. Singer, *Philosophers Are Back on the Job*, *N.Y. Times*, July 7, 1974, § 6 (Magazine), at 7, 19.

49. *Id.*

ity in the reasoning: It provides brilliant apologetics for the status quo. What should be a central element to be justified—the "firmest" of our "moral judgments"—becomes a priori "data."

Another example of this ethical approach is contained in the analysis of the modern advocates of deterrence. Although aware and troubled by the ethical issues in sentencing the convicted individual on the basis of the threat posed by others,<sup>50</sup> they overcome these reservations. With misgivings, they place the burden for controlling crime on the hapless individual offenders who manage to lose in our lottery system of criminal justice and are convicted of a crime. This is scapegoatist ethics: The responsibility for crime is summed up and personified in the punishment of the offenders who are convicted. All others implicated in the pervasive aggression, violence, and greed in our culture are thereby aided in escaping ethical responsibility. There is a gross reductionism underlying this scapegoatism; ethics is encapsulated. The rationale given for this approach is that it is the practical way to control crime, at least at present.<sup>51</sup> In this thinking, there is not a broad ethical or sociological imagination, or an anthropological or social-psychological imagination, or a moderate political perspective.

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

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

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

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

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

*influence of Holy Spirit*

### An Imperial Epistemology

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

With this underlying epistemological stance, there is a compelling argument, usually by implication, that policymaking should be determined ordinarily by research into the facts. Andenaes, for example, emphasizes the need to separate empirical questions about the effectiveness of deterrence from ideological arguments, so that these questions can be discussed "dispassionately and without bias."<sup>52</sup> The assumption is that facts have no ideological context: They are neutral and value-free. Indeed, Andenaes (and other advocates of deterrence) emphasizes the "neglected" factual "issue": "[T]o what degree, and under what conditions, it is possible to direct the behavior of citizens by means of the threat of punishment."<sup>53</sup>

The sophisticated modern advocates of deterrence do not explicitly argue that the resolution of empirical questions provides the principal basis for policymaking. Yet that is the thrust and effect of their analysis. The discussion of deterrence is characterized as "in the main quite unscientific."<sup>54</sup> The "deterrence debate . . . if not meaningless [is] at least largely irrelevant to any material concern."<sup>55</sup> The emphasis is not on "rhetorical statements" but "propositions which could be evaluated on the basis of fact."<sup>56</sup> It is verification of facts, not ideological arguments, which offers the potential for answers. The emphasis on verification is not without concern for the ethical issues.<sup>57</sup> These concerns, however, are

52. Andenaes, *supra* note 7, at 954.

53. *Id.*

54. F. ZIMRING & G. HAWKINS, *supra* note 51, at 2.

55. *Id.* at 4-5.

56. *Id.* at 2.

57. *See id.* at 32-50.

mostly overcome, albeit not without misgivings.

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

### A Humanistic Metaphysics

A humanistic metaphysics and ethics provide very different approaches to fundamental questions.<sup>58</sup> Being is not fixed and manifested in a world of determined structures. It is a flux; a continuous, creative process in which humankind plays a critical role. Being is becoming: Social institutions, norms, morality, and, (to a startling extent) human nature—and even nature—are an ever-changing product of a dynamic and evolutionary process.

58. In this article, there is no effort to provide a ground for the humanistic enterprise beyond human consciousness and activity. There is no suggested cosmology. From a traditional religious viewpoint, God is the ground. From a secular viewpoint, humankind alone is the ground. For others, a cosmic design or order of some sort may provide a ground. The emphasis in this article on human beings providing a ground, out of our experience and struggle, does not preclude a cosmological quest. Such a quest, however, is beyond the scope of this article.

∴ the embrace of humankind by providence, *epistemology*, *anthropology*, *philosophy*

[A]ll things are caught up in this universal surge of constantly changing reality. We no longer consider things as fixed in their structure. We speak now in developmental terms; not of cosmos but of cosmogenesis, not of fixed species but of biogenesis, not of mankind as a determined reality but of anthropogenesis, for man is making himself at the same time as he is in a manner making the world.<sup>59</sup>

Julian Huxley, in his introduction to Teilhard de Chardin's *The Phenomenon of Man*, emphasizes the "absolute necessity of adopting an evolutionary point of view".<sup>60</sup> "[T]he different branches of science combine to demonstrate that the universe in its entirety must be regarded as one gigantic process, a process of becoming, of attaining new levels of existence and organization, which can properly be called a genesis or an evolution."<sup>61</sup> José Ortega y Gasset applies this process to men and women and their human nature:

Man does not have a nature, but a history. . . . Man is no thing, but a drama. . . . His life is something that has to be chosen, made up as he goes along, and a man consists in that choice and invention. Each man is the novelist of himself, and though he may choose between being an original writer and a plagiarist, he cannot escape choosing. . . . He is condemned to be free. . . . Freedom is not an activity exercised by an entity that already possessed a fixed being before and apart from that activity. Being free means . . . being able to be something else than what one is and not being able to settle down once and for all in any determined nature. . . . Unlike all the other things in the universe which have a pre-fixed being given to them, man is the only and almost inconceivable reality that exists without having an irrevocably pre-fixed being. . . . It is not only in economics but also in metaphysics that man must earn his living . . .<sup>62</sup>

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

59. Berry, *The Threshold of the Modern World*, in PROCEEDINGS OF THE TEILHARD CONFERENCE 57, 58 (Human Energetics Research Institute 1964).

60. Huxley, *Introduction to P. TEILHARD DE CHARDIN, THE PHENOMENON OF MAN* 12 (1959).

61. *Id.* at 13.

62. McInnes, *Ortega y Gasset, José*, in 6 THE ENCYCLOPEDIA OF PHILOSOPHY 2, 3-4 (P. Edwards ed. 1967).

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

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

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

63. Marković, *Yugoslav Philosophy*, in 8 THE ENCYCLOPEDIA OF PHILOSOPHY 359, 363 (P. Edwards ed. 1967).

impressive evolutionary thinking

God's standard good - who defines what is good? and what should be?

And there cannot be fixed abs can there  
This is not focused but traditional emanate Christ

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

The purpose and function of humanistic political, legal, and ethical structures is to serve humankind. The validity or lack of validity of these structures and related master beliefs result from their success or failure in serving humankind's evolving experience, consciousness, and needs. The person and humankind transcend what is and only derive personal meaning and social value from their role in status quo structures insofar as these structures embody a humanistic conception of the person and of society. For example, Gandhi made clear that he remained loyal to an institution "so long as that institution conduce[d] to [his] growth and the growth of the nation." Immediately upon finding that the institution 'instead of conducting to its growth impedes it,' he considered it his 'bounden duty to be disloyal to it.'<sup>64</sup> In the words of McDougal and Lasswell:

Instead of institutional symbols such as "capitalism" versus "socialism," "territorial" versus "functional" representation, "centralized" versus "decentralized" planning, considered abstractly and affirmed dogmatically, the focus of attention and debate can usefully shift to the appraisal of contemporary structures according to their positive or negative impact upon present and prospective value-shaping and sharing.<sup>65</sup>

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

64. J. BONDURANT, CONQUEST FOR VIOLENCE: THE GANDHIAN PHILOSOPHY OF CONFLICT 164 (1958) (footnote omitted).

65. McDougal & Lasswell, *supra* note 28, at 29.

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

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

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

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

The substitution of this new ground of our common status as

66. Abbagano, *Humanism*, in 4 THE ENCYCLOPEDIA OF PHILOSOPHY 69, 70 (P. Edwards ed. 1967).

67. J. FEINBERG, SOCIAL PHILOSOPHY 88-89 (1973).

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

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

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

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

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

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

68. DECLARATION OF INDEPENDENCE.

69. E. CAHN, *supra* note 4, at 115-16.

Happiness," leads to a democratic specification which includes civil and political rights to due process, free speech and press, and free exercise of religion, petition, and assembly. A humanist specification, however, also emphasizes human rights in social-economic terms: the right to a job, to food, to medical care, to housing, to education, to clean air, to a pension, to assistance in the event of disability or sickness or death of a parent or mate.

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

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

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

70. Amalrik, *By Bread Alone? A Well-Fed Slave is a Well-Fed Slave*, N.Y. Times, Feb. 3, 1977, at 33, col. 2.

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

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

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

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

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

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

71. *Id.*

72. McDougal & Lasswell, *supra* note 28, at 5 (emphasis in original).

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

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

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

73. McDougal, Lasswell, & Chen, *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, 63 AM. J. INT'L. L. 237, 269 (1969).

74. CLUB OF ROME, REPORT ON WORLD RESOURCES AND GROWTH (1977).

quirement of any decent moral sense. The status quo interpretation of what is practical and what is realistic would be reversed. The myth and moral framework of humanism is a requirement of our historical evolution and of our contemporary experience. It is myth and moral framework whose time has come and without which the time of humankind may be limited. In Amalrick's words: "I believe that everyone who values freedom is confronted by the problem of creating a new ideology which will transcend both liberalism and Communism and make its central issue the indivisible rights of man. . . . I am for an ideology of humanism."<sup>75</sup> If we confront our history, acknowledge that we are the creators and recreators of the political and social world, we are compelled to take responsibility for what we have wrought, including authoritarian and totalitarian systems: monarchy, feudalism, fascism, Leninism and Stalinism, and exploitative capitalism. If we have created these destructive myths and ideologies and embodied them in structures of domination, we can also create humanistic myths and ideologies and embody them in structures of liberation.

*A Humanistic Ethics*

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

75. Amalrik, *supra* note 70, at 33, col. 2.

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a spade.

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Worst of all, automatic conformity denies human ethical responsibility for social institutions and culture, including responsibility for the very roles which provide the ground for conventional ethical obligation. We must recognize that human beings are accountable for the ethical values that exist: We are the authors and the legitimizers. We are responsible for choosing our values and for incorporating them in personal and social realms. We must provide the direction and purpose for evolving being and foster the evolution by our life work which cannot be only a personal odyssey. "Just as in the past, he was judged to betray his personhood if he ceded to a life of instinct, so now the same condemnation is levelled against him if he merely accepts the social order he finds and makes no attempt to better it."<sup>76</sup>

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

In humanistic ethics, there is a basis for a fundamental challenge to central societal techniques of legitimization and denigration. Scapegoatist ethics is rejected. The responsibility for grave defects in our culture and institutions—for example, schools which do not teach, an economic system which leaves millions unemployed, and a culture which glorifies greed—lies not with those who are the victims of these failures, for example, the unemployed.<sup>77</sup> The rejection of scapegoatist ethics means, too, that the responsibility for crime cannot be summed up and personified in the punishment of convicted offenders. Individuals should not be used to remedy problems whose nature and scope go to the heart of our society. Encapsulated ethics leads to encapsulated sociological and criminological formulations focused on the individual. A broader ethical imagination, reflecting the insights, for example, of Mer-

76. Johann, *Teilhard's Personalized Universe*, in PROCEEDINGS OF THE TEILHARD CONFERENCE 93, 105 (Human Energetics Research Institute 1964).

77. See generally W. RYAN, *BLAMING THE VICTIM* (1971).

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myopic

ton<sup>78</sup> or Küng,<sup>79</sup> leads to a broader sociological, anthropological or social-psychological imagination, or a combination of them. With a broader perspective, there is a different context for asking questions about the crime control potential of legal institutions.<sup>80</sup> Reductionist formulations are seen as a requisite of scapegoatist ethics, a prime support for an unjust status quo.

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

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

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

#### A Humanistic Epistemology

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

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

78. See, e.g., T. MERTON, CONFESSIONS OF A GUILTY BYSTANDER (1968).

79. See, e.g., H. KÜNG, ON BEING A CHRISTIAN (E. Quinn trans. 1976).

80. For an example of question-asking on a broader scale, see I. TAYLOR, P. WALTON, & J. YOUNG, THE NEW CRIMINOLOGY: FOR A SOCIAL THEORY OF DEVIANCE 268-82 (1973).

81. H. KÜNG, ON BEING A CHRISTIAN 252-53 (E. Quinn trans. 1976).

ceiving, selecting, and categorizing these facts into conclusions. It is evident that we are looking at the facts through the *lens of the slavemaster*, the warden, and the employer.<sup>82</sup> The perspectives manifest the values and interests of the slavemaster, the warden, and the employer in relation to submissive slaves, compliant prisoners, and productive workers. The perspectives are related not only to the values and interests of those on top but also to their power. They have the power to exemplify their perspectives in practice—to create the fact of flogging for violations of their rules. Impeccable scientific research could be utilized in evaluating this application: for example, how much flogging is required to secure obedience from various types of violators? Perceiving, selecting, and categorizing these facts into conclusions is not a neutral, value-free process. The nature of this process is immediately apparent if we look through the *lens of the slaves*, the prisoners, and the workers. They have a different perspective which manifests their interests and which leads to contrasting perceptions. It is more difficult, however, for them to actualize their perspective into facts in relation to their victimizers, for they lack a critical element: power.

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

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

82. It is helpful to keep in mind the words of the philosopher W.V. Quine: "The totality of our so-called knowledge or beliefs, from the most casual matters of geography and history to the profoundest laws of atomic physics or even of pure mathematics and logic, is a *man-made fabric* . . ." Quine, *Two Dogmas of Empiricism*, in 3 PHILOSOPHY IN THE TWENTIETH CENTURY 102, 118-19 (W. Barrett & H. Aiken eds. 1962).

83. G. MYRDAL, OBJECTIVITY IN SOCIAL RESEARCH 9 (1969) (quoting *Preface* to G. MYRDAL, THE POLITICAL ELEMENT IN THE DEVELOPMENT OF ECONOMIC THEORY at ix-xvi (1954)).

But God is the  
lawgiver!

In analyzing deterrence, Andenaes emphasizes the "neglected" factual "issue": "[T]o what degree, and under what conditions, it is possible to direct the behavior of citizens by means of the threat of punishment."<sup>84</sup> The question is highly ideological: It involves a political and social choice, and the facts gathered reflect the values included in the question. Initially, the perspective underlying the question is authoritarian. The transparent point is that it is highly ideological to pose an "empirical" question about directing behavior by threat of punishment. Related empirical questions about the degree to which the direction of behavior is possible and the requisite "conditions" for such direction (as well as questions about control and prevention) are equally ideological. At an extreme, Nazi officials directed these questions to at least five million foreign workers in German industry and the tens of millions in Nazi-occupied territories. Their response: a terroristic general deterrence.<sup>85</sup> Nazi researchers could systematically gather facts about the effectiveness of this response as applied in various factories and diverse occupied territories. There is nothing neutral or value-free about the research: It serves Nazi interests against the interests of other peoples.

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

84. Andenaes, *supra* note 7, at 954.

85. Referring to control of the millions of foreign workers in Germany, Himmler stated: "They are none of them dangerous so long as we take severe measures at the merest trifles." Opinion and Judgment of the International Military Tribunal at Nuremberg, reprinted in NAZI CONSPIRACY AND AGGRESSION (1947). Referring to control of "disorder" in the occupied portions of the Soviet Union, Keitel said: "[A] human life in unsettled countries frequently counts for nothing, and a deterrent effect can be obtained only by unusual severity." *Id.* at 63.

86. As Telford Taylor quotes a United States Marine Corps "Ultimatum to Vietnamese People": "The U.S. Marines will not hesitate to destroy immediately, any village or hamlet harboring the Vietcong." Another Marine leaflet "informed the inhabitants that their village 'was bombed because you harbored Vietcong' and 'will be bombed again if you harbor Vietcong in any way.'" T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 144 (1970). Taylor summarizes the techniques of American terror:

forced resettlement of millions of rural families with utterly inadequate provision for their health and human dignity; complicity in the torture of prisoners by our wards, the South Vietnamese; enthusiasm for body counts overriding the laws of war on the taking of prisoners; devastation of large areas of the country in order to expose the insurgents; outlawry of every visible

could be systematically gathered and analyzed by researchers utilizing sophisticated techniques (*e.g.*, interviews, observation, and use of experimental and control groups), but this research is not neutral or value-free.

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

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

If, however, one views facts not as a product of nature but as arising from the interaction of people in humanly-created culture and institutions, empirical questions cannot be separated from

human being in the free-fire zones; slaughter of the villagers of Son My even to the infants-in-arms.

*Id.* at 152.

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

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

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

87. E. CASSIRER, 3 *THE PHILOSOPHY OF SYMBOLIC FORMS: MYTHICAL THOUGHT* 409 (R. Manheim trans. 1957).

88. The dichotomy of objective and subjective collapses, also, if what is meant is that the objective is neutral and value-free in contrast to the subjective. The dichotomy is valid, however, if what is meant is that the objective has external reality in contrast to a feeling or a thought (an internal reality).

89. This distinction is not itself what it appears to be, *see, e.g.*, J. PEARCE, *EXPLORING THE CRACK IN THE COSMIC EGG* (1974).

90. Scientific facts have a social element also. Science itself is not a transhuman

The third issue relates to the relationship between empirical verification and policymaking. Policymaking is viewed as essentially normative in character, because the objects of policymaking—culture and institutions—are themselves the embodiment of values. It is impossible to have a value-free analysis of a normative reality. Nevertheless, empirical research can be vitally important in clarifying the effects of current policy and in estimating the possible effects of the adoption of different policies. Thus, empirical research is a valuable method for determining policy.

Verifying the facts of the status quo, however, does not establish the validity of the status quo and its techniques. Verifying the facts of domination and victimization does not establish the validity of the systems of domination and victimization.<sup>91</sup> These facts reveal a human-made world, not the laws of nature, or Fate, or God's Will. Facts about the achievements and lack of achievements of Third World peoples, poor blacks, hispanics, appalachian whites, and women, are not facts about human nature, innate potential, or value-free reality. They are facts about politics, power, culture, and an historical epoch. They are facts about people in diverse social roles struggling for available opportunities. They are facts about what peoples are tracked into different paths and facts about a human-made configuration.

To apply this analysis to Andenaes's question about directing behavior in contemporary America (or a Western context assumed by Andenaes), it may be possible to verify the propositions that the incidence of crime could be reduced among the many unemployed black school dropouts in central Harlem by severe sentencing schemes justified on a general deterrence theory; or that execution of those convicted of murder or rape would reduce violence in our society; or that making an example of corporate violators would reduce corporate crime; or that life sentences even for possession of small amounts of narcotics would reduce the narcotic problem.<sup>92</sup> Empirical verification of these propositions, however, does not establish their political and social validity. The propositions would be true only in the limited sense of being verified. They are not established as true in the sense of the political and social validity re-

endeavor. It is a changing human product related to a historical period and culture as well as to successive scientific paradigms. *See generally* T. KUEHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

91. *See, e.g.*, W. RYAN, *BLAMING THE VICTIM* (1971).

92. I do not mean to imply that Andenaes or other modern theorists would necessarily approve of these sentencing schemes.

quired for policymaking. Such decisions must be made in accordance with acceptable political-social norms and values.

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

Policymaking cannot be based on policy analysis which postulates the need for a dichotomy between ideological arguments and empirical questions so that the latter issues "can be discussed dispassionately and without bias."<sup>93</sup> Such a formulation obscures the nature of both fact and policymaking and the role of fact and norm in policymaking. The formulation tends to transform issues of justice into issues of fact. It ignores an essential reality: Humans are the fact-makers; we must, therefore, judge and shape the world of humanly-created facts and not be objects of it.

## PART II

### A CRITIQUE OF HUMANISM

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

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

93. Andenaes, *supra* note 7, at 954.

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

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

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

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

94. Heidegger, *Letter on Humanism*, in 3 PHILOSOPHY IN THE TWENTIETH CENTURY 270, 281 (W. Barrett & H. Aiken eds. 1962).

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

There is a response to Heidegger's issue which, if not satisfactory on a metaphysical level, is adequate on another level. Social philosophers have suggested a social policy basis for a humanistic approach to social life. Joel Feinberg offers a highly pertinent and useful analysis of grounds for the theory of universal equal human rights—an analysis that is applicable to a closely related issue: "In what man's humanity is to be rooted."<sup>95</sup> Construing Gregory Vlastos, Feinberg suggests that the doctrine of universal equal human rights presupposes a concept of equal and universal human worth, independent of human merit, and assumes that at least some basic rights are "based on the worth human beings have as individuals."<sup>96</sup> Humanism also presupposes equal and universal human worth. Feinberg critically reviews the grounds offered to support the doctrine of equal and universal human worth. If value characteristics are used (*e.g.*, the worth of humans arises from their "infinite value" or "intrinsic pricelessness") the immediate query is: "what is the nature and source of these qualities?"<sup>97</sup> If empirical factors are used (*e.g.*, "man's unique rationality") a grading concept, connecting worth to degree of rationality, is implied.<sup>98</sup> This approach is inconsistent with the theory of equal human worth.

Feinberg comments that metaphysical claims such as "men are ends in themselves" and "men are sacred,"<sup>99</sup> explain human worth only by renaming that which is to be explained. Feinberg argues

95. J. FEINBERG, *SOCIAL PHILOSOPHY* 37 (1973).

96. *Id.* at 88-89 (construing Vlastos, *Justice and Equality*, in *SOCIAL JUSTICE* 31 (R. Brandt ed. 1962)).

97. *Id.* at 91.

98. *Id.*

99. *Id.* at 92.

that the case for equal and universal human worth may well be "groundless—a kind of ultimate attitude not itself justifiable in more ultimate terms."<sup>100</sup> He cites parental love for the child who has gone bad as "groundless" (*i.e.*, not based on any quality of the child) but not "irrational or mysterious."<sup>101</sup> He also suggests that the ground may simply be that "all men equally have a . . . unique angle from which they view the world. They are all equally centers of experience, foci of subjectivity."<sup>102</sup> This manner of regarding men may express an attitude toward "each man's person" that is not "grounded on anything more ultimate than itself, and . . . is not demonstrably justifiable."<sup>103</sup> Feinberg contends that "a world with equal human rights is a more just world, . . . a less dangerous world generally, and one with a more elevated and civilized tone."<sup>104</sup> Feinberg concludes that "[i]f none of this convinces the skeptic, we should turn our backs on him to examine more important problems."<sup>105</sup> The skeptic's persistent "why" seems to be based on two faulty expectations. First, there is, or should be, some conclusive and demonstrably provable ground for any structure of thought. This is an expectation which belies the reality that ultimately any such structure (*e.g.*, natural law, positivism, and science itself) is predicated on basic postulates as to preferred conceptions of reality (ontology) and preferred conceptions of fact and method (epistemology). The second faulty expectation is that the burden of proof should be with those who postulate human worth. This expectation ignores the logical option that the burden could be with those who deny human worth.

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

100. *Id.* at 93.

101. *Id.*

102. *Id.*

103. *Id.* at 94.

104. *Id.* (emphasis deleted).

105. *Id.*

scientific concepts and techniques. Status quo "forms and modes in each society presuppose a notion of human worth of some sort, but such notions are inextricably entangled with existing social interests and master beliefs and are often, therefore, artifacts of the powerful.

Feinberg's characterization of the "attitude of respect toward the humanity in each man's person" as "groundless" ("not grounded on anything more ultimate than itself")<sup>106</sup> pinpoints the inadequacy of the traditional theories of justification. All of these theories manifest a need to find validity in sources outside of explicit human determination: in God, in nature, in human nature, in science, or in status quo social structures. Feinberg's point can be articulated somewhat differently: **The ground of "human worth" is within us.** We create social reality. We also create meaning. We are the ground of being and value—of theory, policy, and action. The "buck" stops with us.

History, as Feinberg intimates, demonstrates that genocide, slaughter, and other victimization is accompanied by a rejection of "the attitude of respect—toward the humanity in each man's person."<sup>107</sup> A witness at the International Military Tribunal at Nuremberg testified about the slaughter of 90,000 men, women, and children, mostly Jews, by one Nazi unit: "I am of the opinion that when, for years, for decades, the doctrine is preached that the Slav race is an inferior race, and Jews not even human, then such an outcome is inevitable."<sup>108</sup> Richard Hammer describes the rejection of "the attitude of respect" towards the Vietnamese by American soldiers:

And that all of them are something not quite human, some kind of lower order of creature. You give them names to depersonalize them, to categorize them as you've become convinced they ought to be categorized. They become dinks and slops and slants and gooks, and you begin to say, and believe, "The only good dink is a dead dink."<sup>109</sup>

Indians, slaves, freed Blacks, workers, and many other subordinated groups have been characterized as savage and inferior as a

106. *Id.*

107. *Id.*

108. Opinion and Judgment of the International Military Tribunal at Nuremberg, reprinted in NAZI CONSPIRACY AND AGGRESSION 77 (1947).

109. R. HAMMER, ONE MORNING IN THE WAR: THE TRAGEDY AT SON MY 71 (1970).

means of justifying their subordination. **jecting the "attitude of respect" is a sine qua non of victimization.** It is easier to kill, plunder, and exploit savages and inferiors; it is harder to kill, plunder, and exploit men, women, and children who are respected. Potent human impulses towards sociability and fraternity must be overcome by ceremonies of degradation which precede the fact of victimization. Incorporating the "attitude of respect" into a culture of respect is a primordial humanistic priority. The ground for belief and action is not located so much in verbal and intellectual acrobatics, but in what we have learned from thousands of years of human experience and struggle.

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### PART III

#### UTILITARIAN PUNISHMENT

##### *Utilitarian Thought: A Humanistic Critique*

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

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

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

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

110. McCloskey, *A Non-Utilitarian Approach to Punishment*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 119, 127 (G. Ezorsky ed. 1972).

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