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OF LIBERALISM AND CONSERVATISM IN AMERICAN CRIMINAL LAW*

Gerhard O. W. Mueller†

INTRODUCTION

Continental scholars traditionally have been preoccupied with the creation of theories about existing and emerging phenomena, and since these theories became identified with their creators and foremost proponents, the custom has emerged of focusing much of the scholarly writing on these theories and, of necessity, on their spokesmen. Thus, continental criminal law scholarship in theoretical, yet personal. American scholarship has not yet quite reached that point; it is not similarly focused on theories and their spokesmen, but deals with issues. In short, and with a bit of exaggeration, European scholars of criminal law talk to and about each other and each other's theories. American criminal-law scholars talk past each other and about the raw stuff from which useful theories can be constructed. Yet, in at least one respect, it has become rather customary among

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Editor's Note: This is the first of a four part Criminal Law Symposium which is dedicated by its authors to the memory of the late Professor Paul W. Tappan, whom the world of criminology lost too soon. The remaining articles which will appear in the next three successive issues are: German Criminal Law And Its Reform by Horst Schröder; Arrest, Prosecution And Police Power In The Federal Republic Of Germany by Cyril D. Robinson; and The Principle Of Harm In The Concept Of Crime by Albin Eser.
American criminal-law academicians, though only in recent years, to size each other up by extrinsic standards. This may be a first indication of a move in the continental direction. These extrinsic standards, however, are those running parallel to contemporary practical politics. In a nation as political in orientation as ours, this "sizing up," with a consequent theoretical grouping, is in terms of one's standing on issues of current public-political concern. As politicians are being rated and grouped in accordance with their standing on such issues as medical care for the aged, foreign aid, income taxation, or the public school system, criminal-law academicians are similarly being rated and grouped in accordance with their standing on such issues as their approach to juvenile delinquency, the capacity issue, police powers, capital punishment, and so on. Actually, since criminal law is of so much concern to those outside the closed circle of academicians, every scholar does risk a rating and grouping with anything he may utter or publish, on any issue within his domain. Not that it should not be that way! Quite to the contrary, there is something wholesome about such a concern with the views of one's contemporaries. Perhaps we may even reach the point at which we can size up each other's theories directly rather than in terms of academical relatively insignificant groupings of political import.

In any event, the groupings are those of practical politics, namely, in terms of liberalism and conservatism. It is not to be expected that criminal law scholars consciously adopt either a liberal or a conservative position on any issue they are about to discuss. Some may do so, some may not. But it is certainly plausible that whatever criminal-law academicians may say, should also be evaluated in terms of its implications to society. After all, the perusal of society's police power constitutes the most direct and most far-reaching of all antagonisms of man's freedom.

There is not a single instance in the field of penal law in which the question of one's Weltanschauung does not arise. Every time organized man proposes to increase the onus upon himself as an individual, in an effort of making more secure what is left of his individual freedom, he asks himself the question of the weighting of the scales—in

1. Chief Parker of the Los Angeles Police has expressed the dilemma in these terms:

If society chooses, for reasons of its own, to handicap itself so severely that it cannot or will not deal effectively with the criminal army, it is doubtful that free society as we now enjoy it will continue; for either crime will increase until there is no internal security worthy of that name, or the police force will be so expanded that the crushing financial and moral burden of a police state will be here whether we like it or not.

Parker, Surveillance by Wiretapping or Dictograph: Threat or Protection?, 42 Calif. L. Rev. 727, 728 (1954).
favor of freedom or in favor of restraint, in favor of “society” or in favor of the “individual.” But is man really in the same position as the merchant who seeks to bring his scale into balance by adding a bit on this side or subtracting a bit on the other?

Since it is plainly impossible to re-examine the entire field of criminal law, it is here proposed to take from the four spheres into which penal law, for the sake of convenience, is customarily divided, a single question for examination of positions taken in point on the necessity of the bridle which democratic man, in the exercise of his self-policing power, has attached to himself.2

I have selected for each of the four spheres a specific question which is familiar enough to most criminal lawyers, on which an abundance of authority, de lege lata and de lege ferenda, exists, on which both liberals and conservatives have taken a stand, yet on which agreement does not exist. I have, moreover, endeavored to select for each sphere an issue which is relatively typical and demonstrative of most other issues in that sphere, yet one which also has a relevant contact with the behavioral sciences, and which has aroused the interest of writers other than those from the inner circle of academia.3

2. Namely: Criminal law—the general part; criminal law—the special part; criminal law administration; criminology.
3. It is impossible, within the confines of this paper, to attempt a full documentation on each of the issues, nor can they be discussed in detail. On previous occasions I have discussed three of the four issues in greater detail, though not from the instant perspective. Readers with a desire for further information are referred to the following previously published articles which, for the sake of simplicity, will not be cited again in this chapter:


Within this examination it shall be my specific objective to investigate the positions customarily labelled as liberal and as conservative in an effort to determine which group takes which positions and why and, ultimately, to ascertain the consistency of each group on all four of the selected issues, as well as the consistency with true liberal and conservative goals. The terms liberal and conservative themselves would require an explanatory essay. To avoid this complication, I shall label those as liberals who label themselves as such. This includes, for our purposes, those writers who champion the principles of equal opportunity for all, of freedom from arbitrary state (police) intervention, with a maximal use of police power to insure these goals. As “true liberalism” I regard that point of view which seeks the accomplishment of communal goals with a minimum amount of state (police) interference with individual freedom, and thus with the least exertion of effort. The term “conservatism” is hard to define, since conservatives themselves rarely endeavor to delineate their policies. I suspect, however, that the conservative, with a general aversion to state interference with individual freedom, is mostly distinguishable by his desire to cling to past—and thus, perhaps, proven practices, even though such practices may amount to an endorsement of state interventionism with freedom. A “true conservative” may even look with favor on a patriarchal state which protects its subjects against their own follies and the depredations of others. “True liberals” and “true conservatives” might have one thing in common: both would approach any actual or fancied evil with caution and with a hesitancy to create a new restriction for purposes of eradicating that evil, expecting that natural forces of whatever sort would solve the problem, though not ruling out the use of police power if absolutely necessary. The (just plain) liberal, as we shall meet him in this article, approaches every evil with the presumption, usually borne by laudable humanitarian considerations, that the use of the police power is called for in order to eradicate that evil.

CRIMINAL LAW — THE GENERAL PART:
THE ISSUE OF CAPACITY

It is generally agreed that only mentally healthy persons should be subjected to the penal power of the state.4 The issue of capacity, or responsibility, (sometimes crudely labelled “insanity”) goes to the

4. Oddly, this does not prevent some lawyers and even doctors from arguing that the mental defectives (“mad-dog killers”) are precisely those persons who should be subjected to capital punishment. Reference in Weiss, WHY I FAVOR CAPITAL PUNISHMENT 7-10 (1961).
very root of the entire penal system. However, there is great conflict on why that should be so and on what amounts to a sufficient degree of mental disturbance to constitute incapacity. Traditionally, Anglo-American law has employed the M’Naghten test\textsuperscript{5} which, conceptually, posits that every crime consists of (a) a relatively free, \textit{i.e.}, rational action\textsuperscript{6} and (b) a meaningful apperception of the significance of such act in terms of society’s demands.\textsuperscript{7} A person whose behavior does not measure up to these standards is incapacitated.

The controversy on the capacity question came clearly into focus in 1954 with the epochal decision in \textit{Durham v. United States},\textsuperscript{8} in which Judge Bazelon of the Circuit Court of Appeals for the District of Columbia, an outstanding jurist who firmly believes in the benefits of psychoanalysis, \textit{freed} by the law of capacity of its medieval vestiges, liberated it from the fetters of the 1843 \textit{M’Naghten} standards and from legalistic criteria, and thus opened the issue of “insanity” to completely unbridled discussion by psychiatric experts, testifying at the bar, simply in terms of whether the crime charged was the product of mental disease or disorder. That the decision amounted to an enormous liberalization cannot be doubted in view of the impact on the acquittal rate; acquittals by reason of insanity in the District of Columbia increased more than tenfold within five years after the new test was created.\textsuperscript{9} Whereas before the \textit{Durham} case those acquitted consisted almost exclusively of psychotics, after \textit{Durham}, acquittals became customary of psychopaths, neurotics or behaviorally disturbed offenders as well.

Everybody with the least bit of an opinion on the subject took sides in the years after 1954. A liberal wing, composed primarily of

\textsuperscript{5} "... [I]t must be clearly proved that at the time of the committing of the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong." M’Naughten’s Case, 10 C. & F. 200, 8 Eng. 8 Rep. 718, 719 (H.L. 1843). See also Diamond, \textit{Isaac Ray and the Trial of Daniel M’Naghten}, 112 Am. J. Psych. 651 (1956).

\textsuperscript{6} That is, the defendant must be able to know the nature and quality of his action (reference to \textit{actus reus}).

\textsuperscript{7} That is, the defendant must be able to know the wrongfulness of his action (reference to \textit{mens rea}). Unfortunately, most trial lawyers, prosecutors and judges fail to appreciate the full significance of the test and think of it merely as establishing the criteria of the defendant’s cognitive capacity to know right from wrong. Where such gross misunderstanding exists, rational verdicts obviously cannot be obtained. Wrong instructions lead to wrong verdicts. "... [T]he fear expressed by some members of both bench and bar that instructions are ignored or not given serious consideration in the jury room is not justified." James, \textit{Juror’s Assessment of Criminal Responsibility}, 7 Soc. Prob. 58, 68 (1959).

\textsuperscript{8} 214 F.2d 862 (D. C. Cir. 1954).

the avant-garde of modern psychiatry of the social-defense persuasion, as well as of defense lawyers, immediately formed in favor of the new test. A conservative wing, composed of practically all prosecutors, some of the best known forensic psychiatrists, and legal scholars, also soon formed. At the risk of oversimplification,


11. The victory in the Durham case had itself been won by an outstanding defense lawyer with a liberal Yale law faculty tradition—Abe Fortas, Esq.


the liberal position may be summarized as follows: The question of mental capacity is entirely one of medicine and must be answered \textit{in concreto} as far as each individual defendant is concerned, but \textit{in abstracto} as far as the consequent criminal liability is concerned. Only that can assure a humane disposition in each criminal case, by protecting mentally or emotionally ill offenders from punishment, while protecting society again depredations. The conservative position may be summarized as follows: The question of mental capacity is one of (fact and) law, to be answered by the court, though with medical guidance. And while it must be answered \textit{in concreto} for each individual defendant, that can be done only \textit{in concreto} as far as criminal liability is concerned, for each crime has its own and different psychological elements, all of which, however, can be conceptualized in terms broad enough to cover all criminality. The \textit{M’Naghten} Rules are precisely that conceptualization. Despite the restriction upon psychiatric inquiry through this legal-conceptual framework, society can be optimally protected, and just dispositions are possible only within this framework. I have idealized both positions to some extent. Mr. Justice Brennan, without of course approving it, characterized the conservative position more realistically (in its emotional rather than rational terms), as follows: "... Any other test would produce a system 'soft on criminals' and destructive of principles of morality and good order."\textsuperscript{15}

Very few of the protagonists of the \textit{M’Naghten} test are wholly satisfied with its 1843 formulation. Proposed revisions are of two types: (1) the analytical structure of the test would remain, but all component elements of the test would be modernized so as to conform with current psychiatric knowledge and semantic usage;\textsuperscript{16} (2) the analytical structure of the test would be abandoned by omitting reference to the "act" requirement and focusing solely on the \textit{mens rea} (or criminal intent) requirement but with reference to freedom of the will, or freedom from inner compulsion.\textsuperscript{17}

All those opposed to the \textit{Durham} test, which was labelled the triumph of modern psychiatry, were instantly called retrograde, retributive, and opposed to scientific advance and to psychiatry in particular. When some leading forensic psychiatrists joined the conservative wing, they too were similarly attacked by their brethren.

Here, then, is an issue on which the battle lines are clearly drawn in terms of liberal and conservative. Now it has happened that in the


\textsuperscript{16} Hall, \textit{General Principles of Criminal Law} 449-528 (2nd Ed. 1960).

ten years of its life, the new test proved so unworkable, for want of guiding criteria, that it had to be largely modified, if not abandoned. Since the court had, in effect, left all definition of mental disease to the medical profession, every re-definition of diagnostic entities by majority vote of hospital staffs changed the legal disposition of cases and introduced utmost uncertainty. This led to a lively revolt within the Durham court itself and, in at least one respect, the court finally returned to its former position that the jury is not bound by the expert testimony, but "... must determine for itself from all the testimony, lay and expert, whether the nature and degree of the disability are sufficient to establish a mental disease or defect." There is even some indication that the court might return to a more concrete description of the referent of mental illness, namely, the crime in question. While the Durham test merely asked whether there was some causal relation between mental illness and the crime charged, which nexus was presumed and could be rebutted only by contrary evidence beyond a reasonable doubt, the court is likely to come back to the sounder position of M'Naghten, which tells the jury that "crime" consists of: (1) specific rational action (the actus reus); and, (2) a specific negative frame of mind to do harm (the mens rea).

A reviewer of the development of this controversy — which is probably the epitome of all current controversies between and within law and psychiatry — may get the impression that the technical considerations just discussed really do not matter at all. Indeed, stands were taken primarily along emotional lines, e.g., the "new" vs. the "old." The liberals regarded the "old" as bad and retrograde while the conservatives regarded it as upright, moral and tough. The "new" was regarded as good, progressive and liberal by the liberals and as

18. Which, unbeknownst to the court, had been phrased as early as 1880. Note, Criminal Law and Insanity, 3 N.J.L.J. 232 (1880).
21. McDonald v. United States, 310 F.2d 692 (5th Cir. 1962); Hawkins v. United States, 310 F.2d 849 (D. C. Cir. 1962).
fanciful and nihilistic by the conservatives. Whether, however, the old or the new is just and utilitarian is a wholly different matter.

It is submitted that in this case, the so-called conservative position is the proper one. It determines in a conceptually certain and thus scientifically accurate manner the real question at the bar, namely: did this defendant have the intellectual or emotional capacity to fulfill the purely psychic as well as axiological elements of the crime with which he stands charged? If that question be not asked, then the issue before the court will not be resolved; and if it is not resolved, any disposition, perforce, is inaccurate and unjust.

It is said that only the so-called liberal (Durham) position determines in a psychiatrically proper way the real diagnosis of a mentally disturbed defendant. Perhaps that is so, though there is no reason why a defendant committed to a diagnostic center in a state with the M'Naghten test cannot be properly diagnosed. But this is not the crucial point, for the diagnosis is not the justiciable issue. Defendants are not charged with "schizophrenic reaction catatonic type" or with "psychoneurotic phobic reactions." They are charged with murder in the first degree or with arson in the second degree.

Suppose that a hitherto very successful businessman, who through hard labor and sound investments had amassed a little fortune, lost it overnight when his bookkeeper absconded with the assets. Faced with financial ruin and disgrace, our businessman sets fire to his warehouse in order to collect his insurance. Now he stands charged with arson in the second degree. The defense is insanity by reason of a phobic reaction manifesting itself by such idiosyncrasies as that the defendant never steps on the cracks of the sidewalk or that he experiences extreme anxiety when at high altitudes. One might here possibly speak of an incapacity to step on sidewalk cracks or ascend to the tops of skyscrapers. If the failure to do either were a crime, the defendant would surely have a genuine defense. But the charge is arson in the second degree, and we have to establish whether the defendant's particular psychoneurosis had incapacitating effects on the psychic (including axiological) elements of the crime of arson in the second degree. Certainly a psychiatrist should be heard on this medical question of fact, but the decision must rest with the court, i.e., judge and jury, because there is at bar a legal question of fact. This question can be answered only if:

1. all the facts, here principally medical, are before the court; and,
2. the question is asked in a proper way.

Both debating factions are agreed on the first point. Psychiatrists must be given an opportunity for proper diagnosis and for testifying as to all their relevant findings. This is a procedural problem which, unfortunately, in many states has not been properly resolved, though in the District of Columbia, as part of the *Durham* decision, it apparently has been. This neither speaks for the *Durham* test nor against the *M'Naghten* test. In fact, it has nothing to do with the test.

The crucial question is not asked in the proper way when the test is phrased merely in terms of a relation — of which the effect is presumed if a "cause," *i.e.*, any deviancy medically labelled a disease, is established — between the disease or defect and the crime charged. In the first place, such a test tells us nothing of the potential or actual effect of the disease and, in the second, it gives us no basis for relating the disease to those elements of the crime charged which might be affected by the disease. In short, a general reference to "crime" in the abstract is unsatisfactory; rather, one must focus on the specific elements of the crime charged. In our example of arson in the second degree, one should seek out the relations between the disease and the psychological aspects in each of the two halves of the concept of the crime of arson in the second degree, as follows:

I. *Actus Reus* (*i.e.*, the psychological elements of the *actus reus*):

Did the defendant know (appreciate) the nature and quality of his act? In particular, did the defendant "willfully burn a building?" In other words, was this a rational action of burning or was, perhaps, the defendant suffering from such an ego impairment as to make the act wholly different from his — or anybody else's — usual rational activities, like riding the subway or buying stock. In popular language, did the defendant know what he was doing?

II. *Mens Rea*:

Did the defendant "intend to defraud the insurer thereof?" In other words, did the defendant have a meaningful, *i.e.*, a depth appreciation of the wrongfulness of his action, a specific wrongfulness in terms of a desire, or a knowledge, that the burning would accrue to the detriment of his insurer? Did the defendant appreciate how society feels about this act?

If both questions be answered in the affirmative, the defendant is guilty of the crime charged and will be subjected to the sanction and socialization efforts of the penal law, from which the defendant is
likely to profit considerably more than from enforced association with the psychotics in an institution for the criminally insane.\textsuperscript{24}

In sum: The liberals, in their ardent desire to be progressive and humanitarian\textsuperscript{25} and to prefer modern psychiatry over old law, have departed from sound principles of adjudicating issues presented at the bar of the court. Being wrong in theory, they are bound to reach wrong dispositions in practice, by populating institutions for psychotic security risks with behaviorally disordered persons who need either ambulatory therapy or, more frequently, value orientation through resocialization efforts. It is submitted that the so-called liberal position is inconsistent with true liberal goals.\textsuperscript{26}

CRIMINAL LAW — THE SPECIAL PART: THE ISSUE OF REGULATORY, ESPECIALLY ECONOMIC, OFFENSES

During the last century, concomitant with the industrial revolution, the number of penal offenses on the statute books has been multiplied many times by the addition of so-called regulatory offenses to the list of common-law crimes. Most of these offenses are directly or indirectly concerned with the regulation of the economy. Each one of the new offenses,\textsuperscript{27} at least originally, was meant to promote the welfare of the population, particularly in the sphere where it was believed that the unorganized consumer or other participant in the economic or social activities of society had no personal means of protection or was oblivious to the dangers which the legislature, in


\textsuperscript{27} Many of the offenses are not entirely novel. Thus, pure-food offenses had their common-law predecessors, most of them of the nuisance type. But these were generally free from all the characteristics of modern regulatory offenses here to be discussed. Particularly, they all pertained to conduct generally known to be obnoxious or immoral. See generally Starrs, \textit{The Regulatory Offenses in Historical Perspective}, \textit{Essays in Criminal Science} 233 (Mueller ed. 1961).
its wisdom, had spotted. These new laws, by the very nature of the real or fancied evils against which they are directed, are virtually all distinguishable from orthodox criminality by: (1) the dragnet nature of coverage ("restraint of trade," "suitable fire escape," "food and necessities"); (2) the enormous discretion, especially of selective enforcement, vested in prosecutors and regulatory agencies; and, (3) the feature of absolute liability, a doctrine under which punishment is imposed for doing the act regardless of whether the actor knew of his "wrongdoing," whether he exercised care to avoid the result, or whether he has any defense at all.

While in the 19th century this new type and form of criminality merely grew wild, a semblance of reasoned support came in the 20th century, together with reasoned arguments against the doctrine. Economic liberals were, of course, quite opposed to any such tampering with man's freedom, and to a considerable extent this has remained the attitude of the business community with the rapidly increasing support of the legal scholars. Support for the new type and form of criminality comes mainly from federal, state and local government circles, particularly from officials who had been connected with government planning functions like those of the regulation boom of World War II and the post-war years. This group includes the career prosecutors whom, in the discussion of our first

28. For the enormous range of this type of legislation, and the legislative carefreeness (carelessness) in drafting, see Remington et al., Liability Without Fault Criminal Statutes—Their Relation to Major Developments in Contemporary Economic and Social Policy: The Situation in Wisconsin, 1956 Wis. L. Rev. 625.

29. Professor Remington, after a definitive study of the Wisconsin regulatory legislation, found "... a delegation of large discretion to administrative personnel to apply the statutes in a way deemed by them to be proper." Remington, supra note 28, at 626.

30. Here, as elsewhere, generalization is dangerous. Regulatory offenses are not necessarily offenses of absolute liability, and vice versa! See generally Hall, GENERAL PRINCIPLES OF CRIMINAL LAW, ch. 10 (2d ed. 1960). For older, and largely outdated assessments, see Sayre, Criminal Responsibility for the Acts of Another, 43 Harv. L. Rev. 669 (1930); Sayre, Mens Rea, 45 Harv. L. Rev. 974 (1932); Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55 (1933); Sayre, The Present Significance of Mens Rea in the Criminal Law, Harv. Leg. Essays 399 (1934). While some of these offenses permit no defenses at all, others do recognize some defenses.


32. E.g., Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401 (1958), as quite representative. Unfortunately, the Model Penal Code of the American Law Institute (§ 2.05), while condemning absolute criminal liability as such, retains it for petty offenses not entailing imprisonment.
issue, we found among the conservative wing. Since many, if not most, of the supporters of modern regulatory penal law also are political liberals, we have here an instance where the liberals take the position adverse to freedom from government restraint.

This at once pinpoints the issue as seen by the political liberals: long range maximum freedom requires the maintenance of a rigorous set of controls on unbridled freedom in our complex society.\(^3\) A tough law, permitting no excuses,\(^4\) administered by discretion-invested officials who can find anybody to have violated the law and who therefore, in the exercise of discretion, will dispense mercy to those who at least show good will, is required for a maximally effective enforcement of the substantive policies. The protection of the public\(^3\) demands the conviction of all violators, guilty or innocent, and such is simply the price which must be paid for the ultimate product of the greatest good of the greatest number, whether the purpose be the prohibition of overweight truck carriage or the avoidance of monopolies and trade combines.\(^3\)

To the political conservative, who dreads any move in the direction of the regimented society of 1984, the issue is full of emotion, though it would seem that the more rational argument is also with him, as follows:

(1) Those who advocate the proliferation of restrictions on freedom through regulatory penal law frequently overlook the fact that, on the whole, "natural" "laws," such as those of supply and demand, of psychological stimulus and response, or of professional or industrial self-policing, are significant conduct regulators. For example, businessmen can prosper in the long run only by pleasing the consumer, and law can do little to increase the desire to please. Similarly, motorists value their lives so that law, by threatening a fine, can do little to increase the desire to continue living.\(^3\) I remember how

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\(^3\) Speaking of the Anti-Trust Laws, Mr. Abe Fortas wrote: "The state's function, in antitrust theory, is merely to assure that the competitive battle is waged free from restraints." Fortas, America's Electrical Price Conspiracy, 5 (3) The Lawyer 29 (1962).

\(^4\) "It is not evident, . . . that strict liability statutes cannot have a deterrent effect greater than that of ordinary criminal statutes." Wasserstrom, Strict Liability in the Criminal Law, 12 Stan. L. Rev. 731, 732 (1960).


\(^3\) For a convenient listing of the regulatory offenses see Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55 (1933); Perkins, The Civil Offense, 100 U. Pa. L. Rev. 832 (1952).

\(^3\) "Rate of speed studies . . . have established that most drivers travel at speeds they consider safe for the highway and the prevailing driving conditions." N. Y. Times, March 29, 1959, §2, p. 21, cols. 1-4.
impressed I was by a public sign on a bridge reading "Diving off this bridge is dangerous to life and subject to $10 fine."

(2) By phrasing the regulatory statutes in terms meant to reach everybody, at all times, in all spheres of life, an energy dissipation takes place and nobody is squarely reached, though some may be reached negligibly by selective enforcement. But selective enforcement by a discretion-invested bureaucracy is the source of man's greatest plight, governmental corruption, as scandals of the one-a-day brand constantly remind us.

(3) The law enforcement conservatives usually overlook the fact that punishments under laws which either are arbitrary, or which at least may be enforced arbitrarily, and which, thus, may befall the guilty and the innocent, the careful and the careless alike, will engender disrespect for all law and its enforcement and result in the utmost frustration of those supposedly regulated, an experience which the regulators try to counteract with demands for further regulatory laws of the same sort.

(4) In terms of simple psychology, the attitude of the law enforcement conservatives, here posing as social liberals, is particularly weak. It is generally recognized that, to be maximally effective, the

38. The point has been one of dispute. See Wasserstrom, supra note 34, at 737. This point is the subject of a paper to be published shortly, sub. tit., "Is There an Inverse Square Law of Penal Regulation?"


40. While these words are being written, the entire structure of N. Y. State government is being shaken by the so-called "liquor board scandal," which has already resulted in dozens of arrests, indictments, impeachments, murder of witnesses and suicides, among governmental officials, high and low, including judges. See Life, April 5, 1963, p. 22. Even the State Attorney General's reputation is tarnished. N. Y. World Tele. & Sun, April 30, 1963, p. 1.

41. "To make a practice of branding people as criminals who are without moral fault tends to weaken respect for the law and the social condemnation of those who break it. 'When it becomes respectable to be convicted, the vitality of the criminal law has been sapped.'" Williams, CRIMINAL LAW—THE GENERAL PART 259 (2nd ed. 1961), citing Sayre, Harv. Leg. Essays 409 (1934). It is noteworthy, however, that Sayre, nevertheless, supported absolute criminal liability to a considerable extent.

An alienation of those regulated has occurred among the heavily regulated food and drug industry so that the Food and Drug Administration's Citizens Advisory Committee was recently forced to urge the F.D.A. "... to develop specific programs designed to encourage a cooperative attitude toward the development of standards and a sincere industry desire to comply voluntarily with the accepted standards for industry operations." CITIES ADVISORY COMMITTEE, REPORT TO THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE ON THE FOOD AND DRUG ADMINISTRATION IX-7 (1962).
threat of criminal punishment must be plainly directed to receptive human minds, i.e., those which know or can know what they are doing, and that any threat otherwise directed is fruitless and wasteful. For that reason, under traditional law, persons with unreceptive minds, such as those acting under unavoidable ignorance of fact or of law, or who are mentally incapacitated, are exempted from the imposition of punishment. When it comes to the regulatory offenses, however, law enforcement conservatives argue the exact opposite:

The purpose of . . . [these] regulations is the accomplishment of some social betterment rather than the punishment of crime, and therefore, the requisite of criminal intent is eliminated to insure the desired social result.

If it be remembered that the prime purpose of punishing, or of threatening punishment, is that of “social engineering” in an effort to maximally prevent socially dangerous consequences, in other words, insurance of desired social results, how can it be argued in the same breath that the most useless thing is to impose punishment on those who are blameless, and that the most useful thing is to impose punishment on the blameless and the blameworthy alike?

In the final assessment one comes to realize that the proliferation of regulatory penal law, especially in the economic sphere, is “social engineering” at its worst. As Hall put it: “The legislature is lulled into complacency by ‘passing a law’; prosecutors are content with the bulk of statistics on ‘convictions’; and the general public is grossly uninformed.” Not improvement of social conditions, but the opposite, is more likely to result from this modern type of regulatory penal legislation. Quite apart from the general frustration of the over-regulated public, with its consequent diminution of respect for all law, havoc rather than order is the result of hasty tampering with


44. See authorities cited note 3(1) supra.


47. *Hall, op. cit. supra* note 30, at 345.
basic conduct patterns. By way of example, Mr. Fortas recently averted to the crippling fines imposed upon some of the smaller electrical-equipment manufacturers, under the nation's best-known economic penal laws, and commented:

If they don't survive as competitors of the giants, or if the net outcome is to enfeeble their financial capability and therefore their capacity to compete, competition in the industry may well suffer, rather than benefit, as the aftermath of this spectacular instance of law enforcement. But such is life in the land of the free and the home of the brave.

Thus, once again, the social or political liberals' humanitarian concern for the actual and fancied sufferings of the populace have led them intellectually somewhat astray. For totally different reasons, their ranks are swelled by the law enforcement conservatives (mostly prosecutors) who, just as they did by their stand on the first issue, certainly raise the suspicion of being more interested in more convictions than in the end product of greater freedom of man in society. The economic liberals seem to have the better of the argument, not only in terms of the all-American credo of the government of laws rather than men, but also in terms of abundant experience with the type of law they detest—though scientific verification through field research as yet is lacking.

CRIMINAL LAW ADMINISTRATION:
THE ISSUE OF POLICE INTERROGATION

In recent years, state law enforcement has been increasingly subjected to supervision by the United States Supreme Court, which gradually made more and more provisions of the Bill of Rights bind-


49. Fortas, supra note 33, at 29.

50. See Note, 42 Mich. L. Rev. 1103, 1106 (1944), with comment thereon by Hall, op. cit. supra note 30, at 349.

51. Lawyers debate this question primarily in terms of the most common consequences of abuse, namely, exclusion of coerced confessions from the evidence at the trial. See POLICE POWER AND INDIVIDUAL FREEDOM, pts. 2 and 3 (Sowle ed. 1962). But the issue is of independent significance apart from the exclusionary rule and will here be discussed on its own merits.
ing on the states,\textsuperscript{52} via the due process clause of the fourteenth amendment.\textsuperscript{53} Probably no state law enforcement activity is now free from federal standards. This is particularly true of the police practice of questioning arrested persons in an effort to obtain admissions and confessions, before the suspect is produced before a magistrate, or meets an attorney, or in an other way is assured of his rights as a citizen, particularly the right to remain silent.\textsuperscript{54} To the great distress of law enforcement officials, the Supreme Court will now reverse any conviction in state courts—the standard is even more stringent for federal courts—which rested on the defendant's confession obtained by uncivilized practices. These need not even involve physical coercion; mere mental tormenting\textsuperscript{55} is sufficiently obnoxious. On this issue, sides had been taken from the beginning of our republic.\textsuperscript{56}

Since the issue is not one which has excited the populace in general,\textsuperscript{57} the side taking has been largely restricted to the legal

\textsuperscript{52} For the development up to 1958 see Allen, \textit{The Supreme Court, Federalism and State Systems of Criminal Justice}, 8 (1) U. Chi. L. S. Rec. 3 (1958), also at 8 De Paul L. Rev. 213 (1959). The most important cases since then include Mapp v. Ohio, 367 U.S. 643 (1961), requiring the remedy of exclusion of all evidence obtained in violation of federal constitutional limitations on searches and seizures; Gideon v. Wainwright, 372 U.S. 335 (1963), extending the sixth amendment right to (assigned) counsel to all criminal defendants in all cases; Wong Sun v. United States, 371 U.S. 471 (1963), extending the exclusionary rule to verbal statements unlawfully obtained. Kerr v. California, 374 U.S. 23, 33 (1963): "... [T]he standard of reasonableness [for search and seizure] is the same under the Fourth and Fourteenth Amendments ...." The 1964 term of the Supreme Court added the following landmark cases: Malloy v. Hogan, 378 U.S. 1 (1964), holding that the fifth amendment's exception from compulsory self-incrimination is protected by the fourteenth amendment against abridgement by the states, with the elaboration in Murphy v. Waterfront Commission, 378 U.S. 52 (1964), that one sovereign within our system may not force a witness to testify, by extension of a local self-incrimination under the laws of another sovereign within the system. Aguilar v. Texas, 378 U.S. 108 (1964), moving forward a differentiation of arrest standards with and without a warrant. Escobedo v. Illinois, 378 U.S. 478 (1964), holding confession inadmissible if made by defendant to police who had failed to warn him of this self-incrimination privilege and refused access to his attorney.

\textsuperscript{53} U. S. \textbf{CONSTITUTION}, amend. XIV, § 1: "... [N]or shall any State deprive any person of life, liberty, or property, without due process of law; ..."

\textsuperscript{54} While it is too early to fathom the implications of Escobedo v. Illinois, 378 U.S. 478 (1964), it is fair to assume that the Supreme Court will henceforth strike down confessions obtained by the police who failed to warn the defendant of his 5th-14th amendments' self-incrimination privilege. Malloy v. Hogan, 378 U.S. 1 (1964).


\textsuperscript{56} See State v. Hobbs, 2 Tyler 380 (Vt. 1803).

\textsuperscript{57} Because abusive questioning is carried on in secrecy. When abuse does occur in public, only the most upright and sensitive citizens have the courage to intervene and risk their liberty by publicizing the abuse.
community. The academicians, the group of political civil libertarians and law enforcement officers, have been the most vociferous debaters. The views are clear enough within the second and third group. Law enforcers, whom so far we have once found in the conservative and once in the liberal camp, with extremely slight, but outspoken academic support, are in clear opposition to the civil libertarians, to whom all direct and not absolutely necessary interference with the civil rights of the individual are anathema. The civil libertarians enjoy the support of most of the criminal-law academicians. We are more or less forced to call theirs the liberal position, and the law enforcers' the conservative one.

The conservative argument goes as follows:

1. Many criminal cases, even when investigated by the best qualified police departments, are capable of solution only by means of an admission or confession from the guilty individual or upon the basis of information obtained from the questioning of other criminal suspects.

2. Criminal offenders, except, of course, those caught in the commission of their crimes, ordinarily will not admit their guilt unless questioned under conditions of privacy, and for a period of perhaps several hours.

3. In dealing with criminal offenders, and consequently also with criminal suspects who may actually be innocent, the interrogator must of necessity employ less refined methods than are considered appropriate for the transaction of ordinary, everyday affairs by and between law-abiding citizens.

The libertarians' argument is just as clear:

It is secrecy which creates the risk of abuses and which contributes to public distrust of the police. Eliminating secrecy in police-station questioning could go far to build


60. E.g., Paulsen, The Fourteenth Amendment and the Third Degree, 6 Stan. L. Rev. 411 (1954).

public confidence in the police, the kind of confidence to which the police should be entitled and which in the long run may prove a more powerful aid to effective law enforcement than the most refined methods for obtaining confessions. The absence of a record [during station house questioning] makes disputes inevitable about the conduct of the police and, sometimes, about what the prisoner has actually said. It is secrecy, not privacy, which accounts for the absence of a reliable record . . . .62

It is hard to imagine issues on which the supposed clash between the individual's freedom from government interference and society's demand for protection against the dangers lurking in the minds and activities of the potential adversaries is more pronounced. What is at stake, however, is simply the question of the most efficient detection of threatened or concealed danger at the least expense to man's primary freedom. Viewed in these terms, the conservative's demands seem excessive on closer examination. As the libertarians would point out, the demand for interrogation of arrested persons in privacy might not be inconsistent with the requirement that all such questioning be filmed and recorded63 or, at less expense, be conducted in the presence of counsel or friends, who can observe the questioning through a one-way mirror or a closed circuit TV system.

But such proposals do not meet with the approval of the conservatives. This raises the suspicion that the law enforcement conservatives are not interested in privacy per se,64 but only in privacy as affording an opportunity for the employment of "less refined methods." When it comes to the employment of "less refined methods" in the questioning of suspects, is it not true that a considerable majority of those suspected of crime and questioned will never be found guilty65 and may even be law-abiding citizens?


63. Id. at 45.

64. A single case has become known in which law enforcement officers made a sound-track motion picture of an "interview"—confession of a suspect, during incommunicado holding. Immediately thereafter, however, the officers' interest in privacy vanished rather swiftly. The film was released to the local television station and subsequently viewed by about 2% of all residents of the area, during showing on three consecutive days. Rideau v. Louisiana, 373 U.S. 723 (1963). The Supreme Court reversed the conviction, as obtained in a jurisdiction in which, after a "Television Trial," no fair trial in court could be obtained.

65. According to the Uniform Crime Reports for 1960, 76.3% of persons formally charged with crimes in the United States were found guilty (p. 86),
A police prerogative to treat every one of their suspects as if he were a criminal, denying him common courtesies or worse, is a most serious encroachment upon the liberties of free citizens. Among those unjustly harassed, disrespect for the police will be instilled, and the sad tales of those citizens are likely to have epidemic effects in the community at large. Moreover, the imposition of "less refined methods" upon the citizenry by the organs of the state, adds a new restriction upon the citizen. To the command: "Do not commit crime," there is then, in effect, added a further command: "under penalty of official restraint through 'less refined methods', do not arouse the suspicion of crime." That, it is submitted, seriously interferes with the citizen's freedom of action and locomotion.

This necessitates a brief description of the types of questioning employed by the police. One could distinguish between interviews, interrogations and inquisitions. "... [I]nterviews... are conducted to learn facts from persons who may have knowledge of a wrongful act but who are not themselves implicated." Interviews are free from even the semblance of constraint and are carried on in a civilized fashion, although the interviewee may subsequently become a suspect himself. "... [I]nterrogations... are conducted to learn facts and to obtain admissions or confessions of wrongful acts from persons who are implicated in a wrongful act." The type of questioning with the maximum of constraint, and under employment of abusive practices—formerly physical, now usually only psychological—is referred to as "inquisition," which the United States Constitution clearly outlaws for both federal and state law enforcement bodies. Legal issues are not raised by mere interviews. In a free country everybody, and that includes the police, is entitled to ask anybody any question he desires, though he is not necessarily entitled to any answers. Inter-

but the F. B. I. releases no figures documenting the enormous gap between the number of arrests and the number of formal charges. It is here where the largest selection takes place. See Goldstein, Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice, 69 Yale L. J. 543 (1960).

66. In this connection it is worth mentioning that in states where the so-called Uniform Arrest Act, [see Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942). It is in force in Delaware, New Hampshire, Rhode Island and Massachusetts, as well as in New York under its "Stop-and-Frisk" Law, (Laws of 1964, ch. 86. See Kuh, New York's "Stop-and-Frisk" Law, N.Y.L.J., May 29, 1964, p. 4)] a person may be taken into police custody on evidence less than probable cause.


68. Ibid.

rogation, then, is the bone of contention. While law enforcement conservatives would like to utilize the whole keyboard of psychological stimulation to obtain statements from suspects, including trickery, deceit and the instilling of fear, the United States Supreme Court has become more and more sensitive to these methods, as the Rogers case demonstrates. Rogers, a forty-eight year old Negro with an eighth-grade education, was suspected of murder and held incommunicado. The questioning police officer threatened to bring in "for questioning Rogers' [arthritic] wife if Rogers did not confess. He threatened to send the two foster children of the Rogers', who were state wards, to an institution meanwhile," and

... made a pretended telephone call on a dead wire to hold a car and officers in readiness to get Mrs. Rogers and the children. He then gave Rogers an hour to make up his mind whether to confess. At the end of that time he took the phone to pretend to order Mrs. Rogers and the children brought in. At this point Rogers gave in and made a confession....

The Supreme Court ruled that this confession was obtained by compulsion, i.e., by an overbearing of the will, and thus violated civilized practices so that, regardless of its probative value, it should not have been introduced in evidence. The Court reversed the conviction.

In the more recent case of Haynes v. Washington, the Court proved even more sensitive when it overruled a conviction resting on a confession obtained during an incommunicado holding. The police had refused the suspect any communication with relatives, friends or an attorney until he confessed.

Oddly enough, all these decisions had to be placed on the vague "civilized standards" basis of fourteenth amendment due process,

70. Lewellen, How to Make A Killer Confess [an article on Professor Inbau of Northwestern University], Saturday Evening Post, March 31, 1956, p. 33.
74. 373 U.S. 503 (1963).
until, in *Malloy v. Hogan*, the Court finally mustered enough strength to hold squarely "that the Fourteenth Amendment guarantees the petitioner the protection of the Fifth Amendment's privilege against self-incrimination." In other words, "civilized standards" includes the self-incrimination privilege itself. It immediately became clear that, not to mention coercive practices, the mere obtaining of a police station confession absent a warning about the self-incrimination privilege, is an illegal practice requiring the suppression of the confession.

Supreme Court justices may be particularly sensitive, but no more than perhaps behooves those august guardians of the law-protected conscience of the nation. We at least like to think that what shocks the conscience of Supreme Court justices also will shock the conscience of the citizens of a civilized nation so that there is, perhaps, a community feeling of civilized standards. If that be so, it would follow that a police force which deviates from these standards puts itself outside the community, isolates itself, does not command the respect of the community and thus cannot count on that maximum of citizen cooperation which is absolutely essential for effective police work. Mr. J. Edgar Hoover recognized the point when he recently proclaimed that "police success in solving crimes . . . will depend to a large extent upon the alertness, cooperativeness, and general assistance rendered to the police by citizens." It stands to reason that, rather than making for greater effectiveness, uncivilized interrogation methods will actually decrease police efficiency in the suppression of crime.

Apart from these disadvantages of the "less refined method" of interrogation, is it at all clear that "many" cases cannot be solved otherwise than by thus extracting confessions? A nervous police officer may make his arrest too early, when wild suspicion has not yet jelled to the standard of probable cause of the suspect's commission of a crime. Under these circumstances the officer may have to question his suspect in order to fathom his mind. But an experienced police officer stalks his prey long enough so that he can prove his case very

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75. 378 U.S. 1 (1964).
77. *Uniform Crime Reports*—1961, *Crime in the United States* 13 (1962). The British have come to the same conclusion: "The Royal Commission ended its observations on misbehavior by the police by saying: 'For it cannot be too strongly emphasized that a police force in which dishonesty of any kind is connived at cannot hope for long to retain the confidence of the public. In this lies a double danger. Not only that their position may be abused to achieve the conviction of a man who is in fact innocent, but also that juries will no longer trust them enough to convict the guilty.'" Du Cann, *Police Evidence I*, 6 (2) The Lawyer 1, 7, 12 (1963).
much without the suspect's personal and knowing participation in the rendering of the proof.

What has been the actual experience with the increasing court restrictions upon the "less refined methods" of police practice of which abusive questioning is but one? Has law enforcement in our great republic broken down? Have police officers been so severely demoralized by the restrictions as no longer to be concerned about effective law enforcement? There are no reliable criteria by which to answer these questions. But we have very little if any evidence to the effect that greater lawfulness on the part of the police—the result of greater restrictions imposed upon them—has made for greater lawlessness outside the police, i.e., in the community, whose freedoms were increased. Mr. Hoover reported for the year 1961 that "police clearances of the more vicious crimes against the person are high. . . . During 1961, police effectiveness in clearing crimes increased 2 percent."78 Both the District of Columbia79 and California80 had excellent results with the introduction of civilized standards in questioning, particularly the outlawing of prolonged detention for interrogation. This is the crux of the matter: as seems to be the statistically ascertainable result and as a priori emotional reasoning seems to affirm, effective law enforcement is not inconsistent with greater freedom of the individual. To the contrary, where, in the name of more effective law enforcement, individual liberty is curtailed, the effectiveness of law enforcement itself seems to be curtailed.

On this issue, then, the civil libertarians clearly have the better of the argument and at least their most sophisticated spokesmen have generally succeeded in transcending the emotional approach by countering the demands of the law enforcement conservatives with rational arguments.81

CRIMINOLOGY: THE ISSUE OF CAPITAL PUNISHMENT

In using the controversy about capital punishment as the criminological test issue in my examination of the rationality of liberal and conservative argumentations, I may well be charged with setting up a

80. See the statements in Elkins v. United States, 364 U.S. 206, 218 (1960).
straw man for a title bout. While a century ago it was easy to quote many reputable writers and scholars as favoring capital punishment for the good of society, today it is not easy to round up more than half a dozen.82 Among the lower and tactical echelon of law enforcers,83 however, most still hold the view that the effective administration of justice requires the threat of capital punishment against murder, treason and, in some states, crimes like rape, armed robbery, arson, narcotics transactions and others.84 These conservatives of law enforcement, supported by a very small number of outspoken criminal judges85 and an infinitesimally small number of prison administrators,86 believe primarily in the deterrent effect of capital punishment. A few may, at least partially, rely on the retribution argument which finds biblical support and some Roman Catholic and fundamentalist-conservative backing.87 To call this the conservative position seems eminently justified, especially since all political libertarians take the opposing view.

The liberals can easily dispose of the deterrence argument. This nation's leading criminological statistician has conclusively shown that no statistical evidence proves capital punishment to be a more effective deterrent than other available deterrent sanctions.88 Opposing statistics do not make the slightest dent in the statistical armor89 so that only one other argument in favor of deterrence remains. Dr.

82. The only truly outstanding American intellectual who, to my knowledge, had the courage to print an article favoring capital punishment is Professor Jacques Barzun of Columbia University. See Barzun, In Favor of Capital Punishment, 31 Am. Scholar 181 (1962). After critics got through with him, there remained precious little of his position. See Controversy: Mr. Barzun and Capital Punishment, 31 Am. Scholar 436 (1962). But three of the six comments reproduced in the American Scholar endorsed Professor Barzun’s position, for his own reasons. Morris, supra at 443; Morley, supra at 446; Allen, supra at 477.


85. For example, Judge Samuel A. Weiss, of Pittsburgh—see Weiss, op. cit. supra note 83; Judge Leibowitz, of Brooklyn—see Symposium on Capital Punishment, 7 N.Y.L.F. 247, 289-296 (1961).

86. For example, Warden Denno. See Leibowitz, supra note 85, at 290. Most prison wardens and correctional personnel are opposed to capital punishment, e.g. Duffy, 88 Men and 2 Women (1962); Lawes, Meet the Murderer (1940); Lawes, 20,000 Years in Sing Sing (1932); Mattick, The Unexamined Death (1963).


89. Weiss, op. cit. supra note 83, at 4; Leibowitz, supra note 85, at 295.
Wertham, an opponent of capital punishment (and a conservative on the capacity issue), put the point this way on the basis of his own clinical experience:

... [A]t the height of depression... young holdup men... thought this was the most clean-cut crime and they got a gun and held up a man for some money.... [V]ery few of them committed murder and I found out from them that what really deterred them, very definitely, was the death penalty.90

This evidence is at best inconclusive. Would the threat of life imprisonment have deterred this statistically insignificant sampling? Would greater certainty of detection have deterred them? A recent New Hampshire case gives us a startling example of the thought processes of gang murderers. A Rhode Island gang decided to dispose of a Rhode Island underworld adversary. Oddly enough, they did not execute the adversary in Rhode Island which has abolished capital punishment, but they waited until the victim was on a short business trip to capital-punishment New Hampshire and disposed of him there.91 A high-ranking New Hampshire law enforcement officer commented: “It is my impression that the murder was committed in New Hampshire because the murderers in their provincial way thought they might get away with it in a state protected by ‘nick cops’.”92 And if there really are some few murderers who can be deterred only by the threat of capital punishment, might not the number of their murders be more than offset by those who kill only because they want to die?93 For those who need a more dramatic proof of the false security into which belief in the superior deterrence of capital punishment inveigles humanity, Sidney Hook, the libertarian philosopher, had this reminder:

92. Letter of December 18, 1962, on file with author.
93. E.g., People v. Wood, 12 N.Y.2d 69 (1962). Wood was a schizophrenic who attacked all who sought to save his life from the electric chair. See also Counsel for the Doomed, Newsweek, March 25, 1963, pp. 36-37; Wood proclaimed: “I really want to ‘ride the lightening’,” Letter from Fred Wood to M. Jacobson, Esq., March 19, 1963. (On file, N.Y.U. School of Law).

A recent Massachusetts murderer addressed the jury in these terms: “It is my opinion that any decision other than guilty... of murder in the first degree, with no recommendation for leniency, is a miscarriage of justice.” Commonwealth v. Chester, 150 N.E.2d 914 (Mass. 1958).

Another Massachusetts murderer, Jim Cooper, hanged himself when he heard that the Governor of Massachusetts was about to commute his sentence. Wiseman, Psychiatry and Law Use and Abuse of Psychiatry in a Murder Case, 118 Am. J. Psych. 289 (1961).
Ladies and Gentlemen, do you really think that the execution of the last batch of Nazi murderers will have any influence upon totalitarian fanatics in the future? Right now in the Soviet Union, in Cuba, in China, and in other dictatorial countries where freedom has been extinguished, thousands of people are being executed or worked to death in mines and camps. Are present-day dictators deterred by the mere destruction of Nazi criminals?  

But the dramatic clash between liberals and conservatives does not occur on the ground of deterrence or other rational considerations. The real encounter is on retribution. The issue is relatively narrow: the liberals do not oppose the taking of life under all circumstances (some pacifists do), for they would admit homicide in genuine self-defense. The conservatives do not demand capital punishment solely in retribution, but they do regard it as the ethical thing to reward him with death who by taking life "has forfeited his God-given right to live."  

While this, unquestionably, was a general attitude among men in the Middle Ages and in antiquity, attitudes have been changing. A prosecutor reported: "I believe that juries are returning more and more often with verdicts of murder with recommendations." It is becoming increasingly difficult to find jurors for murder trials willing to impose capital punishment. The American execution rate has declined from 199 in 1935 to 42 in 1961, 47 in 1962, and only 21 in 1963. A Gallup poll indicates that while in 1953, 68 percent of the population favored capital punishment for murder, in 1961 the number was down to 51 percent. For England it was said that capital punishment "no longer accords with the degree of civilization to which we feel we have attained." This is the real

95. Bishop Riley, as quoted in Weiss, op. cit. supra note 83, at 6. See also Allen, supra note 82, at 447.
96. Which does not make it a "right" argument! For a refutation of the argument of religious retribution see MacDonald, Psychiatry and Colorado Criminal Law, 36 Dicta 74, 79-80 (1959). — I shall leave undiscussed the possible use of capital punishment in contemporary primitive societies which have not progressed significantly beyond the talionic stage of evolution.
98. Herman, supra note 84, at 266, 269.
99. E.g., Wolak Jury Still at Six—100 Questioned Without Adding One Panel Member, Newark Evening News, April 10, 1959, p. 37, col. 1.
point: our physical and intellectual evolution was accompanied by a delayed emotional evolution. In the Middle Ages, at the time of the great pestilence, death was regarded as commonplace. Skeletons and death were members of everybody's family. As the wood-cuts of Dürer document, skulls and bones, and death and misery determined every phase of life. The pestilence went, but the macabre outlook on life and death continued through the era of the public executions of tens of thousands, until the enlightened spirits of the 18th and 19th centuries helped change man's outlook on life and death. Unfortunately, long after the age of enlightenment, the skull and the crossbones were to return to man who had defeated death and misery long ago by his own exertion. Once again death became a member of the family. The Apocalypse had returned to all of Europe. For a while it was forgotten that the macabre spirit of the gallows, the gas chamber and the electric chair simply does not fit into the age of free and scientific man. Man's ingenuity had defeated death where heretofore it was regarded as invincible, whether it be in the sick bed or in the gas chamber. It remains for government to give its official stamp of approval.

But the libertarian point of view cannot be supported, as some attempt to do, on the sole basis of its inhumanitarian selectivity. It is true that "in the 3,666 total [of executions] for 1930-1959, 1,972 of those executed were Negroes, compared with 1,653 whites and 41 other groupings." It is also true that most of those executed were poor and friendless, with gangland executioners notably underrepresented. The short answer to this is that criminal procedure may need reform above all else. And here we close the circle of argumentation, for it is at this point that the conservatives chime in by arguing that all would be well if capital punishment were indiscriminately applied to truly all murders. But what if we do hang,

103. Barnes and Teeters, Criminologists of the extremist social-defense point of view, who "do not advance any of the sentimental objections to capital punishment," and who are prepared, if necessary, to endorse "the practice of exterminating useless, defective, and dangerous human types," find it hard to concede that "a person of any reasonable cultivation . . . can defend the perpetuation of this relic of human barbarism." Barnes & Teeters, New Horizons in Criminology 434, 435 (1950 rev. ed.).


105. Professor Morris' reply to Professor Barzun, supra note 82, at 444. See also Morris, Thoughts on Capital Punishment, 35 Wash. L. Rev. 335 n. 41 (1960).


107. Liebowitz, supra note 85, at 294-295.
gas or electrocute 10,000 murderers annually? I am not even thinking of the unavoidable bungling of executions\textsuperscript{108} or of the erroneously executed convicts.\textsuperscript{109} I am thinking of the dearly purchased illusion of greater safety of his liberty which man thus buys for himself at the expense of this very liberty, an expense which takes its toll from his every phase of life. His daily newspapers perpetuate the sensationalist morbidity of the cat-and-mouse play with human life; his legal system is incapable of maximum effectiveness\textsuperscript{110} and virtually immune to advancement because of technicalities and restrictions created centuries ago solely because hecatombs of gallows then dotted the countryside.\textsuperscript{111} Ultimately, the gas chambers and electric chairs suppress man's spiritual freedom and tie him to his talionic past\textsuperscript{112} and the utilitarian philosophy of the age when man knew little of his capacities. In the mechanical sciences the word impossible has been overcome. It is paradoxical and saddening that the conservatives' last remaining argument for capital punishment, that of ethical retribution, would rest on the semblance of the very same spiritual ethics which also teach the doctrine of redemption. After the behavioral sciences have proved the criminological monster of


\textsuperscript{110} See the sections of The Death Penalty and Law Enforcement, Effect of the Death Penalty on Prosecution, and Coercive Effect of the Death Penalty, in Redlich and Rubin, supra note 104, at 11-16. See also Glueck (letter), quoted in McCafferty, supra note 97, at 22.

\textsuperscript{111} Compare Koestler, Reflection on Hanging 7-8 (1957), with Hall, Theft, Law and Society 118 (1935); "What in fact happened was that, beginning in the early part of the eighteenth century, the persons lay and officials, who administered the criminal law, invested and indulged in practices which almost nullified the capital penalty in most non-chargeable felonies . . . The judges developed many technicalities by which they effectively submerged statutory provisions of capital penalization." These technicalities are still complicating our law, though the reasons for their existence have largely disappeared.

the born criminal to be a scientific monstrosity, and after the demonstration that, through earthly penitence and rehabilitative efforts, convicts are capable of redemption even on earth, nothing is left of the conservatives' argument for the retention of capital punishment.

SUMMARY AND CONCLUSION

These little surveys may have demonstrated that those styled as liberals have not consistently taken libertarian positions. By the same token, those styled as conservatives—and their class is less clearly identifiable—have not consistently taken conservative (here meaning stringent and traditional) positions. There may be two basic reasons for these inconsistencies. First, positions are taken initially for emotional rather than rational reasons, and ratio enters the picture only after the position has been adopted and to the extent that it supports such a siding. But there may be a more significant reason: our society has lost sight of the real goals of liberalism, or perhaps of the meaning of that term. Surmising that liberals and conservatives would agree on the goal value of a society of maximum human freedom, I have in this paper defined liberalism primarily in terms of its approach to the accomplishment of the goal values, namely, with a minimum of police power pressure upon, or governmental regulation of, the primeval individual freedom of each member of society and, thus, with the last exertion of effort. This is indeed a liberal as much as a utilitarian approach. In these terms it emerged that the styled liberals scored only 50% liberal, namely, on the issues of freedom from undue police power in the questioning of suspects, and on the issue of capital punishment. Both are issues overtly appealing to the libertarian sentiments. On the other hand, conservatives choose the overtly conservative but covertly (and long range) liberal positions on the issues of the capacity of criminal defendants and the proliferation of crimes through economic regulatory penal law.

113. In lieu of many learned tomes, merely see George Bernard Shaw, THE CRIME OF IMPRISONMENT 105-114 (1946).

114. Criminals spared from death who are released after a term of years have better records on the whole than released prisoners in general. Wechsler, supra note 104, at 254; Sellin, op. cit. supra note 88, at 69-79; and see Redlich and Rubin, supra note 104, at 24-25.

115. Mr. Justice Douglas, an outstanding liberal, recently had occasion to complain about the very same inconsistency: "Our representatives abroad take their overseas posts fully appraised of the free enterprise system and the American market system. But bills of attainder, ex post facto laws, habeas corpus, the Fifth Amendment, freedom of expression, separation of church and state — these are seldom conversation pieces in our embassies and legations. Yet it is around those subjects and allied constitutional topics that
driven to the unhappy conclusion that emotion and the pursuit of short term goals are likely to be greater determinants in the future policy of American criminal law than reason and the pursuit of long term goals. This constitutes a significant danger for effective penal law administration which should be ever mindful of the ultimate goal of a maximum of man’s freedom in all short term policy decisions, for such is not only our national credo, but also the utilitarian preference. The academician who thinks in terms of long range goals is clearly handicapped in his efforts, since he must take issue with short range determined positions among the popular policy makers. At least half the time he seems opposed to the popular issues and, for the remainder, he supports the popular position primarily for reasons other than those held by the popular policy makers. At best, this puts the academician in an unenviable position, quite apart from the fact that his stand will constantly be mislabelled or, what is worse, that he will be charged with the very inconsistency of which styled liberals and conservatives are constantly guilty.116

Finally, it is clear that neither side has a monopoly on the better argument. Even the academician cannot be totally sure of his position for, as yet, he is operating in the sphere of the vast unknown in which, lacking heuristic validation, his arguments rest largely on reasoning from principles. But such reasoning does already point to the possibility that the supposed need of weighting the scales in favor of or against freedom or restraint is largely imaginary, for there seems to be a position at which the scales are normally in balance. Every artificial weighting on either side requires an artificial counter-weighting on the other—until the scales no longer can stand the stress.

American criminal law has a conscience. This conscience may have ethics as a mother, religion as a father and necessity as a midwife. The courts may be its guardian ad litem, but it is in the primary custody of the academicians of criminal law. We need not worry about these custodians. They seem to understand their task well. Their often emotional decisions may be erroneous from the long range point of view, but they were made sincerely. Let us only hope that sincerity and wisdom will combine for a beneficial custodianship of truly liberal dimensions.