

# The Restitutionary Purpose of the Criminal Law

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## INTRODUCTION

In the May, 1985 issue of the American Bar Association Journal J.S. Bainbridge, Jr., a Baltimore lawyer, made the startling claim that "[r]etribution has returned to criminal justice." Documenting the failure of the criminal law to rehabilitate offenders, Mr. Bainbridge supported his claim on the grounds that legislators, judges, and scholars had lately discovered the shortcomings of the rehabilitative ideal: "Rehabilitation is being passed over like a dish that didn't digest well."<sup>1</sup>

But the demise of rehabilitation in the criminal law will not guarantee that retribution will return to center-stage. Legal scholars, especially, have been reluctant to embrace a philosophy of punishment linked closely to retribution: indeed they greatly fear any penal philosophy based upon retribution. Overwhelmingly they favor the widely embraced utilitarian philosophy of deterrence. They endorse a criminal penalty only if it is likely to restrain convicted offenders from committing other crimes or to deter others from engaging in crime. They believe that the role of retribution is a limited one to be applied only when their utilitarian purpose infringes unreasonably upon individual autonomy.<sup>2</sup>

In their popular criminal law textbook, law professors Wayne La Fave and the late Austin Scott, Jr., have summarized this conventional wisdom:

The broad aim of the criminal law is ... to prevent harm to society .... This is accomplished by punishing those who have done harm, and by threatening with punishment those who would do harm.<sup>3</sup>

Having maintained that no criminal penalty, whether retributive or rehabilitative in effect, may be justified unless it deters criminal behavior, America's law teachers and scholars both within the classroom and in the public marketplace have directed the debate about criminal law penalties to one issue: Do they work?

Ironically, law teachers and scholars prefer their utilitarian theories even though it has been proved that penalties imposed upon people after they have been convicted of criminal activity do not work very well. Criminology experts have conducted studies that question whether anyone is deterred by the conviction of another person and whether even the convicted criminal, himself, is deterred except during the period of time of incarceration.<sup>4</sup> Some social scientists have even suggested that a much more efficient and effective system would provide "treatment" to "cure" actual and potential criminal offenders whose behavior is, in their opinion, determined not chosen.<sup>5</sup>

Almost all law teachers and scholars, lawyers and judges, legislators and ordinary people have

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1. Bainbridge, "The Return of Retribution," 71 A.B.A.J. (1985), 61.

2. See, e.g., H. Packer, THE LIMITS OF THE CRIMINAL SANCTION (1968), 19-70.

3. W. La Fave and A. Scott, CRIMINAL LAW (1972), 9.

4. See, e.g., Nagin, "General Deterrence: A Review of the Empirical Evidence," in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (1978), 95, 135-36. Also see, D. Glaser, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964).

5. See, e.g., K. Menninger, THE CRIME OF PUNISHMENT (1968), 264-270.

refused this invitation. But on what grounds? In their casebook on criminal law three University of Virginia law professors have summarized the most popular reason:

The underlying premise of the criminal law is that it is morally right to treat people as responsible moral agents, whatever the fact of the matter, because any other view would be inconsistent with the values of individual autonomy and freedom that the law should reflect and with the perceptions of each other on which people at least think they are governing their daily lives.<sup>6</sup>

Law students who are taught by these three professors and by most of their colleagues learn that, while the social scientists may have accurately described the real world and the reality of man's condition in it, the law must ignore that reality to achieve other more important goals. In the words of the three Virginia law professors quoted above:

Determinism is rejected by the criminal law, in other words, not because it is a false scientific theory but because it should be rejected in light of the proper normative premises on which the criminal law should function.<sup>7</sup>

By divorcing the criminal law from "scientific reality" law teachers and scholars have freed themselves to keep their favored deterrence rationale for the criminal law without having to account for its failures. By embracing the criminal law's traditional requirements that a man may be punished for conduct only if he may be blamed for making a wrong choice and that his punishment must be proportionate to the seriousness of his offense, they are able to preserve liberty. But they are free to sacrifice that liberty if such principles interfere with the overriding utilitarian objective to deter crime. By refusing to decide whether or not man is a free moral agent, the typical law teacher and scholar may pick and choose according to his own hidden agenda. Consequently, he has held the criminal law captive to a series of uneasy compromises between "two contending philosophical views regarding the ultimate purpose of punishment ... to prevent or minimize criminal behavior ... [or] to impose upon the criminal his just deserts."<sup>8</sup>

Not only have law students suffered at the hands of their double-minded teachers, the American public has suffered as well. In the 1960's, for example, legal experts championed new programs to finance employment and educational opportunities for convicted felons so that they will not return to their previous lives of crime. Taxpayers found themselves paying for such programs; yet they had to pay for their own children's education or training for employment. Later, they discovered that such expensive rehabilitation programs have not "deterred" those who have benefitted from them.<sup>9</sup>

In the 1980's ordinary citizens watch in dismay expensive appeals and long delays as lawyers and courts review and rereview for legal errors the trial records of convicted murderers sentenced to

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6. P. Low, J. Jeffries and R. Bonnie, *CRIMINAL LAW, CASES AND MATERIALS* (1982), 7.

7. *Id.*

8. *Id.*, at 1-2.

9. *See, e.g.*, J. Wilson, ed., *CRIME AND PUBLIC POLICY* (1983), 103-105, 220-223, 253.

death. Why? Partly, because the experts cannot agree that the death penalty deters crime and, also, because they are frightened by the imposition of such a "final penalty" when they are not sure if convicted murderers are really morally responsible for the deaths of their victims.

Such examples, and they could be multiplied without great effort, establish with certainty that the deterrent rationale cannot support any system of criminal law that, in fact, administers true justice. On the one hand, failures will never be discovered until after the programs have been implemented at great cost to liberty and to security. On the other hand, the lives of human beings and the well-being of human society cannot be subjected to scientific experimentation without treating men as mice in a psychological maze.

Notwithstanding this irrefutable dilemma, leaders of America's legal community have been unwilling to jettison the utilitarian concept of deterrence which justifies punishment in preventive terms. At the heart of their refusal is a misunderstanding of the true purpose of criminal punishment as given by God to man and revealed to the nation of Israel through their prophet, Moses.

### **EYE FOR EYE, TOOTH FOR TOOTH: RESTITUTION NOT RETRIBUTION**

Many legal scholars cite the Old Testament passages calling for an "eye for eye, tooth for tooth" as the foundation for the "retributive view" of criminal punishment.<sup>10</sup> The late Herbert Packer attacked these Old Testament verses, known as the *lex talionis*, as calling for the satisfaction of "what is essentially a community blood lust." He claimed that the only purpose of the *lex talionis* was to achieve revenge against the wrongdoer: The criminal must be "paid back" for his crime and he must "pay back" society. On these grounds Packer dismissed the *lex talionis* as having "no useful place in a theory of justification for punishment, because what it expresses is nothing more than dogma, unverifiable and on its face implausible."<sup>11</sup>

What has made the *lex talionis* so implausible to Packer and to fellow colleagues has been twofold: 1) Their aversion to any truth based upon the Christian faith in God's revelation to man; and 2) their dogmatic faith in the scientific method as the only source of knowledge. As a consequence of these prejudices Packer and his fellow law teachers and scholars have mistaken the true purpose and meaning of the *lex talionis*.

They have assumed that the Old Testament standard requiring an "eye for an eye" and a "tooth for a tooth" is to be literally applied. They have made this assumption for one simple reason: They have not carefully studied the *lex talionis* in the context in which it appears in three of the books of Moses - Exodus, Leviticus, and Deuteronomy. In each of these passages it is clear that the rule of "eye for eye" and "tooth for tooth" was never intended to be applied literally. Rather, it was intended to be a principled guide for tailoring all remedies, civil and criminal, to restore a person injured in accordance with the blameworthiness of the wrongdoer and the seriousness of the injury of the person wronged.

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10. See, e.g., J. Kaplan, CRIMINAL JUSTICE (1973), 9.

11. H. Packer, THE LIMITS OF THE CRIMINAL SANCTION (1968), 37-39.

In Deuteronomy, chapter 19, God revealed to Moses the crime of perjury and specified the penalty to be imposed on those instances where the perjurer has accused another of having committed a crime.<sup>12</sup> Upon conviction of such an offense, God commanded that the offender suffer the same penalty that the one against whom he had falsely testified would have suffered if his testimony had been true.<sup>13</sup> For example, if the perjurer had falsely testified that another had stolen and destroyed one of his oxen, then the perjurer would have been required to pay the one against whom he had falsely testified 5 oxen according to the rule of Exodus 22:1. Or if the perjurer had testified falsely that another had committed murder, then the perjurer would pay with his life as if he, the false witness, had committed murder.

These penalties were justified in this passage as conforming with the Biblical command of an "eye for eye, tooth for tooth."<sup>14</sup> Yet, if Packer was correct that the *lex talionis* called for retaliation, an equivalent "pay back" for the wrong done, the penalty should have been literally applied, a "lie for a lie." But that was not the case; rather, the penalty was to fit according to the blameworthiness of the offender and to the harm suffered by the one wronged. By this passage alone, then, it is clear that the "eye for eye/tooth for tooth" rule stated a general principle, not a specific command to be literally applied in every case.

Another passage, this one from Leviticus chapter 24, confirms this reading of the *lex talionis*. In verses 17 through 21, God revealed to Moses the penalties for murder, assault and battery, and destruction of property, specifically the killing of another's animal.<sup>15</sup> Each of the prescribed penalties was linked specifically to the *lex talionis* principle in verse 20: "Breach for breach, eye for eye, tooth for tooth ...." At first glance, it appears that the penalty is to be literally applied: "[H]e that killeth any man shall be put to death ... [H]e that killeth a beast shall make it good; beast for beast ... [I]f a man cause a blemish in his neighbor; as he hath done, so shall it be done to him."<sup>16</sup> But careful study of these verses in context reveals otherwise. Following verse 20, containing the recitation of the "eye for eye/tooth for tooth" principle is verse 21, which reads, as follows:

And he that killeth a beast, he shall restore it; and he that killeth a man, he shall be put to death.

A literal application of the *lex talionis* would have required the killer of the beast to allow the owner of that beast to kill one of the killer's beasts. Instead, as Exodus 22:1 prescribes, the convicted beast killer was required to provide four live sheep in exchange for the one sheep that he killed, or five live oxen in exchange for the one ox that he killed. Again, this passage from Leviticus confirms that the *lex talionis* principle is not to be literally applied.

In fact, the Leviticus passage leads the careful Bible reader to Exodus chapter 21 where "eye for

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12. Deuteronomy 19:15-18.

13. Deuteronomy 19:19.

14. Deuteronomy 19:20-21.

15. Leviticus 24:17-19.

16. *Id.*

eye/tooth for tooth" was first revealed to Moses just after he received the Ten Commandments. In that chapter, God revealed the remedy for assault and battery not to be a returned blow of the same magnitude and to the same part of the guilty party's body as the one that had been delivered; instead, the one guilty of assault was to pay damages resulting from lost wages and medical expenses.<sup>17</sup> This remedy appears with a host of others beginning with the death penalty for murder<sup>18</sup> and ending with an exchange of a live ox for a dead one,<sup>19</sup> all of which are sandwiched around the "eye for eye/tooth for tooth" principle. Anyone, other than the already prejudiced reader, would see clearly that God never intended that man literally apply that principle. Because it was not to be taken literally, it was never intended to embody the revenge or retaliation purpose that has been attributed to it by its critics. To the contrary, as Dr. R.J. Rushdoony has stated:

The principle of restitution is basic to Biblical law; it appears with especial prominence in laws under the sixth and eighth commandments, but it is basic to the purpose of the whole law. The "eye for eye, tooth for tooth" concept is not retaliation, but restitution.<sup>20</sup>

As a restitutionary principle, the "eye for eye, tooth for tooth" principle serves as a safeguard against revenge and retaliation. It limits the available remedies to those proportionate to the blame of the offender and to the harm caused. Moreover, it directs the attention of the judge or other minister of justice to ascertain the specific restitutionary purpose and its primary recipient. Relevant scripture reveals that the victim of crime is often the primary beneficiary of a correct application of the "eye for eye, tooth for tooth" rule. And where the victim is not the primary beneficiary, the purpose of the *lex talionis* is to restore the offender or society.

## RESTITUTION AND VICTIMS

One of the great scandals of twentieth century America has been its prison system. In recent years almost no one has come to its defense. Certainly few take seriously any longer the original purpose of a penitentiary, a place to which a convicted criminal is sent to repent, to do penance, and to come out morally regenerated. Instead, the state and federal prisons have become moral cesspools rampant with violence, sexual perversion, and corruption. Moreover, they have served for years as "graduate schools of crime" especially for young offenders who, during their time of incarceration have learned a variety of new skills from their elders.<sup>21</sup>

If incarceration makes little sense generally, then it makes even less sense as appropriate punishment for those whose crimes are offense against property, such as theft. In an article in the Detroit College of Law Review Charles Colson, founder and director of Prison Fellowship, and Daniel Benson, professor of law at Texas Tech University, have called for the implementation of

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17. Exodus 21:19.

18. Exodus 21:12.

19. Exodus 21:36.

20. R. Rushdoony, *INSTITUTES OF BIBLICAL LAW* (1973), 272.

21. See, e.g., Greenwood, "Controlling the Crime Rate Through Imprisonment," in J. Wilson, *CRIME AND PUBLIC POLICY* (1983), 252-53.

"restitution programs" designed to compensate victims for losses resulting from crimes against property. As the authors have ably demonstrated, a criminal justice system without any mechanism for compensating victims for losses suffered cannot properly be called a system of justice. In America victims of crime have been "virtually ignored ... not compensated in most cases ... given little or no help in recovering losses ... and left entirely to their own resources in picking up their lives and adjusting to what has befallen them."<sup>22</sup> To aggravate this sad state of affairs, these same victims, as taxpayers, must pay higher taxes to house, clothe, and feed the very ones who have injured them.

To support their proposal to establish programs of restitution, Colson and Benson have cited data suggesting that restitution programs, already begun on a trial basis in the United States, have been effective deterrents to criminal behavior as well as sources of substantial financial assistance for their victims.<sup>23</sup> More significantly, they have relied upon the Biblical law requiring restitution to the victim, especially in those instances of crimes against property. In Exodus, chapter 22, the word, "restitution" or one of its derivatives, appears six times in the first twelve verses. For a stolen and destroyed ox, the thief was required to "restore" to its owner five oxen; for a stolen and destroyed sheep, the thief was liable to "restore" to its owner four sheep.<sup>24</sup> Of the sheep or ox was found alive, then the thief was required to "restore double."<sup>25</sup> For an act of trespass, the trespasser was required to "make restitution" and in some circumstances to pay double.<sup>26</sup> For acts of embezzlement, the guilty one was to pay double or otherwise to make restitution.<sup>27</sup>

These Biblical commands to pay a greater sum than the exact monetary value of the property stolen or destroyed were necessary to pay for the "pain and suffering" that follows whenever anyone has been wronged by another person. Indeed, as Justice Oliver Wendell Holmes, Jr., once said: "Even a dog distinguishes between being stumbled over and being kicked."<sup>28</sup> Moreover, the value of "Old Bessie" to her owner often exceeds the dollar amount that he might receive by selling her. The Biblical requirements of five-fold, four-fold, and double money damages reflected the reality of the pain and suffering that the wrongdoer had inflicted.

Such a measure of damages has long been used in America's civil justice system to compensate for injuries caused by negligent driving of an automobile or other like wrongs. While a few legal scholars have called compensation for "pain and suffering" a camouflage for excessive lawyer's fees, most have conceded that such money damages above and beyond the out-of-pocket loss are legitimate. Thus, standard jury instructions in civil tort cases include directions to award a

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22. Colson and Benson, "Restitution as an Alternative to Imprisonment," 11 DET. COLL. OF LAW REV. (1980), 523, 525-26.

23. *Id.*, at 565-76.

24. Exodus 22:1.

25. Exodus 22:4.

26. Exodus 22:6,9.

27. Exodus 22:7,10-12.

28. O. Holmes, THE COMMON LAW (1881), 3.

victorious plaintiff with an amount to make restitution for the plaintiff's pain and suffering.

Such restitutionary remedies were designed to make the victim whole, to do all that was humanly possible to place him in as good a position as he was before the commission of the crime. Because man, unlike God, was unable to restore an animal back to life and to heal the victim of the pain and suffering experienced, money damages or other substitutes were required. The greater the loss and the more serious the offense, the greater the amount of damages or other substitute property was required in conformity with the "eye for eye, tooth for tooth" principle. Thus, if an ox were stolen and killed, five oxen were required, but if the ox were merely stolen, that ox plus another were required.<sup>29</sup>

As Colson and Benson have pointed out, the criminal penalties for theft in America do not reflect these Biblical commands. Instead of paying restitution to their victims, thieves may be required to pay a fine to the state and to serve time in prison. A system of restitutionary remedies designed to repay the victims for their losses would be like the one that already exists in the civil tort system that provides compensation for out-of-pocket expenses and for pain and suffering.

Some may object, however, to this proposal because most convicted thieves are financially unable to pay their victims anything. God has provided that in the event that the thief has "nothing, then he shall be sold for his theft."<sup>30</sup> Under the "eye for eye/tooth for tooth" principle, the offender would be set free as soon as he made restitution to the victim. If the victim preferred, he could sell the offender rather than hold him in servitude.

Such a system could be instituted today. The 13th Amendment of the United States Constitution allows for "involuntary servitude" upon conviction of a crime.<sup>31</sup> In fact, such servitude limited to making restitution to the victim is not as enslaving as the current system of incarceration with its "prolonged imprisonment, with all the deterioration, corruption, destruction of family, impairment of earning ability and the bitterness that goes along with it." Moreover, "the basic principle being applied in the rendering and enforcement of a civil judgment in a tort suit is substantially the same: a civil defendant is forced by the legal system to pay for the loss or injury that he caused."<sup>32</sup>

Restitution to the victim need not be limited to crimes against property. For example, one guilty of an assault and battery on the person of another ought to pay for the loss of wages and for expenses for medical treatment.<sup>33</sup> Even a male guilty of "statutory rape" ought to pay recompense for the damage caused to the young lady.<sup>34</sup> While money cannot completely restore anyone who suffers personal injury wrongfully inflicted, it is the best restitutionary remedy that man has to offer.

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29. Exodus 22:1,4.

30. Exodus 22:3.

31. "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States . . ."

32. Colson and Benson, *supra* note 22, at 555.

33. Exodus 21:19.

34. *See*, Exodus 22:17.

Because money damages in civil tort actions for personal injury have always been available, it would not be difficult to allow for them in a criminal action. And as was the case with property loss, the damage award should include compensation for "pain and suffering" as well as for out-of-pocket losses such as medical expenses and earnings lost. Such compensation could exceed 5 times the actual expenses without violating the "eye for eye/tooth for tooth" principle, because injury to a human being is more serious than injury to one's ox.<sup>35</sup>

At one time in the history of the administration of criminal justice in America, restitutionary payments to victims measured by the Biblical "eye for eye/tooth for tooth" standard were authorized. For example, in 1790 the First Congress enacted a law against theft that provided that any offender, "on conviction, be fined not exceeding the fourfold value of the property so stolen." One-half of this fine was to be paid to the owner of the goods and the other half as a reward to the informer and prosecutor.<sup>36</sup> Restitution to the victim through criminal fines is not, therefore, unprecedented in America.

In recent years state legislatures have begun to respond to pleas on behalf of crime victims by enacting laws providing for restitution for victims. For example, on July 10, 1985, the Governor of Michigan signed into law a bill authorizing the sentencing judge to order a convicted criminal to make restitution for losses to property or for injuries to person caused by his criminal conduct. While the restitution provided may not exceed the market value of the property lost or the cost of medical expenses and loss of wages, the Michigan statute does authorize the judge to "require that the defendant make restitution in services in lieu of money." Moreover, the law prohibits the convicted defendant from profiting from any sales of a book or other recollection regarding his criminal activity until restitution to his victim is paid in full and until reimbursement to the state for the cost of room and board in prison is made.<sup>37</sup> Steps such as this are certainly significant ones towards reinstating Biblical principles of restitution for victims in the administration of criminal justice in America.

## RESTITUTION AND OFFENDERS

A criminal justice system that incorporated restitution for the victim of crime would, in turn, provide for restitution for the criminal offender. In the New Testament a man named Zacchaeus encountered Jesus Christ. In that eventful meeting Zacchaeus promised the Lord that if he had "taken anything from any man by false accusation" he would "restore him four fold."<sup>38</sup> Christ's response to Zacchaeus was immediate: "This day is salvation come to this house forso much as he also is a son of Abraham."<sup>39</sup>

Compliance with God's command to restore a person wronged, if accompanied by true repentance

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35. See, Exodus 22:1 and Genesis 9:6.

36. An Act for the Punishment of Certain Crimes Against the United States, Section 16, 1 Stat. 116 (1790).

37. Act No. 87, Public Acts of 1985, State of Michigan.

38. Luke 19:8.

39. Luke 19:9.

as in the case of Zacchaeus, brings reconciliation between the wrongdoer and his Creator and between the wrongdoer and his victim.<sup>40</sup> As Colson and Benson have noted pilot victim restitution programs in the United States have brought rehabilitation to offenders and deterrence from further criminal activities. This dual restitutionary role of the proper application of the Biblical sanctions for recompensing the crime victim was revealed to Moses in Leviticus, chapter 6, where God commanded that an offender who volunteers to make restitution must present an offering to the Lord for atonement for the sin committed and make restitutionary payment to his victim.<sup>41</sup>

But in many cases criminal offenders will not exhibit the kind of repentant attitude evidenced by Zacchaeus and reflected in Leviticus. In the Old Testament such offenders faced corporal punishment:

If there be a controversy between men ... the judges ... shall justify the righteous, and condemn the wicked. And it shall be, if the wicked man be worthy to be beaten, that the judge shall cause him to lie down, and to be beaten before his face, according to his fault, by a certain number."<sup>42</sup>

The severity of the beating administered was subjected to the "eye for eye/tooth for tooth" principle. Thus, a convicted man, deserving of physical punishment "according to his fault," could not be beaten beyond forty times lest the offender "seem vile unto thee."<sup>43</sup>

For what purpose did the Bible prescribe such physical punishment for certain wrongdoers? Again, the answer is restitution, but this time restitution for the offender.

The Book of Proverbs documents that physical punishment administered according to the Law of God restores the offender's soul, that is, it relieves him from the burden of his guilt:

The blueness of a wound cleanseth away evil; so do stripes the inward parts of the belly.<sup>44</sup>

Withhold not correction from the child: for if thou beatest him with the rod, he shall not die. Thou shalt beat him with the rod, he shall not die."<sup>45</sup>

Moreover, physical punishment has been designed by God to restore the offender to true knowledge and wisdom. Again, according to the writer of Proverbs:

[A] rod is for the back of him that is void of understanding.<sup>46</sup>

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40. 1 Timothy 2:5.

41. Leviticus 6:1-7.

42. Deuteronomy 25:1-2.

43. Deuteronomy 25:3.

44. Proverbs 20:30.

45. Proverbs 23:13-14.

46. Proverbs 10:13.

Foolishness is bound in the heart of a child, but the rod of correction shall drive it far from him.<sup>47</sup>

The rod and reproof give wisdom ....<sup>48</sup>

Almost all penological experts in twentieth century America have, however, rejected these truths in God's word. Indeed, most Americans without hesitation would reject physical punishment of convicted criminals. Indeed, the outcry against corporal punishment has become so intense that some have already attempted to discourage and ultimately to prohibit parents from spanking their children.<sup>49</sup> Indeed, in Europe the Swedish parliament has already outlawed corporal punishment as a means of disciplining children.<sup>50</sup>

Such opposition to corporal punishment of convicted felons and of rebellious children has been reinforced by judicial opinions such as one written by Judge Harry Blackmun before he became a justice of the United States Supreme Court. In *Jackson v. Bishop*,<sup>51</sup> Judge Blackmun ruled that the Arkansas practice of whipping prisoners with the strap, despite all safeguards, violated the United States Constitution's Eighth Amendment that prohibits "cruel and unusual punishment." The Arkansas authorities maintained that whipping was necessary to maintain discipline. Under an earlier court order the Board that supervised the Arkansas prison system had adopted rules that limited the use of physical punishment, in part, as follows:

- Proof of a "major offense;"
- No more than ten lashes, the exact number to be determined by a four-man board of inquiry; and
- An opportunity for the inmate to be heard.

In the trial court, penology experts and inmates testified that "corporal punishment generates hate ... [and] frustrates correctional and rehabilitative goals." At the appellate level Judge Blackmun concluded, in addition, that no matter what safeguards were employed, there would always be abuses of the authority to inflict physical punishment and that, in light of "contemporary concepts of decency and human dignity" any corporal punishment violated the constitutional prohibition against cruel and unusual punishment. In drawing this conclusion Judge Blackmun followed earlier United States Supreme Court opinions that declared that the meaning of "cruel and unusual" depended upon "the evolving standards of decency that mark the progress of a maturing society."<sup>52</sup>

Judge Blackmun's ruling was possible if one agreed with the Supreme Court's assumption that it had the power to change the original meaning of the constitutional text. Unquestionably, the framers did not intend to outlaw corporal punishment because the same Congress that had adopted the constitutional prohibition against cruel and unusual punishment had enacted a law that required

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47. Proverbs 22:15.

48. Proverbs 29:15.

49. BATTERED WOMEN: ISSUES OF PUBLIC POLICY (U.S. Commission on Civil Rights, 1978), 479-80.

50. R. Docksay, YOU WON'T GET SPANKED IN SWEDEN (1980), 8.

51. 404 F.2d 571 (8th Cir. 1968).

52. *Trop v. Dulles*, 356 U.S. 86, 102; 78 S.Ct. 590, 598 (1958).

certain convicted thieves to "be publicly whipped, not exceeding thirty-nine stripes."<sup>53</sup> Indeed, corporal punishment for certain offenders was not uncommon in America in colonial times. For example, Section 43 of the Massachusetts Body of Liberties provided for such punishment as prescribed by Biblical principles:

No man shall be beaten with above 40 stripes, nor shall any true gentleman, nor any man equal to a gentleman be punished with whipping, unless his crime be very shameful, and his course of life vicious and profligate.<sup>54</sup>

And Section 46 of that same document proved that such corporal punishments did not, per se, violate any prohibition against "cruel and unusual" punishments;

For bodily punishments we allow amongst us none that are inhumane, Barbarous or cruel.<sup>55</sup>

While provisions for corporal punishment of certain convicted criminals remained on the books as late as 1972<sup>56</sup> such practice has long been discontinued. Perhaps, this occurred because obvious abuses had taken place in England and America<sup>57</sup> just as they had in Israel when Jesus Christ, Himself, was beaten<sup>58</sup> and when the early church's apostles had likewise suffered for preaching the Gospel.<sup>59</sup> Perhaps, this practice discontinued because civil authorities began to listen to penology experts and to convicted felons, as had Judge Blackmun in the *Jackson* case, and concluded that, even with carefully enforced safeguards, physical punishment was counter productive.

Whatever the reason, God has reminded a nation's leaders through the Book of Proverbs that: "there is a way which seemeth right to a man, but the end thereof are the ways of death."<sup>60</sup> Moreover, He has warned those leaders that if they seek the best for their nation they will follow God's laws for nations: "Righteousness exalteth a nation: but sin is a reproach to any people."<sup>61</sup> The Holy Spirit through the Apostle Paul repeated this warning in the form of a command to the civil rulers:

For rulers are not a terror to good works, but to the evil ... for he is the minister [servant] of God, a revenger to execute wrath upon him that doeth evil.<sup>62</sup>

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53. *Supra*, note 36.

54. R. Perry, ed., SOURCES OF OUR LIBERTIES (1972), 153.

55. *Id.*

56. *See*, 11 Dela. Code, §§631, 811, and 3905-08, *also* G. Newman, JUST AND FAITHFUL (1983), 129.

57. Newman, *supra* note 56, at 28-35.

58. Matthew 27:26.

59. Acts 5:40; 16:23 and 2 Corinthians 11:24.

60. Proverbs 14:12, 16:25.

61. Proverbs 14:34.

62. Romans 13:3-4.

The remedy for abuse of power is not to disregard God's clear command that in appropriate cases convicted criminals should be physically punished, but to see that the civil rulers abide by the "eye for eye/tooth for tooth" principle of proportionality. By completely abandoning such punishment in the criminal justice system and by threatening to stop the practice of such punishment of children in the home, America's leaders have not only robbed its law-abiding citizenry of the protection that God affords them, but it has stolen from the offenders themselves opportunities for spiritual and intellectual restoration, the divinely guaranteed benefits of corporal punishment.

In a book on dealing with the problem of depression, authors Don Baker and Emery Nester have dramatically documented the therapeutic effect of corporal punishment properly administered according to Biblical standards.

One young man had returned from Vietnam a psychological cripple. His mood swings would take him from the extremes of deep depression to acts of insane violence.

He had accidentally killed some Vietnamese children.

The counselor had been working with him for months, trying to help him gain release from the overpowering sense of guilt that bound him. David finally persuaded him to verbally relive those tragic moments in "Nam." We listened spellbound as he painted a grim word picture of the scene that smoldered in his mind.

When finally he had said it all and had left us mentally staring at the lifeless corpses of innocent children, he began to cry. The convulsive sobs that followed racked his entire body.

No one moved to comfort him. No attempt was made to quiet him; we all sat mute and still.

Finally, as his crying began to subside, David said quietly, "And you feel that you need to be punished for what you did?" The young veteran began nodding his head and saying, "Yes, yes ... I need to be punished. Yes, yes."

To my utter amazement, David moved from his chair, picked up a wooden ruler, and said, "Hold out your hands." As the ex-soldier obeyed, the therapist began beating his hands and his forearms mercilessly.

I expected just token punishment - a symbolic beating. But David didn't stop, and we recoiled as we saw that ruler come down again and again on hands that began reddening and swelling with each successive blow.

After what seemed an eternity, the beating ended. The tears gone, the look of pain had eased. Our counselor took that grown man in his arms and held him close as a father would his son, all the time repeating, "It's all right. It's all right. It's over. It's over."

The rest of us then crowded close and held that Vietnam veteran until he began to relax. He looked at the therapist and then at the rest of us and began to sob in relief, uttering over and over again. "Thank you, thank you."<sup>63</sup>

In addition to this contemporary testimony of the restorative effect of corporal punishment, others are beginning to question the almost universal assumption that corporal punishment of convicted

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63. D. Baker and E. Nester, *DEPRESSION* (1983), 60.

criminals is "cruel and unusual." In 1983 Graeme Newman, professor of criminology and dean of the School of Criminal Justice, State university of New York, Albany, published *JUST AND PAINFUL: A CASE FOR THE CORPORAL PUNISHMENT OF CRIMINALS*. In this short, but well-documented study, Dean Newman demonstrated that "none of the research substantiates" the claim "that corporal punishment causes humiliation and terror." To the contrary, Dean Newman pointed out, "it is well established that prison rests on a platform of humiliation and terror."<sup>64</sup>

At the conclusion of his study the dean issued "A punishment Manifesto" that included the following two proposals:

- (1) Acute corporal punishment should be introduced to fill the gap between severe punishment of prison and the non-punishment of probation ....
- (2) For violent crime in which the victim was terrified and humiliated ... a violent corporal punishment should be considered, such as whipping ....<sup>65</sup>

In part, Dean Newman's endorsement of corporal punishment was based upon his concurrence with the proposition that through suffering pain "the offender can come to understand the evil of his offense."<sup>66</sup>

## RESTITUTION AND SOCIETY

In his book on the limitations of the criminal sanction, Herbert Packer cited the death penalty for murder as the most "conspicuous example" of the revenge theory underpinning the *lex talionis*. At first glance it appears that Packer is right. Capital punishment imposed upon a murderer prevents any possible remedy that would restore the victim or that would make restitution to the victim's family. And only those with a preference for the macabre would argue that killing the offender would be good for his soul or for his mind. Careful examination of the Biblical provisions commanding the death penalty for murder, however, reveals that it, too, has a restitutionary purpose, namely, to restore the nation or society in which the murder occurred.

From the time of the first murder, when Cain killed Abel, the unlawful taking of innocent blood has literally "defiled" the land where the murder took place. This "law of the land" was first revealed by God in his encounter with Cain after he had murdered his brother: "And he [God] said, what hast thou done? The voice of thy brother's blood crieth unto me from the ground."<sup>67</sup>

God elaborated upon this law in his instructions to the nation of Israel through the prophet, Moses:

Whoso killeth any person, the murderer shall be put to death by the mouth of the witnesses ... Moreover, ye shall take no satisfaction for the life of a murderer ... but he shall surely be put to death .... So ye shall not pollute the land wherein ye are: for blood

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64. F. Newman, *JUST AND PAINFUL* (1983), 8.

65. *Id.*, at 139.

66. *Id.*, at 100.

67. Genesis 4:10.

it defileth the land: and the land cannot be cleansed of the blood that is shed therein, but the blood of him that shed it.<sup>68</sup>

Finally, God announced through the Psalmist that the nation of Israel had been destroyed and its people scattered, in part, because of its failure to enforce the law of murder and to impose the death penalty upon those guilty of shedding innocent blood:

Yea, they ... shed innocent blood, even the blood of their sons and of their daughters, whom they sacrificed unto the idols of Canaan: and the land was polluted with blood ... Therefore was the wrath of the Lord kindled against his people ... And he gave them into the hand of the heathen.<sup>69</sup>

The prophet Isaiah has made it clear that this "law of the land" has not been limited by God to the geographical boundaries of Israel or to the historical period of the Old Testament. In a timeless prophecy concerning the history of nations past, present and future Isaiah proclaimed that "the earth ... is defiled under the inhabitants thereof; because they have transgressed the laws, changed the ordinances, broken the everlasting covenant."<sup>70</sup> Part of the covenant referred to in this passage undoubtedly includes the covenant that God made with all nations through the patriarch, Noah: "Whoso sheddeth man's blood, by man shall his blood be shed: For in the image of God made he man."<sup>71</sup> That covenant has bound all nations ever since. The prophet, Habakkuk, warned that God still brings judgment upon any nation that habitually violates "the law of the land."<sup>72</sup>

Notwithstanding this consistent Old Testament record, G. Aiken Taylor, editor of the *PRESBYTERIAN JOURNAL* has observed:

Within the Christian community ... it is widely believed that the Christian "ethic" demands the abolition of capital punishment. Some Christian leaders declare that the New Testament modifies the Old Testament in this respect and that Jesus Christ would have rejected capital punishment.<sup>73</sup>

For example, the Southern Presbyterian Assembly's Christian Relations Committee reported in 1961 "that the New Testament 'ethics of love' effectively forbids capital punishment and that the process of rehabilitation which is 'God's redemption' should not be denied any man."<sup>74</sup> But does capital punishment deny to the man executed an opportunity to come to a saving knowledge of Jesus Christ? To this speculation C.S. Lewis has replied: "I do not know whether a murderer is more likely to repent and make a good end on the gallows a few weeks after his trial or in the prison

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68. Numbers 35:30-31,33.

69. Psalm 106:38-41.

70. Isaiah 24:5.

71. Genesis 9:6.

72. Habakkuk 2:1-17.

73. Taylor, *Capital Punishment - Right and Necessary*, in *ESSAYS ON THE DEATH PENALTY* (T. Ingram, ed., 1963), 47.

74. *Id.*

infirmity thirty years later."<sup>75</sup>

Lewis' comment certainly fits the picture that Jesus Christ, Himself, painted for Nicodemus in their conversation about the Christian, born again salvation experience:

The wind bloweth where it listeth, and thou hearest the sound thereof, but canst not tell whence it cometh, and whither it goeth: So is everyone that is born of the Spirit.<sup>76</sup>

In fact, the Bible record gives assurance that the death penalty, even if erroneously imposed, cannot possibly deny anyone the opportunity to be saved. For as Christ has promised all mankind, the Father's will cannot be thwarted by any created thing, including the death penalty:

All that the Father giveth me shall come to me ... And this is the Father's will which hath sent me, that of all which he hath given me I should lose nothing, but should raise it up again at the last day.<sup>77</sup>

Another argument made by some Christians is actually based upon one of the Ten Commandments, "Thou shalt not kill."<sup>78</sup> Does the sixth commandment prohibit capital punishment? Those who make that claim inevitably place God in contradiction to Himself. The God who wrote the Ten Commandments on the two tablets of stone and who gave them to Moses,<sup>79</sup> was the same God who commanded the people of Israel through the same Moses to take the life of anyone who was found guilty of murder.<sup>80</sup> As God has witnessed of Himself, he cannot lie<sup>81</sup> and, therefore, cannot give to contradictory commandments. His Word is one harmonious whole, as the writer of Proverbs has reminded us:

Every word of God is pure [tested]; he is a shield unto them that put their trust in him. Add thou not unto his words, lest he reprove thee, and thou be found a liar.<sup>82</sup>

Finally, some have argued against capital punishment on the basis of two events in the life of Jesus Christ, the Sermon on the Mount and the defense of the adulteress. The passage most often cited from the Sermon is as follows:

Ye have heard that it hath been said, "An eye for an eye and a tooth for a tooth;" but I say unto you, that ye resist not evil; But also whosoever shall smite thee on the right, turn to

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75. C.S. Lewis, *The Humanitarian Theory of Punishment*, in *GOD IN THE DOCK* (1970), 287.

76. John 3:8.

77. John 6:37,39.

78. Exodus 20:13.

79. Exodus 31:18.

80. Exodus 21:12,14, Leviticus 24:17, Numbers 35:30-34, Deuteronomy 19:11-12.

81. Numbers 23:19, Titus 1:2.

82. Proverbs 30:5-6.

him the other, also.<sup>83</sup>

If this statement dictates the repeal of capital punishment on the ground that Jesus rejected the "eye for eye/tooth for tooth" rule of the Old Testament, then for the same reason it requires abolition of all forms of punishment, including the discipline of children. How else could one live and not violate the command "to turn the other cheek." But that was not Christ's message here. The New Testament affirms the right of civil authorities to punish evil doers<sup>84</sup> and the right of fathers to discipline their children.<sup>85</sup> Christ, Himself, reminded his followers to "render therefore unto Caesar the things which be Caesar's."<sup>86</sup> Clearly, then, Christ in His Sermon did not call for an anarchical society governed solely by the law of love.

What He did teach, however, is that those who desired to live in the Kingdom of God could not do so simply by conforming their outward behavior to the rules of civil society. Thus, He told His listeners that hating a man in one's heart is murder and lusting after a woman in one's heart is adultery.<sup>87</sup> While civil authorities had no jurisdiction over a man's heart,<sup>88</sup> God did. Therefore, if a man desired to enter God's kingdom his righteousness must exceed that of the law-abiding citizen of a nation on earth.<sup>89</sup>

In light of this analysis Christ did not even address the question of civil authority in His Sermon on the Mount. He limited His remarks to the responsibilities and duties of those who desired to be right with God. His reference to the "eye for eye/tooth for tooth" principle simply meant that one may be entitled in a human court to a favorable judgment, but that alone would not give that person favor in God's court. The "turn the other cheek" principle applicable in God's system of justice required that even when one has been wronged by another, the one wronged must forgive the wrongdoer and reach out to him in love.<sup>90</sup>

As Christ did not modify or change the authority of civil rulers in His Sermon on the Mount, He did not do so in His defense of the adulteress. In that case Christ contended that only those "without sin" could execute judgment upon the adulterous woman.<sup>91</sup> Of course, not one sitting in judgment qualified.<sup>92</sup> If this passage dictated the demise of capital punishment,<sup>93</sup> because Jesus required those

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83. Matthew 5:38-39.

84. Romans 13:1-4, 1 Peter 2:13-14.

85. Ephesians 6:4.

86. Luke 20:25.

87. Matthew 5:22,28.

88. Matthew 5:21.

89. Matthew 5:20.

90. Matthew 5:42-45.

91. John 8:7.

92. John 8:9-10.

93. Anyone committing adultery in Israel deserved death. Leviticus 20:10.

in judgment to be sinless, then for the same reason it would require the elimination of all punishment, including the discipline of children. But that was not Christ's message. As has been stated above in the analysis of the Sermon on the Mount, the New Testament affirms the right of civil rulers to wield the sword against evil doers and of fathers to discipline their children.

What was Christ's message then? It was a message for the church. The Pharisees and Scribes, the religious leaders of the Jewish community at the time of Christ, sought to continue to exercise the authority that God had given them when Israel was an independent nation and still fulfilling the purposes and plan of God. They had overlooked two things: 1) That Israel had failed to obey God and God had now instituted a new plan to reach all nations with His salvation message;<sup>94</sup> and 2) they had the power to stone the adulteress not from God, but from the Roman Empire.<sup>95</sup> Christ taught in this encounter that the Church had no authority to judge or condemn, but only to bring the message of salvation to the lost. After all, Christ came to save the world, not to judge it.<sup>96</sup> His disciples could do no more than what Christ authorized them to do. Therefore, He rebuked James and John who desired to bring down the fire of judgment upon a village of Samaritans who had rejected the gospel:

Ye know not what manner of spirit ye are of. For the Son of Man is not come to destroy men's lives, but to save them.<sup>97</sup>

In summary, the New Testament, especially Christ's teachings, has not repealed capital punishment. Civil rulers still have the authority, indeed the duty under the Noahic covenant, to impose the death penalty upon any one duly convicted of murder.<sup>98</sup> That was certainly the teaching of the common law at the time of the founding of the United States of America. Indeed, Sir William Blackstone in his COMMENTARIES taught that murder was an unpardonable offense. He supported his view by explicit reference to the Bible:

We are next to consider the crime of deliberate and wilful murder; a crime ... which is I believe punished almost universally throughout the world with death. The words of the mosaical law (over and above the general precept to Noah, that "whoso sheddeth man's blood, by man shall his blood be shed") are very emphatical in prohibiting the pardon of murderers.<sup>99</sup>

Quoting from Numbers chapter 35, Blackstone reminded his readers of "the law of the land:"

[Y]e shall take no satisfaction for the life of a murderer, who is guilty of death, but he

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94. Romans 9:24-33.

95. John 11:48.

96. John 12:47.

97. Luke 9:55-56.

98. Whether or not there is authority to impose the death penalty for offense beyond murder is beyond the scope of this essay. *See, e.g.*, Deuteronomy 22:25-26.

99. W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1769), Vol. IV, at 194.

shall surely be put to death; for the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it.<sup>100</sup>

Finally, Blackstone hailed the common law that prohibited the king from pardoning a murderer, and criticized the Polish monarch who thought proper to remit the penalties of murder to all the nobility, in an edict with this arrogant preamble, "*nos, divini juris rignonem moderantes, Etc.*"<sup>101</sup>

This Latin phrase, "we, moderating the rigors of divine justice," could very well be inserted as the introduction to many twentieth century court opinions and legislative enactments that have modified God's law governing the death penalty. For example, in 1976 the United States Supreme Court found North Carolina's mandatory death penalty for murder unconstitutional under the cruel-and-unusual punishment prohibition of the Eighth Amendment.<sup>102</sup> The Court objected to the statute's "withdrawing all sentencing discretion from juries in capital cases" on two principal grounds: First, that juries would simply disregard their legal duty to impose the death penalty by haphazard refusals to convict of the capital offense; and second, that a mandatory death penalty statute fails "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."

As for the first point, if all laws were subject to constitutional infirmity on account of speculations that those with a duty to enforce them would do so only haphazardly, few laws would survive. Probable disobedience of civil duty should never be grounds for the unconstitutionality of any law.

On the second point, the Court has adopted as constitutionally-mandated a system of sentencing that directly contradicts the Biblical principle that "the penalty must fit the crime." By requiring the sentencing authority to examine the character of a convicted murderer, and the particular circumstances of the murder, the Court has not only disregarded the Biblical norm that all convicted murderers deserve the death penalty, but it has multiplied opportunities for unfairness in the administration of that penalty.

Moses instructed the judges of Israel to show no "respect" of "persons in judgment."<sup>103</sup> The writer of Proverbs echoed the Mosaic law:

These things also belong to the wise. It is not good to have respect of persons in judgment.<sup>104</sup>

By requiring the death penalty to be tailored to the individual, the Court has virtually invited the

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100. *Id.*

101. *Id.*, at 94.

102. *Woodsen v. North Carolina*, 428 U.S. 280 (1976).

103. Deuteronomy 1:17, 16:19.

104. Proverbs 24:24. *Cf.*, Proverbs 28:21.

civil authorities to favor the "great" over the "small,"<sup>105</sup> the "mighty" over the "powerless,"<sup>106</sup> and the "rich over the "poor."<sup>107</sup> Yet, "the law of the land" is violated by anyone who commits murder whether it is his first and only offense after an otherwise exemplary life or the last in a series of offenses by one "trapped" in a lifestyle of crime. In disregard of this law requiring death of one who has spilled innocent blood, the Court has ordained that "a just and appropriate sentence" must take into account "both the offender and the offense" in order to comply with the "progressive and humanizing development ... [of] enlightened policy" of the last half of the twentieth century.<sup>108</sup> The Polish monarch to whom Blackstone referred in his COMMENTARIES would undoubtedly have concurred with this opinion as the best way to protect the "noble class" without having to say so.

Because of a growing public opinion favoring the death penalty for murder, executions have begun to appear more frequently in several states in America. But capital punishment should not depend upon the ebb and flow of public opinion as if it were subject to a popularity contest. The "law of the land" does not change whether by public referendum or initiative or by legislative enactment or judicial fiat. Nor should the Noahic covenant commanding all nations to protect innocent blood by putting to death convicted murderers depend on who wins the philosophical debate whether capital punishment "denies the executed person's humanity" or "affirms the murdered victim's humanity." That was settled by God, Himself, when He disclosed to Noah the reason for capital punishment for murder: "For in the image of God made he man."<sup>109</sup>

## CONCLUSION

If a society follows the "eye for eye/tooth for tooth" principle and if it adheres to the restitutionary purposes of that principle, then the criminal law will have the deterrent effect that the experts claim to desire. That is the promise of God's word as revealed to Moses in Deuteronomy.<sup>110</sup> So long as those experts seek their utilitarian goals of deterrence they will find those goals always eluding them as they, themselves, have acknowledged:

The utilitarian concept of deterrence ... justifies punishment in preventive terms and as such makes an assertion that in principle is subject to empirical verification. We should be able to find out, in other words, whether criminal punishment in fact deters people from committing crimes and more precisely, which sanctions and in what amounts provide the most effective deterrents. Yet to date, we have been unable to do so in a manner that can claim general recognition and acceptance in the scientific community.<sup>111</sup>

More importantly, these experts will be tempted to tamper and to experiment with man's freedom

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105. Deuteronomy 1:17.

106. Leviticus 19:15.

107. James 2:3-4.

108. *Woodsen, supra* note 102, at 304.

109. Genesis 9:6.

110. Deuteronomy 17:13, 19:20.

111. Low, Jeffries and Bonnie, *supra* note 6, at 17-18.

and dignity in order to achieve their higher goals, as Oliver Wendell Holmes, Jr., was willing to do:

If I were having a philosophical talk with a man I was going to have hanged (or electrocuted) I should say, "I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises."<sup>112</sup>

Holmes' view that punishment may be justified for the "common good," even though the individual punished did not deserve it was not at all novel. Caiaphas, the Jewish high priest, advocated the same thing when he called for the crucifixion of Jesus: "[I]t is expedient for you that one man should die for the people, and that the whole nation should not perish."<sup>113</sup> As Dean Newman of the State University of New York, Albany, has pointed out, the lesson to be learned from this passage of Scripture is the one taught by Dante who "reserved the 8th circle of Hell for the utilitarians of history:"

This was the punishment for Caiaphas .... [He] was to be crucified to the ground across the road where people could not help stepping on his body as they passed through. The logic of the punishment is indeed satisfying: the body is used by others as a means to go somewhere .... This punitive expression of the crime lays bare the basic injustice of the utilitarian philosophy: it treats men as means rather than ends.<sup>114</sup>

C.S. Lewis was absolutely right when he urged England to turn away from the so-called modern theories that justified criminal punishment for the purpose of deterring others by example. He called for a return to the traditional common law justification of deserved punishment "not solely, not even primarily, in the interests of society, but in the interests of liberty:"

If the justification of exemplary punishment is not based upon desert but solely on its efficacy as a deterrent, it is not absolutely necessary that the man we punish should even have committed the crime.<sup>115</sup>

America, too, ought to be called back to its original Judeo-Christian roots and be recommitted to a system of restitutionary justice that will restore both liberty and order to a society that has suffered long enough from the "best" that its "brightest" have had to offer.

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112. Howe, ed., *HOLMES-LASKI LETTERS* (1953), 806.

113. John 11:50.

114. Newman, *supra* note 56, at 98-99.

115. Lewis, *supra* note 75, at 291.

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