

2-1990

A Meaner, More Punitive Nation

Bruce Berner

Valparaiso University School of Law

Follow this and additional works at: http://scholar.valpo.edu/law_fac_pubs



Part of the [Criminology Commons](#), and the [Law Commons](#)

Recommended Citation

Bruce Berner, *A Meaner, More Punitive Nation*, *The Cresset*, Feb. 1990, at 26.

This Article is brought to you for free and open access by the Law Faculty Presentations and Publications at ValpoScholar. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



A Meaner, More Punitive Nation

Bruce Berner

President Bush's much burlesqued yearning for a "kinder, gentler nation" deserves more serious attention. It proceeds from an assumption that, collectively, we are currently mean and punitive. But are we? What gauges exist to measure our mean-ness-gentleness quotient? There are many symptoms, such as the creeping disappearance of simple courtesy, but I agree with the opinion of deTocqueville that one of the clearest indicators of a society's civility is the way it treats its criminals. This piece scans the recent American criminal punishment landscape and concludes that the President's wish may be granted. We may become kinder and gentler because that is about the only direction left open. We have, I argue, hit near-bottom in mindless, punitive reaction to

Bruce Berner, a graduate of VU and member of the faculty of the School of Law, contributes regularly to *The Cresset* on issues of law and jurisprudence.

crime. To demonstrate this, I discuss a series of recent cases and statutes.

Before the young Republicans assail this piece as the latest bleeding-heart entry in the war-on-crime debate, let me suggest that such charge would be misdirected. The issue herein is not the means for fighting crime. The events which are chronicled here are outside any sensible debate on law enforcement or penology.

Among the justifications ordinarily offered for punishment for crime are deterrence, prevention, rehabilitation, education, restraint, disapprobation, and reinforcement of norms. We can argue about these and redesign punishment as we learn more about them. We may choose to commit more or fewer resources to the crime problem as political tides ebb and flow. And, of course, we do. Such is the war-on-crime debate. How many years in jail will most effectively prevent robbery? Should we throw more or fewer dollars into the effort to rehabilitate offenders? Should we spend more energy on crime, drug, and alcohol education? Does the death penalty deter? Can people ever really change?

□

There remains, however, an undeniable, critical, aim of punishment variously identified as "just desert," "revenge," or "retribution." We punish in part because some fundamental instinct tells us that deviance should prompt outrage which in turn should prompt the infliction of suffering on the deviant. Kant even had a calculus, complete with pluses and minuses, for exacting retribution. Unless and until the correct "payment" was made (neither too high nor too low), the cosmos was misaligned. We, with-

out this technical apparatus, inarticulately sense that if certain conduct goes unpunished, our world is out of whack. While other punishment aims, like prevention or rehabilitation, reside in empirical, logical, and psychological realms, retribution is almost wholly the product of how outraged we feel and of our sense of proportion in quenching that outrage. How much pure retribution we demand (after we have exhausted the preventive, educational, rehabilitative, etc. effects of punishment) is a powerful barometer of our collective mood.

One final introductory observation. Punishment for crime is relatively high in the United States. Length of prison terms *actually served* for comparable offenses is nowhere else so high. The percentage of population in prison is higher only in the Soviet Union and South Africa. The death penalty is abandoned in virtually every other Western industrialized country. But even accepting typical American punishment as a baseline, the following events seem to suggest a current American retributive impulse amazing in magnitude.

Cameron Kocher. Nine-year-old Cameron Kocher took his father's high-powered rifle and killed a seven-year-old girl as she whizzed by on a snowmobile. It may have been an accident; it may have been intentional. A jury will soon sort that out since the State of Pennsylvania is trying Cameron for murder.

Ray and Faye Copeland. This couple is accused of three murders. The State of Missouri seeks the death penalty. He is 75; she is 68.

Juvenile death penalty. Many states are imposing capital punishment on persons aged 16 and 17. Some had been sentencing persons 15, 14, or younger to death until the Supreme Court

ruled the practice unconstitutional as "cruel and unusual." Whether or not it is cruel, it was not all that unusual.

Abolition of the insanity defense. A large number of states (including Indiana) have virtually abolished the defense of insanity.



Before sorting through this, I concede that these actions have been taken through judgments of a few people or bodies not always completely responsive to the constituencies they are supposed to represent. But there are so many recent instances like these and so little negative reaction to them that they can be fairly employed to portray the culture from which they spring.

None of the listed events can be fully explained by invoking deterrent, rehabilitative, or educative purposes. The idea of deterring Cameron or other "similarly motivated" nine-year-old boys by convicting him of murder is pretty bizarre. (For one thing, to tell a nine-year old that if he kills on purpose, he is a murderer, is to imply to him that such actions are within the realm of his choice. There are some nine-year olds best left ignorant on that point.) I wouldn't want to have to argue that putting Cameron in jail will make him better. The experience up to now seems to have been lost on him. At pretrial conferences, he communicates (when he is awake) solely by tugging on his lawyer's sleeve to ask when he can go home. He seems also to have missed a few of the more subtle moral issues of his conduct and upcoming trial by telling all who seem upset by this killing, "If you don't think about it, you won't be sad."

None of this suggests

Cameron need not be dealt with. He needs help of all kinds and, if the killing was intentional, has needed it for a while. Family, church, school, counselling, the juvenile-justice system all may be appropriate. But to bring to bear on him the criminal justice system, that awesome apparatus designed to channel and express the moral condemnation of the community, is to seek revenge without thought. I have talked about this case with a number of child psychiatrists, grade-school principals, and fourth-grade teachers, all people who deal with the behavior and mentality of nine-year-olds regularly. Not one could see any sense in this prosecution other than an unreasoned manifestation of fear and retaliation. Cameron's case is not quite the fulfillment of the worst-case scenario, for Pennsylvania, as well as several other states, could bring the same charge against a child as young as seven. (Read my lips, "s-e-v-e-n.") Indiana law patiently waits until the child reaches ten.

Annually in the United States, about 250 children under twelve gain access to a gun and kill someone. It is a problem. Most of these cases are dealt with officially by the juvenile system. Many are the result of careless adults who may be appropriately sued civilly or punished criminally. Some are, irreducibly, the price paid for permitting private weapon possession. As Ollie North likes to say, "It's a dangerous world out there." But let us not move toward "solving" this problem with the electric highchair.

And in the case of the elderly Copelands, criminal prosecution is surely appropriate as is serious punishment if they are convicted. This case moves us into more uncertain issues of degree. I do not argue here that imposing

the death penalty on the elderly is unjust, only that it is symptomatic of an extremely strong retributive impulse. It is akin to shooting a mouse with a cannon. Most serious studies cast grave doubt on whether the threat of capital punishment *ever* has measurable deterrent effect, and presumably any such effect would be diminished when aimed at persons nearer the end of their lives. So, rather than pass over the question with rhetoric about deterrence and wars on crime, let us admit that we need to kill people like the Copelands to get our fair measure of revenge, that imprisoning them for the rest of their lives is simply and finally not enough.

The same analysis applies to executing teenagers. The only plausible explanation for doing it is to exact retributive payment. If we are afraid of what they may do, they can be restrained; we have as much power to deliver life sentences with no prospect of release as we do to kill. As to deterrence of others, if we cannot demonstrate that the death penalty influences adults, can anyone believe that the problem gets *less* complicated when we introduce the teenage mind? I've been unsuccessfully trying for years to deter my fifteen-year-old son from leaving his coat on the floor, which seems less complex than preventing killing. (I often wonder if it would help if I didn't leave mine on the floor.)

Even when the death penalty is not involved but the debate is over how long a prison term should be, Americans consistently intuit a period of time long by any comparative standard. Law students often complain about some perpetrator of, say, a petty theft, "getting off with only a year in jail." I understand, indeed share, their frustration with crime,

but I wonder what would lead anyone to put the word "only" in a sentence that contains "year in jail."

The movement toward abolition of the insanity defense suggests either an unwillingness or an inability to distinguish illness from evil. If this statutory trend were simply a confession of inability, abolition would be defensible on deterrence grounds—after all, insanity can be faked, so if we make the defense unavailable, we will at least deter the would-be fakers. (Trying to figure out how to deter the truly insane will only make your head hurt.) Yet, there are a variety of ways to control the uncertainties of the distinction between illness and criminality without destroying the decisive moral difference. These may include: maintaining a definition of insanity which includes only gross mental illness and excludes neurotics and persons with personality disorders, conditions not only less serious, but more difficult to diagnose with accuracy; restricting the scope of expert psychiatric testimony so that the ultimate question remains a moral one for the jury, not a "clinical" one for experts or pseudo-experts; placing the burden of proving insanity squarely on the defendant; increasing the standard of proof as by requiring defendants to prove insanity by "clear and convincing evidence." The failure to try such intermediate steps (a few states have and they seem to work) suggests that, for many, there is not an inability, but an unwillingness, to maintain the distinction between criminality and illness.

The whole theory of criminal punishment, however, rests on the assumption that humans are creatures with the capacity to make choices. When facts demonstrate that the choice to kill or not

is unduly compromised, we either applaud the choice as right (justification defenses like self-defense) or recognize that to ask more of a person in such a position is to ask too much (excuse defenses like duress). Insanity, when properly defined, is the label for people who have so far lost the capacity to make choices or to discern the propriety of those choices that no criminal punishment could be effective or appropriate. If they are dangerous, we should protect ourselves from them. There are many legal and extralegal techniques for this. For example, we quarantine those with serious, communicable diseases. But we don't view it as "punishment," we don't insist on visiting a criminal conviction on them, on announcing to them that they are to be morally condemned. There are many factors in this complex question of abolishing the insanity defense. One fair conclusion, however, is that there exists in America a spirit which possesses and indulges a willingness to impose punishment beyond our ability to account for it rationally.

Nothing is wrong with righteous anger and outrage. If we never experienced it or acted on it, we would be ill, morally bankrupt, or in paradise. And clearly our institutions for channeling and expressing that outrage are morally advanced from lynch mobs. But "how?" and "how much?" are different questions. Regardless of how stunned we may be at the havoc wreaked by nine-year-old children or by those with profound mental illness, moral outrage expressed by invoking the criminal process is inappropriate. As to other situations, in which such outrage is justified, we must be vigilant of both upper and lower boundaries in venting it. Too little punishment risks moral decay. Too

much risks cruelty. My thesis is that the current pressure is on the upper boundary.

Will we become kinder and gentler, at least in this area of criminal punishment? Not until two things happen. First, we must overcome the intuition that harsher and harsher punishments will alleviate the crime problem. We must stop blaming the fever on the aspirin. We must cease camouflaging retributive impulse with rhetoric about deterrence, education, and "wars on crime." We must, in short, own up to our thirst for revenge. Second, we must want to reduce that thirst. The revenge instinct is strong; it is probably insuperable by mere human effort.

To the extent one thinks the punishments chronicled above are proportionate expressions of righteous moral outrage, it is neither necessary nor advisable to become kinder and gentler. For those of us who would like to so change, who see in ourselves more thirst for revenge than we like to admit, we will often find changing very difficult. Anger and anguish, frustration and fear are not lightly left unrequited. These beasts are overcome only with profound struggle.

One helpful strategy is to follow those who lead by example. They live in all times, cultures, and traditions. The patriarch Abraham, as well as Gandhi, Martin Luther King, Jr., and Mother Teresa all come to mind. At a University under the cross, it shouldn't be too difficult to think of one more. □