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## Embracing Chance: Post-Modern Meditations on Punishment

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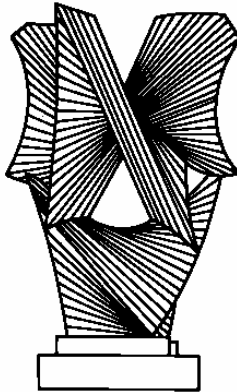
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POST-MODERN MEDITATIONS ON PUNISHMENT

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**EMBRACING CHANCE:**  
**POST-MODERN MEDITATIONS ON PUNISHMENT**

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*A Polemic and Manifesto for the 21st Century*

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Prepared for the New School Conference on Punishment  
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## Preface

Enlightenment is man's emergence from his self-incurred immaturity. Immaturity is the inability to use one's own understanding without the guidance of another.

Immanuel Kant, *An Answer to the Question: 'What is Enlightenment?'* (1784)

**I**n an essay bearing the same title, Michel Foucault read Kant's text against the backdrop of his critique of reason, published just three years earlier. It is precisely at the moment that we assert ourselves as mature beings, Foucault observed, that it is most important to recognize the limits of reason. "It is precisely at this moment that the critique is necessary, since its role is that of defining the conditions under which the use of reason is legitimate in order to determine what can be known, what must be done, and what may be hoped" (1997:308). Foucault warned us, with Kant, that reliance on reason beyond its proper bounds would merely set the clock back: "Illegitimate uses of reason are what give rise to dogmatism and heteronomy, along with illusion" (1997:308). The careful and critical use of reason, in contrast, is what enlightens and leads forward, out of the shadows of illusion. But it can only do so relying on itself. The modern period would embrace a self-conception of self-reliance—carefully bounded by critique.

Foucault also saw in Kant's essay a new philosophical attitude consisting of genuine reflection on the "present"—a turning of the more traditional, eternal gaze of the philosopher onto the contemporary moment, and, with that, an associated task of theorizing knowledge in relation to current times. Foucault dubbed this "the attitude of modernity" and located its resonance in the writings of nineteenth and twentieth century authors, starting foremost with Charles Baudelaire. "By 'attitude,'" Foucault wrote, "I mean a mode of relating to contemporary reality; a voluntary choice made by certain people; in the end, a way of thinking and feeling; a way, too, of acting and behaving that at one and the same time marks a relation of belonging and presents itself as a task" (1997:309). This attitude brought together philosophical inquiry with critical thought focused on contemporary historical actuality. Philosophical training and reflection would now apply themselves to the contemporary moment—most notably, the French

revolution—and concentrate on reasoning through the present. Foucault saw in Kant the origin of a modern attitude that would run through Hegel, Nietzsche, Marx, Durkheim, Rusche and Kirchheimer.

In another essay bearing the same title, Jürgen Habermas adds: “Surprisingly, in the last sentence of his lecture Foucault includes himself in this tradition” (1994:150).

Once again, the attitude of modernity triumphed over the critique of reason. In these pages, I argue that the two strands Foucault identified in Kant’s essay—the crucial moment of critical reason and the modern attitude—collided throughout the nineteenth and twentieth century, and that the modern attitude repeatedly prevailed. Even when the moderns were engaged in the most critical of enterprises, the attitude gained the upper hand and offered up new ways of conceptualizing and making sense of the present, consistently *beyond* the limits of reason. Never daunted by those warnings about illusions, never chastened by the foolish excesses of earlier generations, modern thinkers continued to theorize contemporary historical actuality beyond reason’s bounds.

I propose, today, that we finally abandon the misguided attitude of modernity. It will mean, no doubt, leaving much to chance. This is all for the better. Let me explain.

## 1.

**T**he moderns posed three questions of punishment. The first, born of the Enlightenment itself, sought to identify and define a rational basis for punishing. As men freed themselves from the shackles of religious faith, this first question took shape: If theologians can no longer ground political and legal right, then on what foundation does the sovereign’s right to punish rest? On what basis does the state have a right to punish its citizens? Naturally, the question was not entirely innocent—no good questions ever are. It was animated by a desire to locate the righteous limits of the sovereign’s punitive power at a time that was marked—at least in the eyes of many of the first modern men of reason—by excessive punishments. The *right* to punish, it turns out, would serve to *limit* punishment.

“Here, then, is the foundation of the sovereign’s right to punish crimes,” a young, twenty-five-year-old Cesare Beccaria would declare in 1764: “the necessity of defending

the repository of the public well-being from the usurpations of individuals” (1995:10). The origin of the right, Beccaria explained, derived from the sovereign’s duty to promote “the greatest happiness shared among the greater number” (1995:7). Through his disciple, Jeremy Bentham, Beccaria’s writings would translate into more conventional theories of utilitarianism and deterrence and, later, economic models of social welfare maximization. Other early moderns would derive the right to punish elsewhere—in the autonomy or dignity of the moral agent, in the interests of enlightened self-development, in the harm principle, and in those other traditional expressions of legal right.

This first line of inquiry endures well into the present. In the Anglo-Saxon tradition, the answers draw heavily on a functional analysis of the criminal sanction. In the classic debate over the legal enforcement of morality, for instance, all the major contributors—from H.L.A. Hart (1963:14) and Patrick Devlin (1965:2–3), to Ernest Nagel (1968:138–39), Norval Morris (Morris and Hawkins 1970:4), Joel Feinberg (1987) and others—start from the statement of function articulated in the Wolfenden Report of 1957: “the function of the criminal law . . . is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others.” Liberal theorists would relate this back to John Stuart Mill’s earlier pronouncements in *On Liberty*, while legal moralists would argue for the centrality of upholding morality as the main function of the criminal law. “The criminal law as we know it is based upon moral principle,” Devlin argued. “In a number of crimes its function is simply to enforce a moral principle and nothing else” (Devlin 1965: 7). On both sides of the debate, the sovereign’s “right to punish” derived from identifying the proper function of the criminal sanction.

Although this first discourse continues today, it did not take long for men of knowledge—as Nietzsche described himself—to spot the error in this line of inquiry. The right to punish, after all, was precisely what defined sovereignty and, as such, could hardly serve to constrain sovereign power. The first question had gotten things backwards: the “right to punish” was what the sovereign *achieved* by persuading its members that it could best promote the legitimate goals of punishment. To seek the origin of the right to punish by analyzing the purposes or utilities of punishment would lead nowhere. “The ‘purpose of law,’” Nietzsche declared, “is absolutely the last thing to

employ in the history of the origin of law: . . . whatever exists, having somehow come into being, is again and again reinterpreted to new ends, taken over, transformed, and redirected by some power superior to it” (1967: 77).

It was fruitless to look for the right to punish in its purposes, utilities, or functions—whether from a utilitarian or deontological perspective. “[P]urposes and utilities are only *signs* that a will to power has become master of something less powerful and imposed upon it the character of a function,” Nietzsche emphasized (1967: 77). The proper question to ask of the “right to punish,” then, was not “on what ground,” “of what origin,” or “from where” but rather: “How does the sovereign’s act of punishing become perceived as legitimate?” Or better yet, “Under what conditions does the sovereign’s exercise of that power of punishing *not* trigger sufficient resistance to undermine sovereignty itself?” That question, however, did not call for philosophical debate over rights, deontological argument about autonomy, or econometric analyses of deterrence. It called for historical, sociological, political and genealogical research about acts of resistance, social movements, transformative moments, ideology, and social cohesion. It called for a genealogy of morals, law, and power—in sum, a genealogy of punishment.

With the birth of the social sciences in the late nineteenth century, this critical impulse gave rise to a second line of inquiry. More skeptical, more critical, the questions probed and excavated deeper processes and forces: If the rational discourse over the right to punish is mere pretext and serves only to hide power formations, then what is it exactly that punishment practices *do* for us? What is the *true* function of punishment? What is it that we *do* when we punish? From Emile Durkheim to Antonio Gramsci and the later Frankfurt School, Michel Foucault, and *fin-de-siècle* trends in penology, twentieth century moderns struggled over social organization, economic production, political legitimacy, governance, and the construction of the self—turning punishment practices upside down, dissecting not only their repressive functions but more importantly their role in constructing the contemporary subject and modern society.

At the apex of this second line of inquiry, Michel Foucault would articulate and enumerate, in his magisterial book, *Surveiller et punir: Naissance de la prison*, the central tasks and rules of engagement. First and foremost, “Do not concentrate the study of the punitive mechanisms on their ‘repressive’ effects alone. . . [R]egard punishment as

a complex social function” (1977:23; 1975:28). Foucault explicitly acknowledged that this second project built on the work of Emile Durkheim, citing him alone on that same page (1975: 28 n.1), and owed much to the Frankfurt School. In the immediate passage following his enumeration, Foucault emphasized that “the great book of Rusche et Kirchheimer, *Punishment and Social Structures*, offers a number of essential reference points” (1975:29):

We must first rid ourselves of the illusion that penalty is above all (if not exclusively) a means of reducing crime. . . We must analyse rather the ‘concrete systems of punishment’, study them as social phenomena that cannot be accounted for by the juridical structure of society alone. . . ; we must situate them in their field of operation, in which the punishment of crime is not the sole element; we must show that punitive measures are not simply ‘negative’ mechanisms that make it possible to repress, to prevent, to exclude, to eliminate; but that they are linked to a whole series of positive and useful effects which it is their task to support (Foucault 1979:24; 1975:29–30).

All this, from the Frankfurt School. The key task that emerged from that second line of inquiry, then, was to unearth the deeper forces and relations of power that, through the means of punitive practices, shape us as contemporary subjects. To explore, in effect, “How a specific mode of subjugation could give birth to man as an object of knowledge for a discourse with scientific status” (1975:28–29). To discover and trace the deeper forces that shape our punitive practices and, through them, our knowledge of ourselves.

However, a series of further critiques—critiques of metanarratives, functionalism, and scientific objectivity—would chasten this line of inquiry and nudge it around the cultural turn, helping shape a third discourse on punishment. This line of inquiry would focus not on what punishment is doing *for* us, but on what punishment tells us *about* ourselves: What do our punishment practices tell us about *our* cultural values? What is the social meaning of our institutions of punishment? Less meta-theoretical, less critical-theoretic, this final set of questions would build on, while simultaneously trying to avoid, the searing critique of the construction of knowledge. The questions were intended to be less normative. A description at most. A compelling interpretation. Something to make sense of our world and ourselves. Something to ground, perhaps later, an evaluation of those punishment practices.



The difference was subtle, but important. The second set of questions—especially as they evolved over the course of the twentieth century—had become increasingly focused on the constructed nature of knowledge, what has come to be known as the “power/knowledge” critique: How, exactly, do we come to believe what we hold as true? How is it, for instance, that we come to believe a progress narrative of punishment? What institutions and practices shape us to believe in the idea of the “delinquent”—or, for that matter, in the idea that we could possibly “rehabilitate” or “correct” that “delinquent”? How have our own disciplinary practices contributed to shaping our beliefs? By the late twentieth century, this second set of questions had begun to revolve entirely around the formation of knowledge and to constitute an acid-test for all knowledge claims regarding punishment.

In contrast, the third set of questions—the product, as I mentioned, of a critique of *metanarratives*—tried assiduously to avoid the power/knowledge critique. It cut a more humble profile. It sought only to reflect on what our punishment practices tell us about ourselves, our values, our society—as a mere prolegomenon to a better understanding of punishment, to make possible, later, a better evaluation of our practices and institutions. David Garland’s book, *Punishment and Modern Society* (1990), though ostensibly a pedagogic treatment of the four leading voices in the sociology of punishment, reflects well this third line of inquiry. “The social meaning of punishment is badly understood,” Garland contends. What is needed is “a descriptive prolegomenon which sets out the social foundations of punishment, its characteristic modern forms, and its social significance” (1990:9). The social meaning of punishment “needs to be explored if we are to discover ways of punishing which better accord with our social ideals” (1990:1).

This line of inquiry represents, in Garland’s words, “a deliberate attempt to shift the sociology of punishment away from its recent tendency—engendered by Foucault and the Marxists—to view the penal system more or less exclusively as an apparatus of power and control” (1990:1–2). The task is to develop “a pluralistic, multidimensional approach,” “a rounded, completed image; a recomposition of the fragmentary views developed by more narrowly focused studies” (280). To explore “multiple causality, multiple effects, and multiple meaning” (280). Garland explains:

Values, conceptions, sensibilities, and social meanings—culture, in short—do not exist in the form of a natural atmosphere which envelopes social action and makes it meaningful. Rather, they are actively created and recreated by our social practices and institutions—and punishment plays its part in this generative and regenerative process. (Garland 1990:251)

In this sense, the third line of inquiry calls for richly textured, thick descriptions of our punishment practices intended to expose their social meaning and their role in shaping the fabric of society. All this to serve as a preparatory to normative analysis—to provide “a proper descriptive basis for normative judgments about penal policy” (1990:10).

It is not entirely clear, however, whether such an endeavor can escape the power/knowledge critique. If Foucault’s disciplinary hypotheses were themselves susceptible, surely an interpretation of the “social meaning” of punishment practices and institutions would also be vulnerable. Any interpretation would tell us more about the interpreter and her belief systems, than about the meaning of the practice itself. Surely the semiotic enterprise would reveal more about the modes of reasoning, beliefs, and ethical choices held by the individual interpreter than about the social meaning of the punishment practices themselves.

The closing paragraphs of Garland’s book are revealing in this respect. Modern societies, Garland writes, should expect less from punishment and “might be encouraged to treat it instead as a form of social policy which should, where possible, be minimized” (1990:292). The goal should be to socialize and integrate young citizens, not punish them: “a work of social justice and moral education rather than penal policy. And to the extent that punishment is deemed unavoidable, it should be viewed as a morally expressive undertaking rather than a purely instrumental one” (1990:292). These, I take it, are significant normative commitments that, in all likelihood, bleed into and color a cultural critic’s interpretation of the social meaning of punishment practices.

As dusk fell on the twentieth century, modern writings on punishment continued to reflect more on the authors than on the punishments. Somehow, despite the reformulation of the questions, the texts still told us more about the interpreter’s beliefs, intuitions, and ethical choices, than about the practices of punishment and their social meaning.

## 2.

What do we do now—now that we have seen what lies around the cultural bend and realize, painfully, that the same critiques apply with equal force to any interpretation of cultural meaning that we could possibly slap on our contemporary punishment practices? Should we continue to labor on this final set of questions, return to an earlier set, or, as all our predecessors did, craft a new line of inquiry? What question shall we—children of the 21st century—pose of our punishment practices and institutions?

The answer, paradoxically, is that it does not matter. The formulation of the questions themselves never really mattered, except perhaps to distinguish the analytic philosopher from the critical theorist, the positivist from the cultural critic—minor differences that reflected nothing more than taste, desire, personal aptitude, upbringing, and training. Yes, new questions were formulated and new discourses emerged, but the same problem always plagued those modern text.

In all the modern texts, there always came this moment when the empirical facts ran out or the deductions of principle reached their limit—or both—*and yet the reasoning continued*. There was always this moment, ironically, when the moderns—those paragons of reason—took a leap of faith. It is no accident that it was always there, at that precise moment, that we learned the most—that we could read from the text and decipher a vision of just punishment that was never entirely rational, never purely empirical, and never fully determined by the theoretical premises of the author. In each and every case, the modern text let slip a leap of faith—a choice about how to resolve a gap, an ambiguity, an indeterminacy in an argument of principle or fact.

The inevitable space between theoretical or empirical premises and the final judgment derives, in the end, from that imperceptible fissure in the human sciences between the not-falsified, the not-yet-falsified, the apparently unfalsifiable, the verified but only under certain questionable assumptions, *and truth*. In the empirical domain, no less than in philosophical discourse, legal analysis, and public policy debates, proof never followed mathematical deduction, but rested instead on assertions—whether empirical or logical—that may well have been true, but for which other entirely reasonable hypotheses could have been substituted. The key issue was always which hypothesis to believe from

among the many possible hypotheses, all of which were consistent with the data; which sub-principle to uphold from among all the possible sub-principles that were theoretically coherent with the guiding principle. What the moderns *chose to believe*, ultimately, told us more about them than it did about the world around them. It was always the answers that moderns gave to the questions—regardless of the question itself—that revealed the most about them and their intuitions about just punishment.

Ironically, this gap is precisely what made possible the moment of enlightenment at the very heart of critical theory—what Raymond Geuss refers to as that reflective opening that “gives agents a kind of knowledge inherently productive of enlightenment and emancipation” (1981:2). Once we lifted the veil from our eyes and realized fully that our rational belief in certain theories or premises were no better than religious faith—that we had taken a leap of faith to arrive at our conclusion—it then became possible to trace the genealogy of how we took that leap. It became possible to explore how we came to believe what we did believe and at what price. That is precisely what the great critical thinkers of the nineteenth and twentieth century did along the three principal dimensions of radical thought—power (from Nietzsche through Foucault to Agamben), economic production (from Marx through the Frankfurt School to Althusser), and desire (from Freud through Lacan to Žižek). Not surprisingly, identifying the gap is what also gave birth to the American Legal Realist movement in the early twentieth century and the Critical Legal Studies movement at mid century. It also made possible deconstruction at the end of the century—perhaps the fullest instantiation of the insight.

In this respect, Jacques Derrida—no hero of mine, I assure you, far too ambiguous and playful for my taste—was entirely right though when he wrote that the foundation of law itself rests on a leap of faith—what he refers to as “a performative force, in other words always an interpretive force with an appeal to faith” (1994:32). Legal authority traces to this act of auto-authorization, itself never subject to a legal evaluation of right or wrong—not simply, though certainly, because the legal framework itself post-dates the founding moment, but also and more importantly, because the judgment that a punishment is just must always overcome the gap between theoretical premises and final judgment. The act of reaching the legal conclusion—the just punishment, the sentence, the execution—represents “a stroke of force, a violent performative act, and thus an

interpretation that is in itself neither just nor unjust” (1994:32–33). And it is precisely in this sense that Derrida concludes, paradoxically, that the structure of the law is what opens the door to the very possibility of deconstruction itself—thus his playful hypothesis that justice makes possible deconstruction (1994:36). Though addressing law and justice, Derrida’s point applies equally well to the other disciplines that form the field of crime and punishment, such as sociology, politics, economics, and public policy.

I said “ironically” earlier because it is precisely the moment of critical perception and enlightenment that simultaneously undermines the claims of the radical critical theorists—though, sadly, not necessarily those of the deconstructionists.

### 3.

What do these gaps, ambiguities and indeterminacies look like? What does it mean, exactly, that the moderns inevitably took a leap of faith? “The empirical facts ran out, the deductions of principle reached their limit, *and yet the reasoning continued.*” What does this really sound like? Let me stop for a moment here and give some illustrations. Let me demonstrate some gaps and ambiguities.

#### *Deterrence of Juvenile Offenders*<sup>1</sup>

First, let’s examine a claim of deterrence. The trouble with most research on deterrence is that it is extremely difficult to divorce the effects of deterrence from those of incapacitation—from the fact that increased law enforcement will also result in more imprisonment and thus greater incapacitation of criminal offenders. The National Academy of Sciences appointed a blue-ribbon panel of experts to examine the problem of measuring deterrence in 1978—led by Alfred Blumstein, Jacqueline Cohen, and Daniel Nagin—but the results were disappointing: “[B]ecause the potential sources of error in the estimates of the deterrent effect of these sanctions are so basic and the results sufficiently divergent, no sound, empirically based conclusions can be drawn about the

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<sup>1</sup> For a full treatment of this illustration, please refer to Bernard E. Harcourt, *Language of the Gun: Youth, Crime, and Public Policy*, Chapter 14 (University of Chicago Press, 2006).

existence of the effect, and certainly not about its magnitude.”<sup>2</sup> Little progress has been made since then. As Steven Levitt suggested in 1998, “few of the[] empirical studies [regarding deterrence of adults] have any power to distinguish deterrence from incapacitation and therefore provide only an indirect test of the economic model of crime.”<sup>3</sup>

Levitt nevertheless contends that juveniles and young adults *are* responsive to increases in punishment. In order to demonstrate this, Levitt takes a state-level dataset of criminal offending rates and classifies states into three categories: first, states that have a more severe adult than juvenile criminal justice system; second, states that have similar levels of severity for their adult and juvenile criminal justice systems; and third, states that have a more lenient adult than juvenile criminal justice system. Levitt then compares the relative offending rates of young adults as they turn from juveniles to adults—as they reach majority and become subject to the adult criminal justice system.

Levitt finds that juveniles who have turned adult in the first category of states—those with relatively more severe adult systems—offend less in their first year of majority than they did in the previous year, whereas those juveniles in states with relatively more lenient adult systems offend more than they did the previous year.<sup>4</sup> Levitt concludes from this that deterrence, rather than simply incapacitation, is at work: “Sharp drops in crime at the age of majority suggest that deterrence (and not merely incapacitation) plays an important role” (1998:1156).

Why, exactly, do the data confirm the deterrence hypothesis? The answer, Levitt suggests, is that: “If deterrence is at work, then one would expect an abrupt change in behavior associated with passage to adult status. If, on the other hand, incapacitation is

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<sup>2</sup> Alfred Blumstein, Jacqueline Cohen, and Daniel Nagin, *Report of the Panel on Research on Deterrent and Incapacitative Effects*, 42, in Alfred Blumstein et al. *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (Washington D.C.: National Academy of Sciences, 1978). See also Daniel Nagin, *General Deterrence: A Review of the Empirical Evidence*, in Blumstein, Cohen, and Nagin, eds, *Deterrence and Incapacitation* 95, 135 (deeming current empirical evidence insufficient to confirm the existence of a deterrent effect and “woefully inadequate” for estimating its magnitude). See generally Spelman 2000: 97 (reviewing the literature on the deterrence hypothesis and noting the studies’ inability to separate deterrence from incapacitation or rehabilitation).

<sup>3</sup> Steven D. Levitt, “Juvenile Crime and Punishment,” 106 *J Pol Econ* 1156, 1158 n 2 (1998).

<sup>4</sup> Specifically, Levitt finds that “In the states in which punishments increase the most with the adult court, violent crime rates fall by 3.8 percent for 18-year-olds. In contrast, where the transition to the adult court is most lenient, violent crime committed by 18-year-olds increases 23.1 percent. Where the rise in sanctions with adult court is intermediate, the rise in violent crime is also intermediate: 10.2 percent” (Levitt 1998:1175).

the primary channel, then one would expect longer delays in the transition from the juvenile equilibrium to the adult equilibrium due to lags in the timing of arrest and sentencing. . . It seems likely that large immediate changes in behavior associated with the age of majority are likely to primarily reflect deterrence” (Levitt 1998:1172). The logic of the argument, then, rests on the assumption that deterrence works more speedily than incapacitation at the transitional period around majority.

The trouble with this logic, though, is that there is no metric to test the speed of either mechanism alone, nor to compare the speed of the two competing theories. There is no way, *a priori*, to determine how fast either effect would take—whether it is a month, two months, three months, six months, nine months, twelve months, eighteen months, two years, or more. Levitt’s model uses an *annual* measure of crime. Yet the incapacitation time lag—if there is one—may very well be shorter than that. In fact, if true incapacitation theory is correct—the idea that about 6 percent of young adults are responsible for about 50 percent of their cohort’s criminal activity—one would expect that strict enforcement would have an immediate and sharp incapacitative effect precisely at the moment of the release of delinquent youths turning to majority.

Here, then, is the gap: there is no measure, no metric, no standard against which we could declare that an effect on crime—deterrence or incapacitation—is abrupt or delayed. Nor is there any way to determine how the two effects would compare. We do not have a measure for the incapacitation effect, and a separate one for the deterrence effect. We just have one number, and have to guess whether it seems relatively immediate or relatively delayed. Since we do not know how long the incapacitation effect takes, there is no way of knowing from annual crime data whether the effect looks more immediate or more delayed—whether it is incapacitation or deterrence.

Why is it that Steven Levitt is prepared to skip over this gap and confirm the deterrence hypothesis? It doesn’t really matter. I would tend to emphasize taste, desire, training, and professional advancement; but there may be other explanations. What does matter is that there is a gap and a leap of faith—of faith in rationality—that we can identify. Here it is a gap of the not-yet-falsified type. A theory that is consistent with the data, but does not exclude other competing hypotheses. It would be wrong to base public policy on these empirical findings.

*Racial profiling*<sup>5</sup>

A number of economists contend that the use of racial profiling improves the efficiency of policing by increasing the number of successful searches.<sup>6</sup> Assuming that people respond rationally to the increased cost of offending—assuming rational action theory—targeting more police resources at a higher-offending population will reduce their rate of offending (given the greater likelihood of being detected and punished). If we assume, in addition, that minorities have a higher offending rate than whites, then the optimal level of profiling occurs when the offending rate of minorities declines to the same level as the offending rate of whites. At that point, the police will maximize the number of successful police interventions and have no legitimate interest in profiling minorities to any greater extent. The economists verify these conclusions with accurate mathematical equations and economic models.

Even under these assumptions, however, racial profiling may increase the overall societal rate of offending. It all depends on the relative responsiveness of the two groups—the profiled minorities and the non-profiled whites—to policing. If minorities are *less* responsive to policing than whites, then their decrease in offending will be outweighed, in absolute numbers, by the more elastic responsiveness of whites—i.e. by the increased offending of whites in response to the fact that they are being policed less. This is true despite the fact that the overall number of successful police interventions *increases*—despite the fact that the police are detecting and punishing *more* crime. I demonstrate this with accurate mathematical equations and economic models in *Against Prediction* (2007).

The economists had essentially assumed in their model of racial profiling that minorities are as responsive to policing as whites, if not more. If they hadn't made that crucial assumption, then their own models would demonstrate that racial profiling may increase the amount of crime in society—which is most definitely not an efficient outcome. Their claims are non-falsifiable but only under dubious assumptions. They are

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<sup>5</sup> For a full treatment of this second illustration, please refer to Bernard E. Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age*, Chapter 4 (University of Chicago Press, 2007).

<sup>6</sup> Leading works in the area include John Knowles, Nicola Persico, and Petra Todd, *Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 109 J Pol Econ 203 (2001); Rubén Hernández-Murillo and John Knowles, *Racial Profiling or Racist Policing?: Testing in Aggregated Data* (working paper Apr 18, 2003), online at [http://www.econ.upenn.edu/~jknowles/Research/HKRacProf\\_2003c.pdf](http://www.econ.upenn.edu/~jknowles/Research/HKRacProf_2003c.pdf) (visited July 27, 2004).



mathematically verified, but only if we assume something about the relative elasticity of the two groups which we have no ground to assume. (In fact, if minorities have a higher offending rate than whites, it is far more likely that the cause of that difference, perhaps lower employment opportunities, would lower their responsiveness to policing in comparison to whites).

This, I take it, is a gap *within* their own model: even assuming deterrence (which itself is, for many, a leap), there is a gap over which these economists took a leap of faith. Why? Again, it doesn't matter. I would speculate that it is because they *desire* a clean, parsimonious, mathematical model that affirms rationality. Maybe that's why they became economists. But again, why they took a leap of faith does not really matter. What matters is that they took it and that we can identify it. We should not rely on it to make public policy.

### *Order Maintenance*<sup>7</sup>

For a third illustration, let's turn to a modern policing practice. In the early 1990s, several major U.S. cities began implementing order-maintenance strategies, most notably New York City, in 1994, where then-mayor Rudolph Giuliani and his first police commissioner, William Bratton, put in force the "quality-of-life initiative." The order-maintenance strategies rested on the "broken windows" theory—the idea that minor neighborhood disorder like graffiti and loitering, if left unattended, will cause serious criminal activity (Wilson and Kelling 1982:31).

During the 1990s, several proponents of order-maintenance declared that the broken windows theory had been empirically verified.<sup>8</sup> They rested this assertion on the findings of a 1990 study titled *Disorder and Decline*. Subsequent research discovered several gapping flaws in the study that undermine confidence in the findings.<sup>9</sup> Even

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<sup>7</sup> For a full treatment of this third illustration, please refer to Bernard E. Harcourt, *Illusion of Order: The False Promise of Broken Windows Policing* (Harvard University Press 2001), and Bernard E. Harcourt and Jens Ludwig, "Broken Windows: Evidence from New York City and a Five-City Social Experiment," *The University of Chicago Law Review* 73: 271—320 (2006).

<sup>8</sup> For instance, George Kelling, co-author of the 1982 *Broken Windows* article and of a more recent book entitled *Fixing Broken Windows*, contended that the 1990 study "established the causal links between disorder and serious crime—empirically verifying the 'Broken Windows' hypotheses" (Kelling & Coles 1996:24).

<sup>9</sup> See Harcourt, *Illusion of Order* at 59—78.

putting those gaps aside, the 1990 study used a static dataset to test a dynamic hypothesis: the data consisted of disorder and robbery victimization at one point in time, whereas the broken windows theory posited a developmental sequence over time. The statistical analysis could not—and as a result, did not—falsify the broken windows hypothesis. As Ralph Taylor succinctly observes, the 1990 study was simply off the mark “because these data are cross-sectional, and the thesis is longitudinal” (Taylor 2006: 1626). The gap here was between the not-yet-falsified-because-not-really-tested and truth. Again, it was inappropriate at the time to form public policy on its basis.

Today, the social scientific support for the broken windows theory rests principally on a 2001 study co-authored by George Kelling and William Sousa. In their study, Kelling and Sousa focus on the 75 police precincts in New York City over the period 1989 to 1998. They statistically compare the relationship between violent crime and broken-windows policing, as well as three other dependent variables—unemployment, demographics, and crack cocaine consumption—simulating comparison groups by treating the city as 75 separate and comparable entities. Looking at the change over time, they find that the measure of broken-windows policing is significantly related to the drops in precinct violent crime over the ten-year period—in contrast to demographics, unemployment, and drug use patterns, which are not.

The trouble with the Kelling and Sousa study is that they do not control for what statisticians call “mean reversion.” An examination of their data reveals just that: those precincts that experienced the *largest drop* in crime in the 1990s were the ones that experienced the *largest increases* in crime during the city’s crack epidemic of the mid- to late-1980s. In other words, it may well be true that the precincts that received the greatest dose of broken windows policing in the 1990s experienced the largest declines in crime. But those precincts were precisely the ones that were hit hardest by the crack epidemic that fueled homicide rates in New York City from the mid-1980s through the early 1990s. Everywhere that crime skyrocketed as a result of the crack epidemic, crime declined sharply once the epidemic ebbed—which, it turns out, was also true across the country.

In a recent study with Jens Ludwig, we demonstrate that the declines in crime observed in New York City in the 1990s are exactly what would have been predicted from the rise and fall of the crack epidemic, even if New York had not embarked on its

broken windows policing strategy. Jens Ludwig and I call this *Newton's Law of Crime*: what goes up, must come down, and what goes up the most, tends to come down the most. What it represents, in effect, is a competing hypothesis that more fully explains the relationship between crime and policing.

There's a third gap—or fourth or fifth, I've lost track frankly. Kelling and Sousa infer the truth of the broken windows theory—and advocate a public policy of broken windows policing—on the basis of a not-falsified hypothesis that coincidentally fails to test for a competing explanation. But even if they had tested for mean reversion, we would still be left with a non-falsified hypothesis: the broken windows theory has not been disproved by Jens Ludwig and my study of the New York City data, we have merely offered a different (though in our mind better) explanation of the crime trends.<sup>10</sup> But who is to say which is right? It is, as Ludwig and I suggest, a Scotch verdict: not proven. That's a gap.

Why are Kelling and Sousa willing to take a leap of faith and advocate policies based on the broken windows theory—a theory that is at best not falsified? It doesn't matter. I think I know why, but of course I may be wrong: George Kelling, the co-author of the original *Broken Windows* article, has a lot invested in its truth, especially now that he's running a consulting business, the Hanover Justice Group, that markets broken-windows policing methods to city mayors and councils. But again, it really doesn't matter. What matters here is that we've identified another gap and a corresponding leap of faith.

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<sup>10</sup> I would suggest that the second half of our study, which focuses on the MTO program, does in fact falsify the broken windows hypothesis, but will leave that to another day. In that second part, Jens and I explore the empirical results from MTO, a social experiment underway in five cities, including New York, Chicago and Los Angeles—three of the largest cities that implemented broken-windows style policing—as well as Baltimore and Boston. Under the MTO program, approximately 4,800 low-income families living in high-crime public housing communities characterized by high rates of social disorder were randomly assigned housing vouchers to move to less disadvantaged and disorderly communities. Jens and I compare the crime rates among those who moved and those who didn't—using official arrests and self-report surveys—and the results are clear, though disappointing: moving people to communities with less social or physical disorder on balance does not lead to reductions in their criminal behavior. Neighborhood order and disorder do not seem to have a noticeable effect on criminal behavior.

*The Harm Principle*<sup>11</sup>

The gaps are not only empirical. They also inevitably arise in the derivation of conclusions from legal and moral principles. A good illustration involves the application of the harm principle. If you look honestly at the writings of even the originators and chief proponents of the harm principle, it becomes clear that the principle itself cannot resolve the central cases for which it was developed.

Let's take the example of prostitution. John Stuart Mill framed the question as follows: "Fornication, for example, must be tolerated, and so must gambling; but should a person be free to be a pimp, or to keep a gambling house?" (Mill 1978: 98). Mill himself never answered the question. "There are arguments on both sides," Mill suggested (1978:98). Consistency militated in favor of toleration. On the other hand, pimps stimulate fornication for their own profit and society may elect to discourage conduct that it regards as, in his words, "bad." In the end, Mill refused to take a position regarding the pimp. "I will not venture to decide whether [the arguments] are sufficient to justify the moral anomaly of punishing the accessory when the principal is (and must be) allowed to go free; of fining or imprisoning the procurer, but not the fornicator . . ." (1978:99).

H.L.A. Hart also straddled the fence. His nemesis, Patrick Devlin, famously had argued that all aspects of prostitution should be prohibited, flipping Mill's consistency thesis on its head: if the law can prohibit brothel-keeping because it is exploitative, then surely the law could also regulate prostitution. "All sexual immorality involves the exploitation of human weaknesses," Devlin argued. "The prostitute exploits the lust of her customers and the customer the moral weakness of the prostitute" (Devlin 1965: 12). In contrast to Devlin, but like Mill, Hart refused to resolve the issue explicitly. Instead, Hart reported on the English Street Offences Act of 1959 and endorsed its underlying rationale. Under the Act, prostitution was not made illegal, but solicitation in a street or public place was. According to Hart, this approach respected the important distinctions between public and private, and between immorality and indecency. Hart, who favored these distinctions, reported approvingly that "the recent English law relating to

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<sup>11</sup> For a fuller treatment of this fourth illustration, please refer to Bernard E. Harcourt, *Illusion of Order: The False Promise of Broken Windows Policing*, Part III (Harvard University Press 2001), and Bernard E. Harcourt, "The Collapse of the Harm Principle," *Journal of Criminal Law & Criminology* 90: 109—194 (1999).

prostitution attends to this difference. It has not made prostitution a crime but punishes its public manifestation in order to protect the ordinary citizen, who is an unwilling witness of it in the streets, from something offensive” (1963:45). Hart thus relied on another principle—the offense principle—to justify prohibiting the public manifestations of prostitution.<sup>12</sup>

Faced with a perfect test case to assess the usefulness of the harm principle, both Mill and Hart bunt. Why? Because here, as elsewhere, there are harm arguments on both sides of the equation. There is exploitation at the very least, and, as Catherine MacKinnon has helped us see, significant harm to women in general. The harm principle did not then and does not today resolve the difficult cases at the border of law and morality. More moral armature is necessary.

### *The Death Penalty*

Modern writings on capital punishment illustrate the indeterminacy of principle *and* fact. Regardless of the discourse—whether in social contract theory, utilitarianism, social science, cultural criticism, or even deconstruction—the modern texts reflect more than anything the author’s intuition about just punishment, not a correct derivation of principle. No matter how the inquiry is formulated, nor how the question is framed, modern writings constantly reveal the author’s ethical choice.

Take, for example, modern rational choice literature on the death penalty. Listen carefully. Beccaria, the first true rational choice theorist, did not believe that capital punishment fell within the domain of the sovereign’s right to punish, but instead within the domain of war, which, he argued, was ruled by necessity and utility. But the death penalty, according to Beccaria, served neither interest. It was not necessary because long-draw-out punishments, such as penal servitude or slavery for life, were more effective

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<sup>12</sup> Joel Feinberg adopted a similar approach in *The Moral Limits of the Criminal Law*. Feinberg avoided reference to harm in the context of prostitution, and suggested instead that an offense principle could plausibly restrict overtly erotic behavior, public acts of solicitation, and houses of prostitution (1985:43). The same offense principle, however, would not preclude private sexual conduct including prostitution.<sup>12</sup> Other contemporary liberal writers similarly relied on the offense principle rather than the harm principle. Herbert Packer, for instance, wrote: “It seems that prostitution, like obscenity and like other sexual offenses, should be viewed as a nuisance offense whose gravamen is not the act itself, or even the accompanying commercial transaction, but rather its status as a public indecency. That is the approach taken in England, where law enforcement does not seem to be plagued with the self-imposed problems that our prostitution controls engender” (Packer 1968:331).

and fear-inducing than the fleeting shock of death. It was also not useful because capital punishment had a brutalizing effect on society (1995: 67). Jeremy Bentham—the very spokesman for the theory of marginal deterrence in the modern era—agreed entirely: “the more attention one gives to the punishment of death the more he will be inclined to adopt the opinion of Beccaria—that it ought to be disused. This subject is so ably discussed in his book that to treat it after him is a work that may well be dispensed with” (Hart 1982: 41).

Fast forward to the present. Christmas Day 2005. Here’s Gary Becker, perhaps the world’s leading rational choice theorist and Nobel-prize economist writing on his blog: “My belief in its deterrent effect is partly based on these limited quantitative studies, but also because I believe that most people have a powerful fear of death. David Hume said in discussing suicide that ‘no man ever threw away life, while it was worth living. For such is our natural horror of death...’. Schopenhauer added also in discussing suicide ‘...as soon as the terrors of life reach a point at which they outweigh the terrors of death, a man will put an end to his life. But the terrors of death offer considerable resistance...’” (Becker-Posner Blog, December 25, 2005). Richard Posner adds, also on Christmas Day: “I do not consider revenge an impermissible ground for capital punishment. Revenge has very deep roots in the human psyche” (Becker-Posner Blog, December 25, 2005).

It is almost funny to watch these moderns twist and contort themselves to justify their own ethical intuitions about killing other people. The only issue for a rational choice theorist is whether the death penalty actually deters homicides, net of any other effect. Beccaria chose to believe that the brutalizing effect outweighed the deterrent effect. Becker chose to believe that people fear death. The empirical literature is all over the lot,<sup>13</sup> yet Becker and Posner decide to believe those economists who find a deterrent effect. It’s remarkable to watch—though disheartening for those who once believed in the critical project of reason.

This is not to suggest that the rational choice theorists alone exhibit raw choice. Listen to Hegel: “Beccaria’s endeavor to have capital punishment abolished has had beneficial effects. Even if neither Joseph II nor the French ever succeeded in entirely

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<sup>13</sup> See John Donohue’s review of the literature and replication of the studies in the *Stanford Law Review*.

abolishing it, still we have begun to see which crimes deserve the death penalty and which do not. Capital punishment has in consequence become rarer, *as in fact should be the case with this most extreme punishment*" (247 emphasis added (note to paragraph 100)). These are telling words. What they tell us, though, is not the right way to formulate the inquiry, nor the correct answer to the proper question, but something more fundamental about the personal convictions of the author—and how it is, exactly, that authors bridge the inherent indeterminacy of their own principles.

#### 4.

These gaps and ambiguities will bury the modern period—or at least, they should. Even the sharpest of critics, the most radical thinkers have never been able to escape the overpowering urge to build some new construct, a new edifice, some bridge to get to the other side of knowledge. Neither the followers of Nietzsche, Durkheim, or Marx, nor the cultural critics were able to resist the lure of reconstruction, always cobbling together the “best evidence” to soften their landing. Not even Michel Foucault—that wisest of moderns—could resist displacing our faith in rehabilitation with a genealogical story—one that required just as great a leap of faith. Tragically, this is as true of the cultural critics as it was of the two earlier inquiries.

Many have argued over the ages—and still do—that we should simply continue to live with our structure of knowledge and adjust our expectations of truth: that the not-yet-falsified simply *is* the best model—which is, obviously, hard to dispute—and that we should continue to deploy reason to select the most robust empirical inferences and the most coherent deductions of principle. But the idea that we could distinguish between different hypotheses consistent with the data or principles based on what “makes the most sense,” “sounds the most reasonable,” or “seems the most coherent,” is simply fantastic. Those types of judgment are so culturally determined and so highly influenced by our particular time and place, it is inconceivable that any rational being today could possibly continue to make those statements at this late stage of modernity—at least, with a straight face.

No more. It is too embarrassing to watch as one generation after another of moderns, under the banner of reason, hop, jump and skip over the gaps of knowledge. One would have thought that phrenology would have been sufficient to stop us in our tracks, but, no, instead we got biological determinist theories of social behavior applied to male rape, moral poverty theories of delinquency applied to super-predator black males, rational action theories applied to suicide bombers—and the list goes on and on of theories that require so many caveats and exceptions that even a child would question our modern claim to rationality.

We can no longer leap over the not-yet-falsified. It is no better than turning the clock back and resurrecting faith in divine providence. Foucauldian genealogy does *not* solve the problem: tracing the formation of belief represents nothing more than seducing us to believe another explanation for which there is hardly stronger evidence. It too requires a leap of faith. The cultural turn also solves nothing. The idea that we could interpret the social meaning of a contemporary punishment practice or institution—let alone a practice that occurred in a completely different historical and cultural context—is complete fantasy. The fact that the cultural interpretation is persuasive to us tells us a lot more about what we find convincing—how we categorize, what kind of evidence we find persuasive, what disciplines we defer to—than it does about the “social meaning” of the practice itself. And even when we do come to a rich description that makes sense of the world around us, even when we achieve that formidable task of symbolic interpretation, we are no closer to drawing normative conclusions. We are located precisely at the gap, forced to take a leap. The symbolic interpretation tells us nothing about how the practice came about, how to transform or change it, or how to modify its social meaning. Social meaning offers no purchase on action.

## 5.

Where does this leave us? Surprisingly, with several formidable tasks, which I would describe under the twin rubrics of *social physics* and *randomization*.



*Social physics*

The first task is to triage all philosophical arguments, principled discourse, and social science findings, and save only those that involve *social physics*. By “social physics” I mean only those claims that are necessarily true as a result of the physical nature of our mortal existence. Theories that depend on the intermediation of human consciousness and decision-making should be set aside, left to deal with later when we have more leisure time or, perhaps, when we have made breakthroughs in those new consciousness studies. For the time being, though, we should focus on social physics only.

By way of illustration, let’s consider four theories dear to the field of crime and punishment: (a) rational choice theory, (b) the broken-windows theory, (c) legitimacy theory, and (d) incapacitation theory. The first three operate through the intermediary of human consciousness. In each case, the theories depend on actors believing certain things and conforming their behavior accordingly. The first assumes that individuals pursue their self-interest or maximize their utility, and that, accordingly, when the cost of offending goes up, they will offend less. It is a theory that requires us to accept the idea that individuals—whether knowingly or unconsciously—conform their behavior to calculated expectations of success or failure. The second and third theories—broken-windows and legitimacy theories—also depend on people taking cues from their social or physical environment—a disorderly neighborhood in one case, a discourteous or insolent police officer in another—and adapting their behavior accordingly. All three of these theories require a defined process of the human intellect and a decision about behavior. They require the intermediation of human consciousness. They are neither true, nor false, just not-yet-falsified-properly, nor clearly falsifiable in the near future.

In contrast, the fourth theory involves social physics. If we physically detain an individual and isolate her from the free world, she will not commit statutory offenses on the outside. This is a matter of social physics, not modern social science. Similarly, transportation made it physically impossible for a convict to offend in the original jurisdiction. These types of theories alone are respectable hypotheses for the 21st century. To be sure, it narrows the range of acceptable empirical and principled claims. But that’s all for the better.

### *Randomization*

Naturally, claims of social physics do not resolve the policy choices. The fact that incapacitation or transportation makes it physically impossible for the convict to offend (at least, in the original jurisdiction) does not tell us *how much* incapacitation we should have. It takes us to another empirical and theoretical gap that simply cannot be bridged. Similarly, the triage and elimination of claims that rest of the intermediation of consciousness will leave us most often without any guidance, without any theory at all. There will be no “best evidence” to fill the void. How then shall we organize our political and social environment?

The answer is *randomization*. Where our theories of social physics run out, where we have swept away those other hypotheses that mediate through consciousness, we should leave the decision-making to chance. We should no longer take that leap of faith, but turn instead to the coin toss, the roll of the dice, the lottery draw—in sum, to randomization.

It turns out that this is far more difficult than it sounds at first. Practically every definitional term we use is loaded with different possible meanings, each of which reflects human choice. For instance, what does it mean exactly to distribute police resources “randomly”? Let’s say we generate a random computer program, what is the unit of choice that we should select? Is it a certain population density or self-identified neighborhoods, or police precincts, or is it related somehow to crime rates? The selection of the unit of analysis will have significant distributional consequences. Population densities and crime rates may not map onto neighborhoods, for instance, and the selection of any one of these units as the basis for randomization will affect people differently. How then do we even begin to select the unit of measurement for purposes of drawing straws? Could we deploy randomization here too? How would we implement this?

The answer has to be: Proceed with caution, be attentive to choice, and be prepared to correct the inevitable mistakes that will occur. Try to use as much brutal simplicity as possible to eliminate choice, but, where there is inevitable choice and indeterminacy, turn to chance. In many cases, it will be possible to eliminate the need for randomization simply by administering an intervention completely: instead of randomly

choosing who to search at the airport, search everyone. This, I take it, is a form of brutal simplicity that achieves the same benefits as chance, but avoids the temporary dislocations of randomization. By combining completeness, simplicity, and choice, it might be possible to resolve many of the indeterminacies—better.

First, in the realm of surveillance, searches and detection, law enforcement agencies could turn either to completeness or to random sampling. The Internal Revenue Service could audit tax returns at random using a social security number lottery system. The Transportation Security Administration could search every passenger at the airport, or randomly select a certain percent based on a computer generated algorithm using last names. The Occupational Safety and Health Administration could investigate compliance by employers randomly selecting on employer tax identification number. In these and other prophylactic law enforcement investigations, the agency could very easily replace profiling—which rests on uncertain assumptions about responsiveness and rational action—by randomization.

Second, in the area of choosing law enforcement priorities and crimes to target, law enforcement agencies could allocate resources by chance selection. The local district attorney's office, as well as the federal prosecutor's office, could select annual enforcement targets (as between, for instance, public corruption, insider trading, drug enforcement, or violent crimes) by lottery. State highway policing authorities could distribute patrol cars through a randomized mapping system using heavily-trafficked roads and interstate highways. The Bureau of Alcohol, Tobacco, and Firearms could choose between equal-impact initiatives on the basis of an annual lottery draw.

Third, in the area of punishment and corrections, courts and prison administrators could rely more heavily on chance in sentencing and classification. Judges could impose a sentence following conviction, the length of which would be determined by random selection from within a legislatively specified sentencing range; the range, for instance, could be determined by felony classifications. The department of corrections could assign prisoners to facilities on a random basis within designated escape-risk or security-level categories. Prisoners in need of drug, alcohol, or mental health treatment could be assigned to comparable programs based on a lottery draw.

This is not as far fetched as it may seem at first. Here is an illustration of how it might work. Take the case of someone found guilty of first degree murder defined as intentionally causing the death of another person without justification. Assume that the legislature has imposed a possible range of 15 to 25 years. If convicted, the sentencing judge would simply draw a number between 15 and 25 from an urn. The sentencing range would be determined by the fact that the offense is classified as a first-degree felony. That legislative classification would be based, most likely, on a determination of the gravity of the offense. The distribution of punishments would average 20 years, and individuals would serve between 15 and 25 years depending on the luck of the draw.

One possible consequence might be that we would limit the sentencing ranges. Randomness reflects an honest recognition that we really do not know whether the sentence will deter or not, rehabilitate or not, or do justice. By leaving the sentence to chance (within the range), we are effectively acknowledging our own limitations. Naturally, we would only want randomization between conceivable bounds, that is, within an acceptable range. But randomization would put pressure on the legislature to limit the range of possible theories that justify wider ranges of possible sentences. The wider the range of sentences, the clearer it is that we do not know what we are doing. Randomization might also limit the range of possible forms of punishment. There is no guarantee, of course. It is possible that we may develop a taste for lotteries. But my sense is that, in the field of crime and punishment, it would limit, rather than promote, the proliferation of policing and punishment practices. In all likelihood, it would leave us with imprisonment as the primary mode of punishment.

By chastening our knowledge claims, randomization may also subject our punishment practices to greater economic scrutiny. Today we invest an extraordinary amount of resources into the criminal justice complex. The State of California alone, for instance, spends over five billion dollars in corrections, which is about as much—at times more—than it spends on education. [Detail national costs]. Studies suggest that these investments in prisons helped reduce crime in the 1990s and that about 25 percent of the crime drop in the country was attributable to the exponential increase in incarceration. The day we fully acknowledge that we have no good idea whether this investment deters crime, rehabilitates convicts, or satisfies the urge for retribution, it may be far easier to

assess the economic impact of the investment in more dispassionate and simple economic terms.

## 6.

Randomization is by no means foreign to the law. There are a number of instances in which we turn to chance to resolve legal or political disputes. A number of states statutorily prescribe a flip of the coin to resolve election ties. Wisconsin law, for instance, provides that “If 2 or more candidates for the same office receive the greatest, but an equal number of votes, the winner shall be chosen by lot in the presence of the board of canvassers charged with the responsibility to determine the election.”<sup>14</sup> Similarly, Louisiana law expressly states that “In case of a tie, the secretary of state shall invite the candidates to his office and shall determine the winner by the flip of a coin.”<sup>15</sup> In New Mexico, it’s a poker hand that resolves a tie.<sup>16</sup> Courts as well have turned to chance to resolve election disputes.<sup>17</sup> A number of courts also partition disputed land by lot or chance.<sup>18</sup>

Randomness also surfaces across a number of policing strategies, including sobriety checkpoints and the random selection of airline passengers for further screening at airports. Even efficiency-oriented police administrators at times oppose targeted profiling of higher-risk suspects. New York City’s police commissioner, Raymond Kelly, for instance, opposes ethnic profiling in defensive counterterrorism measures such as stop-and-search programs at New York City subway entrances (*see* Harcourt 2007b). We have become increasingly accustomed to randomized searches in a number of different areas, including “the compelled provision of urine samples for drug testing of law

<sup>14</sup> Wis. Stat. Ann. § 5.01(4) (2005). *See generally* Jesse H. Choper, “Why the Supreme Court Should Not Have Decided the Presidential Election of 2000,” 18 *Constitutional Commentary* 335, 340 n.22 (2001) (collecting the following other sources: [Mo. Rev. Stat. 162.492](#) (2000) (1978 Amendment deleted former subsec. 6, which provided that a tie vote would be determined by the flip of a coin); [N.D. Cent. Code 16.1-11-38](#), 16.1-14-0, 16.1-15-29, 40-21-17, 58-04-15 (2000) (“In case of a tie vote the nominee or nominees must be determined by a coin flip...”). Special thanks to Adam Samaha for these insights.

<sup>15</sup> [La. Rev. Stat. 46:1410\(C\)\(3\)](#) (2005).

<sup>16</sup> Reuters, “Election 2000; The Presidency; High Stakes; If Vote is Tied in New Mexico, Poker Hand Could Settle It,” *Newsday* A05 (Nov. 15, 2000) (describing practice of using “one hand of five-card poker”); [N. M. Stat. Ann. 1-13-11](#) (2000) (“candidate chosen by lot ... in the event of a tie vote”).

<sup>17</sup> *See e.g.* [Huber v. Reznick, 437 N.E.2d 828, 839 \(Ill. App. 1982\)](#) (holding that trial court did not err in choosing a coin flip as the method of determining the winner of the tie vote by lot).

<sup>18</sup> *See generally* Jay M. Zitter, “Judicial Partition of Land by Lot or Chance,” 32 *American Law Reports* 4<sup>th</sup> 909 (Updated March 1999 Annotation).

enforcement officers, jockeys, railroad workers, and other classes of employees” *Edmond*. We have also become accustomed to metal detectors and x-ray machines that screen practically all people entering government buildings or embarking on planes.

Chance also plays a large role in the detection of crime: who gets apprehended and who does not most often turns on luck. As R.A. Duff writes, “One burglar is caught because the police are mounting a blitz on burglaries in that area at that time; another escapes detection because he happens to commit his burglary at some other place or time. . . . In these and other ways the actual fate within the criminal system of two equally guilty offenders may be partly a matter of chance: one loses out in the criminal lottery, while the other wins” (1990:26—27). Yet few of us object to these “detection lotteries.” Few of us find that they seriously infringe on our sense of justice.<sup>19</sup>

### *Efficiencies and Deterrence*

Nevertheless, a call for more randomization will undoubtedly meet with great resistance. Many will instinctively protest that the use of chance is far less efficient than profiling or targeting higher offenders—that it is wasteful to expend law enforcement resources on low-risk offenders. There’s no point conducting extra airport security checks on elderly grandmothers in wheelchairs and families with infants—or “Girl Scouts and grannies,” as one recent commentator writes (Sperry 2005). As I demonstrate elsewhere with equations and graphs,<sup>20</sup> however, profiling on the basis of group offending rates may in fact be counterproductive and may actually cause more crime even under very conservative assumptions regarding the comparative elasticities of the different populations. We have no good theoretical reason to believe that targeted enforcement would be efficient in decreasing crime or would increase, rather than decrease, overall social welfare.

More sophisticated economists may respond that targeting enforcement on groups that are more responsive, at the margin, would maximize the return of any law

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<sup>19</sup> There are also historical instances of randomness in sentencing. One is the decimation of a military regiment as a form of punishment for mutiny. “Each soldier is punished for his part in the mutiny by a one-in-ten risk of being put to death. It is a fairly pure penal lottery, but not entirely pure: the terror of waiting to see who must die is part of the punishment, and this part falls with certainty on all the mutineers alike” (Lewis 1989:58).

<sup>20</sup> Harcourt 2007a, *Against Prediction*; Harcourt 2007b.

enforcement investment. But here, we face an empirical void. What we would need is reliable empirical evidence concerning both the comparative offending rates and the comparative elasticities of the targeted and non-targeted populations.<sup>21</sup> That evidence, however, does not exist. The problem is not the reliability of the evidence, it's that it simply does not exist.<sup>22</sup> If there ever was a place to avoid taking leaps of faith, surely it would be here, where there is no empirical data whatsoever.

On the sentencing side, the conventional wisdom among law-and-economists is that increasing the probability of detection serves as a greater deterrent to crime than increasing the amount of the sanction because of the high discount rate imputed to criminals. Along these lines, it is generally argued that "it is plausible that young males who commit crimes discount the future disutility of imprisonment at a higher rate than the social discount rate, which also suggests that limited prison sentences and relatively high probabilities are optimal" (Polinsky and Shavell 1999:12). In this equation, the decision to embrace randomization in sentencing should have no effect on deterrence. Using a sentencing lottery to determine the length of incarceration from within a sentencing guideline range, rather than using a grid that profiles on prior criminal history, gun use or other factors, would not change the *certainty* of the expected sentence and need not set the *amount* of the expected sentence.

The certainty of the expected sentence is going to be the same whether we employ a random lottery or a mechanism that profiles on a characteristic. Imagine, for instance, a sentencing range of 10 to 20 years for murder. Under a random lottery, a person convicted of murder can be certain that the expected sanction is 15 years. Under a sentencing scheme that profiles on prior criminal history, a person with a prior can be certain that the expected sanction will be, say, 18 years, and a person without a prior can be certain that the expected sanction will be, say, 12 years. The certainty is the same

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<sup>21</sup> I provide the formula at Harcourt 2007a:133.

<sup>22</sup> There may be one single exception in the universe. Avner Bar-Ilan and Bruce Sacerdote have a working paper from 2001 that explores the comparative responsiveness to an increase in the fine for running a red light along several dimensions (finding that the elasticity of red light running with respect to the fine "is larger for younger drivers and drivers with older cars," equivalent for drivers "convicted of violent offenses or property offenses," and smallest, within Israel, for "members of ethnic minority groups"). A handful of other papers come close, but do not address the key issue of *comparative* elasticities. So, for instance, Paul Heaton's 2006 working paper on the effect of eliminating racial profiling policies in New Jersey on the offending of minorities, "Understanding the Effects of Anti-profiling Policies," does not address how the elasticity of black offenders compares to that of whites.

under either scheme. The introduction of a lottery does not change those certainties of sentence, though it may change the expected amount of the sentence for different populations. But it need not. It is up to the designer of the lottery to determine the expected sentence. That is within the entire control of the policy maker. As a result, from a conventional law and economics approach, a sentencing lottery would not necessarily have a negative impact on deterrence.<sup>23</sup>

Some behavioral law and economists have argued, however, that the certainty of a criminal sentence—the fact that the size of a criminal sanction is fixed and known ahead of time—is likely to deter criminals more effectively than uncertain sentences and, on those grounds, have argued against sentencing lotteries. Alon Harel and Uzi Segal contend that criminals prefer sentencing schemes in which the size of the sentence is uncertain and the probability of detection and conviction is certain, and, for this reason, that policymakers should adopt just the opposite (1999:280). (In later work with Tom Baker and Tamar Kugler—work involving actual experimental research—Alon Harel found that uncertainty regarding a sanction is *more* effective at deterring deviant behavior. The results from their experiments suggest that a sentencing lottery would be more effective (Baker, Harel and Kugler 2003).<sup>24</sup> Here, however, I am addressing the arguments against randomization and so will focus on the earlier theoretical argument against sentencing lotteries).

Harel and Segal offer the following hypothetical to support their case against sentencing lotteries. Imagine two possible sentencing schemes. Under the first, the convict is sentenced to five years in prison. Under the second, the convict is subject to a lottery with a 50% chance of receiving two years in prison and a 50% chance of receiving eight years in prison. Harel and Segal assume a certain discount rate, and then calculate

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<sup>23</sup> Some in fact argue that introducing randomization in sentencing may in fact increase deterrence because the criminal may not perceive risk of detection as a game of chance. David Lewis writes, “The criminal might think of escaping punishment as a game of skill—his skill, or perhaps his lawyer’s. For all we know, a risk of losing a game of chance might be much more deterring than an equal risk of losing a game of skill” (Lewis 1989:60).

<sup>24</sup> Their research builds on experimental research on taxpayer compliance, ranging from Jeff T. Casey and John T. Scholz, *Beyond Deterrence: Behavioral Decision Theory and Tax Compliance*, *Law & Society Review* 25:821 (1991) back to Michael W. Spicer and J. Everett Thomas, *Audit Probabilities and the Tax Evasion Decision: An Experimental Approach*, *Journal of Economic Psychology* 2:241 (1982).



the marginal utility that a convict would receive from being out of prison during the next few years. They posit that a five year sentence would involve a loss of utility of 90; a two-year sentence, a loss of utility of 39; and an eight year sentence, a loss of utility of 132. On average, the sentencing lottery represents a loss of utility of 85.5—less than the loss of 90 associated with the fixed sentence of five years. Not surprisingly, Harel and Segal find, on these assumptions, that the potential convict “will prefer the sentencing lottery to the uniform sentencing scheme” (296). Harel and Segal write:

The reason that criminals prefer a sentencing lottery is that, if sent to prison, the convicted person has to surrender first the next few years, namely, those years that have the highest marginal utility. Thus, if a person is sentenced to five years in prison, she surrenders the next five years. If, on the other hand, she faces a lottery, she gains a larger benefit from the possible beneficial outcome, for instance two years in prison, than the loss resulting from the undesirable outcome, for instance eight years in prison. These considerations clearly suggest that in cases in which the sanctions involve imprisonment, individuals prefer sentencing lotteries over a uniform sentencing scheme. (1999:297)

The trouble is, in this scenario, Harel and Segal have stacked the deck against the sentencing lottery by assuming that it has, on average, lower disutility. They are not comparing comparable sentencing scenarios. If instead we assume different discount rates that render the two alternatives comparable, or alternatively restructure the lottery so that its disutility is equivalent to that of a fixed five-year sentence, then there is no reason to believe that criminals would necessarily favor a sentencing lottery. It depends on their attitude to risk and how those preferences compare to the discount rate implicit in the lottery. Whoever designs the sentencing lottery can make it more or less attractive.

Harel and Segal note that psychological experiments have shown individuals to be averse to ambiguity—defined here as “uncertainty with respect to probabilities that certain states of affairs will materialize” (1999:291)—and for this reason argue that the best solution for enforcement is to misrepresent the likelihood of detection so that individuals overestimate the expected sentence. “An optimal legal system is therefore a system that disguises as much as possible the probability of sentencing. Ambiguity with respect to the probability of sentencing is a desirable feature of our enforcement mechanism” (1999:304). But the question of ambiguity is orthogonal to the choice between a sentencing lottery and targeted sentencing. Both a pure sentencing lottery and

a sentencing scheme that targets persons with prior convictions (or other profiles) have the same level of certainty, even if the expected sentence is different. As noted earlier, in both scenarios, the certainty of the expected sentence will be the same: using the example above, in a pure lottery, the murder convict has an expected sentence of 15 years; in the targeted scheme, the murder convict with a prior record can expect 18 years, and the first timer 12 years. The certainty is the same, and it is up to the designer of the lottery to determine all expected sentences. Even assuming bounded rationality, a sentencing lottery would not necessarily have a negative impact on deterrence.<sup>25</sup>

### *Just Punishment and Moral Luck*

Randomization in sentencing will likely meet much greater resistance, though, not because of efficiency concerns but rather because of considerations of fairness, just punishment, and desert. At least, it has in the past. In one notorious incident in 1982, a state court judge in Brooklyn, New York, used a coin toss to determine a jail sentence (Shipp 1983a; Resnick 1984:610). The judge, Alan Friess, was presiding over the criminal sentencing of a defendant convicted of pocketpicking. The parties were plea-bargaining over a sentence of 30 days in jail—which Friess was inclined to impose—or 20 days—which the defendant obviously preferred, when Friess offered the defendant a gamble. “I’m prepared to allow you to decide your own fate,” Friess reported told the defendant, “and if you’re a gambling man, I’ll permit you to flip a coin for that purpose.” Heads, the defendant would get 30 days, tails, 20. The defendant agreed, called tails, and won. Friess sentenced him to 20 days (Van Natta 1996).

The legal establishment responded swiftly. Friess was charged with judicial misconduct for the coin toss,<sup>26</sup> and resigned while the charges were pending. Despite his resignation, the state commission on judicial conduct held hearings to determine whether to bar Friess from ever serving again as a judge in New York. A couple of judges defended Friess. One reportedly testified that a coin toss “is no more bizarre than the way in which I have seen [sentencing] done on thousands of occasions” (Shipp 1983b).

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<sup>25</sup> Moreover, as Harel and Segal recognize well, even fixed sentencing schemes have a significant element of chance. For instance, a lot will turn on the luck of the draw regarding which judge—lenient or stern—presides over the sentencing. The same is true for many other factors (Harel and Segal 1999:292).

<sup>26</sup> The complaint alleged one other incident: apparently, on another occasion, Friess asked courtroom spectators for a show of hands on whom to believe in a harassment case (Shipp 1983).

Another judge, Louis Rosenthal, also from the Brooklyn bench, confessed using a similar approach to speed up the arraignments of individuals charged with dealing three-card Monte. Rosenthal testified that he'd give dealers the choice between pleading guilty or playing a hand themselves. He'd then write down three outcomes on separate pieces of paper: a \$500 fine, 30 days in jail, or discharge. "I'm going to mix up these papers, and he's going to pick one," Rosenthal testified. "They would always plead guilty—they were afraid of the 30 days. . . They knew the odds were against them" (Herman and Johnston 1983). (Rosenthal also resigned from the bench.)

The commission was not impressed and came down hard on Friess, finding that he had "exhibited extraordinarily poor judgment, utter contempt for the process of law and the grossest misunderstanding of the role and responsibility of a judge in our legal system. . . . He has severely prejudiced the administration of justice and demonstrated his unfitness to hold judicial office." Friess was barred from ever serving again as a judge in New York (Shipp 1983a).

"A court of law is not a game of chance," the commission declared. "The public has every right to expect that a jurist will carefully weigh the matters at issue and, in good faith, render reasoned rulings and decisions. Abdicating such solemn responsibilities, particularly in so whimsical a manner as respondent exhibited, is inexcusable and indefensible" (Shipp 1983a).

The few legal commentators who have opined on these matters tend to agree—or at least suggest that we, as a community, would tend to agree. "We insist upon deliberate, self-conscious decisionmaking," Judith Resnik suggests. "The coin flip offended this society's commitment to rationality. Whether or not a judge's mental processes, when pronouncing a sentence of twenty or thirty days, actually amount to anything more than a mental coin flip, the community wishes judicial rulings to appear to be the product of contemplative, deliberate, cognitive processes" (Resnik 1984:610–11).

This reflects—accurately, I believe—our general unease with chance in criminal sentencing. Wherever chance plays a role, there is controversy. The rules surrounding attempt liability, for instance, have spawned a large and controversial literature. The difference between an attempt and the completed offense is usually the product, factually, of pure luck—whether a bullet misses its target, whether a bomb fails to detonate. These

are cases where, in the words of David Lewis, the punishment “leaves something to chance” and we have come to view them as “a disguised form of *penal lottery*” (Lewis 1989:58). There are a number of other cases that involve the luck of the draw, and these too are the more controversial legal doctrines. Charges of reckless endangerment differ from the more serious completed offense often because of lucky circumstances; the defense of impossibility entirely immunizes criminal intent when, by chance, the intended harm factually could not have occurred;<sup>27</sup> and the felony-murder doctrine may trigger based on the chance behavior of an accomplice. These and other legal rules that intersect chance—such as intervening causation and the thin-skulled victim—tend to be the ones that draw the strongest criticism (*see generally* Kadish 1994; Kessler 1994).

A large body of philosophical and legal literature has grown around the issue of luck in criminal sentencing,<sup>28</sup> some of it tied to the larger debate over what Thomas Nagel coined “moral luck.”<sup>29</sup> Most of the commentators oppose the use of chance. Sanford Kadish calls attempt liability a “rationally indefensible doctrine” that “does not serve the crime preventive purposes of the criminal law” (1994:680). David Lewis concludes that “there is no adequate justification for punishing attempts more severely when they succeed” (1989:58). Another commentator declares that “we must adopt a solution that takes a clear stance on luck—that it does not matter” (Kessler 1994:2237). And yet, as a legal matter, the role of luck has been universally embraced in this country and in the West. Most jurisdictions in the United States impose a lesser sentence or half the punishment for attempts; beyond our borders, reduced punishment for attempts has achieved “near universal acceptance in Western law” (Kadish 1994:679).

Why, then, this almost universal intuition *against* luck in criminal sentencing? The reason, I would suggest, is because we believe that there is a rational alternative. We continue to believe that there is a better way, a more rational way, a more morally acceptable way. In discussing penal lotteries, R.A. Duff observes that lotteries are generally justified, from the perspective of fairness or justice, only when “there is no

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<sup>27</sup> The impossibility defense is now no longer the majority rule. *See, e.g.*, Kadish 1994:683.

<sup>28</sup> *See, e.g.*, Lewis 1989; Duff 1990; Kadish 1994; Kessler 1994; Von Hirsch 1976:72–73. For a sampling of earlier works on the issue of attempt liability and luck, including texts by H.L.A. Hart, Andrew Ashworth, Michael Davis, George Fletcher, and Stephen Schulhofer, see the list of texts compiled at Kadish 1994:680 n.5.

<sup>29</sup> Nagel 1979:24–38; *see also* Bernard Williams, *Moral Luck* 20–39 (1981).

other practicable or morally acceptable way of distributing the benefit or burden in question” (Duff 1990:26). Lotteries are justified as a default mechanism when there is no other morally justifiable way: “What justifies such lotteries. . . is the fact that it is either impossible to eliminate them, or possible to reduce or eliminate them only at an unacceptably high cost” (Duff 1990:27).

Duff has it right. What justifies lotteries, morally, is the lack of an alternative. Where he has it wrong, though—and where everyone seems to have it wrong—is in believing that *there is a rational alternative*. The fact is, we have hunches. We take leaps of faith. But we do not have good evidence or determined principles that resolve the sentencing ambiguities. Sentencing lotteries make sense, in the end, precisely because *we have no better choice*.

## 7.

Looking forward, it may be possible to tease together randomization, social physics, brutal simplicity, and, wherever possible, completeness, into a larger framework for the criminal justice system. The common gesture underlying these different impulses—especially the turn to randomization—is to question and ultimately reject social engineering through the crime sanction. Stopping to take leaps of faith means nothing more, in practice, than stopping to engineer persons and social relations through punishment practices. Here, then, would be a seven-point plan to brutally simplify our criminal justice sphere and stop, once and for all, trying to reshape, correct, deter or engineer the next generation:

1. Draft every young adult citizen for two years of civil service and assign twenty-five percent by lot to assist local police departments in providing security services. Another ten percent to provide security at prisons.
2. Distribute law enforcement resources across sub-jurisdictions in proportion to population numbers and annually select and set enforcement priorities for undercover operations (as between, for example, public corruption, insider trading, drug trafficking, or violent crime) by lottery.

3. Tax every citizen at a flat rate based on gross revenue and audit at random using a social security number lottery system.
4. For corporations and government employers who adopt internal surveillance programs (audits, drug tests, etc.), administer the surveillance on a lottery basis and include all employees, executives, cabinet or board members—everyone.
5. At all counter-terrorism check-points—from international airports to subway entrances and bus terminals—administer searches either on every passenger and traveler, or on the highest percent possible chosen at random.
6. Sentence convicts to a fixed term of incarceration by drawing straws, the length of which are determined by a legislatively fixed sentencing range.
7. Classify prisoners to different prisons within their prescribed level of prison security (prescribed proportional to the perceived gravity of the offense) by lottery.

To be sure, we would still need to decide how much money to spend on prison building. We would still need to decide how much of the budget to allocate to law enforcement. But the decision would no longer turn on fictitious empirical claims. Instead, it would be what it has always been: taste. Taste that would reflect either the result of a democratic vote or a totalitarian decree. We would have to decide how many prisoners we were comfortable incarcerating. And it would be no different for other choices: how much order or disorder we like, how much family and community dislocation we can tolerate. These decisions would revert to their rightful realm: aesthetics, taste, and feelings for others—whether compassion or misanthropy. What we would have eliminated, though, is the fictitious and misleading social engineering.

As for reading and debating the work of contemporary moderns, in the twenty-first century we must focus on interruptions in the answers people offer, not on the questions they pose or even simply the answers they give. We must explore what their leaps of faith tell us about their desires, their forms of rationality, and their intuitions of just punishment. The task is to unmask and expose their *choices* about punishment. None of the three modern questions were geared toward unmasking this choice—even the second, most critical question. They all effectively hid choice. The key now is to refocus

the inquiry not on answering the questions, but on exploring the answers that are given. For it is the answers that tell us the most. The task of reading the moderns, then, is to decipher what their answers tell us about their desires and reasoning on matters of just punishment.

## 8.

**M**oderns came in different flavors. There were those who didn't really notice they were taking a leap of faith. They worked through problems with reason—deriving principles, making empirical findings, drawing policy conclusions—without ever noticing that they were bridging some gap or ambiguity. There were those who spent all their time excavating the gaps and ambiguities, and then offering explanations for the leaps of faith—explanations which themselves always ended up bridging another gap. There were those who heard the voice of critical reason, but who adamantly denied that they were making any choices. And then there were those who believed they were, indeed, making a leap of faith, but felt there was no other option in the human domain and tried as best they could to render transparent their ethical choices.

We can think of these as stages of modernity: from early enlightenment, to critical theory, to positivist social science, to cultural critics, to postmodern ethicists. I myself have passed through many of them. Until recently, I truly believed that we should just accept the inevitable leaps of faith in human knowledge, but make them transparent. That we had to “dirty our hands” by setting out fully the ethical choices we make whenever we draw conclusions and advocate for public policies. My work, like that of many other poststructuralists—Foucault especially at the end of his life—had taken a turn to ethics and to the cultivation of the self. It seemed that there was no other option but to recognize human frailty and proceed more honestly.

No more. No more leaps of faith. There is an alternative. Whenever we are at the precipice of reason, faced with competing empirical hypotheses that have not been falsified or an indeterminate principle, or questionable assumptions, we need to stop using reason: stop rationalizing which hypothesis makes more sense, stop marshalling better reasons for one derivation of principle over another, stop legitimizing the questioned assumption. Turn instead to chance. Resolve the indeterminacy by drawing

straws, flipping a coin, pulling numbers from a hat, running a randomized computer algorithm. We need to let chance take over when reason ends.

The end of modernity is within our reach. The final triumph of rationality is near. Reason has finally achieved that exalted state of self-consciousness that can allow it to identify its own extremity and stop there: no longer to rely on blind faith in itself to bridge the inevitable gaps, ambiguities, and indeterminacies of human knowledge; no longer to fill that space beyond the non-falsified hypothesis; ready to relinquish that realm to chance, the coin toss, randomization—the arbitrary.

It is also, in some sense, the end of punishment as a transformative practice—as a practice intended to change mortals, to correct delinquents, to treat the deviant, to deter the super-predator. We have sanitized punishment: no longer the field of social engineering—but also no longer about moral education, nor about social intervention. Punishment is unplugged and defused.

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Iris Marion Young urged me this past summer, in her subtle yet penetrating way, to use this opportunity to explore what a world *without punishment* would look like. I think I have seen it now. It is not a world without anything that could be described as punishment. The person convicted of murder or identity theft may still be sentenced and incarcerated. But it is a world in which we have ceased to punish in furtherance of hunches and unfounded theories—in which punishment is chastened by randomization.



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