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KHOMINI AND CRIMINAL JUSTICE: NOTES ON CRIME AND CULTURE*

GRAEME NEWMAN**

The Ayatollah Khomeini has said:

Islamic justice is based on simplicity and ease. It settles all criminal and civil complaints and in the most convenient, elementary, and expeditious way possible. All that is required is for an Islamic judge, with pen and inkwell and two or three enforcers, to go into a town, come to his verdict on any kind of case, and have it immediately carried out¹

It requires little imagination to insert a character from the old American Wild West into the imagery of Khomeini's justice, with the exception that this hero would ride into town with a gun instead of pen and ink, and would do his own enforcing. The simplicity and clarity of justice in both images surely tempts the romantics among us.

The essential difference between the folklore figure and the Ayatollah Khomeini, however, is that the western hero depicts the uneducated, raw man of the frontier, bringing an innocence, a freshness to the uncivilized society of the Wild West. He represents, really, a kind of "human justice"—a highly optimistic and benign view of man's nature, yet a nature without God. Khomeini, on the other hand, depicts the opposite: a highly educated man, a man who stands for 1,380 years (or thereabouts) of learning, who represents not human justice, but divine justice.

In Khomeini's view, Iranian society is *decivilized* rather than *uncivilized*. His people have been corrupted by the wrong laws and values of the United States, whereas those folks in the Wild West had simply been separated from their laws—a situation of no law, rather than the wrong law.

How is it that two vastly different roles produce strikingly similar

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¹ AYATOLLAH KHOMINI, SAYINGS OF THE AYATOLLAH KHOMINI, 30 (H. Salemsen trans. 1979).

conceptions of justice, that is, a justice of retribution, directness, clarity, openness, defense of the weak, and above all, authoritarianism? We think of the justice as depicted in the Wild West as "rough," or "primitive;" would this assessment fit Khomeini's version of Islamic justice?

In order to answer this question, it is necessary to take a preliminary look at the basics of Islamic law, and its special application by the Ayatollah Khomeini to the Shiite sect. It is important to stress at the outset, though, that although Khomeini derives his teachings from Islam, he is hardly a typical representative of Islamic law. As will shortly become clear, his application of Islamic law is, in one important respect, highly idiosyncratic.

I. THE ORIGINS OF ISLAMIC LAW

Although Khomeini and other important Islamic scholars would argue that Islamic law is essentially of divine origin (since everything is created by God) we may nevertheless recognize that there are two sources of Islamic law; law which was revealed through divine revelation to Muhammad, the Qur'ān, and law which was present *before* the revelation, which is called custom. In this sense, Islam is quite similar to Christianity, since both represent a drastic change with the past, yet have also incorporated in their different ways many of the values, rules and laws prior to their periods of revelation.²

The pre-Islamic law is known as the Sunna, roughly translated as "customary law." This customary law was largely an oral tradition of justice whose function was to settle disputes, mainly within tribes. It served not only to support the authority of the tribal chief but also as a check against it.³ Customary law thrived especially among the desert tribes whose austere life was supplemented by an intricate life style based on honor, blood money and vendetta (thār).⁴ In such an ambi-

² St. Augustine, Thomas Aquinas, and more explicitly Dante incorporated much of the logic and morals of the early pagans into their works on moral philosophy. Thus Christian doctrine became, and continues to be, a mixture of Christian and pagan beliefs. The distinction between the two, however, unlike Islam, has been largely lost, or at least is not as formalized as it is in Islam. Some Islamic scholars have gone to pains to point out that Islamic law is not strictly speaking a divine law, by comparing it to canon law. However, in comparison to English common law, the difference is clear. There has been a conscious attempt to secularize common law. See Badr, *Islamic Law: Its Relation to Other Legal Systems*, 26 AM. J. COMP. L. 187 (1978). If one reads the official statements of the role of Islamic Law, there is no doubt that it is seen as essentially a religious legal system. See MINISTRY OF INTERIOR, KINGDOM OF SAUDI ARABIA, *THE EFFECT OF ISLAMIC LEGISLATION ON CRIME PREVENTION IN SAUDI ARABIA* (1980).

³ M. KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* (1955).

⁴ See J. BLACK-MICHAUD, *COHESIVE FORCE: FEUD IN THE MEDITERRANEAN AND MIDDLE EAST* (1975); and J. PERISTIANY, *HONOUR AND SHAME: THE VALUES OF MEDITERRANEAN SOCIETY* (1965).

ence of incipient chaos, the notion of retributory punishment was born—or at least its social functions were recognized.⁵ Many of these forms of punishment and types of crime were preserved by Muhammad whose aim, it is said, was not to violate the established Sunna, but simply to get rid of idolatry. There is much argument on this point by Islamic scholars since it is also claimed that idolatry was a violation of the Sunna and that Muhammad was indeed concerned with overthrowing the Sunna and replacing it with the new divine law of the Qur'ān.⁶ The fact remains, however, that many crimes and punishments which were pre-Islamic were continued, indeed, were promulgated by Muhammad (e.g., cutting off the hands of a thief, killing the murderer)⁷—a fact, of course, that is not surprising to social historians.

Upon Muhammad's death in 632 A.D., the enactment of laws stopped. Unfortunately, he died at the time when the Islamic empire was beginning to spread out into new territories. New problems and situations arose, requiring new applications of the Qur'ān. It was during these first three hundred years that the four classical schools of Islamic law arose.⁸ It was also during this period that an important

⁵ G. NEWMAN, UNDERSTANDING VIOLENCE (1979). It is of some interest that the well-known Islamic punishment of cutting off the hand of the thief is thought of as purely retributory: a punishment that reflects the crime. Khadduri, however, claims that it was purely incapacitatory to prevent the offender from extracting revenge (for his punishment received) by violent assault. M. KHADDURI, *supra* note 3, at 21. This interpretation is probably not correct, since it fails to recognize that feuds and vendettas were (and are) essentially group or tribal endeavors so that a relative of the chief could just as easily extract vengeance on another's behalf. See Haft-Picker, *Beyond the Subculture of Violence*, in CRIME AND DEVIANCE: A COMPARATIVE PERSPECTIVE (G. Newman ed. 1980). It is of interest that the official interpretation of this punishment by Saudi Arabia is now essentially one of deterrence. See *supra* MINISTRY OF INTERIOR, note 2.

⁶ This controversy is the source of many divisions and sects in Islam. The Qur'ān, after all, claims to have given a detailed account of everything: "We have revealed to you a book explaining everything," Qur'ān LXXVIII: 29, and "We have neglected nothing in the book," Qur'ān VI: 38. Other scholars see nothing wrong in accepting pre-Islamic laws so long as they are not discounted by the Qur'ān. M. KHADDURI, *supra* note 3, at 19-20. See also Coulson, *Law and Religion in Contemporary Islam*, 29 HASTINGS L.J. 1447 (1978).

⁷ A major change would appear to be Muhammad's extensive pronouncements on the family, especially adultery and marriage. "Forbidden to you are your mothers, and your daughters, and your sisters, and your father's sisters and your mother's sisters and your brother's daughters and your foster mother's . . ." Qur'ān IV: 23. Before Islam, the male could marry his stepmother or even his wife's sisters. See W. ROBERTSON SMITH, KINSHIP AND MARRIAGE IN EARLY ARABIA (1907); G. STERN, MARRIAGE IN EARLY ISLAM (1939); Khadduri, *Marriage in Islamic Law: The Modernist Viewpoints*, 26 AM. J. COMP. L. 213 (1978).

⁸ Scholars generally agree that four basic schools of Islam arose during this period, and these tend to predominate in certain geographic areas today. These schools were essentially founded by four individual scholars: (1) Abu Hanifa of Iraq who depended mainly on reasoning and analogical interpretation of the Qur'ān and Sunna and less on the Hadith. This school is dominant today in Turkey, Syria, Lebanon, Jordan, India, Pakistan and Afghanistan; (2) Malik b. Anas, the codifier of the Hadith who saw the center of Islam at Medina, representing the Hijazis. Now dominant in North Africa, West Africa and Kuwait; (3) al-

ancillary body of law was developed, called the Hadith or "tradition." A fine distinction must be drawn here between tradition and customary law. We have seen that customary law, the Sunna, was the oral traditions of justice that were essentially pre-Islamic and were probably incorporated into the Qur'ān by Muhammad (even though we are told that it was God who revealed the laws to Muhammad, who simply wrote them down). Regardless of who was the medium, we can nevertheless find much of the Sunna in the Qur'ān.

Hadith, or tradition, on the other hand, was a collection of sayings, statements, and parables that were reputedly made by Muhammad during the course of his daily life of administering the first Caliphate. Much the same problem lies with the Hadith as with the Qur'ān as to how much customary law is contained therein—again, one can find quite a lot. However, the more important point about the Hadith is that it was first transmitted orally, with some statements being written down at an early stage and some not written down until quite late. Furthermore, unlike the Qur'ān which makes claim as a universal doctrine (because of its divine origin) the Hadith laws were essentially local interpretations and applications of many of Muhammad's "informal" statements. They multiplied at an enormous rate, often used or invented to serve less than divine purposes. At one stage the statements numbered into the thousands, with many contradictions and some absurdities. The important point about them however, is that the statements attempted to specify the more general statements of the Qur'ān and Sunna.

Because of the extensive disagreements contained in these laws, there arose, naturally enough, a question as to their legitimacy. A number of solutions were attempted. First, scholars tried to trace back the chain of orators to one of Muhammad's disciples. Thus, the Hadiths typically begin like this one: "Ali ibn Ibrahim, citing his father who quoted Hammad ibn 'Isa who quoted al-Qaddah ('Abdallah ibn Maysum) who quoted Abu 'Abdullah, said . . ."⁹ The trouble was that even these chains of authority were easily fabricated. Later, in the third century, Al Bakhāri, a deeply religious scholar, gave much authenticity to this method by editing out all those Hadith which he could not verify by traveling throughout one thousand Shaikhs to track down their original lines of descent.

Shafi'i—an extension of Malik towards the "consensus of the community." Now dominant in lower Egypt, Hijaz, Southern Arabia, East Africa, Indonesia and Malaya; and (4) Ahmad ibn Hanbal which is the smallest and most strict in its observance of the Sunna. Now dominant in Saudi Arabia and Qatar. *See* H. LIEBESNY, *THE LAW OF THE NEAR AND MIDDLE EAST* (1975).

⁹ *Quoted by* AYATOLLAH KHOMEINI, *ISLAMIC GOVERNMENT* 74 (1979).

A second method has been to systematize the Hadith by comparing them to the Qur'ān and Sunna, and discarding those that did not conform. This was carried out by the great scholar Mālik b. Anas (A.D. 718-96).¹⁰ Mālik also proposed an additional criterion: the maintenance of those traditions on which there was consensus. However, Mālik's idea of the consent of the community was basically whether a saying was approved of in Medina, which he considered to be the true home of Islam. Naturally what was agreed upon in Medina was not often agreed to in Iraq.

The next important legal theorist, Shāfi'ī (A.D. 768-82) argued for universal consensus. Unfortunately, given the social, geographic and economic circumstances of the Middle East, the actual testing of this consensus was never possible. Indeed, in 754-55, a treatise was addressed to the Caliph by Ibn al-Mugaffa' suggesting that the Hadith should be codified into a different system. Later legal theorists rejected it because of a pronouncement ascribed to Muhammad: ". . . the disagreement of my people is a mercy from Allah."¹¹

This preference for conflict over consensus gave birth to an interesting but complicated relationship among the competing schools. It is quite possible for a Muslim to join any one of the schools that he wishes, since each is considered "orthodox." The differences in interpretation and reasoning between each school are often used as an educative device or heuristic method of arriving at a scholarly, independent judgment.¹² The upshot of this approach has been that more and more reliance had to be put on the Islamic scholars as interpreters of the law, especially Hadith law. Thus, these scholars have become, to varying degrees, extremely powerful *judges*.¹³

Except for some minor disagreements about fasting and certain rituals, Khomeini's representation of the general form of Islamic Law is *not* untypical of basic Islam. As we shall see, the essential area of vast difference between Khomeini's law and general Islamic law is in its political application.¹⁴ It is at this point that we are able to separate

¹⁰ A. GUILLAME, *THE TRADITIONS OF ISLAM* 20-22 (1966).

¹¹ M. KHADDURI, *supra* note 3, at 35.

¹² H. LIEBESNY, *supra* note 8, at 22.

¹³ Islamic Law became in many respects a jurist's law, with much emphasis on methods of interpretation (*ijtihad*). See Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 AM. J. COMP. L. 199 (1978). On interpreting the divine word generally, see W. GRAHAM, *DIVINE WORD AND PROPHETIC WORD IN EARLY ISLAM* (1977).

¹⁴ To the outsider these differences may seem trivial, just as to the outsider to Christianity, the differences between Catholicism and Protestantism may seem trivial. However, differences in day-to-day practices (e.g., eating and fasting) are hardly trivial, since they are so central to all believers' lives. What is meant by "trivial" therefore is usually from the point of view of the substantive elements of the belief system. And here, one can easily say that there is more similarity than difference in fundamental beliefs among the four schools of Islam, or

Khomeini from other Islamic scholars and jurists. Yet before we do this, we should pause briefly for a look at the form and content of Islamic criminal justice, which seems so *foreign* to us in the West. We are only used to the extremes, with either the simplicity of Wild West justice or the infinite complexities, contradictions, procedures and “systems” of modern criminal justice.

II. FORM AND CONTENT OF ISLAMIC LAW

What is meant by “law”? We hear Khomeini and his followers speak of Islamic law and it sounds not like law at all, but only like terrible physical punishments. We think of law as Western criminal law which punishes, but surely not like Islamic law—not so coarsely.

One easy definition of Western criminal law is that it is a set of proscriptions backed up by negative sanctions, underwritten by whatever political system is currently in sway. The essential feature, however, is that it is a set of proscriptions only, that is, it says what *not* to do. It is entirely negative. It is not (explicitly at least) a reward system, or a system of enjoinders, suggesting something *to* do. This is the first essential difference between Western criminal law and Islamic law. Islamic law deals with both enjoinders and proscriptions and, thus, reaches much further into the daily lives of its subjects. The Muslim must choose between the paths of *husn* (beauty) and *qubh* (ugly) or, in our terminology, between good and evil. Along the Muslim path of the good life are a number of choices in addition to those which are strictly enjoined (*fard*) or those that are strictly forbidden (*harām*).¹⁵ Here we come to a second essential difference between Islamic law and Western law.

The degrees of compliance required by the law are spelled out in Islamic law, whereas, in Western law, prohibitions are prohibitions and are stated in absolute terms; that is, you either break the law or you don't. Yet the absolute terminology in which the laws of the West are stated rests upon a whole system of blind-passes and distortions which manage to convey the message that one can probably get away with breaking certain laws because some laws are enforced more or less than others. This problem of the amount of compliance is dealt with explicitly by Islamic law, both in the Qur'ān and the Hadith. Allowance is made, so to speak, for human effort and weakness. In general terms, the believer has the freedom to fulfill certain recommended actions (*mandūb*)

even among the four schools of Islam and the Shiite sect. See I. GOLDZIEHER, INTRODUCTION TO ISLAMIC THEOLOGY AND LAW 31-66 (1981).

¹⁵ Much has been written by Islamic scholars on this point. One scholar argued that the holy quest for the jurist was to find permissions in the Hadith and Qur'ān, since these were much more difficult to find than were prohibitions. *Id.*

and to refrain from others (*makrūh*), with the latter clearly *not* being strictly forbidden. The following edicts of Khomeini demonstrate the flexibility and practicality of these Islamic recommendations:

It is forbidden to eat or drink anything that is impure; it is also forbidden to give anything impure to children to eat, whether or not it may be harmful to them; but it is not forbidden to feed children food which has been only indirectly touched by something impure¹⁶

If a thing becomes impure through having been soiled by the urine of a milk-fed boy [less than two years old], who has not drunk from sow's milk, it is enough to wash it all over one time to purify it. Yet it is wise to wash it again a second time¹⁷

If a person crushes a mosquito on his skin and cannot determine whether the blood therefrom is the insect's or his own, this blood is pure¹⁸

The remarkable social consciousness of many of these enjoinders is illustrated by the following directive:

If the head of a household notices during the course of a meal that one or more of the dishes being served are impure, he must impart this information to his guests; but if it is one of the guests who notices it, he is not obliged to do the same.¹⁹

We can also see in these entreaties, a further striking difference between Islamic law and Western law. Islamic law presents a great deal of specificity in the realm of everyday life. This applies right down to the highly detailed instructions Khomeini gives concerning one's most private bodily functions:

During evacuation, one must not squat facing the sun or moon, unless one's genitals are covered. While defecating, one must avoid squatting exposed to the wind, or in public places, or at the door of one's house, or under a fruit tree. At the time of evacuation, one must also avoid eating, dallying, or washing one's anus with the right hand. Finally, one must avoid talking, unless one is absolutely forced to or is addressing a prayer to God.²⁰

¹⁶ KHOMEINI, *supra* note 1, at 55.

¹⁷ *Id.* at 57.

¹⁸ *Id.* at 61.

¹⁹ *Id.* at 55. The Qur'an also recognizes the necessity to "bend the rules" a little: "He [Allah] hath forbidden you only carrion and blood and swine-flesh and that which hath been immolated in the name of any other Allah; but he who is driven thereto, neither craving nor transgressing, lo! The Allah is forgiving, Merciful." *Qur'an*, XVI: 115.

²⁰ KHOMEINI, *supra* note 1, at 41. The authenticity of this and other more strange pronouncements by Khomeini has been questioned recently, N.Y. Times, March 28, 1980, § III, at 31, especially because Tony Hendra, the editor of *AYATOLLAH KHOMEINI, SAYINGS OF THE AYATOLLAH KHOMEINI* (H. Salemsen trans. 1979) happens to be a former editor of the *National Lampoon*. I am inclined to think, however, that the material is genuine. Many of the Khomeini's sayings cross-check with those in *ISLAMIC GOVERNMENT*, *supra* note 9, and other sources. The intimate details of some of his pronouncements on defecating and sexual intercourse, are consistent with the Islamic culture and teachings, and in addition are in many

Similarly, in the areas of daily living concerning sexual intercourse, business transactions and a host of other daily activities, Khomeini has issued very specific instructions, and these are derived basically from the Hadith and the Qur'ān. Again, one can immediately see the difference between Islamic law and Western law. In the area of the regulation of everyday life, Western law is poorly, if at all, developed. Conversely, in the area of criminal law, there is no such specificity on the part of Islam. It has no extensive and specific statement saying under what conditions killing is a crime, or when taking property becomes criminal. Yet Western law has a highly specific set of laws about these and many other acts which are considered to be criminal.

This is not to say that Western law has no specific law on family or business. It does, but this is achieved by splitting such law off from the criminal law. In Islamic law the split has not been formalized, or, indeed, even recognized. In other words, Islam does not recognize the distinction between "law" on the one hand, and "social control" on the other as we do in the West.

There are only about half a dozen "crimes" under Islam—crimes in the sense that we think of them, which is that they invite serious punishments.²¹ Some of these crimes and their punishments include:

1. *Murder*: This crime is generally described as the purposeful slaying of a believer²² (killing non-believers is okay. In fact, according to some interpretations, it is a duty). The punishment is death by the hand of the victim's family: "And slay not the life which Allah hath forbidden save with right. Whoso is slain wrongfully, we have given power unto his heir, but let him not commit excess in slaying. Lo! he will be helped."²³

2. *Theft*: "As for the thief, both male and female, cut off their hands. It is the reward for their own deeds, an exemplary punishment from Allah."²⁴ This is perhaps the most colorful punishment to Western eyes, where the combination of both reflective and educative aspects of

ways practical health and manners hints that would be appropriate to a backward, largely illiterate population, living in impoverished conditions, some severely so. Similar Hadith are reported by I. GOLDZIEHER, *supra* note 14.

²¹ The actual number of crimes recognized by Islam varies according to the school of law, but it is generally taken to be about 5 or 6. N. ANDERSON, *LAW REFORM IN THE MUSLIM WORLD* 37 (1976); H. LIEBESNY, *supra* note 8, at 228. It is interesting to note that the official statements by the Saudi Arabian scholars on Islamic Law have tried to derive a much larger variety of crimes than the small number presented below. MINISTRY OF INTERIOR, *supra* note 2. The larger number of crimes is derived from excessive interpretation of the same small number of statements in the Qur'ān.

²² "Whosoever slayeth a believer of set purpose, his reward is Hell forever." *Qur'ān* IV: 93. Murder is also forbidden in *Qur'ān* IV: 29; V: 32; VI: 152; and XVII: 33.

²³ *Id.* at XVII: 33.

²⁴ *Id.* at V: 38.

punishment are seen. An attempt is made to reflect an element of the crime in the punishment (i.e., the hands that steal are cut off), and this reflection is seen as "teaching a lesson" or perhaps as serving the motive of general deterrence.²⁵

3. *Adultery*: "The adulterer and the adulteress, scourge ye each one of them with a hundred stripes . . . and let a party of believers witness their punishment."²⁶ We see here another example of an ancient collective punishment: i.e., a punishment in which the community takes part by witnessing it. This type of punishment was a practice of the ancient Jews who stoned offenders to death, and has continued through this century in the West and in many countries of the world with public executions.²⁷

4. *Unfounded Accusation of Adultery*: "And those who accuse honorable women but bring not four witnesses, scourge them with eighty stripes and never afterward accept their testimony—they are indeed evil doers."²⁸

We may smile at the utter simplicity of this tiny number of crimes. Yet we would do well to keep in mind the fact that the American public is informed of crime in American society by a news media which largely bases its material on the FBI crimes index which includes only a handful of crimes that are similar to those above, except that adultery is replaced by auto theft, a clear demonstration of the relationship between crime and culture.

²⁵ Strictly speaking this is inaccurate since the aim was not to so much deter others through the threat of punishment, but rather to demonstrate the inherent truth or goodness in the prohibition. See G. NEWMAN, *THE PUNISHMENT RESPONSE* (1978) for a discussion of reflected punishments. They are the most primitive form of retribution. See also M. A. Kara, *Philosophy of Punishment in Islamic Law* (1977) (Ph.D. dissertation, State University of New York at Albany).

²⁶ *Qur'an* XXIV: 2. In my copy of the *Qur'an*, the word adultery is often referred to as "lewdness," which is forbidden in *Qur'an* IV: 15, in which the punishment was imprisonment in her own household (another reflected punishment) "until death take them." The similarity between this punishment and the burial alive of the vestal virgins who broke their vows is quite remarkable. See G. NEWMAN, *supra* note 25, at 27. The *Qur'an* also forbids adultery. *Qur'an* XVII: 32; XXIV: 2; and XXXIII: 30.

²⁷ A number of scholars have begun to argue for the imitation and borrowing of certain forms of punishment from one legal system to another. See J. SELLIN, *SLAVERY AND THE PENAL SYSTEM* (1976), on the transfer of the punishment of slaves to that of criminals, and S. Christianson, *The American Experience of Imprisonment*, (1980) (unpublished Ph.D. dissertation, State University of New York at Albany). See G. NEWMAN, *supra* note 25, for a general review. However, some Islamic scholars have insisted that Islamic Law is "pure" and untouched by Jewish Law. See Badr, *supra* note 2. These scholars tend to address themselves to law rather than forms of punishment. As far as the law is concerned, much has been made of the requirement that there must be four witnesses to the actual sex act in adultery, the claim being that this is a case in which the rules of evidence in favor of the accused are much more stringent than those of the West. See H. LIEBESNY, *supra* note 8, at 229.

²⁸ *Qur'an* XXIV: 4.

The four Islamic "crimes" are the only classes of action for which the Qur'ān clearly specifies punishments. There are many other forbidden acts and practices for which dire consequences in Hell are predicted, but for which no specific earthly punishment is pronounced. These include: usury, slander, spying, criminal conspiracy, hoarding, avarice, gambling, and drinking "strong" beverages. The only other behavior for which a clear specification is made is manslaughter (accidental killing of someone from another tribe or family) for which blood-money is required: "He who hath killed a believer by mistake must set free a believing slave, and pay the blood-money to the family of the slain"²⁹

To these four crimes the Mutjahids (religious jurists) have added a range of other "crimes" generally chosen from among the additional list above. In Iran, prior to the Shah's removal, the Mutjahids added the crimes of drinking of alcoholic beverages and homosexuality.³⁰ Since the Shah's ousting, Khomeini has reintroduced many more of the old taboos: women must be veiled, the eating of food prepared by non-believers is forbidden (it is impure) and gambling is outlawed, to name but a few. That so many "misdemeanors" exist on the books without specific punishments leaves open a great deal of discretion on the part of the religious judge. Indeed some Iranians (prior to the Shah's fall) complained that the Mutjahids abused their discretion when, in some cases, they prescribed the death penalty (based on some interpretation of passages in the Qur'ān or Hadith) or other very severe punishments for the misdemeanors. This brings us to the next important feature of Islamic law and Khomeini: the role of the religious jurist.

III. THE SOCIO-POLITICS OF KHOMEINI'S CRIMINAL JUSTICE

Much of the Ayatollah Khomeini's book, *Islamic Government*, is taken up with fine exegeses on various Hadiths with the aim of showing that the true and only roles for the Islamic scholar are being the supreme interpreter of the Qur'ān and Islamic laws, and also being a politician; it is his duty to see that the law of Islam is carried out. The political role of the Imam (the prayer leader of Islam—argued to be a direct descen-

²⁹ *Id.* at IV: 92.

³⁰ In Iran, the French Penal Code of 1810 was adopted almost wholesale in 1906 and continued under the Shah's rule (and his father's). Up until the Shah's ousting the Islamic laws and courts existed side-by-side with the Shah's secular courts. See, G. NEWMAN, *COMPARATIVE DEVIANCE: PERCEPTION AND LAW IN SIX CULTURES* 217 (1976). He had gradually taken away much of the power of the Islamic courts. We are here speaking of Islamic law and justice ignoring the intrusion of Western Codes. Many, if not all, Islamic legal systems have been, and continue to be affected by "foreign" legal codes. See Hill, *Comparative and Historical Study of Modern Middle Eastern Law*, 26 AM. J. COMP. L. 279 (1978).

dent of Muhammad according to the Shiite sect) and his role as an organization man are points of considerable conflict in Islam. Without going into all of the many varieties of sects and disagreements, we shall generally sum up the position.

Orthodox Islam became split into a number of different schools of law, depending on the way in which the Hadiths were interpreted. Nevertheless, all were basically passive interpretations, mostly exemplary of scholarly differences. It fell to the religious scholars to interpret the Qur'ān and Hadith (it must be remembered that the Qur'ān to many requires no interpretation as it is the Holy word itself), although there was no highly developed "church organization" among such scholars. At least this is what has been claimed, and certainly the intention was for scholars to "emerge" according to their own abilities, never to be elected or appointed.³¹

In actual fact, the differences in the details of the laws expounded by the Shiite sect compared to the orthodox (Sunni) Muslims (who comprise 80-90% of all Muslims) are not all that great.³² Yet the schism between the Sunni and Shiite is considerable, so much so that the Shiite developed a whole code of "belief" known as *kitman* which allows the Shiite to profess outwardly whatever beliefs are required of him to avoid persecution, while secretly holding his Shiite beliefs. The schism does not turn so much on the substance of the law, but rather on the political role that the Imamate (the Caliphate in Sunni) plays in the Islamic religion.

The Sunni are satisfied to allow such persons to "emerge" according to their own abilities and knowledge of the Qur'ān and Hadith, so long as they were of the tribe of Quraysh (one of the early tribes in Mecca).³³ The Shiites narrowed the qualifications of the Imam still further by insisting that the Imam be a direct descendent of Ali and Fatima.³⁴ In this respect various sects within the Shiites have been accused of worshipping a kind of personality cult, especially as some are inclined

³¹ In some respects the shunning of a formal church organization is similar to that taken by Luther in his criticisms of the Catholic Church for its penchant for politics and organizational hierarchy. Nevertheless, in spite of his views, considerable church hierarchies have grown out of Luther's original ideas. The same has occurred in Islam, although some suggest that this organization is "invisible" and does not become visible until times of crisis such as the Iranian revolution. See, G. JANSEN, *MILITANT ISLAM* (1979).

³² See *supra* note 14.

³³ The Quraysh, a polytheist tribe of Mecca, were enemies of Muhammad who nevertheless made a peace treaty with them in 627. The treaty was broken in 630 and Muhammad marched on Mecca thereby establishing it as the political and religious center of the Islamic empire.

³⁴ Ali was the cousin and son-in-law of Muhammad; Fatima was the daughter of Muhammad and wife of Ali.

to give more weight to Ali than to Muhammad himself.³⁵ However, all Shiites believe that Ali passed on to his male descendants an esoteric knowledge which placed each successive generation beyond reproach, made their interpretations of both the Qur'ān and the Hadith infallible and gave them the divine right to rule. Thus, in contrast to the jurists of orthodox Islam who make their judgments according to scholarly argument and analogical reasoning, which jurists could question, the Shiite Imam makes his judgments in a much more authoritarian way. His statements are edicts rather than judgments.

Now Khomeini has taken this position one step further. Not only is the Imam the infallible interpreter of Islamic law, but it is also his duty to see that this law is carried out. Khomeini cites the following Hadiths (among others) in support of his position:

“Ali, the amir of the faithful, said that the prophet of God said thrice: God have mercy upon my successors.” So he was asked: “O Prophet of God, who are your successors?” He said, “Those who come after me, transmit my statements and my laws and teach them to the people after me.”³⁶

After a delicate exegesis of this Hadith, Khomeini concludes: “There is no place for doubting that the Hadith indicates that the jurist is the ruler and the successor in all affairs.” Furthermore, Khomeini insists that the question, “Who are your successors?” was meant as a *political* question while the *meaning* of the succession is of secondary importance: “The Muslims interpreted [the Caliphate] as a position of rule and governance” and not solely a position of interpretation.

Muhammad ibn Yahya, citing Ahmad ibn Muhammad who quoted Ibn Mahbus who quoted Ali ibn Abi Hamzah said: “I heard Abu-al-Hasan Musa ibn Ja'far, peace be upon him, say: ‘When the faithful dies, the angels, the lands in which he worshipped God and the gates of heaven toward which he rose with his actions weep for him, and he leaves in Islam an irreparable loss because the jurists are the strongholds of Islam as the Medina's well is its stronghold.’”³⁷

Khomeini interprets this Hadith to mean that the jurists are entrusted to preserve Islam with all their power,³⁸ and by this he means that they must also be politicians, managers of society, leaders in the army, defenders of the nation and settlers of disputes. The just jurist is a man of action as well as a man of knowledge and interpreter of the holy word. As Khomeini exhorts: “Do you think that the sole aim

³⁵ Indeed, some extremists claim that the angel Gabriel miscarried God's revelations to Muhammad when they were in fact intended for Ali. M. KHADDURI, *supra* note 3, at 39.

³⁶ KHOMEINI, *supra* note 9, at 48.

³⁷ *Id.* at 48.

³⁸ *Id.* at 39.

of our religion is to have its laws collected in al-Kafi's book and then be shelved away? Will Islam be preserved if we kiss the Qur'an, put it on our heads and recite its phrases with a beautiful voice day and night?"³⁹

If one accepts Khomeini's position concerning the role of the Imam as essentially one of *action*, then the rest easily follows. Since Islam is seen in large part as a system of law (i.e., the Shari'a, a system of duties showing the right way to live) it follows that, "the government of Islam is the government of law so that "only the jurisprudent and nobody else should be in charge of the government."⁴⁰

The final evidence that Khomeini produces is the fact that Muhammad was both prophet and ruler, a point which brings us back to an earlier aspect of Islamic law: it is timeless. The laws as revealed to Muhammad are taken as given, and cannot be changed, which is why the punishment and crimes, few as they may be, have remained unto this day. Again, Khomeini makes this quite clear when he says:

Does the jurisprudent have to reduce the number (of lashes for an unmarried fornicator) to prove that there is a difference between him and the prophet? No, because the ruler, be he a prophet, an Imam or a just jurisprudent, is nothing but an executor of God's order and will.⁴¹

Herein lies the deeply conservative nature of Khomeini's doctrine. The laws which are fourteen centuries old must apply equally today because they are of divine origin. In this, he is not too different from orthodox Islam. But the deeply reactionary nature of his doctrine is the fact that only the Imam and his jurisprudents can say what, in those laws, is or is not applicable to the modern world. Furthermore, they must act politically to see that the modern world is made to conform to the world of fourteen centuries past. Is this progress? From Khomeini's point of view this is indeed progress, for he is arousing Islam from its deep sleep of many centuries to become once again an active, politicized religion, as are most modern religions. But is it progress from the point of view of the old Wild West?

IV. EVALUATING KHOMEINI'S CRIMINAL JUSTICE

There are at least two common attitudes to Khomeini's criminal justice. One is that we should not evaluate it except in Khomeini's terms, since this is the only meaningful evaluation that one can make. In other words, "it may not make sense to us, but it sure as hell does to him." This is, roughly, the position of the cultural relativists. Each culture is presumed to have equal merit, or more precisely *equal justification*.

³⁹ *Id.* at 50.

⁴⁰ *Id.* at 55.

⁴¹ *Id.* at 55.

It is a position most typical of the relativism that predominates in Western social science. Yet we have not heard any academics defend the Islamic practice of whipping or cutting off a thief's hands—although Foucault comes close to it when he decries that Western society has moved away from punishing the body to a punishment that is no less than panoptic supervision.⁴² There are several difficulties with this brand of relativism, the most serious being that it underwrites, by default, the argument that “might is right” because any culture is answerable only unto itself, and should it decide to expand (as many cultures have done—Jewish, Christian and Islamic, to name but a few) it simply follows that the most powerful will win out and become, by definition, the only “just” culture, since it will be the only one left.

We should not, of course, mix up the notion of understanding a particular culture with evaluating it. To reach a full understanding of a culture, one must, no doubt, try to enter into its world. But to assess it—especially from the point of view of justice—one must withdraw from it and apply a set of evaluative principles.

The evaluative words that are popularly applied to Khomeini's criminal justice are “primitive,” “barbaric,” and “totalitarian.” In contrast, those applied to Wild West justice are “romantic,” “cool,” “fair,” “defender of the weak” and so on. Given these descriptions, what principles should we use to evaluate Khomeini's justice? Should we use those of the United States, which has come a long way from the justice of the Wild West and yet still holds a wistful yearning for its return? If so, then let us extract the moral principles that underlie these evaluative labels. First, the notions “primitive” and “barbaric” are, roughly, the opposites of “civilized.” The moral principle underlying them is that Western civilization is good. Second, “totalitarian” refers to the amount of freedom the common people have. Third, the “coolness” and “fairness” of the Wild West Hero refer to the evenhandedness, the equity and the impartiality of the just jurist. Fourth, “defender of the weak” refers to the protection of the common people from tyranny. We may now evaluate Khomeini's criminal law according to these four principles.

A. IS KHOMEINI'S LAW CIVILIZED?

The answer has to be “no,” except in one very important respect. First, let us look at the uncivilized aspects of Khomeini's Islam, and Is-

⁴² M. FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1977) falls just short of asserting this position. His book opens with a description of the horrendous punishment of drawing and quartering of Damiens. Yet he goes on to severely criticize society's move away from these physical punishments, almost suggesting that such punishments are preferable to the panoptic supervision heralded by Jeremy Bentham.

lam generally. A significant step in civilization is the capacity to symbolize.⁴³ This is what separates the civilized society from the barbaric society. Cutting off the hands of thieves, as done in Islam, is a *concrete*, not a symbolic, act of punishment. It is not "civilized." In contrast, Western society uses the highly abstract and symbolic notion of punishment with time in prison.⁴⁴ That prison, which is an horrendous punishment in its own right, should be considered "civilized" punishment carries its own irony—but an examination of this topic would take us beyond the bounds of this article.

Other theorists of civilization, especially the Freudians have argued that the decisive fact setting civilized society apart from primitive society is the amount of repression. For each step of progress in civilization, man must renounce certain of his instinctual desires. The process by which this succession of renunciations occurs is called sublimation. Through sublimation instinctual energy is diverted into the well-known pursuits of civilization, such as science and technology. Sublimation may take many different directions, and the particular direction that it *should* take is the subject of much controversy among theorists of culture.

Also, it is of particular interest that of all the psychoanalytical theorists, one of the most recent and most popular has been Ernest Becker, who took a tiny step—ever so tiny—to move the theory back to a religious basis. This comes after five decades of atheism.⁴⁵ One might well ask, therefore, whether Khomeini's Islamic law should be automatically dismissed as uncivilized merely because of its blatant religious basis. We tend to take the horrendous historical events that heralded the separation of church and state in European and English history as immanent lessons. The increasing secularization of Western law has been applauded as advancing civilization. Yet Khomeini clearly has a different view. To him, the *peak* of Islamic civilization was at the height of Muhammad's rule—i.e., the seventh century. Khomeini views most of what has happened since then as a process of decivilization, largely because of the virtually unbroken line of secular, colonial rulers.⁴⁶

⁴³ This has been argued by a wide range of scholars from many disciplines. See CULTURE AND THE DIRECTION OF EVOLUTION (S. Garn ed. 1964).

⁴⁴ It is true, of course, that prison brings with it a different set of woes many of which we are not especially proud. However, I am aware of no scholar who has advocated its replacement with the bodily punishments which were the precursors to prison. One may note that progress in the West has been extremely slow in giving up reflected punishments of the body—we have discarded it only in the past 100 years. We have still not managed to give up the death penalty.

⁴⁵ E. BECKER, DENIAL OF DEATH (1973). Jung's theory may perhaps be an exception, although his is more towards mysticism rather than religion as such.

⁴⁶ Much of Khomeini's ISLAMIC GOVERNMENT, *supra* note 9, concerns this question. This is, however, an (understandably) ideologically biased book, and uses history selectively. He fails to mention the Ottoman rule which imported French criminal codes to ease commercial

However, this argument does not hold. As we have seen, because of its barbaric practices of bodily punishments, and its inability to symbolize, Khomeini's religious law is more uncivilized than the secularized Western law.

Still, in terms of the amount of repression, it is very difficult to say which culture is more civilized. The enormous number of specific roles and enjoinders propagated by Khomeini and his forbears since Muhammad, must surely suggest large amounts of repression and, subsequently, sublimation. Yet if this were the case, what form has this sublimation taken? It has not been science, since this has been imported largely from the West. The answer must be *ritual*, that is, the daily, detailed demands of Islamic worship and the Shari'a (way of life) demanded of all good Muslims. If one takes the Hadith, the statements of Khomeini, and the actual behavior of Iranians (both public and private) one finds a religion very high in both personal ritual and mass ritual. This, from the psychoanalytic point of view, is where repression takes form. It is also why Iranian masses are so emotionally powerful, such unruly mobs, and yet, paradoxically, so seemingly "organized" (mass ritual).

From this point of view, Khomeini may argue that Islamic civilization has progressed considerably. It is another matter, of course, whether one would prefer a civilization of ritual over a civilization of science. Certainly, Western society is not as sure about itself as it used to be—a fact that has made Khomeini's task all the easier:

If Islam were to intervene at this moment (during Colonial rule of Iran) and to punish an alcohol drinker by whipping him in the presence of a group of believers, these people will accuse Islam of cruelty and harshness. On the other hand, no objection must be made against the bloody massacres that have been taking place in Vietnam for fifteen years . . .⁴⁷

It is, of course, part and parcel of the psychoanalytic theory of culture that barbarism lies (uneasily) just below the surface of any civilization,⁴⁸ including the Islamic. Therefore, it is not a surprise when the Arabs, Jews, Americans or any other culture periodically resort to mass killings (usually in the form of wars).

There is another aspect in which the West's civilized ways may, at least superficially, compare badly with Khomeini's way. A form of sublimation in the West is the rationalization of culture (in the Weberian sense)⁴⁹ which results in a multiplicity of rules, and duties related to

transactions (although admittedly kept the Islamic law side-by-side). To be fair, however, he also castigates those religious scholars who interpreted the Qur'an loosely so as to coincide with colonial rules.

⁴⁷ KHOMEINI, *supra* note 9, at 11.

⁴⁸ S. FREUD, CIVILIZATION AND ITS DISCONTENTS (J. Strachey trans. 1962).

⁴⁹ M. WEBER, THE PROTESTANT AND THE SPIRIT OF CAPITALISM (T. Parsons trans. 1958).

formal organizations and bureaucracies. According to Khomeini, Islamic criminal justice is free of bureaucracy. "These foreign laws caused the Muslim society numerous problems . . . a proficient lawyer can keep a case in the courts all [his] life The case on which the Shari'a judge used to make a decision in two or three days now takes twenty years to settle [under Western law]."⁵⁰ The simplicity and clarity of Khomeini's image of justice⁵¹ may be something that the West yearns for. Our current law in all areas has become vastly complicated and almost impossible to control.

In conclusion it appears that, on balance, Khomeini's Islamic justice is uncivilized though there is some fence-sitting to be done. Perhaps the opposition between ritual and science as seen by Khomeini is best eclipsed by the following passage. It is a familiar argument, leveled at Western society by critics of many different persuasions: "We have nothing against going to the moon, or setting up atomic installations. But we too have a mission to accomplish: the mission of serving Islam and making its sacred principles known to the entire world"⁵²

B. IS KHOMEINI'S LAW TOTALITARIAN?

The definition of words such as "totalitarian" and "freedom" are difficult to agree upon. Certainly, we have seen that the Shiite brand of Islam is highly authoritarian. It recognizes the supreme power of the Imam, who, supposedly, is above human failings. I emphasize this point because many of the attributes that the Khomeini argues the Imam should have, would theoretically prevent the degeneration of the benign authoritarian aspects of his Islamic politics into a totalitarian regime.

Governing is not an end in itself. It is a means of value as long as its goal is noble. If sought as a goal and if all means are used to attain it, then it degenerates to the level of a crime and its seekers come to be considered criminals.⁵³

Yet, because of the evils that accompany politics ("power corrupts . . .") we can only hope that the Imam and his helpers really are above human failings.⁵⁴ If one rejects the super-human qualities of the Imam,

⁵⁰ KHOMEINI, *supra* note 9, at 11.

⁵¹ It should be clear, however, that we are dealing throughout this article with *images*. Whether or not Islamic justice works in practice as the Khomeini claims is another question. His claim that corruption, trickery, etc. were caused in Islamic justice because of colonial influence is probably historically wrong: corruption and trickery are as old as Iran's (and most other government's) histories.

⁵² KHOMEINI, *supra* note 9, at 17.

⁵³ *Id.* at 41.

⁵⁴ This view of government is subject to the usual defects of utilitarian logic: serious evils may be "justified" because of the worthy goal. If the argument is stated in this way, then there is no alternative but to evaluate the goal (Islam) as being a religion worthy of the evils of government. It will be recognized that this philosophical problem was played out by the

then one is left with a cynical conclusion that, in a political system which claims supernatural qualities, a totalitarian society is sure to develop. This would occur even though the Qur'ān and Hadith clearly specify the area of behavior about which the law should have nothing to say. It is clear from the examples above that there is enormous possibility for discretion in applying the few Islamic laws, and we know from the history of criminal justice that where there is discretion, there is room for corruption.

Khomeini denies that the Qur'ān and Hadith concentrate excessively on man's private worship, and advises that the statements of religious interpreters on such personal matters are inferior sources of legislation. Nevertheless, he has made many such pronouncements. Clearly they are stated with the intention that they be acted on, since they are so specific:

In any of the detailed Hadith books, you can hardly find more than three or four chapters concerned with regulating man's private worship and man's relationship with God and a few chapters dealing with ethics. The rest is strongly connected with social and economic affairs, with human rights, with administration and with the policy of societies.⁵⁵

Yet, to the outsider, Muslims appear heavily oppressed by their religion. Women wear veils and hold an appallingly inferior status. All peoples' lives are dominated by the ritual demands of the religion. But as heavily structured as their daily lives or roles may be, one must also recognize that freedom may be structured into a system of domination (and, after all, all systems of government are systems of domination). The Shiite sect, for example, has certain freedoms structured into its marriage law: "Women may legally belong to a man in one of two ways; by continuing marriage or temporary marriage . . ."⁵⁶

Clearly, from the point of view of Western morals, which require extensive renunciations because of the monogamous family structure, the notion of temporary marriage (which can be of one hour's duration) and the encouragement of marriage of children (a girl is considered marriageable over the age of 10), makes for a lot of freedom, but only from the male adult's point of view. It should also, in theory at least, avoid the practice of "cheating" in marriage. The severe punishment for adultery under Islam can be seen to be quite reasonable in this regard, given the wide latitude built into the law in other respects.⁵⁷ Simi-

Christian Church from St. Augustine to Luther, the traditional view being that politics was the work of the devil.

⁵⁵ KHOMEINI, *supra* note 9, at 7.

⁵⁶ KHOMEINI, *supra* note 1, at 94. See also I. GOLDZIEHER, *supra* note 14, at 205-17.

⁵⁷ Care should be taken with this interpretation. The majority of the statements in the Qur'ān on adultery are leveled at women. In addition it is probable that marriages to 10 year

larly, the mild punishment (if at all) for adultery in Western society is easily understood because of the strong emphasis on monogamy and "continuous marriage." It is of particular interest, however, that the structured sexual freedom under Khomeini's Islam brings with it a cost: it is done at the expense of females, especially female children (since the marriage of a 10 year old girl to an older man may, for economic reasons, be preferable).

The clarity and "unrepressed" nature of Khomeini's position, and the contrasting illogical and repressive aspects of the West are well demonstrated by this passage:

Young boys or girls in full sexual effervescence are kept [by Western laws] from getting married before they reach the legal age of majority. This is against the intention of divine laws. Why should the marriage of pubescent girls and boys be forbidden because they are still minors, when they are allowed to listen to the radio and to sexually arousing music?⁵⁸

A final respect in which one might argue that there is more freedom under Khomeini's Islam is that, generally speaking, the people are free, much more free, from the tyranny of crime. Although it is difficult to obtain reliable statistics on crime incidence in Islamic countries, especially when some serious crimes (such as murder) may be dealt with informally (or civilly) and thus not recorded, there is, nevertheless, enough evidence to suggest that the crime rate in Islamic countries is probably much lower than in other countries, East or West.⁵⁹ The official reason that is usually given by Islamic governments is the inherent goodness of Islam. Nevertheless, one would have expected Western influence and the process of modernization to have heavily influenced the incidence of crime, since high industrialization and modernization are, with a few exceptions (Japan being the main one) usually coupled with high crime rates, especially in the category of property crimes. Certainly, one of the supreme aims of Islamic law is the protection of life and property: "In an Islamic government, all people are under the protection of the law. No one may endanger their safety, break into their houses, arrest them, imprison or exile them, or summarily execute them on the basis of a simple accusation or suspicion"⁶⁰ It remains to

olds are not consummated until much later because of various social and economic restrictions.

⁵⁸ KHOMEINI, *supra* note 1, at 33.

⁵⁹ This matter is currently under investigation. Certainly the rates provided by the Saudi Arabian Ministry of Interior are extremely low. MINISTRY OF INTERIOR, *supra* note 2, at 502. For example it reports a theft rate of 12 per 100,000 population in 1975 compared with a rate for Western countries of roughly 1,580 per 100,000 population UNITED NATIONS, CRIME PREVENTION AND CONTROL 26 (1977). However there are methodological difficulties in making such comparisons. See, Vetere & Newman, *International Crime Statistics: An Overview from a Comparative Perspective*, 17 ABSTRACTS CRIMINOLOGY & PENOLOGY 251 (1977).

⁶⁰ KHOMEINI, *supra* note 1, at 28.

be seen whether Khomeini will make good on this promise.

C. IS KHOMEINI'S LAW EQUITABLE?

Right now, the most serious charge brought against the criminal justice system of the West is that it is inequitable. People receive different sentences for the same crime, the laws are structured and enforced in such a way as to discriminate against the poor, and so on.⁶¹ This has, of course, been the criticism of Western criminal justice since Beccaria and Bentham,⁶² whose main concern then was the unbridled discretion allowed to judges in sentencing. Yet, we have seen earlier that the "just jurisprudent" of Khomeini's is given *total* discretion, because he is seen as having esoteric, quasi-divine powers of interpretation of Islamic law. When one adds to this the simplicity and lack of criminal laws under Islam, and, the wide variety of circumstances to which they must be applied, one might expect inequity to follow from such broad discretion and the necessity to judge by analogy.⁶³

As for coolness and fairness of the judge, we have many laws in the West designed to keep mass hysteria, the press and so forth at bay from the criminal trial. Whether this works is another matter. It boils down to whether we can "have faith" in our institutions and institutional safeguards. In contrast, in Iran one must have faith, not in institutional safeguards, but in the holiness of the judge. If only the "just jurisprudent" were, unfailingly, as Khomeini describes, not a seeker of gains, not blood thirsty, not greedy or a taker of bribes, not a seeker of leadership of the Muslims, not ignorant, not rough or fearful, but knowledgeable in Islamic law, and just. If we could believe that the just jurisprudent would at all times display these qualities, then perhaps we could believe that equity would follow.⁶⁴

D. DEFENSE OF THE POOR?

Khomeini says, "Islam, as you know very well solved the problem of poverty and decided at the very outset that the alms are for the

⁶¹ J. REIMAN, *THE RICH GET RICHER AND THE POOR GET PRISON* (1979).

⁶² J. BENTHAM, *An Introduction to the Principles of Morals and Legislation*, in *COLLECTED WORKS* (J. Burns & H.L.A. Hart eds. 1970).

⁶³ It may not necessarily follow that fewer laws automatically mean broad discretion. Pepinsky has argued that the more specificity in the law, the *more* discretion, since there are more issues to interpret. H. PEPINSKY, *CRIME AND CONFLICT* (1976).

⁶⁴ This does, however, give the benefit of the doubt to Khomeini. We know from the sorry history of criminal justice that many injustices have occurred as unintended consequences of good intentions. On the other hand one might argue that it is because we have replaced holy people with unholy institutions and bureaucracies that we suffer these problems!

poor.”⁶⁵ Yet in another passage he says, “[t]he financial taxes legislated by Islam do not contain anything to indicate that they were legislated to feed the poor . . . they indicate that their legislation was for the purpose of securing the expenditures of a major sovereign state.”⁶⁶

Most religions claim to be concerned with the protection of the weak and the poor. Islam is no exception. It is clear, however, that it is through *charity* (i.e., personal alms giving—one of the requirements of Islam) that the poor are to be aided, not through “government spending,” as we would call it. There is little doubt that Khomeini sees the traditional taxes collected by Islamic officials as necessary for underwriting the political structure of his Islamic republic. This is why many of the clergy developed large landholdings in Iran, and had much of it taken away during the Shah’s “white revolution.” It is hard to see how a political system which justifies its collection of taxes purely on the basis of buttressing its own sovereignty (although it may be more honest about it) is oriented seriously to the defense of the weak and poor.

As to whether the United States system is or is not oriented to defense of the weak and poor—well, that is a matter of hot controversy. Let us say in comparison, that there is, at least on the surface, more government assistance to the poor (whether this constitutes their “defense” is admittedly another matter). Also, “alms giving” (charities) in the United States is certainly a very big business. I leave it to the reader to choose between giving to an organized charity as against to a beggar in the street.

Once again we are confronted by the Western penchant for institutional solutions to social problems, whereas those of Khomeini’s Islam are left at the individual level. Indeed, Khomeini’s only concern at the institutional level of society is with one institution—that of the power of the politico-religious institution of Islam. Today, the apparent disorganization of his “institution” belies the basic ethic of the Shiite sect. It depends on charismatic individuals for government, not on institutions. Khomeini’s men are not organization men. They are their own men. When they are powerful, only justice and good can follow.

And it’s the same with Wild West Justice. But we know, of course, that this kind of justice can only happen at the movies.

⁶⁵ KHOMEINI, *supra* note 9, at 91.

⁶⁶ *Id.* at 21.