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# The Pain of Punishment

MARKUS DIRK DUBBER†

## I. INTRODUCTION

The system of capital punishment in the United States today is shaped by its participants' attempt to distance themselves from the infliction of physical violence that is capital punishment. As a complex system of denying and dispersing responsibility for the infliction of pain, the American capital punishment system highlights the central problem of modern punishment since the enlightenment: justifying the infliction of punitive pain on a fellow human being.

No other punishment practice better exposes the justificatory gap between the threat and the infliction of punishment that plagued enlightenment reformers and remains unbridged today. With death penalty statutes reduced to symbolic significance and the rare and much delayed infliction of capital punishment little more than an embarrassed afterthought, how can the infliction of the death penalty on a particular person be justified?

As Foucault's analysis of the enlightenment account of criminal punishment would suggest, the ceremonial focus of the practice of capital punishment indeed has shifted from its infliction to its imposition in public trials.<sup>1</sup> This method of minimizing the responsibility of participants in the imposition of punishment, i.e., jurors and judges, however, is only one among the many responsibility shifting mechanisms available to all participants in the system of capital punishment. Participants shift the moral focus of punishment in order to minimize their sense of responsibility. In general, the closer a participant is to the *imposition* of the sentence, the more likely she is to regard its *infliction* as the relevant event for purposes of assessing moral responsibility, and vice versa.

To see the institution of capital punishment as a system of mutual and comprehensive responsibility shifting, one must consider not only jurors and judges, who tend to get all the attention, but every participant in the system, from the prosecutor to the executioner. In fact, one must investigate the definition of participation in the system, insofar as the distinction between participation

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1. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 9 (1978).

and non-participation is considered a relevant distinction for purposes of assessing moral responsibility.

The ubiquitous effort to deny and disperse responsibility for the infliction of a death sentence accounts for several features of the current practice of capital punishment, including, among others, the popularity of lethal injection as a method of execution, capital jurors' persistent refusal to acknowledge their discretion and their participation in the imposition of capital punishment, the delay between the imposition and the infliction of a death sentence, as well as the Supreme Court's attempt to limit federal habeas review and the proverbial contradictoriness of the Court's capital jurisprudence itself.

Judges, as the architects and supervisors of the capital punishment system, have developed a particularly sophisticated mechanism for diminishing their responsibility for the infliction of capital punishment. In addition to specific doctrinal innovations, a strict formalistic self-definition of the judicial role permits judges to shift responsibility onto others. What Richard Posner calls "severe positivism" and other theories of judicial function that deny judicial choice permit not only death penalty judges today to deny their responsibility for the pragmatic aspect of their interpretive acts. They played a similar role for anti-slavery judges in the antebellum North, for German judges under the Nazi regime, and, more recently, for judges in Apartheid South Africa.

I begin, in part II, by exploring the origins of the splintering of the punishment process in the early modern period and its theoretical cementation in the enlightenment. Here, I will argue that the distinction between the infliction of punishment and other aspects of the punishment process initially reflected the attempt of high public officials to extricate themselves from the infamous practice of public punishment. With the development of the fragile moral sentiments of the enlightenment during the eighteenth century, other public officials, particularly judges, and the newly sensitized middle-class public came to feel an urgent desire for distance from public violence as well.

The fragmentation of the process of punishment to accommodate enlightened sensibilities has continued unabated and finds its most complete manifestation in the current system of capital punishment in the United States. From jurors to Supreme Court justices, from supporters of capital punishment in the abstract to opponents of capital punishment in the abstract, those who actually participate in the imposition and infliction of capital sentences struggle to overcome their inhibition against inflicting physical vio-

lence on another human being.<sup>2</sup>

As I show in part III, the capital punishment system has evolved into a complex sequence of tasks, each of which is assigned to a different participant and all of which are necessary, but none of which is sufficient, to inflict the death penalty on a given person. Along with the fragmentation of tasks comes the fragmentation of responsibility. As a result of the fragmentation of tasks, "no actor in the legal system can say he had no choice;"<sup>3</sup> as a result of the independent insufficiency of their tasks, *every* actor in the legal system can say he had no choice.

Complementing this personal distribution of responsibility, a temporal distribution of responsibility has become crucial to the American system of capital punishment. Participants shift responsibility not only onto other participants but also onto earlier or later events in the process. The delay separating imposition and infliction of capital sentences, which has attracted the ire of death penalty proponents, therefore in fact helps maintain the capital punishment system by permitting its participants to shift responsibility onto an occurrence in the comfortable future (in the case of those who impose the death sentence) or in the comfortable past (in the case of those who inflict it).

My exploration of the different ways in which the participants in the capital punishment system diminish their sense of responsibility for the violent aspect of their actions owes a great deal to Robert Cover's work on anti-slavery judges in the antebellum North and the relation between legal interpretation and the inevitable violence of the law. Cover, however, focused exclusively on one participant in the system of law, the judge.<sup>4</sup> Obviously, I will pay careful attention to the role of judges in the system of capital punishment. Nonetheless, to appreciate the complexity of the system of responsibility dissipation that maintains the capital punishment system, one must expand the traditional focus of legal scholarship to consider other system participants as well.

In Part IV, the conclusion, I outline an alternative account of the relationship between legal interpretation and violence that reflects the violent reality of law and recognizes the necessity and desirability of substantive interpretive choice unconstrained by illusory limitations of official function. At the same time, responsibility for the violence of law, and for the violence of criminal law in particular, cannot be limited to those who happen to participate in

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2. Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

3. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 395.

4. ROBERT COVER, *JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS* (1975); Cover, *supra* note 2, at 1601 n.1.

the communal act of making and interpreting law in an official and therefore privileged capacity.

## II. DIVIDING PUNISHMENT: THREAT, IMPOSITION, INFLICTION

Much has been written in recent years about the change in punishment practices over the past two hundred years, and particularly about the disappearance of public executions. After the dust of deconstructing the Whiggish history of punishment has settled and a new cynicism has replaced the old self-congratulation, there can be little doubt that, beginning in some European cities as early as the fifteenth century, members of the ruling elite distanced and extracted themselves from the execution of punishment. Eventually the hands-on participation of high officials in public executions that was common in some regions of Europe until the late eighteenth century evolved into today's complete separation between the execution of punishment from those aspects of the system of criminal punishment which still involve public officials.

Certain medieval judges in Germany, the *scabini liberi*, not only imposed punishment on an offender; they also inflicted the punishment they had imposed.<sup>5</sup> Until well into the eighteenth century judicial magistrates in Amsterdam instructed the executioner on when to give a convict, who was unlucky enough to have been sentenced to the wheel, the *coup de grâce* that would end his suffering. At public whippings, a magistrate also would determine the appropriate duration of the whipping according to the sentence, which would specifically provide for this discretion.<sup>6</sup> As late as 1798, fourteen judges (12 *Schöppen* and 2 *Scabinen*), ten members of the city council, and a clerk accompanied the executioner to the gallows in the German city of Ansbach.<sup>7</sup>

Even the "gallows meal" ("executioner's meal" in German) on the night before the execution often included not only the convict but also preachers and court clerks, and even the executioner.<sup>8</sup> By contrast, condemned prisoners in the United States today tend to eat their last meal in total solitude under the watchful eyes of a guard outside their cell who silently records their dinner in a log book. It is through one of these log books that we know that Rickey Ray Rector, a severely retarded Arkansas man, left his last

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5. RUDOLF QUANTER, *DIE FOLTER IN DER DEUTSCHEN RECHTSPFLEGE SONST UND JETZT* 73 (1900).

6. *Id.* at 56.

7. PIETER SPIERENBURG, *THE SPECTACLE OF SUFFERING* 52 (1984).

8. *Id.* at 50 (1737 Groningen); EBERHARD SCHMIDT, *EINFÜHRUNG IN DIE GESCHICHTE DER DEUTSCHEN STRAFRECHTSPFLEGE* 186 (3d ed. 1965).

dessert for the morning after his execution, as was his custom.<sup>9</sup>

Judicial attendance at executions continued for some time even after the privatization of capital punishment. So in his American Notes of 1842, Charles Dickens wrote of an execution attended by "the judge, the jury, and citizens to the amount of twenty-five."<sup>10</sup> The Prussian Penal Code of 1851 removed executions from the public sphere but required that two judges of the trial court be present at the infliction of the sentence they had imposed. The prosecutor, or his substitute, along with a clerk, a prison official, and twelve respectable members of the community also had to attend the execution.<sup>11</sup> Even today, several states require attendance of a judge at an execution.<sup>12</sup> The occasional passive attendance of judges at private punishment ceremonies since the nineteenth century, however, is a far cry from their active participation in earlier days. In the modern system of punishment infliction, judges, insofar as they play any role at all, do not inflict punishment themselves but oversee the infliction of punishment by others, the penal bureaucrats. They observe, but do not execute. Their presence merely ensures that the punishment they solemnly imposed is in fact inflicted by those who are charged with the distinct function of punishment infliction, yet whose only function is to execute judicial orders.

Unlike judges, who continued to take an active part in public executions until the institution of enlightenment reforms at the turn of the nineteenth century, other officials began to withdraw from the infliction of punishment long before the advent of enlightenment sensibilities. It has been suggested that judges' close association with the infliction of punishment (and its ultimate inflictors, the executioners) may help explain the widespread disinterest in judicial service among the less corrupt segments of the European nobility during the early modern period.<sup>13</sup>

But the elite did not merely shun judicial office. They also took care in their other official functions to insulate themselves from the infliction of punishment. For instance, the participation

9. Marshall Frady, *Death in Arkansas*, NEW YORKER, Feb. 22, 1993, at 105.

10. CHARLES DICKENS, AMERICAN NOTES (1842) (quoted in LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865, at 93 (1989)). According to Louis Masur, the first "private" execution in the U.S. occurred in Pennsylvania in 1834. The law provided that the witnesses include "at least one physician, the attorney general, and "twelve reputable citizens." MASUR, *supra*, at 94; see also *id.* at 111 (similar witnesses in New York).

11. H.S. SANFORD, THE DIFFERENT SYSTEM OF PENAL CODES IN EUROPE; ALSO, A REPORT ON THE ADMINISTRATIVE CHANGES IN FRANCE, SINCE THE REVOLUTION OF 1848, 58 (1854).

12. See, e.g., N.Y. CORRECT. LAW § 660 (McKinney Supp. 1996).

13. See QUANTER, *supra* note 5, at 73.

of Amsterdam burgomasters in public executions diminished drastically during the seventeenth and eighteenth centuries. Until the middle of the seventeenth century, all burgomasters attended all public executions and played a central role in the execution ceremony, responding to several ritualistic questions, such as questions about the general appropriateness and the particular form of the death penalty in a specific case. Over the following century, however, their participation diminished to the point where, at the middle of the eighteenth century, only the most junior burgomaster attended the execution and played merely a peripheral role. By the beginning of the nineteenth century, no burgomaster appeared at executions.<sup>14</sup>

Fifteenth century Frankfurt provides an even earlier example of the withdrawal of high public officials from the business of executions, though here too *judicial* officials remained intimately connected to the execution. In 1446, the council of Frankfurt decided to grant the executioner a regular salary instead of paying him by the execution "so that the council is not guilty of his activities, but that he is only an accomplice and servant of the *court*."<sup>15</sup>

These attempts by high public officials to distance themselves from public executions preceded the enlightenment and presumably had nothing to do with the much-discussed appearance of moral sensibilities in the eighteenth century that rendered unbearable an act previously thought perfectly justified.<sup>16</sup> Instead, we may speculate, it constituted an effort by those of the highest official status to distance themselves from public acts of punishment once it was no longer necessary openly and constantly to assert their monopoly over the infliction of violence. Once the central authority had completed and secured the centralization of legitimate violence, its representatives may have come to believe that the symbolic advantages of participating in public acts of violence were outweighed by its disadvantages. The execution, after all, was a public act carried out by a person, who through his association with that very act became infamous, i.e., relegated to the lowest social status available.<sup>17</sup>

14. SPIERENBURG, *supra* note 7, at 47-48.

15. *Id.* at 33 (citing KARL-ERNST MEINHARDT, *DAS PEINLICHE STRAFRECHT DER FREIEN REICHSTADT FRANKFURT AM MAIN IM SPIEGEL DER STRAFPRAXIS DES 16. UND 17. JAHRHUNDERTS* 41 (1957)) (emphasis added). *But see* QUANTER, *supra* note 5, at 100-02 (16th and 17th century examples of detailed payment schedules for an executioner's services, including scaring (*territio*), torture, whipping, execution, cutting off a finger, disposing of suicides, plus room and board, a horse, and an assistant).

16. *See infra* text accompanying notes 28-32.

17. *See* QUANTER, *supra* note 5, at 85-102. On American executioners, see NEGLEY K. TRETTERS & JACK H. HEDBLOM, ". . . HANG BY THE NECK . . .": THE LEGAL USE OF SCAFFOLD

Already the oldest document that mentions an executioner, the Augsburg Stadtbuch of 1276, classifies him as among the infamous persons (unehrliche Leute), a group at the very bottom of the social pyramid that also included, among others, illegitimate children, gamblers, prostitutes, Jews, and gypsies. As such, the Augsburg executioner was assigned such unpleasant tasks as supervising the prostitutes, cleaning public latrines, and chasing away lepers.<sup>18</sup> Executioners also often worked as animal skinners, a task abhorred particularly in Germany.<sup>19</sup> In the Holy Roman Empire of German Nation, the executioner retained his infamy until 1731, when infamy was generally abolished except for skinners, who remained infamous until the late eighteenth century.<sup>20</sup> Though no longer officially infamous, German executioners continued to perform the disreputable work of a skinner (Caviller, Schinder, Abdecker) until well into the twentieth century.<sup>21</sup>

Anyone who touched the infamous executioner became infamous himself. The executioner's sons were denied entrance into the regular guilds.<sup>22</sup> The admission of a single relative of an executioner contaminated the entire guild. Funeral guilds even refused to carry the bodies of executioners to their grave. Executioners were often forced to reside outside the city. They had their designated church pews near the exit and were the last participants in the Lord's Supper or the Communion. They had their designated tavern; if not, they had a designated stool and table.

Spectators regularly assaulted executioners, especially after botched executions. Executioners could not find god parents for their children and married relatives of other executioners. Among government officials and even the general public, judges apparently maintained exceptionally close social contact with executioners. They often volunteered as god fathers in the event the executioner could find no one else.<sup>23</sup> Manifesting the connection between the role of the judge and that of the executioner, in early modern Germany the executioner came to be called Blood Judge (Blutrichter) or Sharp Judge (Scharfrichter).

Given the infamous executioner's untrustworthiness as a witness, judges or their clerks were obligated to attend torture ses-

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AND NOOSE, GIBBET, STAKE, AND FIRING SQUAD FROM COLONIAL TIMES TO THE PRESENT 51-59 (1967).

18. SPIERENBURG, *supra* note 7, at 16 (citing ALBRECHT KELLER, *DER SCHARFRICHTER IN DER DEUTSCHEN KULTURGESCHICHTE* 109 (1921)); QUANTER, *supra* note 5, at 87.

19. QUANTER, *supra* note 5, at 87.

20. SPIERENBURG, *supra* note 7, at 39.

21. QUANTER, *supra* note 5, at 87.

22. SPIERENBURG, *supra* note 7, at 16.

23. *Id.* at 19.



sions so that they could record the accused's confession and testify to it in court.<sup>24</sup> Still, it was apparently not uncommon for judicial officials to shun the torture chamber, and only to appear to record the confession (or the accused's death).<sup>25</sup>

Whereas high non-judicial officials managed to distance themselves from the infamous business of executions as early as the fifteenth century, judges remained connected to the imposition of punishment until the radical reform of state punishment during the formative era of modern criminal law between roughly 1750 and 1850. By separating the private infliction of punishment behind impenetrable prison walls from its public imposition in a court of law under judicial supervision, the modern system of punishment restricted the judge's participation in the system of punishment to its imposition and relieved him of his participation in its infliction.

These formative reforms of punishment therefore already laid the groundwork for the complete extraction of public officials from the infliction of punishment that continues to this day. Although the executioner remains a servant of the court, no judicial official participates in the execution. Nor does any other public official. When Bill Clinton interrupted his 1992 New Hampshire primary campaign to oversee the execution of Rickey Ray Rector, no one expected him to lend a hand in the lethal injection procedure, read the death warrant, or even sit in the spectators' room.<sup>26</sup> The reading of the death warrant has been delegated to the warden, who is viewed and who views himself as a penal bureaucrat who is no more a public official than one of the prison guards, or, for that matter, the person who oils the pistons to ensure proper functioning of the lethal injection apparatus.<sup>27</sup>

The spread of enlightenment ideas and sensibilities contributed both a new urgency to the desire to separate oneself from the infliction of penal pain and a new means of achieving that separation. As the executioner's infamy went the way of all other infamies in the first half of the eighteenth century, and the societal

24. QUANTER, *supra* note 5, at 90-91. This practice probably reflected not only the executioner's unreliability, but also his illiteracy, *cf.* WILLIAM SHAKESPEARE, *MUCH ADO ABOUT NOTHING*, act 4, Sc. 2 (Dogberry and Verges bring in the town clerk to record Borachio's confession), as well as the obsession with written documents typical of the inquisitorial process of the time.

25. QUANTER, *supra* note 5, at 91. Whether this lack of interest in torture sessions reflected disgust with the procedure, as Quanter suggests, is of course difficult to determine.

26. Clinton instead spent the night of Rector's execution virtually incommunicado in the governor's mansion, presumably discussing his response to the Jennifer Flowers scandal, which had broken the day he arrived in Little Rock. Frady, *supra* note 9, at 105.

27. *See infra* text accompanying note 70.

attitude toward executioners turned from awed disgust into uneasy ambivalence, mere association with the infliction of punishment and therefore with the executioner's domain no longer carried the same sort of flavor of conduct unfit for a burgomaster.

As the enlightenment's insight into the basic similarity of all humans eroded the status motivation for the avoidance of public executions, it put another, more universal, motivation in its place. The enlightened gentlemen, council members, judges, and spectators now identified with the condemned as fellow human creatures. As the influential Philadelphia prison reformer and abolitionist Benjamin Rush noted in 1787, "[e]very body acknowledges our obligations to *universal benevolence*," which "cannot be fulfilled, unless we love the whole human race, however diversified they may be by weakness or crimes."<sup>28</sup> To record this altered sensibility,<sup>29</sup> the eighteenth and early nineteenth century produced scores of slightly melodramatic and self-obsessed accounts of execution not unlike the following account of a 1776 execution in Amsterdam:<sup>30</sup>

Be quiet, I see the multitude pressing; they all fix their eyes simultaneously on the spot where the sufferers have to enter the scaffold. No wonder, one of the guilty is already presented there. But good heavens, what a frightening spectacle! Miserable man, I am indeed overwhelmed with pity for the state you are in. What a face, what a deadly complexion. . . . How full of fright was my soul! How affected was I inside, when I saw them climb the ladder one after the other! I was cold, I trembled with every step they took. I often turned away my face and distracted my eyes from the mortal spectacle to the endless number of spectators. I thought that I noticed in some of them the same horror at such a terrible spectacle, the same repugnance I felt. This raised an inner joy in me: it gave me a positive view of my fellow-creatures again.

The recognition of the fundamental similarity of all humans that lay at the core of enlightenment moral and political thought both blurred strict medieval status distinctions and placed the convict within the circle of empathy of middle- and upper-class gentlemen, particularly those who in their judicial capacity had

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28. BENJAMIN RUSH, AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS, AND UPON SOCIETY 7 (Philadelphia 1787); see also *Jefferson to Thomas Law, June 13, 1814*, in ANDREW LIPSCOMB & ALBERT BERGH, 14 THE WRITINGS OF THOMAS JEFFERSON 141 (1903) ("Nature hath implanted in our breasts a love of others, a sense of duty to them, a moral instinct, in short, which prompts us irresistibly to feel and to succor their distresses . . .").

29. Cf., most recently, Karen Halttunen, *Humanitarianism and the Pornography of Pain in Anglo-American History*, 100 AM. HIST. REV. 303 (1995).

30. SPIERENBURG, *supra* note 7, at 193 (anonymous Amsterdam pamphlet of 1773 describing a group execution of seven people).

previously played an integral part in the infliction of punitive pain. The new literary form of the novel played on (and developed) the empathic identification of reader with character and author and other readers, much like the impressionable execution spectator from Amsterdam identified both with the suffering of the convict and with the horror experienced by some of his fellow spectators.<sup>31</sup> Shaftesbury, Hutcheson, and a whole string of moral sense philosophers expounded the principle of empathic identification as the basis of proper moral judgment and action. Utilitarians like Hume and Adam Smith stressed the empathic nature of utility, which they portrayed as a principle that takes into account the interests of all members of the community to bring about the greatest good for that community. Even Bentham, a writer not known for his sentimentality, recognized the importance of empathic identification as a source of pain that affects the utility calculus.<sup>32</sup>

The newly championed ideal of the equal dignity of all members of the human community manifested itself in a series of fundamental reforms of state punishment in all of its aspects. As the state's most flagrant intervention in the lifespans of its human constituents, punishment attracted the interest of enlightenment thinkers from the very beginning. Beccaria, in his famous pamphlet on Crimes and Punishments, called for a general overhaul of continental punishment theory and practice based on the utilitarian principle of general deterrence. Voltaire, in his commentary to the French translation, applied Beccaria's remarks to the French system of punishment. Writers all across Europe assailed the lengthy secret written process in continental criminal courts and the barbaric punishments the courts imposed under laws that dated as far back as the *Constitutio Criminalis Carolina* of 1532 (CCC), which was still in force in most German states at the time. Across the Channel, Bentham attacked the arbitrariness of common law judges who made up the criminal law as they went along, without regard to notice and retroactivity, uniformity or utility. With tremendous industry over the course of several decades, he worked out the application of the utility principle to all aspects of state punishment, from its threat in penal codes to its imposition in criminal courts to its infliction in prisons.

On the continent, the enlightenment reforms opened the trials

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31. Cf. SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* 123-30 (1989) (crowds at hot-air balloon ascension in France); LOUIS P. MASUR, *rites of EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865*, at 50 (1989) (crowds at hot-air balloon ascension in Philadelphia).

32. JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 176 (1948) (1st ed. 1789).

to the (propertied) public, introduced the criminal jury, and led to the principled codification of the criminal law. Even in England and the United States, where public jury trials were not a novelty and codification efforts were less successful, imprisonment became the dominant, and eventually the exclusive, mode of punishment. When all was said and done, the public infliction of punishment had become private, and the private imposition of punishment had become public. The spectacle of the gallows had been transferred into the new public courtrooms; the ceremonial focus of punishment had shifted from its infliction to its imposition.

The great enlightenment thinkers, however, left us not only with a system of punishment that attempts to justify state punishment in a world of presumptively equal and autonomous rational agents. They also left behind a searching analysis of the problem their institutional reforms were meant to solve. Having dissected the phenomenon of punishment into its constituent aspects—threat, imposition, and infliction—and having drawn on their empathic imagination to capture the full extent of the pain punishment inflicted on the punished and his community, the founding fathers of modern criminal law faced the formidable task of legitimizing state punishment in each of its aspects. Of all the aspects of the practice of state punishment, its actual infliction obviously presents the most pressing justificatory challenge. And it is precisely this challenge that the enlightenment creators of modern punishment failed to meet. As they lavished theoretical attention on legitimizing the threat of punishment in penal codes and their imposition in courts of law, they shied away from justifying the infliction of publicly threatened and imposed penalties, the actual painful application of the norms of criminal law.

The great German enlightenment reformer and theorist of criminal law, Paul Johann Anselm Feuerbach (1775-1833), well illustrates the contributions and shortcomings of enlightenment punishment reform.<sup>33</sup> Feuerbach's theory of general deterrence was based entirely on the deterrent effect of the existence of a penal code, rather than on the execution of threatened punishments. As a result, Feuerbach focused on justifying the establishment of a penal code and failed utterly to justify its application.

Feuerbach's version of general deterrence theory, the dominant theory of punishment ever since the enlightenment, does not differ substantially from Bentham's. They argued that penalties were justified if and only if the imagined pain the potential of-

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33. HERBERT BLOHM, *FEUERBACH UND DAS REICHSSTRAFGESETZBUCH VON 1871* (1935) (Strafrechtliche Abhandlungen, Heft 358).

fender expects to experience upon their infliction is great enough to outweigh the benefit he expects upon the commission of the crime. Both Feuerbach and Bentham stressed that a lesser penalty would be as illegitimate as one that was so great as to violate the principle of parsimony (which provided that the state was only justified in applying the minimum penalty necessary to deter potential offenders).<sup>34</sup>

Feuerbach emphasized that it was the threat of penal code provisions that mattered, not their application in particular cases. He was convinced that the promising emergence of empirical psychology, the restraint of enlightened rulers, and the newfound self-respect of their subjects would reduce the occasional execution of threatened punishments to the role of reaffirming the necessary imposition of punishment as threatened by the penal code. Bentham at least had made room for specific deterrent considerations by developing a detailed scheme of proportional punishments which were to more firmly establish the memory of the punitive pain in an offender's memory. Bentham, however, then recommended that the actual infliction of these often rather harsh penalties (including hand piercing for forgery) be replaced by merely apparent punishments to achieve maximum general deterrent effect at minimum pain.<sup>35</sup>

Most important for our purposes, Feuerbach carefully distinguished between the threat and the infliction of punishment and clearly recognized that both of these aspects of punishment required justification. This analytic distinction, perhaps the most significant contribution of Feuerbach's theory, also exposed its greatest weakness: its failure to justify the infliction of punishment. According to Feuerbach, the mere threat of punishment, i.e., of interfering with the offender-citizen's autonomy, is not inconsistent with the state's purpose of protecting its citizens' autonomy against interference as long as it remains just that: a threat. This justification of the legislative threat of punishment, however, created obvious problems with justifying the infliction of punishment.

Throughout his career, Feuerbach experimented with varying justifications of state interference once the threat of punishment had proved ineffective, each of which ultimately proved unsatisfactory. Aside from variations on the actual or constructive consent justifications popular among social contract theorists of the time, which need not detain us here, Feuerbach argued (as did Bentham) that the infliction of punishment was justified because it was nec-

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34. BENTHAM, *supra* note 32, at 177, 193.

35. JEREMY BENTHAM, PRINCIPLES OF PENAL LAW (Rationale of Punishment), in 1 THE WORKS OF JEREMY BENTHAM 365, 408 (1962).

essary to make the threat of punishment credible.<sup>36</sup> The infliction of punishment, however, could hardly be justified based on a threat that in turn was justified because it did not amount to an infliction.<sup>37</sup>

Feuerbach's emphasis on the threat instead of on the infliction of punishment, an emphasis that can be found among all the general preventionists of the time, contrasted sharply with pre-enlightenment punishment theory and practice. Before the enlightenment, the justification of the threat of punishment was irrelevant simply because the threat was irrelevant. Pre-enlightenment punishment relied exclusively on the actual infliction of punishment, a symbol of moral retribution and of superior might in the face of challenges to authority. The CCC and other early codes were not designed to deter potential offenders by their very existence. They might have governed the administration of the criminal law in principle, but were not even primarily addressed at the potential offender. At most, the old cumbersome criminal codes amounted to general guidelines for judicial discretion; in practice judges enjoyed virtually unchecked discretion.<sup>38</sup>

The founding fathers of our modern system of punishment therefore not only moved the spectacle from the infliction of punishment to its imposition, as Foucault has shown. They also relieved the infliction of punishment of its justificatory burden and placed it instead squarely on the threat of punishment in the pages of the penal codes. Both developments converged into a total displacement of the infliction of punishment from the scope of the justificatory enterprise. The infliction of punishment was expelled from accounts of punishment proper and redefined as the craft of penological experts who performed an obscure and largely unexamined craft. At best, the infliction of punishment had become an afterthought, a necessary evil to keep the deterrent power of its threat alive.

36. PAUL JOHANN ANSELM FEUERBACH, *ANTI-HOBBSES ODER ÜBER DIE GRENZEN DER HÖCHSTEN GEWALT UND DAS ZWANGSRECHT DER BÜRGER GEGEN DEN OBERHERRN* 225 (1798); see OSKAR DÖRING, *FEUERBACHS STRAFTHEORIE UND IHR VERHÄLTNISS ZUR KANTISCHEN PHILOSOPHIE* 26 (1907) (Kantstudien Ergänzungsheft 3); see also BENTHAM, *supra* note 32, at 193.

37. See DÖRING, *supra* note 36, at 26-27; WOLFGANG NAUCKE, *KANT UND DIE PSYCHOLOGISCHE ZWANGSTHEORIE FEUERBACHS* 53 (1962); RICHARD HARTMANN, *P.J.A. FEUERBACHS POLITISCHE UND STRAFRECHTLICHE GRUNDANSCHAUNGEN* 124 (1961); RICHARD SCHMIDT, *DIE AUFGABEN DER STRAFRECHTSPFLEGE* 29 (1895).

38. FERDINAND CARL THEODOR HEPP, *VERSUCHE ÜBER EINZELNE LEHREN DER STRAFRECHTSWISSENSCHAFT* 29 (1827); FERDINAND CARL THEODOR HEPP, *2 DARSTELLUNG UND BEURTHEILUNG DER DEUTSCHEN STRAFRECHTS-SYSTEME, EIN BEITRAG ZUR GESCHICHTE DER PHILOSOPHIE UND DER STRAFGESETZGEBUNGS-WISSENSCHAFT* 3 (2d ed. 1844).

It was this ejection of the infliction of punishment from the scope of proper concern that permitted participants in and observers of the punishment system to join the newly sensitized members of the educated public in marveling at the rational penal codes and the rational criminal trials, without giving much thought to the infliction of pain these codes and trials would require somewhere sometime at the hands of someone who did not partake in the public search for truth and the celebration of the common rationality of offender, legislator, judge, juror, and spectator that had generated the punishment order he now executed.

In the end, the enlightenment penal reformers thus failed to remedy the very problem that had led them apply their critical faculties to criminal punishment in the first place, namely the challenge of justifying the infliction of pain on fellow members of the human community. The same uneasiness about the infliction of punishment that inspired their justificatory attempts also doomed their attempts to failure. It is one thing to justify the threat and the imposition of punishment on deterrence grounds; it is quite another to justify its infliction.<sup>39</sup>

Insofar as enlightenment thought laid the groundwork for the modern system of criminal punishment, Feuerbach's dilemma remains our dilemma today. The question today still is how the modern state can justify the infliction of punishment once the gaps between threat, imposition, and infliction have been opened. Yet the theory and practice of punishment confine their attention to the first two aspects of the practice of punishment, shunting the third, most troubling, aspect to the realm of correctional bureaucracy.

We have yet to come to grips with the fact that the enlightenment reformers' optimistic conviction that crime would be eradicated by the new rational and accessible deterrence codes has proved utterly unfounded. Enlightenment thinkers did not spend much effort justifying the infliction in part because they thought it would be unnecessary to inflict the threatened punishment since the threat alone made crime irrational and therefore impossible. Two centuries later, John Rawls, our most systematic and thorough political thinker in the enlightenment tradition, developed a comprehensive account of the legitimation of state institutions in a modern democratic society. Yet Rawls saw no reason to discuss the state institution most in need of legitimation, punishment, presumably because crime will be negligible in a truly well-ordered

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39. Cf. John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3 (1955); Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *HARV. L. REV.* 625, 674-75 (1984).

society.<sup>40</sup>

After two centuries of crime in the face of public codes, we now face the questions the enlightenment reformers did not anticipate: What justifies the state's infliction of punishment given that the very need for inflicting the threatened penalty presupposes the failure of the state's penal threat?

We may be farther from addressing this problem today than were the early enlightenment thinkers, Feuerbach in particular. As enlightenment sensibilities spread and the infliction of punishment increasingly came to be perceived as troubling, punishment theory and practice has continuously widened the gap between threat and imposition on the one hand, and infliction on the other, paying less and less attention to the crucial issue of justifying the infliction of punishment.

The rehabilitative approach to punishment, which emerged in the late eighteenth and early nineteenth centuries and came to dominate the practice of punishment infliction in the twentieth century, can be seen as one massive and prolonged attempt to deny the necessity of pain and the exercise of intrusive social control in punishment and thereby to avoid the necessity of justifying the infliction of that pain and the exercise of that control. The rehabilitationists came to distinguish sharply between punishment and treatment and declared that punishment was not punishment at all, but treatment. Treatment, even in the form of indeterminate terms of imprisonment in dilapidated state prisons, required a very different justification than punishment. In fact, redefining punishment as treatment rendered the justification issue moot. The criminally pathological inmate was entitled to correctional treatment as any other patient.<sup>41</sup> If anything called for justification under the rehabilitative model, it presumably would have been not the infliction of punishment, but the *failure* to inflict "punitive treatment."<sup>42</sup>

Over the past three decades, retributivists have driven out the once dominant rehabilitationists in American punishment theory. Even these new retributivists, however, largely have remained within the limited framework for punishment theory established

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40. See Petra Wittig, *Die Aufrechterhaltung gesellschaftlicher Stabilität: Zwischen Gerechtigkeitssinn und Strafe*, 107 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 251, 268 (1995).

41. See generally Peter Landau, *Die rechtsphilosophische Begründung der Beserungsstrafe: Karl Christian Friedrich Krause und Karl David August Röder*, in STRAFGERECHTIGKEIT: FESTSCHRIFT FÜR ARTHUR KAUFMANN ZUM 70. GEBURTSTAG 473 (Fritjof Haft, Winfried Hassemer, Ulfrid Neumann, Wolfgang Schild & Ulrich Schroth eds. 1993).

42. Herbert Wechsler & Jerome Michaels, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1306 (1937).



by H.L.A. Hart and perpetuated by other consequentialists.<sup>43</sup> Although the new retributivists originally challenged what they perceived as the perverse rehabilitationist hypocrisy of passing traditional punishments for medical treatment, they generally failed to address the justificatory problem the rehabilitationists had attempted to dodge by portraying punishment as treatment.

Consider, for example, the work of Joel Feinberg and Herbert Morris, two important contributors to the retributivist revival. Morris developed a retributive general justification of punishment as a reestablishment of the balance of costs and benefits in human society, but said nothing about justifying the infliction of punishment, or, for that matter, the imposition of punishment.<sup>44</sup> Feinberg eloquently described the symbolic condemnatory function of punishment, but explicitly remarked that the actual infliction of pain could not be justified on symbolic grounds.<sup>45</sup>

The retributivist (re)turn in punishment theory also has had little effect on the practice of inflicting punishment. Despite sweeping reforms of sentencing laws throughout the United States along retributivist lines, prisons continue to be run very much like they were fifty years ago, despite the occasional legislative decision to remove exercise equipment and television sets to the dismay of both inmates and their guards. Some of the pretense of treatment has disappeared, but it has not been replaced with a coherent justification of punishment infliction. The infliction of punishment continues to attract no principled attention as a problem of punishment and continues to be regarded as the province of lower-level penal bureaucrats.

The institution of capital punishment illustrates better than any other aspect of the current system of punishment that we remain incapable of legitimizing the infliction of state punishment.<sup>46</sup> From the outset, the death penalty presented the rehabilitationists with an obvious problem. It is one thing to portray life long incarceration as treatment. It is quite another to characterize killing as

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43. The most obvious exception to this rule is Graeme Newman, who not only confronts the issue of pain, but argues for corporal punishment on the ground that, since it is never anything but pain, the state might as well distribute that pain explicitly and in accordance with the objectives of punishment. GRAEME NEWMAN, *JUST AND PAINFUL: A CASE FOR THE CORPORAL PUNISHMENT OF CRIMINALS* (1983); see also Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 *STAN. L. REV.* 1149 (1990).

44. Herbert Morris, *Persons and Punishment*, 53 *MONIST* 475 (1968).

45. JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 101 (1970). It was left to R.A. Duff to attempt to provide that justification. R.A. DUFF, *TRIALS AND PUNISHMENTS* 241 (1986).

46. See Cover, *supra* note 2, at 1623.

treatment.<sup>47</sup> The termination of life, more obviously than any other punishment, always also is punishment of the body. No other state act so challenges our general inhibition to inflict violence, and particularly physical violence, on other people.<sup>48</sup>

The struggle of our modern system of punishment to come to terms with the infliction of capital punishment—the only infliction of punishment that continues to be recognized as an “execution,” the only infliction of punishment that continues to resist all efforts to cleanse it of its physical and painful nature—therefore exposes both our inability to justify the infliction of pain as punishment and the stubbornness of our attempts to deny the fact of painful punishment even at the price of utter absurdity. No other penalty better illustrates the gap between threat and imposition, on one side, and infliction, on the other. No other penalty better illustrates the justificatory deficit that continues to plague the infliction of punishment.

### III. DISPERSING RESPONSIBILITY

The current system of capital punishment operates so as to minimize its participants' responsibility for the infliction of capital punishment.<sup>49</sup> Those who do not view themselves as participating in the system of capital punishment pay little or no attention to the infliction of capital punishment. They instead focus on the abstract significance of the threat and of the imposition of capital punishment. The threat of capital punishment is thought to carry not only deterrent but also symbolic significance. It symbolizes the state's authority even in the face of extreme challenges, as well as an abstract retributive balance between crime and punishment.<sup>50</sup>

By contrast, executions—i.e., inflictions of capital punishment—have become irrelevant in the public eye. They are little more than the embarrassed private fulfillment of a dreaded public obligation whose origins are too remote to come to mind. Even the imposition of capital punishment may attract far less public atten-

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47. This is not to say that execution has not been characterized as treatment. *See, e.g.*, Wechsler & Michaels, *supra* note 42, at 1305 (discussing “a system in which the modes of treatment range from the psychiatric clinic through all the manifold forms of imprisonment to the gallows”). Note also that the execution protocol in New York's new death penalty statute deals with such questions as “Examination of convicted person's body and certificate” and “Disposition of body.” N.Y. CORRECT. LAW §§ 661-662 (McKinney Supp. 1996).

48. *See* Cover, *supra* note 2, at 1613; *see also* Dan-Cohen, *supra* note 39, at 674.

49. *See generally* FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 89-102 (1986).

50. HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA 65, 68 (3d ed. 1982); ZIMRING & HAWKINS, *supra* note 49, at 16-17.

tion than does the presence of a death penalty statute on the books. As the recent experience with New York's new death penalty statute illustrates, calls for "the death penalty" may well be calls for the legislative threat of capital punishment rather than for its imposition, not to mention its infliction. Studies suggest that non-participants' attitudes toward the death penalty as an abstract symbol differ significantly from their attitudes toward the actual application of the death penalty in a specific case. Even strong supporters of capital punishment on the books hesitate to impose the death penalty on a particular individual.<sup>51</sup>

The participants in the system of capital punishment, however, do not have the luxury of treating the infliction of a penalty they help apply as irrelevant. Since they share the general inhibition against inflicting extreme violence on a particular person, they develop mechanisms to minimize their sense of responsibility for the infliction of the death penalty. Even so, they often suffer tremendously as a result of their participation in the infliction of death on another human being.<sup>52</sup> This holds true for virtually all participants at any level in the system of capital punishment, regardless of their attitude toward the death penalty in the abstract.<sup>53</sup>

Two characteristics of the current system of capital punishment manifest with particular clarity the struggle to deny responsibility for the painful dimension of capital punishment. Both characteristics minimize the sense of responsibility of participants in the system of capital punishment. First, every effort is made to deny the violence of capital punishment in the first place. As the rehabilitative ideal has been discredited and disavowed, it is in execution protocols, of all places, that the treatment metaphor remains alive and well as the medicalization of capital punishment continues to flourish. Today, physicians participating in lethal injections refer to condemned prisoners as patients and execution procedures are reformed to eliminate the condemned's pain.

Second, to the extent that these efforts to characterize involuntary termination as beneficial treatment have failed, the system of capital punishment sustains itself by dispersing any residual re-

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51. See *infra* text accompanying notes 75-77.

52. Leigh B. Bienen, *Helping Jurors Out: Post-Verdict Debriefing for Jurors in Emotionally Disturbing Trials*, 68 *IND. L.J.* 1333, 1347 (1993); Stanley M. Kaplan, *Death, So Say We All*, *PSYCHOL. TODAY*, July 1985, at 48, 49.

53. Whitherspooning and reverse-Whitherspooning, in theory, exclude only those prospective jurors who hold a categorical view on the issue of capital punishment irrespective of the circumstances of the particular case. See Craig Haney et al., "Modern" *Death Qualification*, 18 *LAW & HUM. BEHAV.* 619, 619, 625 (1994).

sponsibility for the violence of inflicting capital punishment among system participants and, if need be, among non-participants as well. Participants at any level of the capital punishment system, from the jurors who impose the death sentence to the executioners who inflict it, can shift the responsibility onto others. It is the gulf that, in Cover's words, separates on one side thought, interpretation, and understanding from action on the other<sup>54</sup> and that, in Foucault's analysis, separates imposition from infiction provides the framework for this complex shifting mechanism designed to minimize and disperse responsibility.

### A. *Inflicting Punishment*

I begin at the end, the execution and the executioner. The so-called Missouri Protocol well illustrates both the medicalization of infliction and the dispersal of responsibility that characterizes our capital punishment system.<sup>55</sup> The Missouri Protocol establishes the procedure for execution by lethal injection. It was drafted by Missouri legislators and corrections officials with the cooperation of Fred Leuchter, the inventor of the lethal injection system currently used in Missouri and several other states.

Eager to break into the execution equipment market, Leuchter set out to design a palatable execution mechanism that would minimize the pain of condemned and executioner. His lethal injection system promised both to put the prisoner to death without pain and to minimize the sense of responsibility of anyone participating in the execution. Leuchter's business motto is "capital punishment, not capital torture."

Leuchter's lethal injection system minimizes the condemned's pain by injecting three chemicals in one-minute intervals, the first of which induces sleep. The second paralyzes the respiratory system. The third causes heart death.<sup>56</sup>

The process resembles a medical procedure in several ways. First, although the Hippocratic oath consistently and universally has been interpreted by medical societies to prohibit the participation of physicians in the infliction of capital punishment,<sup>57</sup> the

54. Cover, *supra* note 2, at 1612-13, 1622.

55. In the following I rely heavily on Stephen Trombley's excellent documentary "The Execution Protocol" and the accompanying book of the same title. THE EXECUTION PROTOCOL (First Run/Icarus Films 1992) [hereinafter TROMBLEY, EXECUTION PROTOCOL (Film)]; STEPHEN TROMBLEY, THE EXECUTION PROTOCOL: INSIDE AMERICA'S CAPITAL PUNISHMENT INDUSTRY (1992) [hereinafter TROMBLEY, EXECUTION PROTOCOL (Book)].

56. TROMBLEY, EXECUTION PROTOCOL (Film), *supra* note 55.

57. AMERICAN COLLEGE OF PHYSICIANS, BREACH OF TRUST: PHYSICIAN PARTICIPATION IN EXECUTIONS IN THE UNITED STATES 38 (1994).

Protocol assigns a physician or nurse an essential role in the actual execution. A health professional conducts pre-execution examinations to determine the condemned's competency for execution, sets the IV, monitors the EKG from behind a window during the lethal injection process, and declares the condemned dead, or alive, in which case the procedure would recommence.

Second, the condemned resembles a hospital patient in an intensive care ward strapped to an IV as the gurney to which he is strapped resembles a hospital bed. As though to highlight the medical appearance of lethal injection, the execution chamber in Potosi, Missouri, abuts the prison health facilities. During executions at Potosi, the control module from which the injection process is activated and monitored stands in the dental storage room. At Potosi, one and the same doctor treats death row inmates during their imprisonment, examines the condemned for competency for execution, monitors the EKG during the execution, and pronounces "the patient" dead at the end of the execution.<sup>58</sup>

The advantage of such a medicalized execution procedure for those who participate in the actual execution, and by extension for those who participate in the capital punishment system at an earlier stage, is obvious: if the condemned experiences no physical pain, the inhibition against inflicting pain remains unaffected. Without a morally relevant act, there is no moral responsibility. Without moral responsibility, there is no denial. Consider, for example, how three Missouri prison officials who have participated in a number of executions described lethal injection: "It's like if you or I went to the dentist and they gave you Pentothal . . . You're gone. Good-bye." "It's just like going to sleep. Closing your eyes and going to sleep." "It's basically very painless, very swift. The individual goes to sleep."<sup>59</sup>

Strictly speaking, the physician's role in the capital punishment therefore is not a locus of responsibility onto which other participants can shift their responsibility. Instead, the physician's participation, particularly in lethal injections, denies the very need to shift responsibility as it denies the infliction of physical violence. Guided by the Hippocratic oath not to do harm, the physician helps characterize the infliction of capital punishment as treatment, which, though clearly detrimental in the end, is seen as benefiting the condemned (and the executioner) by symbolizing the effort to minimize the condemned's pain during the execution.

The physician's participation, however, cannot negate the

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58. TROMBLEY, EXECUTION PROTOCOL (Film), *supra* note 55.

59. TROMBLEY, EXECUTION PROTOCOL (Book), *supra* note 55, at 115, 213.

physical violence of capital punishment, nor can it negate the possibility of pain, given that the particular sort of pain the condemned may experience during the execution can never be known. This is obviously the case in successful executions. It is also the case in botched executions, since no one has ever cared to inquire into the physical sensations of a condemned who has just suffered through a failed execution attempt. In such a case, the first impulse of the panicked executioner has been not to ask questions but to finish the job, if only to relieve the condemned of whatever pain she is generally assumed to be experiencing.

It is this failure to accomplish the impossible, i.e., to portray the most extreme form of physical interference as entirely devoid of physical significance, that shapes the capital punishment system today. The residue of physical violence that no reclassification of punishment as treatment has been able to erase triggers the concerted effort of participants in the capital punishment system to minimize their responsibility for its infliction.

The remainder of this Part will deal with this system of denial. Let us once again begin with Fred Leuchter. Leuchter realized that his commitment to minimizing the pain experienced by the condemned and the executioner alike required him not only to medicalize the execution to the greatest extent possible, but also to put into place a procedure that, on the day of the execution, minimized the participants' residual sense of responsibility. First, this meant minimizing the actual human contribution to the injection process while maximizing the contribution of machines.<sup>60</sup> Second, it meant, in the language of the New Jersey statute calling for the development of a lethal injection procedure in that state, "ensur[ing] that the identity of the person actually inflicting the lethal injection is unknown even to the person himself."<sup>61</sup> And third, it meant dividing the procedure into a myriad of tasks and sub-tasks and sub-sub-tasks. After the IV has been set, the entire process under the Missouri Protocol is automated. The three pistons con-

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60. Bentham's infamous whipping machine similarly served not only to uniform punishment, but also to distance both the judicial imposer and the professional inflicter from the infliction of punishment:

A machine might be made, which should put in motion certain elastic rods of cane or whalebone, the number and size of which might be determined by the law: the body of the delinquent might be subjected to the strokes of these rods, and the force and rapidity with which they should be applied, might be prescribed by the judge: thus everything which is arbitrary might be removed. A public officer, of more responsible character than the common executioner, might preside over the infliction of the punishment.

BENTHAM, *supra* note 35, at 415.

61. TROMBLEY, EXECUTION PROTOCOL (Book), *supra* note 55, at 76.

taining the three chemicals used during the execution operate automatically to release the appropriate chemical in the appropriate intervals. The activation of the automated procedure, however, remained a problem, which Leuchter addressed in two ways. First, he moved the control module into a secluded windowless room separated by a wall from the execution chamber. Second, he dispersed and obscured the act of activation. Under the Missouri Protocol, the control module "is operated by the two executioners. It has two complete sets of controls. . . . Each station is armed by turning a key at the bottom of the panel. When it is time for the execution to commence, each of the executioners presses a button. A computer in the machine chooses which executioner has activated the sequence, and the choice is then automatically erased from memory."<sup>62</sup> Even in the event of a system failure, the identity of the "person actually inflicting the lethal injection" remains a mystery. In this case, "an electrical override . . . can be used to activate any or all of the three pistons. Both executioners operate the electrical override, and the on-board computer has already chosen, during makeready, which of the executioners has actually activated the system."<sup>63</sup>

Leuchter considered this system preferable to executions by firing squad, in which one of the gunmen, all of whom are hidden behind a slit screen, receives a blank so that each executioner can shift responsibility onto his colleagues since he might have been the one shooting the blank. As Leuchter explained, however, "[a]nyone who's ever fired a gun knows if he's firing a blank, because he won't get any recoil!"<sup>64</sup> Moreover, firing squad executions leave open the possibility that every member of the squad will seek to avoid responsibility by aiming away from the condemned's heart. At a 1951 execution in Utah, a popular inmate slowly bled to death because every one of the five guards on the firing squad aimed over his heart and hit his chest instead.<sup>65</sup>

The lethal injection machine designed by Leuchter uses pulls that, as one Missouri prison official pointed out, "have got the same size spring on them, so the person pulling doesn't feel anything different."<sup>66</sup> As a colleague added, "It's a matter of it being set up that way to the advantage of the individuals that are actually pushing the buttons or whatever . . . ."<sup>67</sup> A Missouri state leg-

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62. *Id.* at 79.

63. *Id.* at 80.

64. *Id.* at 11.

65. *Id.* at 11.

66. *Id.* at 106.

67. *Id.*

islator and co-author of the Missouri Protocol explained more generally that the Missouri Protocol, by concealing the identity of the person generally considered to be the actual executioner and by fracturing the execution task, seeks to ensure

that the responsibility of an execution . . . does not fall on the shoulders of any one particular individual. It's spread out so that it helps to some degree to relieve the stress that's involved. Also, because when several people are involved at several levels, they are actually able to be more efficient in carrying out the responsibilities of the state. So we have a very specific protocol and we're constantly updating and changing this. I think it's been changed a total of thirteen times.<sup>68</sup>

In addition to a large number of other participants, "six key members of the execution team" fulfill a dizzying array of functions during the night of the execution, all of which have been defined in great detail in the Protocol. Then there are, of course, the inmate and the twelve state and the five inmate witnesses. There are the contract nurse or IV technician, who inserts the IV, and the doctor who performs the competency examination, monitors the EKG, and pronounces death. These are joined by plant engineer "and his entourage," the exterior door operator, at least two certified module operators, though usually "[t]here are four . . . individuals behind closed doors that do the actual pushing of the button per se," according to one of the key members of the execution team. Then there are the chaplain, the psychologist, the three individuals in charge of internal security, the two or three people making sure the phones, the manual backup system, and the blinds on the windows between the witness room and the execution chamber are in working order, plus the people who use the phones, including the Deputy Director of Adult Institutions, who monitors the open phone line to the attorney general, and the person in charge of calling the governor's designated representative to check if any last minute stays have been issued, not to forget the operations officer in the execution chamber who oversees the entire procedure.<sup>69</sup>

The following excerpts from the Missouri Protocol illustrate how this highly formalized procedure splinters and sprinkles execution tasks and responsibility among a large number of participants.

[D]eath warrants are usually issued around ten days prior to a scheduled

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68. TROMBLEY, EXECUTION PROTOCOL (Film), *supra* note 55.

69. For a detailed description of the Missouri Protocol, see TROMBLEY, EXECUTION PROTOCOL (Book), *supra* note 55, at 110-12, 114, 210-12.



execution date. The protocol says that the condemned person should be taken to the deathwatch, or holding, cell forty-eight hours prior to the execution . . . . During the deathwatch, there is an officer in the holding cell with the condemned person twenty-four hours a day. The deathwatch officer keeps a log of visitors and events throughout the period. . . . [C]ondemned inmates on deathwatch have free canteen privileges, including soft drinks, snacks, and cigarettes. There is a television and VCR in the cell, and most inmates spend their time watching films on video. . . . The prison doctor is notified forty-eight hours in advance, and the protocol states that the inmate is given a physical examination twenty-four hours prior to being executed. . . . From the time the staff man their posts and the inmate's last visitor is obliged to leave [7 p.m.], every second of everyone's time is accounted for:

7:00 P.M. Phones in the execution room are checked. Clocks are checked and synchronized with the one in the media room.

7:30 P.M. The inmate is given a clean set of clothing and is offered a sedative. One of the certified operators verifies that the lethal injection machine is ready.

8:30 P.M. The gurney is prepared. Blinds in the death chamber are drawn.

10:00 P.M. During the previous ninety minutes, telephones and clocks have been checked and rechecked, as has the lethal injection machine and associated hardware. At 10:00 P.M., the execution team reports to the death chamber, and the drugs are loaded into the lethal injection machine. The assistant superintendent of programs verifies that all members of the execution team have reported. (As part of the security operation, the six key members of the execution team wear highest-priority security badges. Other staff wear badges identifying them for duty at various levels of security within the prison and at the perimeter.)

10:30 P.M. The chaplain reports to holding cell. Ambulance and hears arrive at sally port. State witnesses report to employees' entrance. Missouri law requires that there be a minimum of twelve state witnesses. Six of these are normally press. Telephones are manned.

10:40 P.M. The director of the Division of Adult Institutions reports to parole board courtroom in the prison.

10:45 P.M. State witnesses report to hearing room.

11:00 P.M. The director of the Division of Adult Institutions reports to hearing room. The deputy director monitors the open telephone line to the attorney general.

11:05 P.M. The deputy director reports to the main conference room.

11:10 P.M. Telephones are tested.

11:15 P.M. The doctor tests the electrocardiogram equipment.

11:20 P.M. The department director tests the telephones and monitors all lines. Clocks are rechecked. The department director carries a portable radio as a backup in case of telephone failure.

11:30 P.M. The department director telephones the governor's designated representative to check if there is any stay. The assistant superintendent of programs ensures that only authorized personnel are in execution area.

11:35 P.M. The inmate is escorted to the gurney and secured on it. The EKG is attached, and the IV line is set.

11:40 P.M. Telephones are monitored. Inmate witnesses arrive. . . .

11:55 P.M. Telephones are monitored.

12:00 P.M. The department director telephones the superintendent to ask if there is a stay of execution. If no, the superintendent proceeds. The blinds are opened in the execution chamber.

12:01 A.M. The superintendent reads the death warrant. The execution commences.

During the execution, each event is timed with a stopwatch and logged by the operations officer, who is in the death chamber. The doctor monitors the EKG and signals to the operations officer that there is no sign of heart activity. The blinds are closed, and the doctor examines the inmate and establishes the time of death and signs the death certificate. After the blinds have been closed, the inmate witnesses are escorted from the prison. The state witnesses sign a Return Warrant of Execution, and the press witnesses proceed to the press area. A press conference is held, and a nominated media witness must be available for questioning by other media who did not witness the execution.<sup>70</sup>

The Potosi official who orders the module operators to push their buttons provides the following alternative account of the last stages of the execution process:

[Y]ou have the operations officer . . . actually in the chamber documenting everything that transpires. The plant maintenance engineer is in there in regard to any last-minute preparations for the machine. There are four other individuals behind closed doors that do the actual pushing of the button per se . . . . [The plant maintenance engineer, the warden, the Deputy Director of Adult Institutions, and his executive assistant], those are the key individuals in regard to making sure that everything . . . that the proper information comes from the director to them, and they give the word to the operations officer, who initiates the command for execution. . . . At twelve, all systems are checked. All the way from the execution chamber itself, we talk to the director, who in turn talks to his legal counsel, and the legal counsel for the governor, to see if there is any change at all in the upcoming execution. At twelve midnight, the order is given to commence the execution itself, and at that time the operations officer receives word through the protocol and the chain of command, and gives the word to proceed. The machine is activated at that time. Then the buttons are pushed, and the execution commences.<sup>71</sup>

The reference to a chain of command is no accident. The Potosi warden, like many correctional bureaucrats, has a military background. So have many of his subordinates, one of whom ex-

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70. *Id.* at 108-12.

71. *Id.* at 212-13.

plains that:

[c]ertainly from the standpoint of protocol, of chain of command, it certainly aligns itself with the military chain of command. And I have heard [the warden] numerous times refer to it as a battle, or possibly preparing for a particular initiative, or a particular battle. And I think there's some validity behind that, even from my own standpoint, of when I went to Vietnam. I knew there was a job to do, and knew what job I had to do.<sup>72</sup>

In other words, the Missouri Protocol not only fractures the execution procedure and distributes the resulting tasks among an army of officials but also ensures that those officials can think of themselves both as united in the pursuit of a common perilous task and as duty bound unquestioningly to obey the orders of their superiors. The responsibility therefore is first chopped into little pieces which are then sent up the chain of command.

Even a chain of command, however, has a beginning and an end. It is important that responsibility be shiftable onto another link in the chain. But as crucial as its dispersal are the limits of responsibility. It is clear that the certified operator who pushes the button that activates the execution procedure stands at the end of the responsibility chain. This is so even though her colleague pushes an identical button and, without her colleague doing so, the execution would not occur, not to mention that several people, including the doctor, who, by monitoring the execution process, intervening to correct procedural snags, and checking the condemned's vital signs after the injections, continue to participate in the execution process long after the hapless module operator's job is done. What remains unclear is merely which of the two operators occupies this unenviable position.

Responsibility is thus dispersed, but also contained. If the answer to the all-important question of "who is the executioner, really?" remained truly and entirely unresolved, if the chain of command had no end, responsibility would spill out of the module room and engulf every participant in the system of capital punishment, all the way up the chain of causation, perhaps even beyond the artificial boundaries of "the system of capital punishment."

In the eyes of the execution personnel, the question of the beginning of the chain of command is similarly settled and unsettled. It is clear that the chain of causation begins somewhere outside the world of the prison, which the participants in the execution protocol inhabit without exception. At the same time, it remains both unclear and irrelevant exactly where the chain begins, whether it is

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72. *Id.* at 215.

with the legislators who passed the death penalty law, the juror who imposed the death sentence, the judge who pronounced the sentence, or perhaps the governor who signed the death warrant.

The mere presence of a chain of command and an order to terminate the life of a condemned inmate, however, does not automatically free lower level officials who participate in executions of criminal, or for that matter of moral, responsibility.<sup>73</sup> Although the chain of command defense has been invoked successfully to evade legal responsibility for one's homicidal acts in countless cases, there are exceptions to the rule. As the My Lai case illustrates, not even conduct in Vietnam lay entirely outside the reach of the criminal law. The defense is barred if the defendant knew or should have known that the act was "unlawful."<sup>74</sup>

Leaving questions of natural law aside for the moment, the lawfulness of executions, however, has traditionally been thought to be beyond doubt for executioners, given that it is the very interpreter of the law, the judge, who orders the execution. This image of the executioner as servant of the court is not an invention of contemporary capital punishment. Criticizing the death sentences imposed on two Nazi executioner's aides in the Russian Zone in the late 1940s, Gustav Radbruch—whose supposed conversion from positivism to natural law became the subject of the famous Hart-Fuller debate about the legality of Nazi law—stressed that executioners could not be held legally responsible for carrying out unjust death sentences simply because it was their duty to put into action any order passed on to them by the judicial authorities.<sup>75</sup> According to Radbruch, if an executioner was to be faulted for anything, it would have to be for *refusing* to follow judicial orders, not for carrying them out.<sup>76</sup>

Robert Cover has pointed out how this image of the inflicter of

73. On this distinction, see TELFORD TAYLOR, *GUILT, RESPONSIBILITY, AND THE THIRD REICH* (1970).

74. DEPARTMENT OF THE ARMY FIELD MANUAL FM 27-10: *THE LAW OF LAND WARFARE* ¶ 509 (1956) (quoted in TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 51 (1970)); see also MODEL PENAL CODE § 2.10.

75. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

76. Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, 1946 SÜD-DEUTSCHE JURISTEN-ZEITUNG 105. Before his turn toward natural law in the years after the war, Radbruch had similarly defined the role of the judge: "We have contempt for the pastor, who preaches against his conviction, but we celebrate the judge, who does not permit his contrary sense of justice to interfere with his commitment to the law." GUSTAV RADBRUCH, *RECHTSPHILOSOPHIE* 83-84 (3d ed. 1932) ("Wir verachten den Pfarrer, der gegen seine Überzeugung predigt, aber wir verehren den Richter, der sich durch sein widerstrebendes Rechtsgefühl in seiner Gesetzestreue nicht beirren läßt.").

punishment as the passive executioner of judicial will permits the inflicter to shift moral responsibility onto the imposer of punishment, the judge.<sup>77</sup> Participants in executions at Potosi tend to view themselves (somewhat more vaguely) as servants of the state. Potosi's warden, for instance, sees himself as an "instrument of the state."<sup>78</sup> His assistant superintendent explained that "as a professional in the Department of Corrections, I know my duty. . . . All I'm doing is a job that the state says I should do."<sup>79</sup> "I . . . have made up my mind," he continues, "that I am a tool of the state . . . ."<sup>80</sup>

The execution participants thus first shift responsibility within the complex of the Missouri Protocol, either up the chain of command to the master of their penal world, the warden, or down to the unidentified and unidentifiable module operator who activates the automatic injection mechanism. Not even the elaborate provisions of the Missouri Protocol, however, sufficiently diminish the responsibility of executors of the Protocol for the execution of the condemned prisoner. Protocol participants thus look beyond the Protocol and their bureaucratic realm to some superior authority in the separate hierarchy of law to further reduce their sense of responsibility.

As execution participants in this way leave the protective confines of the Protocol, they become part of the larger system of capital punishment and its mechanism of responsibility diffusion. The system as a whole rests on the ability of its participants to distance themselves temporally and personally (and in most cases, also geographically), from what they perceive as the relevant event in the process of capital punishment. The truly troubling event, however, always remains the actual infliction of punitive pain, the "execution." It is therefore no surprise to find that those who participate in the infliction would require a particularly complex system of responsibility minimization, such as the Missouri Protocol.

Since the Missouri Protocol, however, cannot by itself eliminate the sense of responsibility for the physical harm of execution, those who participate in the infliction of capital punishment focus on other relevant events earlier in the process of capital punishment. Continuing to perceive themselves as tools of the state bereft of choice, prison officials take comfort in the fact that many others who do possess the power of choice have exercised that power continuously over an extended period of time. As a Missouri

77. Cover, *supra* note 2, at 1626-27.

78. TROMBLEY, *EXECUTION PROTOCOL* (Film), *supra* note 55.

79. TROMBLEY, *EXECUTION PROTOCOL* (Book), *supra* note 55, at 205.

80. *Id.* at 216.

corrections bureaucrat observed:

I've made peace with myself on this thing by knowing that the fellow that's being executed has had every chance of appeal. He's had his trials; the number of appeals the guy has had—the United States Supreme Court three times, Eighth Circuit three times, the local court of appeals three or four times. When you know that the case has been scrutinized that closely, then it makes you feel much easier.<sup>81</sup>

By focusing on earlier events in the process of capital punishment such as the imposition of punishment and subsequent reconsiderations thereof, those closest to the infliction in time, person, and place manage to shift their responsibility onto the individuals who participated in these earlier events. At the same time, however, participants in the *imposition* of capital punishment continue to rest secure in the recognition that they do not and cannot participate in the actual *infliction* of punishment. Those participants associated with the imposition of punishment therefore focus their moral attention onto the infliction of punishment as those involved in the infliction of punishment emphasize the significance of its imposition. Still, these shifts of focus, even that onto the imposition of punishment, all reflect the same underlying problem that shapes the capital punishment system: the inability to take responsibility for the infliction of death as the most extreme form of violent interference with the life plans of a fellow human being.

Given the important responsibility reducing function of both the temporal and personal diffusion of the capital punishment system, recent attempts by supporters of capital punishment outraged at the delay between imposition and infliction of death sentences to streamline appeals in capital cases may well prove counterproductive. Insofar as the current capital punishment system has developed to accommodate the sensibilities of its participants, reducing the temporal or personal distance any participant may place between herself and whatever event she considers relevant may bring about the collapse of the entire system.

### B. *Imposing Punishment*

From those most closely associated with the infliction of capital punishment, let us move to the other end of the system, namely to those most closely associated with its imposition, the capital jury. Here, we find both a level of stress similar to that experienced by execution officials and a concerted effort to minimize the jurors' sense of responsibility that rivals the Missouri Protocol in com-

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81. *Id.* at 113.

plexity and sophistication.

1. *Jurors.* The comments of capital sentencing jurors provide the most compelling illustration of the significant gap between threat and imposition of punishment that plagues contemporary punishment practices in general, and the capital punishment system in particular. Evidence abounds of jurors who had favored capital punishment in the abstract as late as the *voir dire*, but found themselves deeply troubled by, if not incapable of, imposing the death penalty on a particular individual. A recent study of Florida capital jurors in the most active death penalty county of the state revealed that a change of attitudes toward the death penalty during the trial was the second most significant factor accounting for a jury's recommendation of a life sentence.<sup>82</sup> As one of the jurors in the study put it, despite her continued support of the death penalty in general, "the difference between objective death and real death made the difference."<sup>83</sup> Consider also the following responses of capital jurors in the Capital Jury Project:

I remember the jury selection, they asked my opinions on the death penalty, and I said, 'Well, y'know, if you'd asked me that any other time, I would have told you how adamantly and strongly I believe in it, but I mean, sittin' across the room from, y'know, lookin' somebody straight in the face, knowin' that, y'know, it was gonna be my decision, uh, it's not quite so easy.'<sup>84</sup>

The jurors' sense of responsibility is diminished in at least three ways. First, responsibility for the sentencing decision is dispersed among all members of the jury. Although this dispersion of responsibility occurs in all criminal cases tried before jury,<sup>85</sup> it is

82. William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 34 (1988).

83. *Id.* at 35. See also *Harris v. Alabama*, 115 S. Ct. 1031, 1039 (1995) (Stevens, J., dissenting) ("Voting for a political candidate who vows to be 'tough on crime' differs vastly from voting at the conclusion of an actual trial to condemn a specific individual to death. . . . [Jurors] focus their attention on a particular case involving the fate of one fellow citizen, rather than on a generalized remedy for a global category of faceless violent criminals, who, in the abstract, may appear unworthy of life.").

84. Joseph L. Hoffmann, *Where's the Buck? - Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1143 (1995). See also John Braithwaite & Philip Pettit, *Republican Criminology and Victim Advocacy*, 28 LAW & SOC'Y REV. 765, 773 (1994) ("Because distance enables the simplification of evil, citizens are more likely to support capital punishment in response to a decontextualized survey question than they are when they sit in a courtroom as jury, judge, or prosecutor.").

85. Or, for that matter, in all cases argued before a panel of professional judges. Cf. CARL FRIEDRICH HEINZE, EIN DEUTSCHES GESCHWORENENGERICHT 83 (2d ed. 1865) (pointing out "the dissipation and evaporation of personal responsibility that results from collegial

only in capital cases that every state and the federal government give the defendant the option of having her sentence decided, or at least recommended, by a jury. As one capital juror interviewed by the Capital Jury Project remarked, "[W]hen it was over, we all walked out to the parking lot together and we stood there in a circle for quite a while just talking and especially the foreman of the jury said just remember—eleven other people decided this with you."<sup>86</sup>

Second, capital sentencing jurors often form a highly restrictive perception of their power of choice, a perception the prosecutor reinforces precisely because it relieves the jurors of their inhibition against sentencing a fellow human being to die. Robert Weisberg several years ago showed how prosecutors portray the jurors' sentencing task as an exercise in arithmetic, in which jurors merely need to check off the applicable aggravating and mitigating circumstances on the verdict sheets provided by the courts, then compare the total number of aggravators with the total number of mitigators, and impose the resulting sentence. Combined with the judge's instructions, which often employ mandatory language (e.g., you shall impose a sentence of death if you find that the aggravators outnumber the mitigators),<sup>87</sup> the prosecutor's arithmetical argument suggests to the jurors that, in Weisberg's words, their apparently painful choice is no choice at all—that the law is making it for them.<sup>88</sup> This arithmetical approach to capital sentencing often is seen as consistent with, if not required by, the anti-sympathy instructions commonly given at capital sentencing hearing, which prohibit the jurors from considering their emotional responses and attitudes.<sup>89</sup> Preliminary findings by the Capital Jury Project confirm Weisberg's observation:

I do not think the jurors had any specific arguments, I just think they had a problem with being responsible for giving that verdict. We went down

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action").

86. Bienen, *supra* note 52, at 1342.

87. *Cf. Riley v. State*, 889 S.W.2d 290 (Tex. Crim. App. 1994), *cert. denied* 115 S. Ct. 2569 (1995) (reversing death sentence because venireperson was improperly struck for cause). The venireperson originally "agreed that she 'personally could not participate in any proceeding that ultimately decreed and handed down a death sentence.'" *Id.* at 297. After being told that the sentencing jury's task was to answer "special issues," affirmative answers to which would lead the court to impose the sentence, she would "'have to'" set aside her objections and answer the questions truthfully in accordance with her oath. *Id.*

88. Weisberg, *supra* note 3, at 376.

89. *California v. Brown*, 479 U.S. 538 (1987); *see also People v. Easley*, 671 P.2d 813 (Cal. 1983); *Fox v. State*, 779 P.2d 562 (Okla. Crim. App. 1989), *cert. denied* 494 U.S. 1060 (1990), and *cert. denied* 115 S. Ct. 1318 (1995); *Johnson v. State*, 731 P.2d 993 (Okla. Crim. App. 1987), *cert. denied* 484 U.S. 878 (1987).



each aggravating and mitigating circumstances and we came up with more aggravating factors than mitigating factors.<sup>90</sup>

I had to know, for me to go on, that I had given him every benefit of the doubt, that I had looked at every thing . . . before I could agree that was what the law mandated.<sup>91</sup>

I think it more or less was a procedure. I had a feeling [the judge] was giving us a procedure and we needed to go through these certain steps. And then if all the pieces fit, then you have a responsibility to come back with a death sentence.<sup>92</sup>

Unless we found him insane, temporarily insane, not responsible for his actions, we would have to find him guilty of a capital crime and recommend the death penalty.<sup>93</sup>

It seemed that it took a great deal of time to answer properly the list of things that the state asked us to answer. . . . The way it was set up if we answered so many questions on page one then we continued to page two, and then by the end if we found less number of statements that we should allow her to live than what we should not allow her to live, the state then required us to sentence her to death. I appreciated the state having a form like this because all of the jury members felt like by the way it was worded it was really the state putting her to death for this crime instead of a group of twelve individuals.<sup>94</sup>

I mean because what he told us, because again that was when we sort of, didn't let our emotions into it. We tried to go by what the law said, you know, the understanding and what it was.<sup>95</sup>

Third, in states that have assigned the judge the authority to impose the sentence, jurors frequently come to perceive their sentencing decision as largely irrelevant.<sup>96</sup>

[The judge] was very careful in telling us that whatever we decided it

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90. Hoffmann, *supra* note 84, at 1143.

91. *Id.* at 1145.

92. *Id.* at 1152.

93. *Id.*

94. William Bowers & Margaret Vandiver, In Their Own Words: How Capital Jurors Explain Their Life or Death Sentencing Decisions 8 (May 26, 1992) (Capital Jury Project Working Paper No. 6, unpublished).

95. Hoffmann, *supra* note 84, at 1153.

96. The assignment of responsibility onto the judge and onto fellow jurors is of course neither limited to capital cases nor to the United States today. *See, e.g.*, FRANZ ALEXANDER & HUGO STAUB, *THE CRIMINAL, THE JUDGE, AND THE PUBLIC* 18 (1956): "The layman finds himself face to face with his responsibility; he must needs sit in judgment and he can render this judgment only by way of a psychological understanding of the offender. However, the heavy burden of responsibility which such a layman must carry, i.e., the responsibility of taking the consequences of a judgment based on his individual insecure intuition, is made easier in the following two ways: First, the judgment rendered is not an individual but a collective one, that of the whole jury; and second, the majorities of penal codes leave it to the learned judge who, under the protection of the paragraphs of the law, limits their influence on the sentence and thus relieves the jury from a part of their responsibility."

would be a recommendation and that if we decided for the death penalty that, you know, that the final decision would rest with him, so not to, um, you know, to look at it as an individual case, and not, if he then goes ahead and decides for the death penalty, not to let it weigh on our consciences too much, because what we did was only offer a recommendation.<sup>97</sup>

[The judge] stressed a lot that it was just a recommendation. He said, all you're going to do, he said, if you say yes, he should get the death penalty, that's not actually, you know, it doesn't mean we're actually going to give him the death penalty. It's just, your recommending to the judge, and they, that was, all this recommendation stuff was, was all we ever heard, that's all we ever heard, was you're just recommending. They wanted to make sure we didn't think we were actually killing him.<sup>98</sup>

At her instructions she also told us that she—what we were doing was giving her a recommendation. That we would not be sentencing him. This was our recommendation. She had the final say, so I think in her sentence she was taking some of the responsibility off of our shoulders and allowing us to give an opinion, a recommendation, and yet carrying the full load herself of whether it was going to be indeed the death penalty or not.<sup>99</sup>

Finally, jurors often convince themselves that their death sentence will in fact not be carried out, i.e., that their imposition of the penalty will not result in its infliction, even if they know that judges only rarely override a jury recommendation of death.<sup>100</sup> This may occur in states in which the judge is not required to follow the jury's sentencing decision: "I think one of the things that helped us the most is I said, just because we have a death penalty verdict does not mean he will be killed. The judge has to either accept our recommendation or not."<sup>101</sup>

However, even in states that leave the sentencing decision entirely to the jury, jurors come to believe that their decision to impose the death penalty will not result in its infliction. It may well be that most capital sentencing jurors do not believe that the death sentence they impose will ever be inflicted because they expect that the sentence will be reversed somewhere along the line of the appellate process.<sup>102</sup> Even if they believe that, despite the sub-

97. Hoffmann, *supra* note 84, at 1147.

98. *Id.*

99. Bowers & Vandiver, *supra* note 94, at 10.

100. Hoffmann, *supra* note 84, at 1151; *see also* Harris v. Alabama, 115 S. Ct. 1031, 1036 (1995) (referring to "some ostensibly surprising statistics" showing that, in Alabama, "there have been only 5 cases in which the judge rejected an advisory verdict of death, compared to 47 instances where the judge imposed a death sentence over a jury recommendation of life"); *Id.* at 1040 n.8 (Stevens, J., dissenting) (citing similar evidence for other states (Florida, Indiana)).

101. Hoffmann, *supra* note 84, at 1150.

102. Anthony Paduano & Clive A. Stafford Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L.

stantial delay separating imposition and infliction of the sentence, the death sentence will be carried out, the very length of the delay may suggest to jurors that a mistakenly imposed death sentence will be reversed:

If the attorneys wanted to go ahead and dig further into the case, ah, at least the kid would still be alive. You know, of course everybody knows that they go to death row for at least ten years or better. So, you know, it's not like he'd be snuffed out in a year or so. And they have umpteen thousand appeals that they get to go through. . . .<sup>103</sup>

At any rate, the considerable temporal distance separating the imposition of the death penalty from its infliction permits the jurors to deny their participation in, and therefore their responsibility for, its infliction. At the very least, jurors know and are repeatedly reassured by prosecutors and judges that their verdict will not be carried out immediately.

It may at this point be objected that the current capital punishment system can hardly be said to rest on capital jurors' denial of moral responsibility for death sentences. The Supreme Court, after all, has explicitly held, in *Caldwell v. Mississippi*, that it is "constitutionally impermissible to rest a death sentence on a determination by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."<sup>104</sup>

The Supreme Court, however, has failed to put teeth into the *Caldwell* rule. *Caldwell* has essentially been limited to cases of particularly egregious prosecutorial argument.<sup>105</sup> It has never been successfully invoked against instructions or argument in the quasi-mandatory or arithmetical mode or against recommendation instructions. On the contrary, the Court has repeatedly upheld both anti-sympathy instructions and capital sentencing statutes that place the ultimate sentencing decision into the judge's hands.<sup>106</sup>

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REV. 211, 213 n.3 (1987).

103. William Bowers, Margaret Vandiver & Patricia Dugan, In Their Own Words: How Capital Jurors Explain Their Life and Death Sentencing Decisions 6 (Nov. 7, 1992)(Capital Jury Project Working Paper No. 7, unpublished).

104. *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985).

105. The Court only recently limited *Caldwell's* application even to prosecutorial argument. In *Romano v. Oklahoma*, the Court found no constitutional fault with the prosecution's introduction of a prior death sentence at a capital sentencing hearing. Along the way to its decision, the Court clarified that the *Caldwell* rule applied only to cases in which the jury's sense of responsibility was minimized through false evidence or argument. In *Romano v. Oklahoma*, 114 S. Ct. 2004, 2010 (1994).

106. *California v. Brown*, 479 U.S. 538 (1987).

More important, this objection misses the point. As in the case of instructions of the quasi-mandatory or arithmetical type discussed above, capital sentencing jurors are often so eager to shed responsibility for the imposition of the death penalty that they will deny their choice even in the face of instructions to the contrary. According to findings of the Capital Jury Project, one juror in a recommendation state went so far as to deny that she played any part in the imposition of the death penalty.<sup>107</sup>

Given the eagerness of capital sentencing jurors to minimize their sense of responsibility and the prosecutor's eagerness to obtain a death sentence, jurors will seize every opportunity to shift their responsibility onto others, including the prosecutor, who exercised his professional expert judgment to seek the death penalty in the case before them in the first place, and the judge, who, as the representative of the law, guides their discretion in accordance with state law as well as with the federal constitutional law of capital sentencing. The Supreme Court's capital jurisprudence, after all, requires not only that the jury have discretion to settle on the appropriate sentence but also that the judge's instructions guide that discretion.

The Supreme Court's capital jurisprudence in *Caldwell* and elsewhere reflects and perpetuates the ambivalent attitude toward juror responsibility that underlies the entire system of capital punishment. Naturally, the Court's famously conflicted and convoluted capital jurisprudence of guidance and discretion tends to be measured against its attempt to craft a constitutional death penalty system.<sup>108</sup> In this light, sentencer guidance is necessary to prevent a discriminatory or arbitrary application of the death penalty, whereas sentencer discretion serves to prevent the imposition of capital punishment on undeserving defendants.

Although these considerations undoubtedly help shape the Court's capital jurisprudence, it would be a mistake to disregard the role of Supreme Court justices and their judicial colleagues in the system of capital punishment. Supreme Court justices, like all other judges, have a strong interest in shifting responsibility for the imposition and the infliction of capital punishment onto other participants in the system. Given the dominating role judges play in the current capital punishment system, it should come as no surprise that the system is arranged to accommodate that interest.

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107. Hoffmann, *supra* note 84, at 1147-48.

108. See *Walton v. Arizona*, 497 U.S. 639, 657-74 (1990) (Scalia, J., concurring in part and concurring in the judgment); *Morgan v. Illinois*, 504 U.S. 719, 752 (1992) (Scalia, J., dissenting); see also Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

2. *Judges.* One therefore cannot understand the current system of capital punishment without understanding the role judges play within it. Proponents of capital punishment tend to overlook this basic fact when they blame overzealous defense lawyers for the delay in the infliction of death sentences. The current delays of often more than ten years would be impossible without the active assistance of federal and state judges. The image of the liberal federal judge who routinely overturns state death sentences, which has become almost as prevalent as the image of the unprincipled defense lawyer who manipulates the Supreme Court's self-inflicted capital jurisprudence, is as misleading as that of the bloodthirsty state judge who is anxious to pull the switch. The only people who express a desire to inflict capital punishment personally are those who not only have nothing to do with the imposition or infliction of this penalty, but also never will be in a position to inflict it. Examples that come to mind include the fraternity brothers who congregate outside prisons during execution nights, the secretary who prepares celebratory execution cakes for court house employees, and the Congressman from Texas who recently proclaimed on the House floor that, "if the law would allow it, [he] would have pulled the switch" in some of the capital cases he tried as a prosecutor.<sup>109</sup>

By contrast, virtually everyone who actually participates in the system of capital punishment, from the capital sentencing jurors to the state trial and appellate judges, to their federal counterparts, and on to the governor, the warden, the physician, and the executioner, struggles with the fundamental inhibition against inflicting the always physical violence of execution. This general principle is subject to only few exceptions, such as the ambitious prosecutor, who recklessly becomes entangled in the adversarial challenge of obtaining not only a guilty verdict but a death sentence to boot. Some individuals may never have possessed or sufficiently developed the normal potential for empathy, or may have lost it. Not unlike the Milgram experiment, the capital punishment system creates a hierarchical and formal environment that permits even those who possess a well-developed empathic capacity to suspend that capacity in a clearly defined and limited context.<sup>110</sup>

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109. Michael Wines, *House Takes up Crime Bill and Votes Tough Measures*, N.Y. TIMES, Apr. 20, 1994, at A16, col. 5. (quoting Rep. Greg Laughlin (D-TX)).

110. I am concerned in this article only with such persons. The moral judgments of hanging judges in the United States today, or of fanatical Nazis like Roland Freisler and Adolf Eichmann, however important their study may be for a comprehensive account of moral behavior, is not my concern. For a recent discussion of such difficult matters, see ARNE JOHAN VETLESEN, *PERCEPTION, EMPATHY, AND JUDGMENT* (1994). On the development

There is no reason to believe that Supreme Court justices differ so dramatically from other human beings that they do not share our inhibition against inflicting fatal violence on another person. For instance, even one of the architects of the revival of capital punishment after *Furman*, Justice Powell, struggled with capital cases. According to his biographer, "After fifteen years of capital cases, Powell knew firsthand their deadly hold on the judge's peace of mind. He knew how hard it was not to take a second, third, or fourth look at rejected claims, how easy it seemed to put the whole thing off for one more hearing, how much courage—or callousness—it took to treat death like any other penalty."<sup>111</sup>

The current debate about accelerating the process of capital punishment is seriously misguided because it fails to take into account Justice Powell's simple insight into the gutwrenching nature of capital cases. The most important cause of the current delay lies with the deeply troubling impact capital cases continue to have on judges all over the country, or, in the words of then-Justice Rehnquist, not known as an outspoken critic of capital punishment, "the natural reluctance of state and federal judges to rule against an inmate on death row."<sup>112</sup> Any reform proposal that fails to ac-

of full empathic capacities, see John Rawls, *The Sense of Justice*, 72 PHIL. REV. 281 (1963).

111. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 452-53 (1994); see also Maxwell v. Bishop, 398 F.2d 138, 153-54 (1968) (then-Judge Blackmun commenting on the "particularly excruciating" decisional process in capital cases); Furman v. Georgia, 408 U.S. 238, 405 (1972) (Justice Blackmun remarking on the "excruciating agony of the spirit" caused by capital cases).

112. Coleman v. Balkcom, 451 U.S. 949, 959 (1981) (Rehnquist, J., dissenting from denial of cert.). This is not to say, however, that judicial discomfort in capital cases always results in delay. Many judges put off capital cases and dig into the details of the record to search for constitutional error. Others prefer not to become deeply involved in capital cases and write hurried opinions to get them out of their chambers. Cf. Nancy Levit, *Expediting Death: Repressive Tolerance and Post-Conviction Due Process Jurisprudence in Capital Cases*, 59 UMKC L. REV. 55 (1990). As a result, some of the sloppiest opinions appear in capital cases. For example, federal habeas courts often find themselves inspecting cursory state supreme court opinions in capital cases for clues that may indicate how the state court resolved an issue, or whether it addressed it at all. Yet other judges, particularly ambitious federal district judges, make a point of displaying their coolness in the face of death by issuing opinions in capital cases with particular dispatch or by denying habeas petitions on dubious procedural grounds. From my days as a clerk on the Eleventh Circuit, I recall one instance in which a federal district judge issued a lengthy opinion denying habeas relief to a state death row inmate so quickly after a hearing on the merits that substantial portions of the opinion had to have been prepared long before the hearing. Another district judge dismissed a first habeas petition filed shortly before the scheduled execution date as an abuse of the writ and refused to stay the execution pending review of the petition's merits. (In the end, this particular judge only contributed to the delay since the court of appeals reversed her decision. Davis v. Dugger, 829 F.2d 1513 (11th Cir. 1987), *rev'g* Davis v. Wainwright, 644 F. Supp. 269 (M.D. Fla. 1986)). This sort of behavior either indicates a disconcerting failure

knowledge this fact is bound to fail.

For instance, proposals to limit death row inmates' access to the federal courts will ultimately do little to accelerate the capital punishment process. First, the problem of delay is by no means confined to the federal courts. As the reports on habeas reform issued by the ABA and the Powell Committee made clear despite their different recommendations, a capital case tends to spend nearly as much time in state courts as it does in federal courts.<sup>113</sup> Second, as long as federal judges continue to feel troubled by capital cases, merely reducing the number of habeas petitions per death row inmate will have little effect. Although the delay may be decreased slightly, judges are likely to take more time reviewing the more substantial and complex first petitions that must be expected once successive petitions have been prohibited as a rule.

Confronted with hard cases whose violent impact cannot not be denied, judges over time have developed a repertoire of rhetorical methods designed to diminish their responsibility for the pragmatic import of their interpretive acts in general, and for the infliction of the capital punishment they help impose in particular. Robert Cover, for example, has identified "three related responsibility-mitigation mechanisms" antebellum anti-slavery judges employed to justify to themselves and the world their application of the law of slavery: "(1) Elevation of the formal stakes (sometimes combined with minimization of the moral stakes). (2) Retreat to a mechanistic formalism. (3) Ascription of responsibility elsewhere."<sup>114</sup>

These strategies have proved popular not only in early nineteenth century North America, but in many countries and in many ages, whenever judges were eager to deny the violence of their official function. They have blossomed in oppressive times as well as in hard cases in less oppressive times. German judges under the Nazi regime and, more recently, South African judges under Apartheid struggled with their responsibility in oppressive times. American judges today facing capital cases are forced to deal with hard cases in less oppressive times. So were judges deciding cases under the Fugitive Slave Act in the antebellum North. All of these

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of the empathic capacities crucial to judging or simply represents another way in which judges attempt to cope with the crisis of a capital case.

113. Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases* 1990 A.B.A. CRIM. JUST. SEC. 30 n. 88, 34 n. 96, 46, 138 n. 533; Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, *Report on Habeas Corpus in Capital Cases*, 45 CRIM. L. REP. (BNA) 3239, 3241 (Sept. 27, 1989); see also Franklin E. Zimring, *Ambivalence in State Capital Punishment Policy: An Empirical Sounding*, 18 N.Y.U. REV. L. & SOC. CHANGE 729 (1990-91).

114. COVER, *supra* note 4, at 199.

judges faced cases and situations that made them ponder the very real practical significance of their interpretive acts, cases and situations that suddenly and violently exposed the instability and artificiality of the enlightenment construct that had separated judges from the implementation of their decisions.<sup>115</sup>

In the case of criminal punishment in general and capital punishment in particular, this construct of judicial withdrawal is as crucial (given the extreme nature of the effect of judicial decisions) as it is fragile (given its recent origin in the enlightenment reform of the criminal process). It is therefore no surprise that one finds in such cases a particularly convoluted system of responsibility denial that rivals the apologetics of Nazi and Apartheid judges.

It is important to recognize that cases of severe physical punishment are hard in the relevant sense irrespective of the judge's opinions on matters of criminal justice. Justice Powell struggled with capital cases as much as did Justice Blackmun. It is the nature of the practical consequence of judicial decision, i.e., the pragmatic nature of judicial action, which creates the severe responsibility crisis that is to be resolved by certain doctrinal mechanisms. Certainly, a judge who opposes the death penalty (or other Draconian sentences) in the abstract will experience additional discomfort that a judge who supports the death penalty (or other Draconian sentences) in the abstract will not. Both judges, however, regardless of their abstract positions, face the very same general problem, namely justifying their participation in the infliction of extreme physical violence on another human being.

For the same reason, it is also irrelevant whether the resolution of cases which inflict physical violence on the defendant, be it through criminal punishment, re-enslavement, or execution by the Gestapo, appear in more or less oppressive times. These cases are hard because they involve the infliction of physical violence, regardless of whether the laws calling for its infliction have been passed by a democratically elected legislature, by the electorate in a referendum, or by a totalitarian dictator. None of this is to say, however, that the origin of the legal provision at issue in a hard case may not influence the judge's distribution of responsibility. In fact, as we shall see, the originator of the provision often becomes a prime target for responsibility assignment.

To focus our attention on judicial attempts to diminish responsibility in the American system of capital punishment, we will use a recent essay by Judge John Noonan on his role in the Robert Alton Harris case as the backbone for our discussion. Noonan's es-

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115. See *supra* text accompanying notes 28-39.



say deserves close analysis for several reasons. Not only does Noonan rank among the most thoughtful and sophisticated members of the federal judiciary today, he also has written a great deal on the pragmatic effect of judicial action on individual persons.<sup>116</sup> Given that judges rarely comment on their participation in the capital punishment system, Noonan's essay is easily the most searching treatment of this issue to appear in print.<sup>117</sup>

Noonan's essay on the Harris case illustrates all three of Cover's responsibility-mitigation mechanisms. Let us take them slightly out of order. We will begin with the first rhetorical strategy identified by Cover, the elevation of formal stakes. The retreat to a mechanistic formalism, Cover's second method of responsibility minimization, will be discussed as but one of the many ways in which judges historically have employed the third mechanism in Cover's arsenal, the ascription of responsibility elsewhere.

(1) *Elevation of the formal stakes (sometimes combined with minimization of the moral stakes)*. Noonan somewhat ominously hints at what would happen should the federal judge exceed her role: "When judges are loosed from the law, says Camus's Judge-Penitent, they 'race through their job.' The race can become that of the horses of the night."<sup>118</sup> Although Noonan leaves the precise consequences of loosing the judiciary from the law to the reader's imagination, he also leaves little doubt that overstepping the formal bounds of the judicial role, whatever they might be, by itself represents a grave, perhaps unspeakable, danger. In other words, the image of a freewheeling judiciary unconstrained by the law is troubling regardless of the moral status of its actions. To elevate formal over moral stakes in Cover's sense means to suggest that a judicial act that reaches beyond the formal limitations of the judicial role always incurs the prohibitive cost of abandoning the formal foundations of the rule of law as a whole, even if the act be morally praiseworthy or substantively just in the particular case.<sup>119</sup>

(3) *Ascription of responsibility elsewhere*. Noonan's reference to "horses of the night" not only raises the scepter of a lawless

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116. See, e.g. JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, HOLMES, AND WYTHE AS MAKERS OF THE MASKS* (1976).

117. It is also fitting to apply Cover's framework to Noonan's essay since it is dedicated to the memory of Robert Cover and was delivered as a Robert Cover Memorial Lecture at Yale Law School. John T. Noonan, Jr., *Horses of the Night: Harris v. Vasquez*, 45 *STAN. L. REV.* 1011 (1993).

118. *Id.* at 1024 (citation omitted).

119. See also *infra* text accompanying notes 175-89 (failure to recognize the moral nature of judicial choices regarding formal principles).

judiciary run amok, it also implicitly shifts responsibility for the violent nature of judicial interpretation onto judges who, unlike Noonan himself, exceed the formal limits of their function. Among the judges left unprotected by their role, Noonan intimates, might have been the Supreme Court justices who, in the middle of the night preceding Harris' final execution date, issued the final order dissolving the last stay of execution and prohibiting the issuance of any further stays without its approval, which in fact led to Harris' execution within thirty minutes.

Noonan was more forthright in assigning responsibility for Harris' execution to the state prosecutor and the warden at San Quentin:

The state over thirteen years was represented by a changing platoon. In the last rounds, Louis Hanioan stuck with determination to the task of destroying all of Harris' arguments. Above him in 1990 was the Attorney General of the state, John Van De Kamp; in 1992 it was Daniel Lungren. These lawyers cooperated with the infliction of death; they were as responsible for it as the warden who dropped the lever releasing the gas pellets.<sup>120</sup>

According to Noonan, "a judge who does order that a man be put to death" and a judge who affirms the order on appeal are both "cooperator[s] in the use of lethal force."<sup>121</sup> Noonan, however, carefully distinguishes between these state judges and himself and his colleagues on the federal bench. The role of federal judges restricts them: "[t]hey can only say whether the federal constitution has been violated by the trial and sentencing."<sup>122</sup> Presumably, unlike state prosecutors and state judges, federal judges "are not free to dispense their own view of justice."<sup>123</sup> State prosecutors, too, are restricted by their role. Their role, however, "imposes on them a part in the infliction of death."<sup>124</sup> "In contrast, the role assigned by law to the federal judges gives them no part in the infliction of the punishment."<sup>125</sup>

By shifting responsibility for the pragmatic meaning of his judicial acts to third parties, Noonan adopts a rhetorical strategy that is as old as it is widespread. Most immediate, the judicial

120. Noonan, *supra* note 117, at 1022.

121. *Id.* at 1022-23.

122. *Id.* at 1023.

123. *Id.*

124. *Id.*

125. *Id.* Noonan's attempt to shift responsibility from himself and his federal judicial colleagues onto others relies crucially on a narrow formalistic definition of the role of federal judges and thus invokes Cover's final responsibility-minimization mechanism, (2) the retreat to mechanistic formalism. We will turn to this particular method of responsibility dispersion in greater detail below. See *infra* text accompanying notes 148-89.

ascription of responsibility to others underlies much of the Supreme Court's death penalty jurisprudence. The very incoherence of the Supreme Court's post-*Furman* capital jurisprudence shifted responsibility for the imposition and infliction of death sentences onto the lower courts. By constructing a byzantine complex of contradictory requirements, the Court made it clear that the reinstatement of capital punishment would require a significant effort on the part of state legislators and judges. Moreover, the contradictory nature of capital sentencing law ensured that lower courts eager to overturn capital sentencing schemes and the death sentences they produced would find a way to do so.

More generally, judges continue to place responsibility for the infliction of physical violence that is criminal punishment anywhere but in themselves. As Cover himself has pointed out, it is a fundamental feature of our system of criminal punishment in general, and of our system of capital punishment in particular, that judges, since the enlightenment reform of punishment, do not and cannot participate in the infliction of the punishment they order.<sup>126</sup> As we have seen, the modern criminal process assigned the infliction of punishment to a well-defined cadre of bureaucrats who are strictly separated from the search for truth and justice ceremoniously overseen by the judge at trial.<sup>127</sup>

Freed of the disagreeable task of *inflicting* punishment, the judge becomes associated exclusively with the ritual of the imposition of punishment and its direct or collateral review. Even so, judges remain troubled by their participation in the system of capital punishment and now seek to distance themselves from the *imposition* of punishment as well. They prefer to view themselves as the independent arbiter who with considerable pomp and circumstance guides the search for truth and records its results, but leaves the significant choice to others. These others might include the sentencing jurors and, at times, the prosecutor or, as we will see shortly, the informer whose reports set the apparatus of criminal justice in motion. Any residual sense of responsibility is then diminished with an impressive arsenal of institutional and doctrinal constraints, all of which combine to reduce the judge's room for choice to nothing.

Eager to place responsibility for the imposition of capital punishment onto the sentencing jurors, judges—and therefore the entire system of capital punishment they shape and oversee—are

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126. Cover, *supra* note 2, at 1626; see also Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 54 (1983) [hereinafter Cover, *Nomos and Narrative*].

127. See *supra* text accompanying note 27.

fundamentally conflicted about sentencing instructions in capital cases. On the one hand, the judge may want to guide juror discretion to prevent arbitrary impositions of the death penalty. On the other, the judge has a strong interest in stressing the independence of the jurors' deliberations in order to deny her responsibility for the imposition of the death sentence. With instructions that, in accordance with the Supreme Court's capital jurisprudence, contain language stressing both the jurors' discretion and the strict limitations on that discretion (and, in recommendation states, language stressing both the jurors' responsibility and the mere advisory nature of their decision), judges can both maintain control over jury deliberations and shift responsibility to the jurors at the same time. It is therefore likely that instructions to capital sentencing juries will continue to reflect this ambivalence, and thereby give desperate jurors the opportunity to deny their personal responsibility by latching onto phrases that appear to limit their discretion.<sup>128</sup>

From the judicial perspective, the capital sentencing jury suggests itself as the most obvious locus of responsibility for the imposition of the death sentence. The system of capital punishment in the United States, after all, is set up so that the capital sentencing decision is made, or at least strongly influenced by, a jury of the defendant's peers. Jurors are inserted temporarily into the system to make the crucial sentencing decision. The permanent participants in the system of capital punishment, including all the members of the courtroom elite—the prosecutor, the judge, and often also the criminal defense attorney—merely set the stage for the dramatic pronouncement of the jury's decision on guilt and sentence.<sup>129</sup> The system is arranged precisely to prevent a single professional judge from making a choice as momentous as that between guilt and innocence or between life and death. The fact that the vast majority of criminal cases, including a substantial number of capital cases, never make it to the jury has yet to affect the carefully maintained image of our criminal justice system as built around the jury as the prime decisionmaker.<sup>130</sup>

There is another reason why jurors suggest themselves as convenient residues of unwanted responsibility: they are outsiders, who have been placed at the heart of the capital punishment sys-

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128. See *supra* text accompanying notes 82-108.

129. See JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* (1977); PETER F. NARDULLI, *THE COURTROOM ELITE: AN ORGANIZATIONAL PERSPECTIVE ON CRIMINAL JUSTICE* (1978).

130. See John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119 (1992).

tem for a brief moment and therefore do not forge relationships with members of the courtroom elite. If jurors establish relationships with anyone other than fellow jurors, it tends to be with the marshal or perhaps with the clerk of the court. Contacts between jurors and members of the courtroom elite are strictly forbidden, at least until the end of the proceeding in which they participate.

Now, members of one group of the courtroom elite will hesitate to shift responsibility onto a fellow group member. Prosecutors very rarely blame other prosecutors; and public defenders will tend not to blame other public defenders. Most important, judges very rarely blame other judges, particularly judges with whom they sit on a panel in regular intervals. Moreover, one member of the courtroom elite also will hesitate to shift responsibility onto another member of the elite, even if she belongs to another group.

As a result, members of the courtroom elite will have a tendency to shift responsibility onto outsiders first, fellow elite members a remote second, and fellow group members only in rare instances. Outsiders such as informers, jurors, and prison officials are therefore far more likely to emerge as loci of responsibility in a judge-molded and judge-dominated system of capital punishment than are public defenders,<sup>131</sup> prosecutors, or fellow judges.

We already have seen how the system permits judges to shift responsibility onto jurors and executioners. The grudge informer case that became the subject of the celebrated exchange between Hart and Fuller in the 1950s illustrates the shift of responsibility onto another outsider, the informer.<sup>132</sup> The woman defendant in this case had denounced her husband in October 1944 to a local official of the Nazi party for having made disparaging comments about Hitler in the privacy of his home and in the presence of only his wife.<sup>133</sup> The local official forwarded the information to his superior who in turn filed a complaint. After a trial, at which the informer testified, her husband was convicted and sentenced to death, but, as a healthy young male near the end of the war, was sent to the front (on "front probation") after about a week in

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131. There are of course defense attorneys, including many public defenders, who do not join the courtroom elite. They then also make for convenient bearers of responsibility. Consider, for example, the common tactic, employed by judges and many others, of attributing the delay between infliction and imposition of capital punishment to overzealous defense attorneys who refuse to play by the rules.

132. Judgment of July 27, 1949, Oberlandesgericht (OLG) Bamberg, 1950 *SÜDDEUTSCHE JURISTEN-ZEITUNG* 207; Hart, *supra* note 75 at 618-21; Fuller, *supra* note 75 at 652-55; see also Radbruch, *supra* note 76 at 105-08.

133. Among other things, he expressed regret at Hitler's survival of the assassination attempt on July 20, 1944. Judgment of July 27, 1949, OLG Bamberg, 1950 *SÜDDEUTSCHE JURISTEN-ZEITUNG* at 208.

prison. It appears that her husband was convicted under one or both of two statutes that criminalized "publicly seek[ing] to injure or destroy the will of the German people or an allied people to assert themselves stalwartly against their enemies"<sup>134</sup> and "publicly mak[ing] spiteful or provocative statements directed against . . . the leading personalities of the . . . National Socialist German Workers' Party."<sup>135</sup> By the time of the denunciation, the German courts had come to interpret the statutory term "publicly" to apply to any statement made in the company of at least one other person.<sup>136</sup>

After the war, the woman informer was convicted of wrongful imprisonment. The court opinion affirming her conviction easily disposed of the possibility that the prosecutor or the judges in the case might be criminally liable for the defendant's suffering.<sup>137</sup> Neither Hart nor Fuller even addressed this question. The opinion instead spent much time contrasting the informer's blameworthiness with the flawless, if not exemplary, conduct of the judicial officials. The officials were not liable because they had merely fulfilled their function of enforcing and applying the law. As such they were but a "tool"<sup>138</sup> in the hands of the informer who used them to effectuate her evil aims. After all, she had "turned to other men" after her husband had been conscripted in 1940 and was seeking a divorce. So she forged the fiendish plan of using her husband's derogatory remarks during a one-day home visit from the front to get rid of him.

The woman informer thus emerged as the devious schemer who set into motion the machinery of the law of which the prosecutor and the judges were but parts. Helplessly entangled in their official functions, the prosecutor and the judges saw no escape. The prosecutor, under the German legality principle, was required to pursue the case. The judge similarly was required to apply the statute as it had been broadly interpreted by the courts at the

134. Kriegssonderstrafrechtsverordnung of Aug. 17, 1938, § 5, 1939 Reichsgesetzblatt, Teil I (RGBl. I) 1456 (translated in Fuller, *supra* note 75, at 653).

135. Heimtückegesetz of Dec. 20, 1934, art. II, 1934 RGBl. I 1269 (translated in Fuller, *supra* note 75, at 654).

136. See LG Weiden (Dec. 19, 1948, Kls 1/48), reprinted in JUSTIZ UND NS-VERBRECHEN: SAMMLUNG DEUTSCHER STRAFURTEILE WEGEN NATIONALSOZIALISTISCHER TÖTUNGSVERBRECHEN 1945-1966, 233, 280 (1969). The *Heimtückegesetz* also contained a constructive publicity clause that treated nonpublic statements as public "when the person making them realized or should have realized they would reach the public." Heimtückegesetz of Dec. 20, 1934, art. II, 1934 RGBl. I at 1269 (translated in Fuller, *supra* note 75, at 654).

137. Judgment of July 27, 1949, OLG Bamberg, 1950 SÜDDEUTSCHE JURISTEN-ZEITUNG at 208-09.

138. *Id.* at 208.

time. Only the woman had in fact made a blameworthy choice. Her duty to report violations of the criminal law, a duty that Nazi law and propaganda stressed again and again, did not save her from criminal liability.<sup>139</sup>

That her husband had in fact made the alleged statements, that she relied on a frequently enforced law, and that she did not enforce the law with her own hands, but turned the matter over to a regular court of law did not help the woman. The very same facts, however, shielded the prosecutor and the judges from even the hint of criminal responsibility.

Even if the court officials in this case had been charged with wrongful imprisonment and perversion of justice (a felony under German law),<sup>140</sup> they would not have been convicted. They could have invoked the so-called blocking effect (*Sperrwirkung*) of the perversion of justice provision, which conditions the liability of court officials for other crimes on their conviction of perversion of justice. A conviction of perversion of justice, however, in turn required proof of a *knowing* perversion of justice (*dolus directus*).<sup>141</sup> It proved virtually impossible, however, to make this showing because the defendant held the key to the crucial evidence about her state of mind at the time of her judicial act and inevitably testified that at the time she had believed her conduct to have been not unlawful since, after all, she had been merely applying existing law. This defense was successfully invoked in every prosecution of Nazi judges and prosecutors in West Germany after the war so that not a single judge or prosecutor was ever convicted of criminal wrongdoing by a West German court. As we have seen, informers, who had misused the hapless system participants and, as outsiders, could not invoke the blocking effect, were not so lucky.<sup>142</sup>

139. Cf. Strafgesetzbuch (StGB) (old) § 139 (imprisonment for failure to report high treason and other "crimes detrimental to the community" ("gemeingefährliche Verbrechen")). The German Supreme Court recently recognized the duty to report certain crimes under East German law as relevant to a defense of necessity or duress. 1994 NEUE ZEITSCHRIFT FÜR STRAFRECHT (NStz) 426, 428.

140. StGB § 336 (Rechtsbeugung) ("Any judge, government official or arbitrator who, in processing or deciding a legal matter, perverts justice [sich . . . einer Beugung des Rechts schuldig macht] to favor or disfavor one of the parties shall be punished by imprisonment from one to five years."). On the crime of perversion of justice, see generally FRANK SCHOLDERER, RECHTSBEUGUNG IM DEMOKRATISCHEN RECHTSSTAAT: ZUR REKONSTRUKTION DES § 336 StGB FÜR DIE GEGENWART (1993). The German Penal Code has contained a perversion of justice provision since its inception in 1871.

141. This is no longer the case. Now *dolus eventualis*, an acceptance of a substantial risk that one perverts justice, suffices. See, e.g., DREHER-TRÖNDLE, STRAFGESETZBUCH UND NEBENGESETZE § 336 Rnr. 6 (46th ed. 1993).

142. The German Supreme Court recently extended an analogue of the *Sperrwirkung* to (East German) informers. 1994 NStz 426, 428.

Note that both prosecutors and judges were regularly excused as a group. This similar treatment reflects the close association between prosecutor and judge typical of the inquisitorial German criminal process, in which prosecutor and judge share the responsibility for disposing of a case. Accordingly, German criminal law does not distinguish between the two offices for purposes of assessing liability for perversion of justice. Today prosecutors can be convicted of perversion of justice for misconduct during the part of the process they control, including pre-trial investigation and pre-trial negotiations.<sup>143</sup> At the same time, prosecutors can invoke the same defenses to a perversion of justice charge that are available to judges.

The ease with which Judge Noonan assigned blame to the state prosecutors in the Harris case, American judges and prosecutors do not stand or fall together when it comes to ascribing responsibility for the effects of their official acts. In the American adversarial system, the relationship between prosecutor and judge is after all designed to be somewhat less intimate than between their German counterparts.

Whereas an American judge therefore might be more comfortable than his German colleague to shift responsibility onto a prosecutor, the commitment to collegiality among the judges themselves remains considerable. Noonan is very careful to exonerate the entire federal bench, including most significantly his fellow panel members who outvoted him time and time again, denying Harris habeas relief and execution stays. By contrast, German criminal law distinguishes between the liability of panel members depending on their assent to or dissent from an unlawful conviction or sentence.<sup>144</sup>

The procedural posture of the Harris case (and almost every other death penalty case that makes it to a federal court)<sup>145</sup> as a review of a state judgment by a federal court on a petition for a federal writ of habeas corpus establishes another boundary beyond which a federal judge can remove responsibility in capital cases. As we saw earlier, Noonan sharply contrasts the responsibility of state actors, on the one hand, and the non-responsibility of federal actors, on the other. Compared to this formal jurisdictional distinction, variations of blameworthiness among different actors on a given side of the jurisdictional divide are of little significance. State prosecutors are as responsible as state trial and appellate

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143. DREHER-TRÖNDLE, *supra* note 141, at § 336 Rn. 4.

144. *Id.* at § 336 Rn. 5.

145. Except the growing number of federal death penalty cases.



judges.<sup>146</sup> Federal district judges are as non-responsible as federal appellate judges. Federal appellate judges who vote to deny the habeas petition filed by a death row inmate are as non-responsible as federal appellate judges (like Noonan) who vote to grant it.<sup>147</sup>

(2) *Retreat to a mechanistic formalism.* At bottom, Noonan's analysis of the question of his responsibility for the imposition and infliction of capital punishment thus turns on his account of the role of the judge, and of the federal judge considering a habeas corpus petition filed by a state prisoner in particular. It is the narrow formalism of this account that permits Noonan to shift responsibility onto other participants in the system of punishment and thereby to distance himself (and his colleagues on the federal bench) from the violent impact of his judicial acts.

In a nutshell, Noonan argues that federal judges are not responsible for the imposition and infliction of capital punishment on state inmates because they do not review the general appropriateness of this imposition and infliction. Instead, they merely decide whether, within the procedural constraints imposed by the federal habeas statute, the imposition and infliction of capital punishment on a given habeas petitioner violated or would violate the federal constitution.

To better appreciate the sophistication of Noonan's analysis, let us take a look at earlier (and often far clumsier) judicial attempts to diminish or deny responsibility by defining the judicial role in a narrow and formalistic way. The most intense scrutiny of judicial responsibility for the consequences of judicial decisions has occurred (and continues to occur) in the context of the Germans' attempt to explain the collapse of German lawyers between 1933 and 1945.<sup>148</sup> Soon after the war, German lawyers declared as though with one voice that legal positivism was to blame for their collaboration with the Nazi regime. It was conceded that there had been bad apples, such as the fanatical president of the *Volksgerichtshof*, Roland Freisler, but that, in general, judges did no more than apply the laws in force at the time. Legal positivism, so the story went, had taught them not to question the legitimacy of legislative directives, so that responsibility for the results of their sub-

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146. Noonan does not discuss the responsibility of state judges on collateral review.

147. The only federal judges who could not invoke this wholesale exoneration of the federal bench would appear to be the justices of the Supreme Court (all of them or only those in the majority?), but only insofar as they exceeded their role by issuing the final no-further-stays-order in the *Harris* case. See *supra* text accompanying note 119.

148. See generally Markus Dirk Dubber, *Judicial Positivism and Hitler's Injustice*, 93 COLUM. L. REV. 1807 (1993).

sumption of cases under given legal provisions rested squarely on the shoulders of the Nazi leaders, who had generated these provisions.

This prescriptive variety of positivism which combines strict formalism with naive literalism—"severe" positivism, in Richard Posner's term<sup>149</sup>—was said to foster the establishment and perpetuation of corrupt legal systems. As a result, "legal positivism" in general was discredited. In response, Hart and other positivists invoked, among other things, the reformist spirit of Bentham to point out that the origins of positivism lay not in the perpetuation of evil but in the effort to do good.<sup>150</sup> This was true enough but did little to address the attack on formalism and literalism. Bentham, after all, along with every other enlightenment reformer of law at the time, sought to eliminate the discretion of judges and called for a strict literalism and formalism in the judicial application of codes. Judicial discretion to these reformers was an obstacle in the path of the enlightened modernization of the law through codification. As a result, enlightenment reformers of the law, from Montesquieu in France, Frederic II in Prussia, Beccaria in Italy, Feuerbach in Bavaria, to Bentham in England, thought it imperative to require literal application of their new codes and to prohibit non-official code commentaries.<sup>151</sup>

In the end, one is left with the unremarkable insights that literalism and formalism are only as good as the laws they apply and that they help judges insulate themselves from responsibility for applying bad laws. Perhaps German judges did not in fact turn to severe positivism during the Nazi era, and only retrospectively exploited its exculpating potential after 1945, as has been suggested. Even if this were the case, it obviously would change nothing about the responsibility minimizing potential of severe positivism. It matters little when the minimization is sought. At any rate, evidence of the actual function of severe positivism in the decision-making process of German judges is difficult to obtain. Apologetic memoirs are unreliable and the highly oppressive nature of the regime and the virtual absence of public challenges to judicial acquiescence in Nazi law did not encourage public comment, in opinions or elsewhere, on the responsibility minimizing role of positivism.

In Apartheid South Africa, by contrast, national and interna-

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149. *United States v. Marshall*, 908 F.2d 1312, 1335 (7th Cir. 1990) (Posner, J. dissenting), *aff'd sub nom. United v. Chapman*, 500 U.S. 453 (1991).

150. Hart, *supra* note 75, at 594-600.

151. HINRICH RÜPING, *GRUNDRISS DER STRAFRECHTSGESCHICHTE* 67 (2d ed. 1991). Needless to say, this prohibition fared no better than that issued by Justinian over a millennium earlier.

tional pressure complemented the Apartheid regime's independent desire to support its claims of superiority over black Africans by associating itself with what it perceived as the liberal European notion of the rule of law. As a result, judges saw the need to justify their enforcement of racist laws that discriminated against non-whites and unleashed the force of arbitrary state violence onto them. Thus challenged, South African judges and their defenders invoked the very sort of restrictive positivism that has been said to account for the German jurists' failure. Once again, the judicial function was reduced to one of application, with universal denials of any significant discretion in the interpretation of laws, however vague. The judge was merely to apply the law, as the South African constitution assigned the making of law to parliament. The judge's moral and political beliefs were not to influence her application of the law to the case before her.<sup>152</sup> As one South African commentator pointed out at the time, this severe positivism hardly could have reflected complete ignorance of the judicial lawmaking power:

A more likely explanation for the adoption of the mechanical approach to statutory interpretation is that it absolves the judge from personal responsibility. It is the body of statutory law which contains the law of apartheid, the laws which depart most fundamentally from the accepted tenets of justice, and it is this body of law which must surely most trouble the consciences of those judges who do not support the National Party Government's legislative program and politics.<sup>153</sup>

Given the popularity of this brand of formalist-literalist positivism among judges eager to minimize their responsibility for the consequences of their interpretive acts, one can hardly deny the responsibility minimizing potential of this variety of positivism. It would be just as misguided to claim, however, that no other view of the judicial role permitted and continues to permit judges to diminish their sense of responsibility. Any theory, positivist or not, that denies judicial choice denies judicial responsibility. For instance, Nazi judges frequently invoked the Nazi party program, Hitler's directives, and the *Volksgeist* or the healthy legal consciousness of the *Volk* to justify decidedly non-literal interpreta-

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152. DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY* 151 (1991); Edwin Cameron, *Legal Chauvinism, Executive-Mindedness and Justice—L.C. Steyn's Impact on South African Law*, 99 S. AFR. L.J. 39, 59-60 (1982).

153. JOHN DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 371-72 (1978) (citing COVER, *supra* note 4, at 235; see also Cameron, *supra* note 151, at 60; John Dugard, *The Judicial Process, Positivism and Civil Liberty*, 88 S. AFR. L.J. 181 (1971).

tions of existing Nazi or pre-Nazi law.<sup>154</sup> Only in this way could the Nazis corrupt the entire German legal system without recodifying the entirety of pre-1933 German law.<sup>155</sup> Some South African judges similarly emphasized their duty to implement the emanations of the *Volksgeist*. Of course, much as the Nazis' *Volk* concept did not include non-Aryan Germans, so the South African's *Volk* concept did not include the non-white majority.<sup>156</sup>

For purposes of judicial responsibility, therefore, not all accounts of judicial function that permit flexible interpretation of legal texts are alike. Even a non-literalist account can minimize judicial choice, and therefore judicial responsibility, by replacing the interpretive constraints exerted by the literal meaning of statutory language and the authority of the legislature with other authorial voices of equal, if not greater, authority. For example, the infamous 1935 amendment of section 2 of the German Penal Code did not simply abandon the doctrine of strict construction in favor of analogous interpretation of criminal statutes: "That person will be punished who commits an act which the law declares to be punishable or which deserves punishment according to the fundamental principle of a penal statute and the healthy sentiment of the *Volk*."<sup>157</sup> It also replaced the constraining power of the literal meaning of criminal statutes with the even more awesome constraining power of the healthy consciousness of the *Volk*, which in turn was defined by the Nazi party program and Hitler's even more specific directives.<sup>158</sup>

The *Volk* and the Communist Party played a very similar role in East Germany after the war. The interests of the *Volk*, now redefined as the working class, once again were represented exclusively and completely by the Communist Party and the members of the Politbüro. The *Volk* judges were but representatives of the *Volk's* interests so defined. It is this very defense that, in a reenactment of the cases against Nazi judges four decades earlier, has shielded former East German judges from criminal liability under the German perversion of justice provision, with the exception of one judge who was sentenced to two years' probation for his partic-

154. See, e.g., the interpretation of "public" in the Hart-Fuller grudge informer case, *supra* text accompanying note 129.

155. See BERND RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG: ZUM WANDEL DER PRIVATRECHTSORDNUNG IM NATIONALSOZIALISMUS* (3d ed. 1988).

156. Markus Dirk Dubber, *The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology*, 43 AM. J. COMP. L. 227 (1995); John Dugard, *Should Judges Resign?—A Reply to Prof. Wacks*, 101 S. AFR. L.J. 286, 289-90 (1984).

157. Gesetz zur Änderung des Strafgesetzbuchs, June 28, 1935, 1935 RGBl. I 839 (amending StGB § 2).

158. Dubber, *supra* note 156, at 227.

ipation in the expedited Waldheim trials in 1950, where more than 3400 defendants were convicted of Nazi and war crimes in trials that often lasted only a few minutes. Most defendants were sentenced to substantial prison terms and thirty-two were sentenced to death.<sup>159</sup>

In this sense, the shift of judicial responsibility onto the *Volk* does not categorically differ from the shift of judicial responsibility onto the American people that Robert Cover found among anti-slavery judges in the antebellum North. In both cases, ultimate responsibility was placed onto the ultimate originators of the text the judges had before them, regardless whether the *Volk's* choice manifested itself in the Party Program and in the border laws passed by an all-Communist parliament or the people's choice manifested itself in the United States Constitution (which contained a Fugitive Slave clause) and in the fugitive slave laws passed by the federal legislature.<sup>160</sup>

There is no need, then, to turn to oppressive regimes for invocations of severe positivism and other doctrinal methods to shift judicial responsibility onto others. Hard cases in the United States provide ample illustrations. Cover masterfully has exposed the various ways in which antebellum Northern judges diminished their sense of responsibility in cases involving the forced return of slaves under the fugitive slave laws. In recent years, two groups of cases have generated a similar responsibility crisis that has forced American judges to explore their responsibility for the consequences of their official acts of legal interpretation: capital cases and cases requiring the application of harsh mandatory sentencing laws, guidelines cases, for short.

The harsh mandatory sentences under the federal sentencing guidelines have evoked the full panoply of judicial responses. Regardless of their general attitude toward criminal sentencing, federal judges have balked at the harsh penalties the guidelines prescribe, particularly on low level drug couriers and minority crack defendants. Nonetheless, most judges have applied the guidelines in accord with what they perceived as their duty to apply the law as given. Others have held the guidelines unconstitutional, while some circumvented the guidelines clandestinely through arrangements with the parties. Then there were those who interpreted the guidelines flexibly to allow for greater leniency in particular cases.

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159. *Staatsanwalt fordert fünf Jahre Haft im Leipziger Waldheim-Prozess*, FRANKFURTER ALLGEMEINE ZEITUNG, Aug. 27, 1993; Albert Funk, *Laut, aber milde*, FRANKFURTER ALLGEMEINE ZEITUNG, July 27, 1993; *Waldheim-Richter zu zwei Jahren auf Bewährung verurteilt*, FRANKFURTER ALLGEMEINE ZEITUNG, Sept. 2, 1993.

160. U.S. CONST., art. IV, § 2; see generally COVER, *supra* note 4, at 159-91.

Some grudgingly applied the guidelines, but complained about the guidelines' injustice in their opinions. Others upon taking senior status removed themselves from the criminal docket. Finally, some district judges resigned in protest.<sup>161</sup>

For our purposes, the judges who opted for a literal interpretation of the guidelines are of particular interest. Although the guidelines, being guidelines and having been promulgated by an unelected federal commission with practically no congressional oversight, may appear as particularly good candidates for flexible judicial interpretation, judges routinely refuse to acknowledge their discretion in applying them. Take, for example, the guideline provision that, until recently, assessed criminal punishment on the basis of the weight of the mixture or substance containing an illegal substance.<sup>162</sup> In the case of a drug like LSD, which is heavily diluted and consumed in minute liquid doses that are applied to carrier substances, such as thick paper or sugar cubes, this provision led to absurd results. For instance, a dealer selling, say, half a gram of pure LSD faced less than five years in prison, whereas her unfortunate colleague, who sells the same weight of LSD diluted in sugar cubes would be subject to a twenty-year sentence.

The Seventh Circuit, among others, refused to exercise its discretion to interpret the guidelines provision more flexibly and hold that the LSD carriers should not be counted as "substances containing" LSD for purposes of sentencing. In a remarkable dissent, Judge Richard Posner pointed out that "the literal interpretation adopted by the majority is not inevitable. All interpretation is contextual."<sup>163</sup> He traced his disagreement with the majority back to:

the disagreement between the severely positivistic view that the content of law is exhausted in clear, explicit, and definite enactments by or under express delegation from legislatures, and the natural lawyer's or legal pragmatist's view that the practice of interpretation and the general terms of the Constitution . . . authorize judges to enrich positive law with the moral val-

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161. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1686-87 (1992); *Federal Judge Quits over Sentencing Rules*, CHI. TRIB., Oct. 1, 1990, at 4; *Judges Spurns Rule on Sentencing: Rejects 17 ½ Year-Term for Drugs*, N.Y. TIMES, Jan. 27, 1991, at A18; Sandra Torry, *Some Federal Judges Just Say No to Drug Cases*, WASH. POST., May 17, 1993; see also LOIS G. FORER, *A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING*, 3-6, 122-23 (1994).

162. UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL, U.S. SENTENCING COMM'N § 2D1.1 and app. C at 378-79 (1994); cf. *Neal v. United States*, 116 S. Ct. 416 (1995); *Chapman v. United States*, 500 U.S. 453 (1991).

163. *United States v. Marshall*, 908 F.2d 1312, 1337 (7th Cir. 1990) (Posner, J. dissenting), *aff'd sub nom. United v. Chapman*, 500 U.S. 453 (1991).

ues and practical concerns of civilized society.<sup>164</sup>

The uneasiness of judges in the face of mandatory sentencing guidelines may stem not only from their inhibition against inflicting serious physical violence, but also from what they perceive as the legislative usurpation of one of their traditional fiefdoms. No similar ambiguity surrounds the attitudes of judges toward capital cases. The "death is different" campaign of the last few decades may have done little to heighten public awareness of the violence of long term imprisonment,<sup>165</sup> but it certainly has managed to highlight the exceptional physical violence of capital punishment. It is therefore in capital cases that we find judges most eager to invoke the responsibility minimizing function of restrictive formalism.

The clearest illustration of the role of formalism appears in an area of the law that in theory has precious little to do with capital punishment, but in practice has become entirely engulfed by capital jurisprudence: the law of federal habeas corpus. Rightly or wrongly, the federal habeas remedy has been singled out as the main cause of delay in death penalty cases. As a result, both the Supreme Court and the federal legislature for years have attempted to accelerate the capital punishment process through the reform of federal habeas law. Along the way, non-capital habeas cases, which constitute the vast majority of habeas cases, have been largely forgotten.

The Supreme Court has been far more successful than Congress in implementing radical habeas reform.<sup>166</sup> In the process, the Court has turned federal habeas from a gateway for wrongfully convicted or sentenced state death row inmates into a massive system of responsibility denial available to federal judges. In essence, the Court's habeas reform has shifted the responsibility in capital cases back onto the state courts by drastically limiting the availability of federal habeas review. Moreover, the Court has gone even further and relieved itself and the lower courts of responsibility for the decision to bar access to the federal courts on habeas by, first, postulating that this decision involves no judicial choice of any kind but instead is dictated by the commands of juridical logic, and by, second, resolving any remaining ambiguities on this point

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164. *Id.* at 1335.

165. See Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 *BUFF. L. REV.* 689, 713-14 (1995).

166. By the time Congress passed habeas reform as part of the Antiterrorism and Effective Death Penalty Act of 1996, the Supreme Court had been revamping habeas for over a decade. Antiterrorism and Effective Death Penalty Act of 1996 §§ 101-108, H.R. REP. NO. 518, 104th Cong., 2d Sess. 4-14 (1996).

against the habeas petitioner.<sup>167</sup>

Responding to the expansion of federal habeas by the Warren Court, Paul Bator, in a 1963 article that remains the theoretical backbone of habeas critics today, warned in true Thayerite fashion that expansive federal habeas review might diminish a state judge's sense of responsibility: "I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else."<sup>168</sup> According to Bator, the problem with expansive federal habeas was not, as one hears so often today, the irritation of state judges bitter about an infringement of their judicial integrity and independence, but "the possible damage done to the inner sense of responsibility, to the pride and conscientiousness, of a state judge in doing what is, after all, under the constitutional scheme a part of *his* business: the decision of federal questions properly raised in state litigation."<sup>169</sup>

Professor Bator's concerns have been allayed. The business of capital punishment is firmly back in the hands of the state courts. It is the federal judges, whose sense of responsibility has been relieved by the Supreme Court's erection of formidable procedural barriers to federal habeas review and by its diminution of judicial discretion in the application of these barriers to particular cases.

The story of the Court's limitation of federal habeas review in recent years has already been told more than once and there is no need to retell it here.<sup>170</sup> Suffice it to say that the Court has tightened the procedural rules designed to keep state capital cases out of federal court, including the rules regarding successive petitions, abuse of the writ, and procedural default. In general, the Court has transformed the equitable remedy of habeas into a complex of rigid procedural requirements that only few specialists can master. Once procedural errors have been made, even stricter requirements for successive petitions make it extremely difficult to remedy them.

By closing the federal habeas door to state inmates, federal courts from the Supreme Court on down to the district courts have

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167. See Susan Bandes, *Taking Justice to Its Logical Extreme: A Comment on Teague v. Lane*, 66 S. CAL. L. REV. 2453 (1993).

168. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963)

169. *Id.* at 506.

170. Markus Dirk Dubber, *Prudence and Substance: How the Supreme Court's New Retroactivity Doctrine Mirrors and Affects Substantive Constitutional Law*, 30 AM. CRIM. L. REV. 1, n.1 (1992).



managed to minimize their responsibility for the imposition and infliction of capital punishment. It is obviously much easier to deny responsibility for a death sentence if one can dispose of a capital case on procedural or jurisdictional grounds, instead of having to dig through the record to consider the case on the merits.<sup>171</sup>

The burden on federal judges is further lightened if the very decision to keep a death row inmate out of federal court on procedural grounds itself virtually eliminates the judge's discretion and resolves any lingering ambiguities against the petitioner. This is the contribution of the Supreme Court's new retroactivity rules on habeas. In essence, the new retroactivity rule prevents a federal habeas court from considering claims that invoke a 'new' rule of law. The question of the novelty of a given rule is resolved by inexorable jurisprudential logic: a rule is new if, at the time it was presented to the state courts, it was neither "dictated," "compelled," "controlled," nor "required" by precedent.

Should a federal judge be unable to deny the petition on this logical ground, say, because she was unsure whether the invoked rule was merely "within the logical compass" of precedent at the time (in which case it may count as a new rule) or whether it can be said to have crossed the line into logical compulsion (in which case it would be an old rule), she need not burden herself with resolving this question. Instead she may turn to the state courts. If the state courts, at the time they faced the rule in question, could have detected "indications" that the rule's recognition was not required by precedent, it is a new rule.<sup>172</sup> In case the state fails to raise a retroactivity defense, a federal court at any level can address the issue *sua sponte*, even though the Supreme Court also has stressed that it is a prudential, not a jurisdictional rule. The petitioner can never invoke the retroactivity issue to bar the state's invocation of a new rule, because, as the Court has recently clarified, the new retroactivity rule, which applies only to collateral review, was designed specifically and exclusively to keep habeas petitions out of federal court.<sup>173</sup>

The new retroactivity doctrine thus well illustrates how judge-made doctrine can diminish judicial responsibility in the system of capital punishment. As we have seen earlier, however, general conceptions of the judicial function that are not directly grounded in legal doctrine also play an important role in the ubiquitous attempt by judges to minimize their responsibility in the face of hard

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171. *But see* *Kyles v. Whitley*, 115 S. Ct. 1555 (1995) (reversing, over bitter dissents, conviction of death row inmate after detailed factual analysis of *Brady* claim).

172. Dubber, *supra* note 170, at 17-18.

173. *Lockhart v. Fretwell*, 506 U.S. 364 (1993).

cases, i.e., cases that may result in the infliction of physical violence as a result of the judge's interpretive act. In fact, the new retroactivity rules themselves implicitly relied on a strictly formalist account of judicial decisionmaking. Under this account, the common law judge sifts through precedent for logical rules the application of which dictates the outcome in the case before her by application of a simple but inexorable syllogism. Cover's anti-slavery judges invoked a similarly limited account of judicial function, which permitted them to shift responsibility to the judicial authors of those precedents which "controlled" their decisions with the power of logic and of *stare decisis*.<sup>174</sup>

Let us now return to Judge Noonan's particularly sophisticated contemporary effort to minimize judicial responsibility by minimizing the judicial function in the system of capital punishment. Noonan does not embrace the sort of primitive pseudo-logical approach to legal interpretation that underlies the Supreme Court's retroactivity doctrine, nor the crude formalism that one finds in Nazi apologetics or in the jurisprudence of anti-slavery judges in the antebellum North and of South African judges under Apartheid, all of which turn on not only the possibility, but also the desirability, of freeing judicial interpretation of the judge's moral convictions because legal questions, after all, are not moral questions.

Noonan also does not endorse the sort of naive literalism attacked by Judge Posner in his *Marshall* dissent. As Noonan concedes, "beliefs on fundamental questions affect the actions of every judge."<sup>175</sup> Presumably, these beliefs would include moral convictions, particularly convictions regarding the moral justification of capital punishment in the abstract and as applied to a particular person in Noonan's court. Still, Noonan attempts to avoid the obvious implication that judges, even federal judges, therefore bear moral responsibility for their participation in capital cases. Instead, he stresses the distinction between defining the scope of judicial function and exercising that function, once defined. Noonan acknowledges the role of a judge's moral convictions in exercising the judicial function, say, in resolving the indeterminacies of a legal text such as the vague federal constitutional provisions federal judges interpret on federal habeas review. In stark contrast, he sees no similar textual indeterminacies and therefore no part for a judge's moral convictions when it comes to determining the scope of the judicial function to begin with: "while beliefs on fundamen-

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174. COVER, *supra* note 4, at 143.

175. Noonan, *supra* note 117, at 1024.

tal questions affect the actions of every judge, it is possible for the judge to distinguish what lies within his competence and what does not. His beliefs and the beliefs of the public cannot enlarge his power or alter his role."<sup>176</sup>

It is the consideration of moral beliefs in the judge's definition of his role, not the inevitable moralization of constitutional interpretation, that, in Noonan's view, raises the scepter of horses galloping through the night. Noonan, however, can hardly hold simultaneously that moral convictions "affect the actions of every judge" and that they do not affect the judge's definition of his role, since clearly that definition is itself normative judicial action. If moral convictions enter the judicial interpretation of, say, the Eighth Amendment, then they surely also enter the judicial interpretation of whatever text defines the scope of judicial competence. The resolution of the how and the what of judicial function turns on the judicial interpretation of texts. If the judicial interpretation of one text is a normative choice that must (and should) draw on fundamental moral convictions, so does the judicial interpretation of another. Even if the judicial role could be formally and clearly defined, the very choice to adhere to the limitations of this role in turn would be a normative one and thus subject to the same influence of fundamental personal convictions.<sup>177</sup>

Now it might at this point be suggested that the text which defines the judicial role is less indeterminate than the constitutional provision which occupies the federal habeas judge. Perhaps Noonan thinks of the federal habeas statute as the text that unproblematically defines his function. The equitable nature of the habeas remedy, however, suggests that the habeas statute itself is not likely to place rigid restrictions on the judge's role.<sup>178</sup> In fact, 28 U.S.C. § 2243 instructs the habeas judge to "dispose of the matter as law and justice require." At the very least, the precise scope of federal habeas review has been subject to intense debate over the past three decades, suggesting that the vague terms of the federal habeas statute make for a poor guidepost for a federal judge

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176. *Id.*

177. See COVER, *supra* note 4, at 197 ("moral-formal decision" of anti-slavery judges was really "moral-moral" decision"); see also *infra* note 195 (Cover on "jurisdictional" limitations).

178. As the Supreme Court explained in the *Gomez* case: "Whether his claim is framed as a habeas petition or as a § 1983 action, Harris seeks an equitable remedy." *Gomez v. United States Dist. Court*, 503 U.S. 653, 653-54 (1992). The Court's recent decision in *Lonchar v. Thomas* is not to the contrary. Rather than deny the equitable nature of the habeas remedy, the Court in *Lonchar* disapproved of the dismissal of a death row inmate's first habeas petition for "special *ad hoc* 'equitable' reasons." *Lonchar v. Thomas*, 116 S. Ct. 1293 (1996).

searching for her role on habeas.

Noonan stresses that habeas review is limited to questions of federal constitutional law. 28 U.S.C. § 2254(a) does limit federal habeas jurisdiction to claims that the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." Given that, as Noonan recognizes, the interpretation of constitutional texts in particular necessarily reflects the moral beliefs and the moral choices of its interpreter, the limitation of the federal habeas judge's role to interpreting those texts does little to shield him from moral responsibility for his interpretive acts. Leaving this question aside, it has also proved difficult to determine exactly what sorts of claims allege a "violation of the Constitution" and thus fall within the federal courts' habeas jurisdiction. Consider, for example, the recent debate among Supreme Court justices about the question whether a substantive claim of innocence amounts to a claim of constitutional violation.<sup>179</sup> At any rate, even if a substantive claim of innocence should not rise to the level of a constitutional claim, it has recently been argued that § 2254(a) authorizes federal habeas review of such a claim as a violation of federal common law, i.e., of "the . . . laws . . . of the United States."<sup>180</sup> Even Paul Bator, in his thirty-year-old article on habeas that continues to be cited by Supreme Court justices eager to restrict the scope of habeas, suggested that we might think of federal habeas jurisdiction as "a roving extraordinary commission to undo injustice,"<sup>181</sup> much as Justice Holmes and Judge Learned Hand had done before him.<sup>182</sup>

Then, again, perhaps it is the judicial oath that defines the federal judge's role with unquestionable clarity. Consider, for example, how Judge Edith Jones of the Fifth Circuit Court of Appeals recently came to the rescue of her fellow federal judges: "I know many judges who are opposed to capital punishment but who abide by their oath to enforce the law of the land and never deliberately procrastinate over such cases."<sup>183</sup> The judicial oath provided similar solace to anti-slavery judges in the antebellum North.

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179. It does in very limited circumstances. See *Herrera v. Collins*, 506 U.S. 390 (1993).

180. Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303 (1993).

181. Bator, *supra* note 168, at 527 (1963).

182. See *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting) ("Habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes from the outside, . . . and although every form may have been preserved, opens an inquiry whether they have been more than an empty shell.").

183. *Letter to the Editor*, N.Y. TIMES, Feb. 3, 1989, at A30. The juror oath similarly has been used to diminish a juror's sense of responsibility for her capital sentencing decision. See *Riley v. State*, 889 S.W.2d 290 (Tex. Ct. App. 1993) *cert. denied*, 115 S. Ct. 2569 (1995).

As a legal periodical remarked in defense of Justice Story's enforcement of the Fugitive Slave clause: "The very object of the oath of office is to prevent the judge from exercising his discretion, in declaring . . . what the law is according to his opinion or feeling of its moral character."<sup>184</sup>

A closer look reveals, however, that judicial oaths tend not to define the judicial role quite as unambiguously as their judicial in-vokers apparently assume. For example, Joseph Story, Edith Jones, along with John Noonan and his co-panelists in the Harris case, all "solemnly swore," not that they will "enforce the law of the land," but that they "will *administer justice* without respect to persons, and do equal right to the poor and the rich, and that [they] will faithfully and impartially discharge and perform all the duties incumbent upon me as under the Constitution and laws of the United States."<sup>185</sup> South African judges similarly swore to "*administer justice* to all persons alike without fear, favour or prejudice, and, as the circumstances of any particular case may require, in accordance with the law and customs of the Republic of South Africa."<sup>186</sup>

Judicial oaths are so ambiguous that they are constantly cited to support contrary conceptions of the judicial role. In diametric opposition to the limited reading assumed by Jones and many other federal judges, the federal oath recently was invoked to stress the broad duty of judges not merely to enforce the law but to do justice, particularly in decisions that traditionally have relied especially on judicial flexibility and discretion, such as criminal sentencing<sup>187</sup> and collateral habeas review.<sup>188</sup> Similar arguments were advanced in South Africa under Apartheid based on the South African judicial oath to "administer justice."<sup>189</sup>

Judges occasionally contrast their narrow and clearly defined role in the system of punishment with that of the governor, or whoever holds the clemency power in a given system. In recent years, federal judges time and time again have stressed that ultimate responsibility for the infliction of capital punishment lies with the governor and her virtually unrestrained clemency power. So when a state death row inmate recently asked the Supreme

184. COVER, *supra* note 4, at 172; see also *id.* at 193.

185. 28 U.S.C. § 453 (1988) (emphasis added).

186. DYZENHAUS, *supra* note 152, at 49 (quoting Supreme Court Act 59 of 1959, s. 10(2)(a)) (emphasis added).

187. See, Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1687, 1727 (1992).

188. *In re Clark*, 5 Cal. 4th 750, 802 (1993) (Mosk, J., concurring and dissenting).

189. Cf. Dugard, *supra* note 156, at 291.

Court to consider his claim of innocence on habeas since the state courts would not hear it, he was reminded of the governor's clemency power.<sup>190</sup> As judges see it, the governor is free of all the constraints of role that prevent them from exercising an attributable choice. The governor faces no penal code, no constitutional amendments, no habeas statutes, no restrictive oaths, only her conscience.

In the current system of capital punishment, however, governors tend to perceive their own role rather more restrictively. Like the executioner, they can point to the system's ceremonial focus on the imposition of punishment which, after the customary years of review, is not only temporally, but also personally removed. True, the governor cannot rely on the executioner's Missouri Protocol, or something like it, nor on the executioner's self-perception as servant of the state or, more specifically, of the court. There is no need for such a Coverian responsibility minimization mechanism, however, because the governor, like the judge, is removed from the actual infliction of punishment. After all, the executive, as we have seen, had extricated itself from the infliction of punishment long before members of the judiciary, who continued to direct and stage executions and other forms of public corporal punishment until the late eighteenth century. The governor's representative may be available to the execution team by telephone on the night of the execution to pass on any gubernatorial stays, and then-Governor Bill Clinton may leave the New Hampshire campaign trail to rush back to Little Rock for the execution of the lobotomized Rickey Ray Rector, but the governor will not appear in prison to supervise or even to witness the execution. She can rest assure that she, just like the judge or the prosecutor or the legislator or the victim's grieving relative, would not be permitted to set the IV or push the buttons on the control module in Potosi's dentistry storage room.

#### IV. CONCLUSION

Modern man, Kierkegaard suggests in *The Present Age*, is the man of the crowd. Morally, modern man has seized to exist; he has been replaced by the public as the operative moral agent. The individual no longer takes responsibility for his actions, nor does he, strictly speaking, take any action at all. The crowd acts, though none of its members does.<sup>191</sup>

Viewed in its complex entirety, the modern system of capital punishment appears as one mad and futile scramble to deny per-

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190. *Herrera v. Collins*, 506 U.S. 390 (1993).

191. SOREN KIERKEGAARD, *THE PRESENT AGE* (Alexander Dru trans. 1962).

sonal responsibility for the necessarily violent aspect of law. It is the system of capital punishment that inflicts the pain of its punishment, not any of its members. If a particular member of the system is to be held responsible for the system's acts, it is always someone else, someone earlier, and someone elsewhere. A recent commentary on the possibility of the Holocaust illustrates the point:

The advanced technical division of labor yields the fragmentation of the total human act: no one man decides to carry out the evil act and is confronted with its consequences. The person who assumes full responsibility for the act has evaporated. The individual agent does not see himself as a moral subject but as an exchangeable part of a larger unit.<sup>192</sup>

Obviously, the evilness of the system's act differs dramatically between the Holocaust and the infliction of capital punishment. The point remains the same, however, as individuals in both systems struggle to deny their responsibility for an act that offends their inhibition against inflicting physical violence on another to a greater or lesser degree.

The development of the infliction of capital punishment into a technology, though inevitably primitive, separates the individual and the system to which she belongs, on one side, from the act which she helps consummate as a member of the system, but seeks to deny as an individual, on the other. The lethal injection apparatus of pistons and tubes, which are set in motion by the push of two buttons appear as a macabre Hoffmannesque puppet troupe without the puppeteer, which opens at midnight and, a short while later, disappears, leaving behind a dead man, who had been asleep in his hospital bed. The wonders of independent-minded inanimate objects that obey only the laws of the natural world similarly intervene between the human action and the infliction of death in the gas chamber. There, it is not pistons and tubes that deliver the cause of death, but a long and winding spiral that dangles from the ceiling over the condemned's head. Compelled solely by the forces of gravity, a capsule slowly worms its way down the spiral and drops into a bucket of acid at the condemned's feet. There it reacts with the acid and, literally under the eyes of the condemned, generates the lethal gas that soon fills the chamber.<sup>193</sup>

If the ubiquitous denial of personal responsibility is a condition of modern society, the methods of minimizing responsibility for the violent impact of criminal law, and of law more generally,

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192. VETLESEN, *supra* note 110, at 90.

193. See Guyora Binder, *Paradox and Punishment: Irony in the Execution of Jesse Bishop* (unpublished 1980).

appear as mere symptoms of a more fundamental malaise. It may therefore seem not only professionally myopic but pointless to consider how our conception of law might make room for the violent reality of legal action without attributing that reality to anything or anyone other than a given human actor.

Suspending modern disbelief for the moment, however, one might, in the spirit of Robert Cover, suggest that such a pragmatic conception of law as violence should (1) recognize the violent nature of legal interpretive action, (2) acknowledge the necessity of individual choice in the course of that action, (3) challenge the privileged status of some actor's interpretive choice over another's, and (4) affirm the contextual and therefore communal nature of that choice.

(1) As all interpretation, legal interpretation takes place within a context, which in the case of law is defined not only by communal norms, but also by the past, present, and future violence of the actual infliction of law. In this intimate connection with violent state action, legal interpretation differs from other practices of interpretation.<sup>194</sup> In the particular case of the criminal law, legal interpretation means violence because it invokes the threat of its violent enforcement against alternative interpretations and inflicts the violence of punishment on the convicted defendant. Not only capital punishment is physical violence, so are the other oppressive measures of social control employed by the state, from parole supervision to lifelong incarceration to confinement in a mental health facility. All these measures not only violently interfere with the life plans of persons, but operate against the imposing backdrop of the concentrated power of the state to enforce its commands with additional violence if necessary. What matters in legal interpretation is not only whose ox is being gored, but that some ox is always being gored.

(2) Once the violent nature of legal interpretation has been acknowledged, individuals must be encouraged to face the substantive choice available to them. It must be made clear that the constraints of institutional role are self-imposed insofar as these constraints themselves reflect normative choices of the kind they are invoked to deny. As interpretations of texts, all choices in substantive as well as functional (or, in Cover's word, "jurisdictional"<sup>195</sup>) matters represent attempts to make sense of formative texts that shape community life. A given interpretive choice should not be permitted to suppress another through the violence of law based

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194. Cover, *supra* note 2, at 1606; Cover, *Nomos and Narrative*, *supra* note 126, at 45 n.125; see also Dan-Cohen, *supra* note 39, at 674.

195. Cover, *Nomos and Narrative*, *supra* note 126, at 53-60.



on functional superiority alone.

(3) State officials, in particular judges, therefore should always remain conscious of the possible multiplicity of interpretations of public texts. The state violence that always hovers in the background of official legal interpretations should remain at the minimum level necessary to maintain the maximum development of and dialogue about competing interpretations.<sup>196</sup>

(4) The common interpretive nature of all law judgments, however, not only requires functionally superior interpreters to respect the interpretive acts of others less empowered. For our purposes most relevant, it also implies that no one interpreter should be able to shift responsibility for such a judgment onto another simply because that other interpreter functionally enjoys greater authority to interpret the law, just as the latter may not deny the possibility of choice simply by invoking the purportedly immovable constraints of her function.

At bottom, the currently ubiquitous effort of assigning and therefore limiting responsibility for the violence of the law to particular individuals, and thereby relieving others of any sense of accountability, is misguided. Law is a communal matter insofar as it always also reflects and affects the communal sense of right. It is this interrelation with communal norms that gives the law's commands the power of the should, as opposed to the power of the must.<sup>197</sup> The official interpreters of the law texts, as their fellow non-official interpreters, therefore must recognize both that their choice will always be a substantive one (even if it appears to be merely functional) and that it contributes, though with particular force, to a project of law generation and interpretation that encompasses every member of the normative community. The formal restriction on their function does not free officials of the need to choose substantively, nor does the extraordinary power of their function saddle them with exclusive responsibility for their substantive choices.

It is therefore entirely improper for those who perceive themselves as non-participants in the system of capital punishment to shift the entire weight of responsibility for the infliction of capital punishment onto the system participants, who then struggle to disperse the responsibility among themselves. In this way, the participants in the capital punishment system perform much the same function as did the executioner in the era of public executions, who was easily identified as the individual responsible for the infliction

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196. *Id.* at 40, 44, 48.

197. See RUDOLF LAUN, *RECHT UND SITTlichkeit* 91-100 (3d ed. 1935) (1924).

of punishment, capital and otherwise, but always public.

Foucault has remarked that, as a result of the enlightenment reconception of punishment, "a whole army of technicians took over from the executioner, the immediate anatomist of pain: warders, doctors, chaplains, psychiatrists, psychologists, educationalists."<sup>198</sup> In fact, the entire panoply of participants in the capital punishment system has replaced the executioner. As a result, not only these new penal bureaucrats, but every one commonly perceived as a participant in the system of capital punishment, now strives to "avoid the bad conscience and cultural infamy that used to attach to the executioner or the jailer by claiming to be merely instruments of punishment."<sup>199</sup> This functional excuse has been available to the executioner since time immemorial, and it now is also popular among his modern successors, the army of participants in the system of capital punishment, who attempt to silence their own moral inhibition against the infliction of extreme physical violence and to avoid the ostracism of others by claiming to merely follow the stark logic of capital punishment law as instrumentalities of the capital punishment system.

In the end, those who consider themselves non-participants call for capital punishment with impunity, blithely leaving the agonizing fulfillment of their calls for executions to a group of fellow community members who struggle to deny their responsibility. We have already noted the stark difference in attitude between an on-looker's endorsement of capital punishment as an abstract symbol and that same person's ambivalence about voting for the death sentence in a particular case. Consider also the difference in attitude between New York legislators who had felt free to support a capital punishment law in anticipation of a certain gubernatorial veto and the same legislators who faced the same law without that anticipation.<sup>200</sup> Finally, recall the attitude of the Texas Congressman who recently bragged about his willingness to "pull the switch" in his prosecutorial days, knowing full well that he was precluded from actually inflicting capital punishment on anyone, and compare it with the lingering uneasiness experienced by those who actually do what the Congressman wishes he could have done.

Surely, insofar as an individual has chosen to participate in the system of capital punishment and as she, in a particular case, makes the substantive choice—whether avowedly or not—to bring the law's violence to bear onto another person, she carries individ-

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198. FOUCAULT, *supra* note 1, at 11.

199. DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY* 182 (1990).

200. *See, e.g., James Dao, Death Penalty in New York Is Restored After 18 Years*, N.Y. TIMES, Mar. 8, 1995, at A1.

ual responsibility for her interpretive acts. Nonetheless, participants in the capital punishment system perform not only an official, but also a communal function. Insofar as the participants in the capital punishment system interpret texts—as they must and should—within the context of the norms of a given moral community, they cannot bear exclusive responsibility for their official interpretive acts.

Now, not only punishment is a communal matter, so is crime. The modern successors of the medieval executioner do not bear exclusive responsibility for the violent enforcement of communal norms, and neither do the criminal offenders for the violent violation of these norms. Whereas the solitary executioner has been replaced by a multitude of imposers and inflictors, the offender remains isolated and ostracized. The responsibility for the violence of punishment no longer rests on a single individual, nor should the responsibility for the violence of crime.

Today, the participants in the system of criminal punishment represent the community, as the executioner once represented the sovereign.<sup>201</sup> This shift in the concept of punishment reflects a shift in the concept of crime. Crime no longer is seen as an assault on the sovereign, but as an offense against the community. Once, punishment was inflicted in the name of the sovereign. Now, it is inflicted in the name of the community as the community's response to the violation of its norms.

It is a convenient arrangement for community members, participants and non-participants in the system of capital punishment alike, to deny individual and communal responsibility for the violence of criminal punishment on the ground that individual choice is *impossible* given institutional constraints, and to shift that responsibility onto another person. At the same time, it is convenient for community members to deny individual and community responsibility for the violence of crime on the ground that the offender's individual choice is *possible* given the absence of any constraints whatsoever, and to shift that responsibility onto the offender alone.

In both cases, the inhibition against the infliction of violence on another triggers the urge to distance oneself from that infliction and to deny its violence in the first place. Both crime and its punishment are violent by nature. We distance ourselves from both instances of violence. It is easier for us to deny the violence of pun-

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201. In fact, the modern system of punishment is set up to reflect the close connection between punishment and the community in the institution of the jury. This connection is particularly crucial in capital cases, where the jury deliberates not only on guilt, but also on sentence.

ishment than the violence of crime simply because it is easier for us to control and hide the violence of punishment than the informal, arbitrary, and public violence of crime.

To be sure the isolation of offenders fulfills two important societal functions. As Durkheim and George Herbert Mead have pointed out, the community wide ostracism of the violators of communal norms fosters the community's sense of solidarity and reaffirms the very norms violated by the offender. Moreover, as we have seen, it permits community members to distance themselves from the violence of the criminal act.

These payoffs of exclusion and differentiation, however, come at a high price.<sup>202</sup> In the process of distancing and denial, the difficult substantive question of communal responsibility for the communal phenomena of crime and punishment remains unaddressed and unresolved. As community members differentiate themselves from both the modern execution apparatus and the offender, they may find commonality in a common enemy and ease their post-enlightened sensibilities but do little to formulate a communal solution to a communal problem.

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202. George Herbert Mead, *The Psychology of Punitive Justice*, 23 *AM. J. SOCIOLOGY* 577, 592 (1918).

