



Emory University School of Law
Emory Law Scholarly Commons

Faculty Articles


Faculty Scholarship

1994

In Slime and Darkness: The Metaphor of Filth in Criminal Justice

Martha Grace Duncan

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/faculty-articles>

 Part of the [Anthropology Commons](#), [Comparative Literature Commons](#), [Criminal Law Commons](#), [Law and Psychology Commons](#), [Other Psychiatry and Psychology Commons](#), and the [Psychology Commons](#)

TULANE LAW REVIEW

VOL. 68

MARCH 1994

No. 4

IN SLIME AND DARKNESS: THE METAPHOR OF FILTH IN CRIMINAL JUSTICE

MARTHA GRACE DUNCAN*

I. INTRODUCTION.....	727
II. "EJECT HIM TAINTED NOW": THE CRIMINAL AS FILTH IN WESTERN CULTURE	732
A. " <i>Come, Thick Night</i> ": <i>Crime, Dirt, and Darkness</i>	732
B. " <i>The Real Black Hound is the Moor</i> ": <i>The Fantasy of the Criminal as Wet Dirt</i>	739
C. " <i>Waters on the Hand of Blood</i> ": <i>Washing and the Unavailing Effort to Regain Innocence</i>	748
D. " <i>A Great Gulf Fixed</i> ": <i>Banishment of the Diseased Criminal</i>	751
E. " <i>The Land of Gloom and Chaos</i> ": <i>Darkness and Dirt as Essential Qualities of the Criminal's Punishment</i>	755
III. PROJECTING AN "EXCREMENTITIOUS MASS": THE METAPHOR OF FILTH IN THE HISTORY OF BOTANY BAY.....	757

* Associate Professor of Law, Emory University. Ph.D., Columbia University, 1976; J.D., Yale Law School, 1983. For comments on earlier drafts of this Article, I wish to thank Thomas Arthur, David Bederman, Jennifer Brown, Richard Duncan, Lynn Gaffigan, Harriet King, Andrew Kull, Marc Miller, Colleen Murphy, Ross Nankivell, Ellen Podgor, Ralph Roughton, J. Allen Smith, Walter O. Weyrauch, and Deborah Young. My greatest debt is to Donald W. Fyr, who provided constant encouragement and many helpful suggestions.

A.	<i>Banished Beyond the Seas: The Origins of Transportation to Australia</i>	757
B.	<i>"A Pervading Stain": The Language of Filth in Australian History</i>	761
C.	<i>The Origins and Meanings of the Anal Metaphor</i>	766
1.	The Metaphor of Filth as a "Pupil's Metaphor"	766
2.	The Metaphor of Filth as a Defense Against Identification with Criminals	767
3.	The Other Side of the Conflict: Popular Identification with Criminals and Delight in Their Ways	771
4.	The Revilement of Superintendent Maconochie: An Epitome	774
D.	<i>"Symbolism as a Motive": The Botany Bay Venture as a Reenactment of the Fall</i>	778
IV.	STIRRING THE "ODOROUS PILE": VICISSITUDES OF THE METAPHOR IN BRITAIN AND THE UNITED STATES	782
A.	<i>"Perfect Order and Perfect Silence": The Obsessional Motif in Criminal Justice</i>	782
1.	Vagrancy Law	782
2.	Penology	784
3.	Juvenile Justice	788
B.	<i>"Into the Dirt, Into the Slime": The Metaphor of Filth in American Case Law</i>	792
V.	CONCLUSION	798
	APPENDIX	801

The Tao that can be spoken is not the real Tao

—Laotze, *Tao Teh Ching*¹

[I]f Shakespeare had decided to let the Weird Sisters inhabit water, like the Rhine Maidens, instead of "fog and filthy air," the whole play of Macbeth would have been profoundly different.

—Philip Wheelwright, *Metaphor and Reality*²

1. LAOTZE, TAO TEH CHING, *quoted in* PHILIP WHEELWRIGHT, *METAPHOR AND REALITY* 22 (1962).

2. WHEELWRIGHT, *supra* note 1, at 95 (quoting WILLIAM SHAKESPEARE, *THE TRAGEDY OF MACBETH* act 1, sc. 1).

I. INTRODUCTION

Philosophers have long proclaimed the essential role of metaphors in generating meaning. Words that say one thing and suggest another are necessary for the growth of our thought and may be an inevitable aspect of language itself.³ Nevertheless, metaphors can hamper understanding when we lose sight of their status as tropes and take them for reality.⁴

One of the most common metaphors in our culture is that of the criminal as filth. References to criminals as "dirt," "slime," and "scum" pervade the media and everyday conversation. Yet, despite the familiarity of these figures of speech, scholars have devoted little attention to such questions as the following: What is the origin of the metaphor likening criminals to filth? Is this metaphor accidental, or is it essential to our thinking about lawbreakers? And, to the degree that this metaphor governs our understanding of criminals, what are the consequences for our criminal justice system?⁵

3. See, e.g., ARISTOTLE, *THE RHETORIC OF ARISTOTLE* 149 (Richard C. Jebb trans. & John E. Sandys ed., 1909) (referring to the "supreme importance of metaphor both in poetry and prose"); OWEN BARFIELD, *Poetic Diction and Legal Fiction*, in *THE REDISCOVERY OF MEANING, AND OTHER ESSAYS* 44, 45 (1977) ("But figurative expression is found everywhere; its roots descend very deep . . . into the nature . . . of language itself."); C.S. LEWIS, *Bluspels and Flalansferes: A Semantic Nightmare*, in *REHABILITATIONS AND OTHER ESSAYS* 133 *passim* (Norwood ed. 1976) (1939) (arguing that metaphors are necessary for meaning, which is the precondition of truth or falsehood); JOHN M. MURRY, *Metaphor*, in *2 COUNTRIES OF THE MIND* 1, 1 (1931) ("Metaphor is as ultimate as speech itself, and speech as ultimate as thought").

4. See, e.g., BARFIELD, *supra* note 3, at 63. More specifically, Judge Cardozo warned, "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Berkey v. Third Ave. Ry.*, 155 N.E. 58, 61 (N.Y. 1926).

5. I have uncovered only one legal article that touches on the metaphor of filth in criminal justice. See Peter Linebaugh, *(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein*, 60 N.Y.U. L. REV. 212 (1985). In a section of his article entitled "Garbage," Linebaugh addresses Professor John Langbein's claim that in eighteenth-century England, "the criminal justice system occupies a place not much more central than the garbage collection system." *Id.* at 238. Linebaugh responds that the comparison between garbage collection and criminal justice is indeed apt, for prisons and courts were located near the ditch that carried sewage through London to the Thames River. *Id.* at 239. Moreover, crime prevention, like garbage collection, was a basic function of government. In contrast to Langbein's belittling intent, Linebaugh argues that the metaphor actually highlights the importance of criminal justice in eighteenth-century England. At that time and place, when sewage was nearly omnipresent, the disposal of filth was hardly a trivial concern. *Id.* at 238-42.

Numerous legal scholars have examined metaphors in noncriminal contexts. See MILNER S. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY* (1985); JAMES B. WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984); Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395 (1986); James F. Childress, *Triage in Neonatal Intensive Care: The Limitations of a Metaphor*, 69 VA. L. REV. 547 (1983); Burr Henly, "Penumbra": *The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81 (1987); James E.

These questions beckon with special urgency at a time when the United States keeps more than one million people behind bars;⁶ when penologists urge other ways of combatting crime, yet legislators resist their call;⁷ when sentencing guidelines mandate severe punishments for venial offenses⁸—all highlighting the irrational sources of our attitudes toward criminals.

Theoretical no less than practical considerations imbue these questions with a special allure, for filth is a concept of exceptional richness and power, an archetypal symbol with roots lying deep in childhood, in early parental warnings and primordial experiences

Murray, *Understanding Law as Metaphor*, 34 J. LEGAL EDUC. 714 (1984); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

The particular metaphor comparing filth to evil has been addressed in some works of literary criticism. See, e.g., CAROLINE F.E. SPURGEON, *SHAKESPEARE'S IMAGERY AND WHAT IT TELLS US* 159-61 (1st Am. ed. 1958) (1935) (showing that Shakespeare conceived of evil as dirty, black, and diseased); Gary S. Morson, *Verbal Pollution in The Brothers Karamazov*, in *CRITICAL ESSAYS ON DOSTOEVSKY* 234 *passim* (Robin F. Miller ed., 1986) (analyzing the theme of filth in *The Brothers Karamazov*).

6. According to the latest figures from the United States Department of Justice, 1.2 million persons were held in local jails or in state or federal prisons in 1991. TRACY L. SNELL, U.S. DEP'T OF JUSTICE, *CORRECTIONAL POPULATIONS IN THE UNITED STATES: 1991*, at 1 (1993).

7. See, e.g., NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION* 6-9 (1990) ("[T]here is general agreement about the need to develop and expand 'intermediate punishments,'" *id.* at 9, such as "[i]ntensive probation, the fine, [and] the community service order," *id.* at 6); Fox Butterfield, *Are American Jails Becoming Shelters from the Storm?*, N.Y. TIMES, July 19, 1992, at E4 (citing Professor Norval Morris, who believes that "increased imprisonment has made no difference in the crime rate," and citing exorbitant expenditures on new prisons); Don Terry, *More Familiar, Life in Cell Seems Less Terrible*, N.Y. TIMES, Sept. 13, 1992, at A1, A15 (quoting New Haven Police Chief Nicholas Pastore on the "mean-spirited system of justice" that warehouses criminals but lacks genuine concern for them); Joseph B. Treaster, *2 U.S. Judges Decline Drug Cases, Protesting Sentencing Rules*, N.Y. TIMES, April 17, 1993, at A1 (discussing two prominent senior judges who refuse to preside over drug cases to protest our society's emphasis on arrests and imprisonment).

8. Thus, Judge Richard A. Posner cites our "exceptionally severe criminal punishments (many for intrinsically minor, esoteric, or archaic offenses)" as one of the factors making the United States "the most penal of the civilized nations . . . a disturbing state of affairs." Richard A. Posner, *Courting Evil*, NEW REPUBLIC, June 17, 1991, at 36, 42 (reviewing INGO MULLER, *HITLER'S JUSTICE: THE COURT OF THE THIRD REICH* (Deborah L. Schneider trans., 1991)).

On a more specific level, Judge Harold Greene recently declared the Federal Sentencing Guidelines unconstitutional as applied to a defendant in a drug case. Michael York, *Judge Rejects Federal Sentencing Guidelines; Mandatory 30-Year Imprisonment for Repeat Drug Offender Called Unconstitutional*, WASH. POST, April 30, 1993, at D5. The defendant had been convicted of possessing about one-fourth of an ounce of heroin and cocaine—an offense requiring thirty years' imprisonment, according to the *Guidelines*. *Id.* Sentencing the defendant to ten years in prison, Judge Greene observed that the mandated sentence was "grossly out of proportion to the seriousness" of the crime. *Id.* He added, "We cannot allow justice and rationality to become casualties of a war on drugs being waged with Draconian, politically expedient sentences." *Id.*

of the body. Contradictory and paradoxical, filth in its ultimate form of excrement unites radically opposed meanings. On the one hand, it signifies meaninglessness: the nullifying reduction of all things to one homogeneous mass. On the other hand, as psychoanalysts inform us, excrement represents many good things: an artistic creation, a gift, wealth.⁹

Strongly repelling and strongly attracting, filth serves as an apt metaphor for criminals, who likewise evoke our simultaneous hate and love, repudiation and admiration. By virtue of this similarity, filth appears to be, in C. S. Lewis's terms, a pupil's rather than a master's metaphor.¹⁰ The evidence suggests that we may be incapable of reflecting about criminals without concepts such as slime, scum, and excrement.

If this is so, then our liberation from the metaphor may depend not on rejecting this figure of speech, nor in finding substitutes for it, but rather in seeing clearly the vicissitudes of the metaphor in criminal justice. This Article suggests that the metaphor leads to a view of criminals as diseased and contagious and to a policy requiring segregation of criminals from uncontaminated noncriminals. In addition, on a measure-for-measure theory of punishment, the metaphor may cause authorities to imprison criminals in places that are conceived as suitably filthy and malodorous.

Along the way to these conclusions, this Article explores several byways of our topic, among them the reasons that we connect

9. For the idea of feces as an artistic creation, consider the following vignette: "[A] three-year-old boy . . . came into the parental bedroom carrying a chamber pot containing three turds: one large, one middle-sized, and one small . . . ; the boy exclaimed with great joy, 'Look, I've made a daddy, a mommy, and a me!'" LEONARD SHENGOLD, *HALO IN THE SKY: OBSERVATIONS ON ANALITY AND DEFENSE* 46 (1988); see also *id.* at 47 (quoting a letter in which Gustave Flaubert jubilantly looks forward to his future creative writing with the words, "[T]hen the shitting: and the shit had better be good!").

For the notion of excrement as a gift, see 17 SIGMUND FREUD, *On Transformations of Instinct as Exemplified in Anal Erotism*, in *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 125, 130 (James Strachey ed. & trans., 1955) [hereinafter *THE STANDARD EDITION*] (describing feces as "the infant's first gift, a part of his body which he will give up only on persuasion by someone he loves").

As this quotation implies, excrement can also signify wealth. To a child, feces are "a very precious substance." OTTO FENICHEL, *THE PSYCHOANALYTIC THEORY OF NEUROSI* 281 (1945). Indeed, feces may be considered the prototypical possession, being "actually outside [the body] but symbolically inside." *Id.*; cf. NORMAN O. BROWN, *LIFE AGAINST DEATH: THE PSYCHOANALYTICAL MEANING OF HISTORY* 293 (1959) ("Possessions are worthless to the body unless animated by the fantasy that they are excrement . . .").

10. See LEWIS, *supra* note 3, at 140-45. For a discussion of the distinction between a pupil's and a master's metaphor, see *infra* text accompanying notes 222-24.

evil with darkness, the relationship between crime and foul odors, and the fantasy that criminals are made specifically of soft, wet dirt, or slime.

An article such as this one, which seeks to examine the labyrinthine chains of meanings that we associate with illegal behavior, cries out for an interdisciplinary approach. Specifically, it demands a source that can reveal our unconscious as well as our conscious associations. Such a source is classical literature—works of fiction that, by virtue of being read and loved through centuries and across continents, have proven their capacity to strike a responsive chord in their readers. Therefore, in Part II of this Article, I employ the classics, supplemented by occasional examples from contemporary fiction, history, and theology, to demonstrate the pervasiveness of the anal metaphor for criminals.¹¹

After this examination of the larger picture, in Part III the Article offers an extended illustration, a case study in legal history: namely, the Botany Bay venture, Britain's 1786 decision to found a penal colony in Australia and its eighty-one-year-long practice of banishing criminals to that remote continent. The history of Australia is replete with descriptions of convicts as "sewage" and of their island-prison as a "dunghill," a "cesspool," and a "sink of wickedness."¹² In even more graphic terms, Jeremy Bentham described the policy of transporting criminals to Australia as projecting an "excrementitious mass."¹³ Notwithstanding the richness of these expressions, it was not for its language that I elected to analyze the Botany Bay experiment, but because this episode represents a remarkable effort by noncriminals—an effort to eliminate

11. In recent years, numerous scholars have drawn on literature to illuminate legal issues. See, e.g., RICHARD A. POSNER, *LAW AND LITERATURE* (1988); RICHARD H. WEISBERG, *THE FAILURE OF THE WORD* (1984); JAMES B. WHITE, *THE LEGAL IMAGINATION* (abr. ed. 1985); Lee C. Bollinger, *The Homer of the Pacific: Melville's Art and the Ambiguities of Judging Evil*, 75 MICH. L. REV. 823 (1977); Martha G. Duncan, "Cradled On The Sea": *Positive Images of Prison and Theories of Punishment*, 76 CAL. L. REV. 1201 (1988); Norval Morris, *The Watching Brief*, 54 U. CHI. L. REV. 1215 (1987) (one of a series of stories that Professor Morris has written to explore legal issues).

12. See ROBERT HUGHES, *THE FATAL SHORE* 355 (1987) (referring to New South Wales as a "sink of wickedness") (quoting Sydney Smith, *EDINBURGH REV.*, July 1819); GEORGE IVES, *A HISTORY OF PENAL METHODS* 145 (Frederick A. Stokes Co. 1970) (1914) (referring to convicts as "sewage"); W.P. MORRELL, *BRITISH COLONIAL POLICY IN THE AGE OF PEEL AND RUSSELL* 404 (1930) (referring to the penal colony at New South Wales as a "cesspool") (quoting *THE TIMES* (London), Mar. 29, 1849); MICHAEL STURMA, *VICE IN A VICIOUS SOCIETY* 53 (1950) (describing the Australian penal colony as a "dunghill") (quoting *PEOPLE'S ADVOCATE*, Sept. 8, 1849).

13. See *infra* note 204 and accompanying text.

the very relationship with criminals, to repudiate convicts utterly and treat them as if they were on another planet, or a distant star.

In interpreting the Australian undertaking, I will draw on two scholarly disciplines that have developed theories of filth: psychoanalysis, with its exploration of anality and obsessional neurosis; and anthropology, with its examination of taboos and pollution-avoidance behavior. Based on this literature, I will show that the Botany Bay venture was more than a practical response to a growing problem; it was also an enterprise fraught with, and partially determined by, unconscious meanings.¹⁴ Physically, it reproduced the act of expelling waste from the body; psychologically, it resembled the defense mechanisms of externalization and projection. And symbolically, this banishment of people who had violated the laws, and become impure thereby, represented a re-enactment of an age-old story: the Fall.

In Part IV, this Article shows how the theory of anality sheds light on other areas of criminal justice: vagrancy law, with its emphasis on "cleaning up" neighborhoods and towns; eighteenth-century prison reform with its goal of "perfect order and perfect silence";¹⁵ and juvenile justice, with its effort to remove children from messy cities of contagious criminality to rural homes of supposed order and purity. In the final pages, I discuss American cases in which judges, prosecutors, and defense attorneys reveal their vision of criminals as filth.

14. For other works exploring the relationship between unconscious meanings and the law, see JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1979); JAY KATZ ET AL., *PSYCHOANALYSIS PSYCHIATRY AND LAW* (1967); C.G. SCHOENFELD, *PSYCHOANALYSIS AND THE LAW* (1973); GREGORY ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* (1954); FRANZ R. BIENENFELD, *Prolegomena to a Psychoanalysis of Law and Justice*, 53 CAL. L. REV. 957 (1965); ALBERT A. EHRENZWEIG, *Psychoanalytical Jurisprudence: A Common Language for Babylon*, 65 COLUM. L. REV. 1331 (1965); JOSEPH GOLDSTEIN, *Psychoanalysis and Jurisprudence*, 77 YALE L.J. 1053 (1968).

15. CHRISTOPHER HIBBERT, *THE ROOTS OF EVIL* 160 (1963).

II. "EJECT HIM TAINTED NOW":¹⁶ THE CRIMINAL AS FILTH IN WESTERN CULTURE

A. "Come, Thick Night":¹⁷ *Crime, Dirt, and Darkness*

Lighten our darkness, we beseech thee, O Lord; and by thy great mercy defend us from all perils and dangers of this night

.....

—*The Book of Common Prayer*¹⁸

The day is for honest men, the night for thieves.

—Euripides, *Iphigenia in Tauris*¹⁹

Early in Dickens's novel *A Tale of Two Cities*, during the first trial of Charles Darnay, an intriguing scene occurs. The British Attorney General has been attempting with circumstantial evidence to show that Darnay passed state secrets to the French. He has just asked the witness, Mr. Jarvis Lorry, when he has seen the prisoner before. As Mr. Lorry answers him, the following dialogue ensues:

"I was returning from France a few days afterwards, and at Calais, the prisoner came on board the packet-ship in which I returned, and made the voyage with me."

"At what hour did he come on board?"

"At a little after midnight."

"In the dead of the night. Was he the only passenger who came on board at that untimely hour?"

"He happened to be the only one."

"Never mind about 'happening,' Mr. Lorry. He was the only passenger who came on board in the dead of the night?"

"He was."²⁰

In this exchange, the Attorney General intimates that a mere appearance in deepest night justifies an inference of criminality—an idea that we see again in an actual legal case, *United States v. Barker*,²¹ one of the cases that emerged from the Watergate burglary.

16. JOHN MILTON, *PARADISE LOST* bk. 11, l. 52 (Merritt Y. Hughes, new ed., Odyssey Press 1962) (1667); see also *infra* text accompanying note 143.

17. WILLIAM SHAKESPEARE, *THE TRAGEDY OF MACBETH* act 1, sc. 5, l. 49 (adapted by Thomas Middleton), in *THE COMPLETE WORKS* 1099 (Stanley Wells et al. eds., 1986); see also *infra* text accompanying note 30.

18. *A Collect For Aid Against Perils*, in *THE BOOK OF COMMON PRAYER* 70, 70 (1979).

19. Euripides, *Iphigenia at Tauris*, in 3 *THE COMPLETE GREEK TRAGEDIES: EURIPIDES* 387, l. 1026 (David Greene & Richmond Lattimore ed., 1959), quoted in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 85 (Emily M. Beck ed., 14th ed., rev. & enlarged, 1968).

20. CHARLES DICKENS, *A TALE OF TWO CITIES* 71 (Nelson Doubleday, Inc. 1960) (1859).

21. 546 F.2d 940 (D.C. Cir. 1976).

At the end of his dissenting opinion in *Barker*, Judge Leventhal writes: "I come back—again and again, in my mind—to the stark fact that we are dealing with a breaking and entering *in the dead of night*, both surreptitious and forcible, and a violation of civil rights statutes."²² As in the preceding fictional example, here too the association with profound darkness suffices to render an act more suspect than it would have been if done in the light. To be sure, the common law differentiated between illegal entries at night and during the day, but Judge Leventhal also gains rhetorical power from the timeless association between darkness and criminality.

The question arises why darkness should be so closely associated with wrongdoing. At first blush, the answer may seem obvious. Human beings rely heavily on their sense of sight; in the dark, their diminished ability to see renders them more helpless and more vulnerable to predators. Criminals, then, really do enjoy an advantage in the dark. Yet this answer, although containing an element of truth, surely cannot be the whole explanation. For one thing, nearly as many violent crimes occur in the daytime as at night.²³ More importantly, noncriminals' fear of darkness exhibits a primordial quality, deeper than rational cause and effect, as we see in this old Scottish prayer:

From ghoulies and ghosties and long-leggety beasties
And things that go bump in the night, Good Lord, deliver us!²⁴

In her mystery novel *Devices and Desires*, P. D. James captures the irrational power of darkness in this scene in which the detective remembers his childhood: "[T]he small Adam Dalglish was already dreading those last twenty yards of his walk home, where the rectory drive curved and the bushes grew thickest. Night was different from bright day, smelled different, sounded different; ordinary things assumed different shapes; an alien and more sinister power ruled the night."²⁵ As if the darkness were an active, conscious enemy, the child Adam would plan a strategy to outsmart it: "Once through the gate to the drive, he would walk fast, but not too fast, since the power that ruled the night could

22. *Id.* at 973 (Leventhal, J., dissenting) (emphasis added).

23. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: CRIMINAL VICTIMIZATION IN THE UNITED STATES tbl. 59 (1991) (stating that 46.8% of all violent crimes occur in the daytime).

24. BARTLETT, *supra* note 19, at 1098.

25. P.D. JAMES, *DEVICES AND DESIRES* 66-67 (1990).

smell out terror."²⁶ Here we see that darkness is associated not merely with particular acts of wrongdoing but with an abstract force, evil itself.

If the association of darkness with evil exhibits a primitive, elemental quality, such that its origin cannot be purely rational, then we must search further for the complete explanation of this linkage. I suggest that a clue may lie in the kinship between darkness and filth. Etymology supports this proposition, for the English word "dark" derives from a root meaning "to soil."²⁷ Although English speakers today may be oblivious of this origin, the etymology shows that at an earlier time in our history, human beings viewed darkness and dirt as closely linked. Moreover, it makes sense that this should be so, because as psychiatrist Robert Coles points out, "Dirt is dark, and summons in hygienic middle-class minds all sorts of fears—germs and illness, contamination. Man's waste products are dark, and if they are not eventually expelled he grows sick."²⁸ Like Coles, who makes this observation in a study of racism, Patricia Williams adduces the relationship between blackness and dirt as a partial explanation of racial prejudice: "The blackness of black people . . . has always represented the blemish, the uncleanness, the barrier separating individual and society."²⁹

If the association between darkness and crime flows partly from the affinity between darkness and filth, it follows that the closer this affinity is made to seem, the more darkness will evoke thoughts of crime. Most kinds of filth have a mass to them; they occupy space in such a way that other objects cannot occupy the same space at the same time. Darkness does not exhibit these properties. Yet, creative writers frequently describe darkness as if it, like dirt, had a mass and occupied space. This is especially so when the writer wants to create a crime-ridden ambience. Consider, for example, the following scene from *Macbeth*, where Lady Macbeth, planning Duncan's murder and fearing her own weakness, cries out for the help of a dark night:

26. *Id.* at 67.

27. See WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 668 (2d ed. unabr. 1947) [hereinafter WEBSTER'S], cf. JOSEPH T. SHIPLEY, THE ORIGINS OF ENGLISH WORDS 68 (1984) (deriving "dark" from a root meaning "muddied").

28. ROBERT COLES, CHILDREN OF CRISIS 357 (1964).

29. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 198 (1991).

Come, thick night,
 And pall thee in the dunnest smoke of hell,
 That my keen knife see not the wound it makes,
 Nor heaven peep through the blanket of the dark
 To cry "Hold, hold!"³⁰

Here Shakespeare imagines the night as "thick," a conception that we find again two acts later when Macbeth, having just arranged the murders of Banquo and Fleance, calls on darkness to hide the evidence of his heinous deeds:

Come, seeling night,
 Scarf up the tender eye of pitiful day,
 And with thy bloody and invisible hand
 Cancel and tear to pieces that great bond
 Which keeps me pale. Light thickens, and the crow
 Makes wing to th' rooky wood.³¹

With the phrase "light thickens," Shakespeare associates darkness with a viscous form of light, an image that resonates with the "gruel thick and slab"³² that the witches brew in a later scene. Darkness is portrayed not as the absence of light, or as a void, but rather as a denser, more solid form of light. Compare the rendering of darkness in this sentence from the modern novel *Before and After*, by Rosellen Brown. The author is describing the thoughts of a man who has just learned that his son is a murderer: "I . . . lay there for many hours staring up as if the dark were dirt and I was buried under it."³³

Besides describing darkness as thick and suffocating, creative writers often employ fog, rain, and turbulence to render darkness more viscous, more dirty, and more evocative of crime. Notice in this connection a remarkable autobiographical statement by the French mystery writer Georges Simenon: "I was born in the dark and the rain, and I got away. The crimes I write about—sometimes I think they are the crimes I would have committed if I had not got away."³⁴ Using a diaphor—a metaphor that compares through juxtaposition—Simenon likens being in the darkness and rain to being a criminal.

30. SHAKESPEARE, *supra* note 17, act 1, sc. 5, ll. 49-53.

31. *Id.* act 3, sc. 2, ll. 47-52.

32. *Id.* act 4, sc. 1, l. 32.

33. ROSELLEN BROWN, *BEFORE AND AFTER* 57 (1992).

34. LUCILLE F. BECKER, *GEORGES SIMENON* 31 (1977).

For a more elaborate illustration of this theme, let us return to *Macbeth*. We begin with the stormy opening scene and the first witch's questions:

When shall we three meet again?
In thunder, lightning, or in rain?³⁵

If these images give substance to the darkness, thus implicitly bringing it closer to filth, the resemblance between moisture-laden darkness and dirt is made explicit at the end of the scene, when the witches chant together:

Fair is foul, and foul is fair,
Hover through the fog and filthy air.³⁶

The way Macbeth addresses the witches, the instigators of crime, likewise serves to equate darkness and filth, for he sometimes calls them "[f]ilthy hags"³⁷ and at other times "secret, black, and midnight hags."³⁸ By using interchangeably words meaning "obscure" and words meaning "filthy," Shakespeare prepares us to see as filthy the many scenes of stormy darkness that pervade this play.

Toward the end of *Macbeth*, the predominant image changes from darkness to slime as the witches celebrate Macbeth's vile deeds by making a particularly slimy stew, a "gruel thick and slab."³⁹ That the gruel epitomizes evil there can be no doubt, for, as they make it, the witches chant:

All ill come running in, all good keep out.⁴⁰

Here, too, slime and darkness are confounded; among the macabre ingredients in this brew, none is associated with light, although two are explicitly linked to darkness:

Root of hemlock digged i'th' dark,
. . .
. . . and slips of yew
Slivered in the moon's eclipse.⁴¹

Like Shakespeare, the novelist Daphne du Maurier uses fog and rain to make darkness more solid, dirty, and ominous. These images pervade her novel *Jamaica Inn*, a story about ruthless men

35. SHAKESPEARE, *supra* note 17, act 1, sc. 1, ll. 1-2.

36. *Id.* ll. 10-11.

37. *Id.* act 4, sc. 1, l. 131.

38. *Id.* l. 64.

39. *Id.* l. 32.

40. *Id.* l. 50.

41. *Id.* ll. 25, 27, 28.

who lure ships to their destruction and murder all survivors. Here is how the novel begins:

It was a cold grey day in late November. The weather had changed overnight, when a backing wind brought a granite sky and a mizzling rain with it, and although it was now only a little after two o'clock in the afternoon the pallor of a winter evening seemed to have closed upon the hills, cloaking them in mist. It would be dark by four.⁴²

The threat of darkness alone has power to elicit apprehension, but here the author's particular rendering of the scene magnifies the effect on the reader's imagination. On the next page, du Maurier openly compares the misty, rainy darkness to uncleanness when one of the travellers observes "for at least the twentieth time that it was the dirtiest night she ever remembered."⁴³ Once again, etymology corroborates the affinity between darkness and filth; the word "mist" derives from a word meaning "urinate," to excrete fluid waste.⁴⁴

In a parallel example from another genre, the renowned film director Alfred Hitchcock sets a scene of driving rain and pitch blackness as *Psycho*⁴⁵ victim Marian Crane pulls up in front of the Bates Motel, where she will be murdered. As in *Jamaica Inn*, the resemblance to filth is made explicit, for one of the first things Norman Bates says to his victim is, "Dirty night."⁴⁶ The final scene of the movie returns to the association between murder and filth. It shows Crane's car as the authorities retrieve it from a muddy swamp; the car is laden with ooze.⁴⁷

The associations between darkness, filth, and criminality, which are employed as chance images in *Psycho*, are elevated to a symbolic level in Dickens's novel *Bleak House*. In this book, Dickens sets himself a remarkable task, to cast a *court* in the role of a villainous criminal. He embarks on this task in the opening paragraph, where he describes, in exaggerated terms, a muddy, sooty scene: "As much mud in the streets, as if the waters had but

42. DAPHNE DU MAURIER, *JAMAICA INN* 1 (1937).

43. *Id.* at 2.

44. See SHIPLEY, *supra* note 27, at 240.

45. *PSYCHO* (Paramount Pictures 1960).

46. *Id.*

47. *Id.* Films, which must do with pictures what books can do with words, afford many examples of our theme. See, e.g., *MURDER BY DECREE* (Highlight Theatrical Production 1979) (using thick fog to evoke an ominous feeling in this movie about Jack the Ripper); *THE PRINCESS COMES ACROSS* (Paramount Pictures 1936) (setting the stage for attempted murder with heavy fog and darkness).

newly retired from the face of the earth, and it would not be wonderful to meet a Megalosaurus, forty feet long or so, waddling like an elephantine lizard up Holborn Hill."⁴⁸ In addition to mud, there is darkness—not just any darkness, but an especially filthy form of it: "Smoke lowering down from chimney-pots, making a soft black drizzle, with flakes of soot in it as big as full-grown snowflakes—gone into mourning, one might imagine, for the death of the sun."⁴⁹

In the second paragraph, Dickens introduces the motif of fog—in our terms, a viscous kind of darkness: "Fog everywhere. Fog up the river, where it flows among green aits [islets] and meadows; fog down the river, where it rolls defiled among the tiers of shipping, and the waterside pollutions of a great (and dirty) city."⁵⁰ Because he describes the fog as "defiled," Dickens hardly means us to see it as a pristine morning mist; as in the preceding paragraph, here too, the images of dirt and darkness are inextricably entwined.

Having detailed this scene of filth and darkness, Dickens goes on to aggravate and combine both elements as he applies them to the judicial system: "The raw afternoon is rawest, and the dense fog is densest, and the muddy streets are muddiest, near the leaden-headed old obstruction . . . Temple Bar."⁵¹ And at the very center of this filth, "at the very heart of the fog, sits the Lord High Chancellor in his High Court of Chancery."⁵²

In the following paragraphs, Dickens openly characterizes the court as the villain of the piece, describing it as the "most pestilent of hoary sinners,"⁵³ and referring to "all the injustice it has committed, and all the misery it has caused."⁵⁴ Nevertheless, his images have already showed us—and more effectively than any explicit condemnations—that the court is the criminal. That Dickens, a master of symbolism, selects entwined metaphors of filth and darkness for this purpose demonstrates both the association of these symbols with each other and their archetypal power to evoke evil.

48. CHARLES DICKENS, *BLEAK HOUSE* 1 (Houghton Mifflin Co. 1956) (1853).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 5.

I have suggested that the mental linkage between two ideas, darkness and criminality, derives partly from their common association with a third idea, that of filth. It is now necessary to add that crime's association is not so much with filth in general as with a particular kind of filth: namely, wet, soft dirt, or slime. In the next section, we will take up this topic of wet dirt, and in so doing, we will also shift our focus from one human faculty to two others. For as darkness is the manifestation of our metaphor that appeals mainly to the sense of sight, so slime is the manifestation that appeals predominantly to the senses of touch and smell.

B. "The Real Black Hound is the Moor":⁵⁵ *The Fantasy of the Criminal as Wet Dirt*

the slime

That sticks on filthy deeds.

—Shakespeare, *Othello*⁵⁶

In his essay *The Fantasy of Dirt*, Lawrence Kubie reports that, on the hierarchy of dirtiness, human beings almost universally regard softness and wetness as dirtier than hardness and dryness.⁵⁷ We recognize the truth in this statement, but why should it be so? According to Kubie, our attitudes toward dirt originate more in fantasy than in realistic concerns; he asserts: "Because once in a hundred times somebody else's toothbrush or spoon might carry to one a pathogenic organism, does not mean that in all the other ninety-nine times there is an objective aesthetic or bacteriological difference between one's own spittle and that of the rest of the world."⁵⁸

If our notion of dirt is not based on realistic concerns, on what theory is it based? By investigating those substances that we avoid touching and even seeing, Kubie reaches this conclusion: "[Dirt is] anything which either symbolically or in reality emerges from the body, or which has been sullied by contact with a body aper-

55. John Fowles, *Foreword* to ARTHUR C. DOYLE, *THE HOUND OF THE BASKERVILLES* 7, 11 (John Murry & Jonathan Cape 1974) (1902); see also *infra* text accompanying note 78.

56. WILLIAM SHAKESPEARE, *THE TRAGEDY OF OTHELLO THE MOOR OF VENICE* act 5, sc. 2, ll. 149-50 (Gerald E. Bentley ed., Penguin Books 1958).

57. Lawrence S. Kubie, *The Fantasy of Dirt*, 6 *PSYCHOANALYTIC Q.* 388, 395 (1937).

58. *Id.* at 393. Likewise, the distinguished anthropologist Mary Douglas believes that realistic concerns cannot explain our attitudes toward dirt. She writes: "Nor do our ideas about disease account for the range of our behaviour in cleaning or avoiding dirt. . . . In chasing dirt, . . . we are . . . positively re-ordering our environment, making it conform to an idea." MARY DOUGLAS, *PURITY AND DANGER* 2 (1966).

ture."⁵⁹ For example, we may be content with a certain amount of dust in the air, but when that dust enters someone's nostrils, mixes with water salts and a few watered-down molecules of mucoprotein, and emerges in a sneeze, we consider the resulting substance filthy.⁶⁰

Consistent with Kubie's formulation is an analysis presented by Erwin Strauss. In his monograph *On Obsession*, Strauss writes: "Separation from the integrity of the living organism turns the physiognomy from delight to disgust."⁶¹ Extrapolating from this finding, he goes on: "This separation indicates a transition from life to death; it signifies decay. Disgust is directed more against decay, the process of decomposition, than against the dead."⁶²

Neither Kubie nor Strauss applies his findings to the criminal justice system; nevertheless, certain conclusions about our attitudes toward criminals follow from their analyses. For example, if we intimately associate criminals with slime, then we evidently imagine them not simply as filth but as the quintessence of filth. Furthermore, we associate criminals with human mortality and not merely in the trivial sense that some lawbreakers are murderers; rather, we seem to equate criminals with the decomposing, reeking matter that our bodies will one day become.

Slime is sometimes conceived as the matrix from which we came as well as the fate to which we go. Consider, for example, the following versions of the creation story in *Genesis*: "And the Lord God formed man of the slime of the earth . . ." ⁶³ And again: "Yahweh shaped an earthling from clay of this earth . . ." ⁶⁴ Elaborating on the second version, the noted literary critic Harold Bloom observes: "[Yahweh] picks up the moistened clay and molds it in his hands, rather like a solitary child making a mud pie . . ." ⁶⁵ The poet Langdon Smith provides a humorous and touching variation on this theme:

59. Kubie, *supra* note 57, at 391. *But see* Walter O. Weyrauch & Maureen A. Bell, *Autonomous Lawmaking: The Case of the Gypsies*, 103 YALE L.J. 323, 350 (1993) (discussing gypsies' view that bodily products emanating from the top half of the body are clean; only products emerging from the lower half of the body are considered polluting).

60. Kubie, *supra* note 57, at 391-92.

61. ERWIN W. STRAUSS, *ON OBSESSION* 13 (1948).

62. *Id.*

63. *Genesis* 2:7 (New American Catholic ed. 1952).

64. THE BOOK OF J 61 (David Rosenberg trans. & Harold Bloom interpreter, 1990).

65. *Id.* at 175.

When you were a tadpole and I was a fish,
 In the Paleozoic time, And side by side in the ebbing tide
 We sprawled through the ooze and
 slime⁶⁶

If we imagine ourselves as slime, as originating in slime, or as fated to end in slime, then the zeal with which we denounce criminals as "slime" becomes more understandable. The denunciation represents a defense against awareness of our own mortality.

Later in this Article,⁶⁷ we will explore further the defensive functions of our attitudes toward criminals, but first, let us examine some works of literature and see how profoundly and pervasively our culture identifies criminals with slime. I begin with the illustration par excellence of this theme, a novella in which wet dirt serves as a leitmotif of evil and, in the words of one of its characters, a "worthy setting" for crime: Arthur Conan Doyle's *The Hound of the Baskervilles*.⁶⁸

As this nineteenth-century novella begins, a prospective client, Dr. Mortimer, is reading Holmes and Watson a letter about a deadly black hound. The letter concludes with the following warning: "I counsel you by way of caution to forbear from crossing the moor in those dark hours when the powers of evil are exalted."⁶⁹ Although the warning places special emphasis on night as a time when evil reigns, an equally important theme is the association of criminality with the moor. Indeed, it is difficult to separate the two motifs, because the narrator frequently describes the moor as black or dark.⁷⁰ For example, at one point Watson states: "[T]he dark, void spaces on either side of the narrow road told me that we were back upon the moor once again."⁷¹

But the moor has one aspect that literal darkness lacks; it connotes not just dirt, but wet dirt. Derived from a root meaning damp, "moor" means a "broad tract of open land, . . . poorly drained, with patches of heath and peat bogs."⁷² Bogs, in turn, are even more closely associated with moist filth, being quagmires

66. LANGDON SMITH, *EVOLUTION: A FANTASY* pt. I (1909), reprinted in *THE OXFORD DICTIONARY OF QUOTATIONS* 651 (Angela Partington ed., 4th ed. 1992).

67. See *infra* parts III.C.-D., IV.

68. ARTHUR CONAN DOYLE, *The Hound of the Baskervilles*, reprinted in *THE ILLUSTRATED SHERLOCK HOLMES TREASURY* 527, 535 (Avenel Books 1976) (1902).

69. *Id.*

70. See, e.g., *id.* at 575, 585.

71. *Id.* at 617.

72. *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 852 (William Morris ed., 1969).

"filled with decayed moss and other vegetable matter; wet spongy ground, where a heavy body is apt to sink."⁷³

A particular bog, the great Grimpen Mire, looms throughout the story as a symbol of danger and evil. In the final scene, having learned that the murderer keeps a refuge on an island in the Mire, Holmes and Watson venture into the deadly swamp to look for him. Here the narrator describes in ominous tones the wet, decomposing earth: "Rank reeds and lush, slimy water-plants sent an odour of decay and a heavy miasmatic vapour into our faces, while a false step plunged us more than once thigh-deep into the dark, quivering mire, which shook for yards in soft undulations around our feet."⁷⁴ As Watson imagines it, this slime is not a passive evil, but an aggressive, almost human force: "Its tenacious grip plucked at our heels as we walked, and when we sank into it, it was as if some malignant hand were tugging us down into those obscene depths"⁷⁵

If there could still be any doubt whether the story means to associate evil with slime and decay, the doubt would be resolved by the fate of the murderer: "Somewhere in the heart of the great Grimpen Mire, down in the foul slime of the huge morass which had sucked him in, this cold and cruel-hearted man is for ever buried."⁷⁶ In death as in life, the criminal and the Mire are united.

In *The Hound of the Baskervilles*, the metaphors of wet dirt are not chance images; they are embedded in an entire network of related images.⁷⁷ So integral are they to the story that it is impossible to imagine the work without them. As the novelist John Fowles observes in his Foreword to the 1974 Edition, "the real black hound is the Moor itself"⁷⁸

The motif of evil as wet dirt did not appear for the first time in the nineteenth century. Rather, in his brilliant rendering of crime, Conan Doyle was drawing on a symbol with origins deep in the Judeo-Christian tradition. Thus, the sixteenth-century allegorist

73. WEBSTER's, *supra* note 27, at 301.

74. DOYLE, *supra* note 68, at 625.

75. *Id.*

76. *Id.*

77. For the distinction between a chance image and a network of images, see YEVGENY ZAMYATIN, *Backstage*, in *A SOVIET HERETIC: ESSAYS BY YEVGENY ZAMYATIN* 190, 198 (Mirra Ginsburg ed. & trans., 1970).

78. Fowles, *supra* note 55, at 11.

John Bunyan chose a slimy bog, the "Slough of Despond," to represent evil in *The Pilgrim's Progress*.⁷⁹

Soon after the protagonist, Christian, flees his home in the City of Destruction to seek eternal life, he falls into a bog, becomes "grievously bedaubed with dirt,"⁸⁰ and begins to sink. With the assistance of a man named Help, he struggles free of the bog; he then inquires why the hazard is not remedied, so that travellers might pass safely through the region. Help explains: "This miry slough is such a place as cannot be mended; it is the descent whither the scum and filth that attends conviction for sin doth continually run, and therefore it is called the Slough of Despond . . ."⁸¹ Like the witches' brew in *Macbeth*,⁸² this slough serves as a receptacle of evil. More specifically, it symbolizes a state of moral turpitude into which an individual has sunk. This meaning has been captured beautifully in *Webster's New International Dictionary*, which defines "slough" as "an engulfing depth of sin."⁸³

Writing a thousand years before Bunyan, the Roman philosopher Boethius also conceived of evil as slime in a line that some have translated: "Seest thou then in what mire wickedness wallows . . . ?"⁸⁴ By contrast, in Queen Elizabeth's translation, this line reads: "See you not in what a great slowe, wicked thinges be wrapt in . . ."⁸⁵ Here the Queen makes a play on words. To the idea of evil encased in mud, she adds an allusion to the other meaning of "slough": the outer skin that a reptile periodically sheds.⁸⁶

The metaphor of the criminal as a reptile or, more exactly, a *slimy* reptile, is important in our culture. In the following passage from *Middlemarch*, George Eliot chooses this metaphor to describe Bulstrode's feelings after a horrifying encounter with his blackmailer: "It was as if he had had a loathsome dream, and could not shake off its images with their hateful kindred of sensa-

79. JOHN BUNYAN, *THE PILGRIM'S PROGRESS* 31 (G.F. Maine ed., 1953) (Part I, 1678; Part II, 1684).

80. *Id.* at 30.

81. *Id.* at 31.

82. *See supra* note 40 and accompanying text.

83. WEBSTER'S, *supra* note 27, at 2369.

84. BOETHIUS, *THE CONSOLATION OF PHILOSOPHY* 128, 315 (H.F. Stewart rev. trans., Harvard Univ. Press 1953).

85. Boethius, *De Consolatione Philosophiae* bk. iv, pt. III (Queen Elizabeth trans., 1593), in *QUEEN ELIZABETH'S ENGLISHINGS* 81 (Caroline Pemberton ed., London, Kegan Paul, Trench, Trubner & Co. 1899), *quoted in* 15 *THE OXFORD ENGLISH DICTIONARY* 739, 740 (2d ed. 1989).

86. *See* 15 *THE OXFORD ENGLISH DICTIONARY*, *supra* note 85, at 740.

tions—as if on all the pleasant surroundings of his life a dangerous reptile had left his slimy traces.”⁸⁷

Reptiles are not, of course, actually slimy, but when used to represent criminals, they are imagined as such—a conception we see again in Dickens’s novel *Oliver Twist*. Here is how Dickens describes the villainous gang leader, Fagin: “As he glided stealthily along, creeping beneath the shelter of the walls and doorways, the hideous old man seemed like some loathsome reptile, engendered in the slime and darkness through which he moved: crawling forth, by night, in search of some rich offal for a meal.”⁸⁸ As Dickens portrays him, the criminal could hardly be more closely associated with filth. Fagin, he tells us, was secreted out of the very mud through which he crawls, seeking garbage to eat.

In his later novel *Great Expectations*, Dickens returns to this vision of the criminal as a slimy creature. In the opening scene, he describes the “raw afternoon towards evening,”⁸⁹ when Pip encounters a convict who is “soaked in water, and smothered in mud.”⁹⁰ After the convict has threatened Pip and enlisted his help, Pip stutters the words, “Goo-good night, sir.”⁹¹ The convict replies, “‘Much of that!’ . . . glancing about him over the cold wet flat. ‘I wish I was a frog. Or a[n] eel!’”⁹²

Like these nineteenth-century novels, the twentieth-century musical *Peter Pan* resorts to the metaphor of a wet, filthy creature to highlight the badness of its villain, Captain Hook. Bragging about his evil deeds to the other pirates, Hook sings: “Who’s the slimiest rat in the pack?”⁹³ At the end of the song, Captain Hook and the pirates alternately sing:

Slimy . . .
Slimy . . .
Cap’n Hook!⁹⁴

Because slimy dirt is sometimes in a state of decomposition, this dirt may be putrid; therefore, evil is associated not merely with filth but specifically with filth that stinks. In the following passage

87. GEORGE ELIOT, *MIDDLEMARCH* 504 (Gordon S. Haight ed., Houghton Mifflin Co. 1956) (1871-1872).

88. CHARLES DICKENS, *THE ADVENTURES OF OLIVER TWIST* 135 (Oxford Illustrated Dickens ed., Oxford Univ. Press 1949) (1837-1839).

89. CHARLES DICKENS, *GREAT EXPECTATIONS* 11 (Heritage Club 1939) (1861-1862).

90. *Id.* at 12.

91. *Id.* at 14.

92. *Id.*

93. *PETER PAN* (National Broadcasting Co. 1960).

94. *Id.*

from *A Portrait of the Artist as a Young Man*, James Joyce conveys the evil of hell by vividly rendering its stench:

Imagine some foul and putrid corpse that has lain rotting and decomposing in the grave, a jellylike mass of liquid corruption. Imagine such a corpse . . . giving off dense choking fumes of nauseous loathsome decomposition. And then imagine this sickening stench multiplied a millionfold and a millionfold again from the millions upon millions of fetid carcasses massed together in the reeking darkness, a huge and rotting human fungus. Imagine all this and you will have some idea of the horror of the stench of hell.⁹⁵

Not only evil places, but also evil deeds, are conceived as malodorous. In *Hamlet*, King Claudius condemns his own fratricide with the words: "O, my offense is rank, it smells to heaven."⁹⁶ Conversely, the acts of pure, good people smell sweet. For example, Paul describes Christ's sacrifice as a "sweet-smelling savour"⁹⁷ or, in another translation, a "fragrant offering."⁹⁸

Because of its association with evil, smelliness in itself may be taken as an indicator of reprehensibility. In Dostoevsky's novel *The Brothers Karamozov*, when Father Zossima's corpse begins to smell the day after his death, the monks take the odor as a sign that the Father was not holy after all. In a chapter entitled "The Odor of Corruption,"⁹⁹ the smell issuing from the coffin not only diminishes the Father's reputation; it also engenders "coarsely unbridled"¹⁰⁰ temptations among the monks. For example, some who had envied the Father were pleased that his noisome corpse had diminished his aura of sanctity. In the same novel, the brother who killed his father is named Smerdyakov, "[son] of the stinking one."¹⁰¹ Ivan refers to him as "the stinking lackey."¹⁰² Moreover, Smerdyakov was conceived in the fetid passageway when his father had "passed through the 'backway.'"¹⁰³

95. JAMES JOYCE, *A PORTRAIT OF THE ARTIST AS A YOUNG MAN* 111 (R.B. Hershner ed., Bedford Books 1993) (1964).

96. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 3, l. 36 (Cyrus Hoy ed., Norton & Co., Norton Critical ed. 1963).

97. *Ephesians* 5:2 (King James).

98. *Ephesians* 5:2 (Revised Standard).

99. FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 327 (Richard Pevear & Larissa Volokhonsky trans., 1990) (1879-1880).

100. *Id.* at 330.

101. *Id.* at 783 n.2 (alteration in original).

102. *Id.* at 225.

103. *Id.* at 98. For an analysis of the theme of filth in *The Brothers Karamazov*, see Morson, *supra* note 5, at 234 *passim*.

Perhaps the most extended association between bad smells and criminality appears in Dostoevsky's other masterpiece, *Crime and Punishment*, in which St. Petersburg, the site of the crime, is repeatedly described as fetid. Consider, for example, this passage from the opening scene:

The stuffiness, the jostling crowds, the bricks and mortar, scaffolding and dust everywhere, and that peculiar summer stench so familiar to everyone who cannot get away from St. Petersburg . . . all combined to aggravate the disturbance of the young man's nerves. The intolerable reek from the public houses . . . completed the mournfully repellent picture.¹⁰⁴

Throughout the novel, Dostoevsky characterizes the air as "foul-smelling, contaminated,"¹⁰⁵ and "reeking with its familiar odours."¹⁰⁶ It is amid this fetid atmosphere that Raskolnikov plans his crime. By contrast, before committing the murder, Raskolnikov walks to the Petersburg island, where the air is clean and fresh. Here he dreams of his childhood and awakens horrified at what he is planning to do.¹⁰⁷

Literature's portrayal of crime and criminals as smelly lends support to the idea that we imagine lawbreakers as the filthiest of filth, as decaying matter, or the paradigmatic type of filth, excrement. On first examination, this finding may seem unsurprising, because the available repertoire of powerful negative symbols is small; we had to choose one symbol from this repertoire, and that one was filth. On closer inspection, however, the metaphor appears to be a revealing choice, a choice that shows our simultaneous hatred and love, repulsion and attraction, toward filth and the criminal.

But why do I speak of love and attraction to filth, or, for that matter, the criminal? To take up first the issue of filth, psychoanalysis, no less than everyday observation, suggests that filth holds an unconscious allure for us all. Human infants enjoy playing with feces, and older children exhibit a special fascination with mud pies, fingerpaints, and other slimy, smeary things.¹⁰⁸ Currently,

104. FEODOR DOSTOEVSKY, *CRIME AND PUNISHMENT* 2 (Jessie Coulson trans. & George Gibian ed., Norton & Co., 2d Norton Critical ed. 1975) (1866-1867).

105. *Id.* at 132.

106. *Id.* at 407.

107. See George Gibian, *Traditional Symbolism in Crime and Punishment*, in *id.* at 519, 525.

108. For a discussion of children's fascination with anal things, see RUTH L. MUNROE, *SCHOOLS OF PSYCHOANALYTIC THOUGHT* 194-96 (1955).

there is a toy on the market that consists of a green gelatinous ooze; it is called, simply, *Slime*.¹⁰⁹

As children grow older, their attraction to slime is overlaid with a veneer of repugnance, and mental conflict results. This conflict has been acknowledged in an amusing way by the creators of another contemporary toy, *Icky-Poo*.¹¹⁰ On the back cover of *The Official Icky-Poo Book*, which accompanies a container of sticky slime, the editors declare, "You'll be disgusted with yourself for loving it."¹¹¹ Conscious mental conflict is painful; therefore, children develop defense mechanisms to avoid awareness of their attraction to dirt. For example, psychologist Ruth Munroe reports that her children became so intolerant of filth that they insisted on changing the dishwasher several times during the washing up.¹¹² In their fastidiousness, Munroe's children were employing a reaction-formation, a defense mechanism whereby the individual avoids awareness of an impulse or feeling by exaggerating its opposite.¹¹³

Besides exaggerating their repugnance, children often defend against recognizing their interest in filth by attributing this interest to others—a dynamic we see in the following incident from my own experience. During the period when I was writing this Article, my seven-year-old niece asked me whether I wanted to hear a "really disgusting poem." Before I could reply, she began to recite:

Ooshy-Gooshy was a worm;
A mighty worm was he.
He sat upon the railroad tracks.
Squish. It was not for me!

Thinking that the poem might come in handy some day, I asked her to repeat it, so I could write down the words. She did so, then asked forcefully, "What do you want to know for?" I explained that I was writing about criminals and the language we use to describe them. I added, "We like slime, but we also don't like it. And your poem shows that we like it." Indignantly, she replied, "No it doesn't! It shows that we don't like it!" I asked, "But if we don't like slime, why are we writing poems about it?" My niece pondered this briefly, then defended her position in a

109. *Slime* (Nickelodeon trademark, MTV Networks 1992).

110. *Icky-Poo* (Klutz Press trademark, licensed from Applied Elastometrics, Inc.).

111. THE OFFICIAL ICKY-POO BOOK, back cover (Klutz Press ed., 1990).

112. MUNROE, *supra* note 108, at 252.

113. For a general discussion of reaction-formation, see FENICHEL, *supra* note 9, at 151-53; MUNROE, *supra* note 108, at 251-54.

tone of utter repudiation: "That's a two-year-olds' poem!" In other words, it is not we who like slime, but the members of another, devalued, group. This defense mechanism, the attribution to others of unacceptable feelings in oneself, is known as projection.¹¹⁴

As the preceding vignette illustrates, filth is not unequivocally despised but is rather an object of inner conflict. When the polarities of filth and cleanliness, mess and order, are central to a person's mental life, we speak of obsessive-compulsive neurosis.¹¹⁵ This neurosis derives from an unusually strong attachment to the anal zone—what Erik Erikson has called the "'other end' of the human anatomy, that factory of waste-products and odorous gases which is totally removed from our own observation and is the opposite of the face we show to the world."¹¹⁶

We may not all be full-blown obsessive-compulsives, but we do all exhibit some compulsive traits, some attachment to the anal zone. In our dealings with criminals, I submit, we are especially apt to behave like the classic obsessive-compulsive patient, seeing dirt and contamination everywhere,¹¹⁷ and using measures such as washing, neatening, and segregating to contend with this perceived threat. In the next section, I take up these measures as they appear in literary portrayals of criminality. I begin with the theme of washing.

C. *"Waters on the Hand of Blood":¹¹⁸ Washing and the Unavailing Effort to Regain Innocence*

I will sprinkle clean water upon you, and you shall be clean from all your uncleannesses.

—Ezekiel 26:25¹¹⁹

114. See CHARLES BRENNER, AN ELEMENTARY TEXTBOOK OF PSYCHOANALYSIS 91-93 (rev. ed. 1973).

115. For discussions of cleanliness and orderliness as components of the obsessive character, see KARL ABRAHAM, *Contributions to the Theory of the Anal Character*, in SELECTED PAPERS OF KARL ABRAHAM 371, 388-89 (Douglas Bryan & Alix Strachey trans., 1948); 9 SIGMOND FREUD, *Character and Anal Erotism*, in THE STANDARD EDITION, *supra* note 9, at 167 *passim* (1959); ROGER A. MACKINNON & ROBERT MICHELS, THE PSYCHIATRIC INTERVIEW IN CLINICAL PRACTICE 90-91 (1971).

116. ERIK H. ERIKSON, YOUNG MAN LUTHER 246 (1958).

117. Cf. V.E. von Gebattel, *The World of the Compulsive* (Sylvia Koppel & Ernest Angel trans., abr.), in EXISTENCE 170, 187 (Rollo May et al. eds., 1958) ("Now the image of dirt or of death afflicts him with constant contamination.").

118. SOPHOCLES, OEDIPUS TYRANNUS, *quoted in* PHILIP WHEELWRIGHT, THE BURNING FOUNTAIN 181 (new & rev. ed. 1968); *see also infra* text accompanying note 125.

119. Ezekiel 26:25 (King James).

Cleanliness is, indeed, next to godliness.

—John Wesley¹²⁰

From the cultural equation of crime with filth it follows that water will play a central symbolic role in efforts to control crime. With its two properties as a cleansing agent and a giver of life, water serves as an archetypal symbol.¹²¹ In the Judaeo-Christian tradition, as in other traditions throughout the world, cleansing with water represents the abandonment of an evil existence and rebirth into a life of innocence and purity.¹²²

*The Pilgrim's Progress*¹²³ illustrates the symbolic power of water in the scene where Christian visits a large parlour that is filthy with dust. When a man tries to sweep away the filth, he only succeeds in creating more dust, causing Christian to choke. Then a damsel sprinkles the room with water, and when she has finished, it becomes possible to sweep and cleanse the room. The Interpreter explains:

"This parlour is the heart of a man that was never sanctified by the sweet grace of the Gospel; the dust is his original sin and inward corruptions He that began to sweep at first is the law; but she that brought water, and did sprinkle it, is the Gospel."¹²⁴

Although this example depicts water as potentially effective in the struggle against guilt, a stronger literary tradition portrays cleansing as futile where the crime is heinous. For instance, in Sophocles's *Oedipus Tyrannus*, a messenger professes hopelessness in this way after the revelation of Oedipus's horrible deeds:

Though stream on stream should pour
Their swift-cleansing waters on the hand of blood,
The old stain shall not be washed away.¹²⁵

Likewise, Lord Byron's Cain, after slaying his brother Abel, recognizes sorrowfully:

120. 3 JOHN WESLEY, *On Dress*, in *THE WORKS OF JOHN WESLEY* 247, 249 (Albert C. Outler ed., Bicentennial ed. 1986).

121. See WHEELWRIGHT, *supra* note 1, at 125.

122. See Han J.W. Drijvers, *Ablutions*, in 1 *THE ENCYCLOPEDIA OF RELIGION* 9 *passim* (Mircea Eliade ed., 1987); Michael Meslin, *Baptism*, in 2 *ENCYCLOPEDIA OF RELIGION*, *supra*, at 59 *passim*.

123. BUNYAN, *supra* note 79.

124. *Id.* at 22.

125. SOPHOCLES, *supra* note 118, at 181.

And I who have shed blood cannot shed tears.
But the four rivers would not cleanse my soul.¹²⁶

And again, in the most famous literary version of this theme, Macbeth raises the prospect of washing away his guilt only to despair of success:

Will all great Neptune's ocean wash this blood
Clean from my hand? No, this my hand will rather
The multitudinous seas incarnardine,
Making the green one red.¹²⁷

Later, Lady Macbeth, her mind crazed from guilt, seeks peace and blamelessness by enacting the same metaphor. Repeatedly, for as long as a quarter of an hour at a time, she rubs her hands together, as though washing them.¹²⁸ Yet, like her husband, she harbors no illusion of recovering innocence:

"All the perfumes of Arabia will not sweeten this little hand. O, O, O!"¹²⁹

Psychoanalysis confirms the idea that Lady Macbeth's efforts, however much repeated, will avail nothing. Ritualistic handwashing is a classic obsessional symptom, an "undoing," which aims to ward off the pain of remorse through an expiatory gesture that annuls the wrongful act.¹³⁰ Typically, the undoing must be repeated over and over, and this very repetition is itself a sign that the conflict remains unresolved. As Ruth Munroe explains:

Compulsive rituals of negative magic are especially repetitive because in one way or another they usually include a positive expression of the impulse either in the undoing itself or in the thought or act which precipitates the undoing. . . . The one meaning (doing) tends to intrude upon the other, and the patient is never sure just how many acts will undo the eternally recurrent positive impulse.¹³¹

Thus, the stain that imbues the criminal is an indelible stain, and the criminal, being irreclaimable, must be thrown away. So basic is this idea that *Webster's New International Dictionary* uses criminals illustratively in the very sentence defining "offal."

126. LORD BYRON'S *CAIN* act 3, ll. 521-22 (Truman G. Steffan ed., University Tex. Press 1968).

127. SHAKESPEARE, *supra* note 17, act 2, sc. 2, ll. 58-61.

128. *See id.* act 5, sc. 1, ll. 25-29.

129. *Id.* ll. 48-50.

130. *See Undoing*, in *ENCYCLOPEDIA OF PSYCHOANALYSIS* 459, 459-60 (Ludwig Eidelberg ed., 1968); *see also* FENICHEL, *supra* note 9, at 289.

131. MUNROE, *supra* note 108, at 257.

“Offal,” it says, is “[a]nything that is thrown away as worthless; carrion; refuse; rubbish; garbage; as, the *offal* of jails.”¹³² But the image of the criminal as ineradicably stained is not the only source of banishment. Indeed, the powerful appeal of banishment (including internal banishment, or imprisonment) may stem from its ability to unite the notion of discarding worthless garbage with that of removing a diseased group from a healthy one, to prevent contamination.

D. “A Great Gulf Fixed”:¹³³ *Banishment of the Diseased Criminal*

They flung me down like a heap of carrion, and retreated as if they fled from the pollution of my touch.

—Charles Maturin, *Melmoth the Wanderer*¹³⁴

Our earliest encounters with the notion of dirt often occur in the context of parental prohibitions related to illness, for example: “Don’t touch; it’s dirty; it will make you sick.” Because of this common experience and because of the causal connection between dirt and illness, the notion of filth readily becomes assimilated to the notion of disease.¹³⁵

Literature supports the idea that we tend to imagine criminals as not merely dirty but also contagious and diseased. A vivid illustration of this theme appears in Dickens’s novel *A Tale of Two Cities* after the lawyer, Stryver, discovers that Charles Darnay is acquainted with the Marquis St. Evremonde. “I am sorry for it,”¹³⁶ Stryver comments. When Darnay insists on knowing why, Stryver answers:

“Here is a fellow, who, infected by the most pestilent and blasphemous code of devilry that ever was known, abandoned his property to the vilest scum of the earth that ever did murder by wholesale, and you ask me why I am sorry that a man who instructs youth knows him? Well, but I’ll answer you. I am sorry because I believe there is contamination in such a scoundrel. That’s why.”¹³⁷

132. WEBSTER’s, *supra* note 27, at 1690.

133. *Luke* 16:26 (King James); see also *supra* text accompanying note 149.

134. CHARLES R. MATURIN, *MELMOTH THE WANDERER* 166 (Douglas Grant ed., Oxford Univ. Press 1968) (1820).

135. See Kubie, *supra* note 57, at 416 (“[T]hat which is dirty will make one sick, and sickness and dirt become synonymous.”).

136. DICKENS, *supra* note 20, at 237.

137. *Id.*

So contagious is evil, in Stryver's view, that one may acquire it through mere acquaintance with a "scoundrel." Shakespeare's plays reveal that he too regards evil as an infectious disease. In *Hamlet*, a play about an unpunished act of murder, the central image is disease, in particular, as Caroline Spurgeon notes, "a hidden corruption infecting and destroying a wholesome body."¹³⁸

If crime is a contagious disease, it makes sense that non-criminals should adopt measures to prevent criminals from contaminating them. Jaggers, the barrister in *Great Expectations*, employs cleansing for this purpose. As Pip relates:

I embrace this opportunity of remarking that he washed his clients off, as if he were a surgeon or a dentist. He had a closet in his room, fitted up for the purpose, which smelt of the scented soap like a perfumer's shop. It had an unusually large jack-towel on a roller inside the door, and he would wash his hands, and wipe them and dry them all over this towel, whenever he came in from a police-court or dismissed a client from his room.¹³⁹

So also Wemmick, the solicitor who works with Jaggers, attempts to avoid defilement by the criminal milieu. Every evening, on returning home, Wemmick crosses a drawbridge over a chasm and then pulls the bridge up behind him. To Pip, he observes, "After I have crossed this bridge, I hoist it up—so—and cut off the communication."¹⁴⁰

Whereas Wemmick avoids criminal contamination through this nocturnal rite of self-banishment, literature's more common theme is the banishment of evildoers. A seminal example in our culture is the story of *Oedipus Tyrannus*, by Sophocles. When the play begins, the town of Thebes is afflicted with a "fiery plague" that spreads death everywhere.¹⁴¹ In the ancient Greek view, this pestilence implied the existence of an unpunished criminal in the town. Therefore, King Oedipus, seeking to alleviate the people's suffering, sets out to discover the culpable person in their midst. Finding in the end that he himself is the criminal who has slain his father and married his mother, Oedipus demands to be punished in the traditional way, with banishment.¹⁴²

138. SPURGEON, *supra* note 5, at 213.

139. DICKENS, *supra* note 89, at 204.

140. *Id.* at 200.

141. SOPHOCLES, *OEDIPUS TYRANNUS* 3 (Luci Berkowitz & Theodore F. Brunner trans. & eds., Norton & Co., Norton Critical ed. 1970) (1st performance circa 429 B.C.).

142. *Id.* at 4. For discussions of murder and pollution in ancient Greece, see DOUGLAS M. MACDOWELL, *ATHENIAN HOMICIDE LAW IN THE AGE OF THE ORATORS passim* (1963);

Even more central to our culture is the *Old Testament* version of the story known as the Fall: the tale of Adam and Eve's temptation in the Garden of Eden, their succumbing to disobedience, and their resulting exile. In Milton's retelling, Christ intercedes for the couple; nevertheless, God declares that Man, being sullied, may no longer abide in paradise:

But longer in that Paradise to dwell,
The Law I gave to nature him forbids:
Those pure immortal Elements that know
No gross, no unharmonious mixture foul,
Eject him tainted now, and purge
him off.¹⁴³

As a Milton scholar explains, Adam and Eve may not remain in Paradise, because "what is immortally pure and untaintable cannot assimilate what is soiled by any admixture of pollution."¹⁴⁴ Thus, the motive behind segregating these transgressors is not so much to avoid contracting their disease as to render the nonexpelled remnant utterly pure.

In a variation on the story of the Fall, Adam and Eve's son Cain, in a jealous rage, kills his brother Abel. Like his parents before him, Cain receives the punishment of exile for his crime. Condemned by God to be "a fugitive and a vagabond"¹⁴⁵ on the face of the earth, he goes forth to the land of Nod, East of Eden, out of the Lord's presence.¹⁴⁶

The theme of removing the wicked from the righteous runs through the *New Testament* as well as the *Old*. For example, in explicating the Final Judgment, Jesus describes God as separating the sheep from the goats, putting the goats on his left hand and sending them, cursed, into everlasting punishment. Significantly, this story associates darkness with wickedness; Syrian sheep, the breed that would have been familiar to the Gospel writers, were white, while the goats were black. Even in the dusk, they could be told apart.¹⁴⁷

Jesus' story of the rich man and Lazarus provides another vivid example of the segregation motif. In this parable the rich

Richard A. Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71, 83-90 (1980).

143. MILTON, *supra* note 16, bk. 11, ll. 48-52.

144. HARRY BLAMIRE, *MILTON'S CREATION* 273 (1971).

145. *Genesis* 4:12 (King James).

146. *See id.* 4:16.

147. *See Matthew* 25:32-33; 7 THE INTERPRETER'S BIBLE 563 (1951).

man, dressed in purple, enjoys everything good while he lives. Meanwhile, a beggar, Lazarus, lies "at his gate . . . [a]nd desir[es] to be fed with crumbs from the rich man's table."¹⁴⁸ After both men die, Lazarus rests in heaven in Abraham's bosom, whereas the rich man lies agonizing in hell. The rich man begs Abraham to let Lazarus put his finger in the water and cool his tongue to alleviate his torment. In denying the rich man's request, Abraham explains: "[B]etween us and you there is a great gulf fixed: so that they which would pass from hence to you cannot; neither can they pass to us, that would come from thence."¹⁴⁹

Rituals of separation, defilement, and contagion—such are the themes of these stories, and they suggest that banishment has its roots in a concept we associate with primitive peoples, an ancient concept we know by its Polynesian name, "taboo." As defined by anthropologists, "taboo" refers to rules of pollution: superstitious prohibitions on touching certain persons or objects.¹⁵⁰ In his seminal work *The Golden Bough: A Study in Magic and Religion*, J.G. Frazer describes the persons to whom the taboo applies: "[T]he common feature . . . is that they are dangerous and in danger"¹⁵¹ The purpose of the taboo, then, is to "seclude these persons from the rest of the world so that the dreaded spiritual danger shall neither reach them nor spread from them."¹⁵²

If the anthropological concept that illuminates banishment is taboo, the psychoanalytic counterpart is the defense mechanism of isolation. Although now used primarily to mean the separation of thoughts from their corresponding emotions, isolation once had a more general meaning: the spatial or temporal separation of the

148. *Luke* 16:20-21 (King James).

149. *Id.* 16:26-27.

150. CHARLOTTE SEYMOUR SMITH, *MACMILLAN DICTIONARY OF ANTHROPOLOGY* 276 (1986).

151. JAMES G. FRAZER, *THE GOLDEN BOUGH: A STUDY IN MAGIC AND RELIGION* 260 (abr. ed. 1951).

152. *Id.* In primitive societies, persons to whom taboos apply are sometimes considered polluted, at other times sacred. *Id.*; Mary Douglas, *Taboo*, *New Soc'y*, March 12, 1964, at 24, 24. So also criminals are considered unclean, and they, too, are sometimes viewed as holy. Thus, in Greek mythology, Prometheus stole fire from the gods and became, by the same act, the savior of mankind. Likewise, according to Christian theology, Christ was convicted of crimes under Roman law; in the act of being punished, he redeemed the sins of humanity. Even the ordinary criminal was, in Dostoevsky's view, "almost a Redeemer, who ha[d] taken on himself the guilt which must else have been borne by others." 21 SIGMUND FREUD, *Dostoevsky and Parricide*, in *THE STANDARD EDITION*, *supra* note 9, at 177, 190 (1961); see also PHILIP RIEFF, *FREUD: THE MIND OF THE MORALIST* 303-05 (Anchor Books 1961) (1959) (discussing "ethical criminals").

spheres that (it is thought) should not be in contact. As Otto Fenichel explains: "Numerous compulsive symptoms regulate the modes in which objects should be or must not be touched. The objects represent genitals or dirt. 'Clean' things must not communicate with 'dirty' ones."¹⁵³

Its parallels with taboo and isolation suggest that banishment cannot be understood as merely a straightforward, rational response to evildoing. Rather, its origins lie deep in superstition and magical thinking. Later, in analyzing the Australian penal colony, we shall return to this topic,¹⁵⁴ but first let us examine the places that evildoers inhabit beyond the "great gulf."

E. "A Land of Gloom and Chaos":¹⁵⁵ *Darkness and Dirt as Essential Qualities of the Criminal's Punishment*

Beyond the great gulf that separates the ungodly from the virtuous, evildoers are imagined as dwelling in conditions that mirror the characteristics of the punished—conditions known in theology as "measure-for-measure" punishments.¹⁵⁶ Since, as we have seen, criminals are commonly associated with slime, darkness, and foul odors, their places of punishment must likewise reflect these qualities.

The Hebrew concept of "Gehenna" provides a particularly interesting illustration of the ways in which the metaphor of filth has influenced human beings' thinking about punishment. Originally Gehenna was an actual place, a valley outside Jerusalem where garbage burned perpetually. In intertestamental times, Gehenna took on an eschatological meaning, becoming the site of evil-doers' eternal punishment. Over time, the concept of "Gehenna" was assimilated to an older idea of hell, "Sheol," a place of mire and darkness. Because darkness and fire seemed incompatible, the Hebrews imagined Gehenna's fire as giving off no light. They willingly tolerated even this incompatibility to retain darkness as an affliction of the punished.¹⁵⁷

Milton draws on this Hebrew tradition when, in *Paradise Lost*, he describes Hell as follows:

153. FENICHEL, *supra* note 9, at 288.

154. *See infra* part III.

155. *Job* 10:22 (Revised Standard); *see also infra* text accompanying note 268.

156. *See* MARTHA HIMMELFARB, *TOURS OF HELL* 106-07 (1983).

157. *See* ENCYCLOPEDIA OF THE BIBLE 847-48 (1963); F-N ENCYCLOPEDIA OF RELIGION 1457 (Paul K. Meagher et al. eds., 1979); 6 *NEW CATHOLIC ENCYCLOPEDIA* 312-13 (Catholic Univ. of Am. ed., 1967).

A dungeon horrible, on all sides round
 As one great furnace flamed, yet
 from those flames
 No light, but rather darkness visible.¹⁵⁸

Besides darkness, extreme removal from God characterizes the place where Milton's fallen angels dwell:

[H]ere their prison ordained
 In utter darkness, and their portion set
 As far removed from God and light of heav'n
 As from the center thrice to th' utmost pole.¹⁵⁹

The quality of being so far removed from light hints at an anal meaning to Milton's portrayal. This same association can be seen in actual practice in medieval times, when the unclaimed bodies of executed criminals were left to rot without a grave. The place where the corpses lay was then used as a dump; villagers threw garbage on the criminals' remains.¹⁶⁰ By this custom, society expressed its view of criminals as intimately related to stench and filth.

These anal meanings of criminality find another concrete expression in twentieth-century America. In the famous zoning case *Village of Euclid v. Ambler Realty Co.*,¹⁶¹ the Supreme Court details the functions and institutions that the Euclid city officials have seen fit to put together in zone U-6: "plants for sewage disposal and for producing gas, garbage and refuse incineration, scrap iron, junk, scrap paper and rag storage, aviation fields, cemeteries, crematories, penal and correctional institutions, insane and feeble minded institutions, storage of oil and gasoline, . . . and manufacturing and industrial operations."¹⁶² As in the literary, theological, and historical examples, here too, criminals are associated with anal matters: waste, foul-smelling operations, and death, with its inevitable connotations of rot and decay.

How are we to understand the practice of punishing criminals in dark, dirty, smelly places? On one level, as the phrase "measure-for-measure punishment"¹⁶³ implies, this practice may appeal to our sense of fairness; it seems only just that those who have engaged in crime and thus made themselves filthy should be forced

158. MILTON, *supra* note 16, bk. 1, ll. 61-63.

159. *Id.* bk. 1, ll. 71-74.

160. See PHILIPPE ARIÈS, *THE HOUR OF OUR DEATH* 43-44 (1981).

161. 272 U.S. 365 (1926).

162. *Id.* at 381.

163. See *supra* note 156 and accompanying text.

to dwell in filth. On another level, the practice may signify an indulgence of the noncriminals' sadistic drive, thinly disguised as an appropriate punishment. No doubt both these explanations contain a partial validity. In addition, the practice of punishing criminals in filth can be understood as a mysophilic practice—a practice expressing a love of filth. Rather than being a defense, like washing and banishment, it represents a breakthrough of the original impulse: the attraction to dirt and the delight in playing with slimy, smeary things.

At the beginning of this Essay, I undertook to explore the ways that we employ the metaphor of filth to conceptualize criminals. But what began as an investigation of a metaphor has revealed to us an allegory—not a static image, but a dynamic story in which noncriminals perceive criminals first as slimy and dark, and then as dangerously diseased. Finally, fearing that they too will become contaminated with filth, the noncriminals banish the lawbreakers to a suitably dark, filthy, and remote place.

In Part III, I will show that this allegory found a resonance in late eighteenth and nineteenth century Britain and Australia. More specifically, I will suggest that British people living in these lands assimilated both their criminals and their new continent to this archetypal story, reenacting with real people and real places an epic drama of self-purification through banishment of the filthy.

III. PROJECTING AN "EXCREMENTITIOUS MASS":¹⁶⁴ THE METAPHOR OF FILTH IN THE HISTORY OF BOTANY BAY

Spewed from our country, forgotten, bound to the dark edge of the earth

—Wertenbaker, *Our Country's Good*¹⁶⁵

A. *Banished Beyond the Seas: The Origins of Transportation to Australia*

In 1786, having lost its American colonies, which had previously served as a repository for British criminals;¹⁶⁶ and being plagued by overcrowded prisons, from which typhus threatened to

164. 4 JEREMY BENTHAM, *Panopticon Versus New South Wales*, in THE WORKS OF JEREMY BENTHAM 173, 176 (Russell & Russell, Inc. 1962) (1838-1843); see *infra* note 204 and accompanying text; see also *supra* note 13 and accompanying text.

165. TIMBERLAKE WERTENBAKER, *OUR COUNTRY'S GOOD* act 1, sc. 1 (Royal Court Writers Ser. 1988).

166. ALAN FROST, *CONVICTS AND EMPIRE* 3 (1980).

spread into the surrounding communities;¹⁶⁷ the British government decided on a remarkable course of action: the creation of a penal colony at Botany Bay, on the eastern coast of Australia.¹⁶⁸

Although it was not the only attempt at a solution to the penal crisis—the penitentiary also developed during this period¹⁶⁹—the “thief-colony” on the far side of the world would play an important role in the British criminal justice system for eighty-one years, from 1787, when the First Fleet departed for New South Wales with 736 convicts aboard,¹⁷⁰ until 1868, when the last ship landed its prisoners in Western Australia.¹⁷¹ Estimates of those forcibly exiled to Australia vary, but all calculations indicate a large number of transported convicts—probably from 156,000 to 162,000.¹⁷² “Transportation,” as forced exile was legally known, was sometimes employed as a sentence in its own right; at other times, it served as a merciful alternative to death.

Forced exile had, of course, been used as a punishment before the Australian experiment but never in the same way or on the same grand scale. Exile, Blackstone tells us, was a “punishment[] unknown . . . to the common law.”¹⁷³ The Habeas Corpus Act provided that “no subject of this realm . . . shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas (where they cannot have the full benefit and protection of the common law) but that all such imprisonments shall be illegal.”¹⁷⁴ Indeed, the British sovereign was not even permitted to send a subject out of the realm to be a foreign ambassador against his will, “[f]or this might, in reality, be no more than an honourable exile.”¹⁷⁵

Nevertheless, Parliament possessed the authority to override the common law and did so in 1597, in an act providing that persistent idlers should be “conveyed . . . beyond the seas.”¹⁷⁶ It was on

167. See Hughes, *supra* note 12, at 42. I am indebted to Hughes's *The Fatal Shore* for awakening my interest in Australian history. This beautifully-crafted book, although not explicitly psychoanalytic, provides the kind of material that the psychoanalytically-minded interpreter requires.

168. See FROST, *supra* note 166, at 121.

169. See MICHAEL IGNATIEFF, *A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION, 1750-1850 passim* (1978).

170. See HUGHES, *supra* note 12, at 71.

171. *Id.* at 578.

172. *Id.* at 611 n.2.

173. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *137.

174. *Id.* at *137-38.

175. *Id.* at *138.

176. See HUGHES, *supra* note 12, at 40.

the authority of this act that Britain transported convicts to the American colonies during the seventeenth and eighteenth centuries, thereby avoiding a crisis of numbers in its prisons.¹⁷⁷ When, in 1776, the American colonies revolted, Britain no longer had a place to send its prisoners. Acting on the assumption that Britain would soon win the war, the British government adopted a stopgap measure, The Hulks Act,¹⁷⁸ whereby old and rotting men-o'-war and troop transports would be used to hold convicts sentenced to be transported until their destination should be decided.¹⁷⁹ As time went on, with the hulks' population increasing by one thousand prisoners a year¹⁸⁰ and with "gaol fever" rampant on the ships, the British government made increasingly frantic efforts to find a solution to its penal crisis.¹⁸¹ In 1786, these efforts culminated in the appointment of a Governor, Lieutenant-Governor, and Chaplain for a penal colony to be established in Australia.¹⁸² In late May, 1787, six convict ships departed for the far side of the world.¹⁸³

Historians have been hard pressed to make sense of the decision to create a penal colony in Australia. Some scholars, incredulous at what seems on its face an ill-conceived scheme, have sought out nontraditional explanations; specifically, they have proposed that Britain aimed at creating a strategic foothold in the Far East or a flax industry on Norfolk Island, off of Australia's eastern coast.¹⁸⁴ In their quest for new interpretations, these historians have hoped to find "a less gratuitous beginning for Australia"¹⁸⁵ than the plan for a penal colony. Writing of the revisionists' motivation, David Mackay observes: "The general sense is that Australia's colonial past is tawdry and requires tidying up. In their search for more noble and 'rational' explanations . . . writers have attempted to erase a blot from Australia's history"¹⁸⁶

177. See *id.* at 40-42.

178. See 1 C.M.H. CLARK, A HISTORY OF AUSTRALIA 73-75 (1962).

179. See *id.* at 76, 81-82.

180. See HUGHES, *supra* note 12, at 42.

181. *Id.* at 42-43.

182. See CLARK, *supra* note 178, at 73-75.

183. See HUGHES, *supra* note 12, at 68.

184. See, e.g., AUSTRALIANS TO 1788, at 394 (D.J. Mulvaney & J. Peter White eds., 1987) [hereinafter AUSTRALIANS]; GEOFFREY BLAINEY, THE TYRANNY OF DISTANCE *passim* (1982).

185. FROST, *supra* note 166, at 182. In significant language, Frost also observes, "The rag and bone shop of Australia's beginning was perhaps not so foul as we have for so long supposed." *Id.* at 135.

186. DAVID MACKAY, A PLACE OF EXILE 3 (1985).

Although some historians have found merit in the idea that commercial and strategic factors played a role in Britain's decision,¹⁸⁷ others have rejected this view,¹⁸⁸ for powerful reasons. Thus, as to the commercial motive of growing flax on Norfolk Island, the equipping of the First Fleet tends to contradict this interpretation. The British government neglected to send either suitable tools or trained flax dressers to the colony. Not surprisingly, the flax industry got off to a slow start and was soon given up altogether.¹⁸⁹

Many have found the argument for a strategic motive equally unconvincing. For example, Robert Hughes notes that the Australian colony lay thousands of miles from the areas of England's strategic interest; moreover, by the 1790s French ships no longer posed a significant threat in the Far East. Evidence about Prime Minister Pitt's state of mind also tends to belie the strategic motive, for his correspondence at the time contains only a few vague allusions to the strategic arguments.¹⁹⁰

If the arguments for commercial and strategic motives are weak at best, we are left with the traditional explanation: that the British founded Australia as a place to dump criminals. But this theory, though widely accepted, is unsatisfying to virtually everyone, because it implies that the British government acted irrationally. Consider, for example, the assessment of David Mackay, author of *A Place of Exile*: "[T]he government found itself propelled towards . . . the worst possible alternative—the scarcely-known shores of Botany Bay. Having arrived at this choice almost by default, it was then compelled to try to justify a decision which in reality had little to recommend it."¹⁹¹ He continues:

The despatch of the first fleet to Botany Bay was a reckless act on the part of a desperate ministry. The intended site for the settlement was insufficiently known; the expedition itself was poorly organized and badly equipped

Sending out the first fleet without an adequate preliminary survey was irresponsible¹⁹²

187. See, e.g., AUSTRALIANS, *supra* note 12, at 394.

188. See, e.g., MACKAY, *supra* note 186, at 4-6.

189. See *id.* at 61; see also HUGHES, *supra* note 12, at 65.

190. See HUGHES, *supra* note 12, at 64-66; see also MACKAY, *supra* note 186, at 59-61 (providing detailed evidence that New South Wales had no credibility as a strategic base).

191. MACKAY, *supra* note 186, at 56.

192. *Id.* at 57.

In a similar vein, Hughes writes: "They chose the least imaginable spot on earth, which had been visited only once by white men."¹⁹³ Hughes goes so far as to characterize the plan of establishing a convict colony in a place so little known and far away as "bizarre."¹⁹⁴

Geoffrey Blainey points out two other puzzling aspects of the decision to ship convicts to Botany Bay: first, transportation to eastern Australia was a terribly expensive solution to the British penal crisis; and second, it was a very slow way to solve what is thought to have been an urgent problem. Almost two and a half years elapsed between the sailing of the First Fleet of convict ships and the departure of the Second Fleet.¹⁹⁵ Thus, the plan to create a penal colony at Botany Bay seems curiously irrational if judged by the policymakers' conscious motives.

But psychoanalysis tells us that not all motives are conscious; indeed, a large part of mental functioning takes place outside awareness.¹⁹⁶ And it is precisely when behavior makes little sense in terms of its acknowledged purposes that we have the most to gain in searching for unconscious motives. In the following pages, I undertake an examination of these unacknowledged purposes through an analysis of the imagery that the British used in discussing Australia and the criminal exiles. Based on this analysis, I will suggest that the policy of establishing a penal colony in Australia can be understood in terms of two unconscious aims: (1) to avoid a painful awareness of disavowed criminal qualities in the self by projectively identifying with those qualities in others; and (2) to reenact an archetypal drama about dwellers in paradise who became tainted and were banished to a dark, remote land.

B. "A Pervading Stain":¹⁹⁷ *The Language of Filth in Australian History*

The student of Australian history cannot fail to be impressed by the pervasiveness of anal metaphors in the debate over transporting criminals to that far-off land. The very idea of "far-off" itself hints at anality, because in the human body, the anal region is remote from that part of the body we identify most closely with our

193. HUGHES, *supra* note 12, at 42.

194. *Id.* at 57.

195. See BLAINAY, *supra* note 184, at 19.

196. CHARLES RYCOFT, A CRITICAL DICTIONARY OF PSYCHOANALYSIS 23, 93, 173-77 (1968).

197. MORRELL, *supra* note 12, at 393; see also *infra* text accompanying note 212.

selves, namely, the face. A letter written by the English essayist, Charles Lamb, to his friend Barron Field conveys some sense of Australia's remoteness to the eighteenth-century European:

"I do not know whereabouts Africa merges into Asia; . . . nor can form the remotest conjecture of the position of New South Wales [the name then given to all of eastern Australia], or Van Diemen's Land [Tasmania, a large island off of Australia's southern coast]. Yet do I hold a correspondence with a very dear friend in the first-named of these two Terrae Incognitae."¹⁹⁸

To men and women of eighteenth-century England, Australia was truly an unknown land. Prior to the transporting of the convicts, only one British ship had ever landed at Botany Bay, and that briefly, seventeen years earlier. The first convict fleet required 250 days to reach its destination.

The point, of course, is not that Australia was literally an unknown and remote place but that these qualities enabled Australia to serve as a powerful *symbol* of the unknown, the remote, and the anal. Australia's function as a symbol of Britain's backside can be seen in the title of a three-volume work about Australia published in the early 1850s. Written by Colonel Godfrey Mundy, a long-term official visitor to Australia, the work is entitled *Our Antipodes*.¹⁹⁹

Besides remoteness, more explicit anal metaphors were also used to speak of Australia. Consider, for example, the following passage in which Bishop William Ullathorne, Vicar-Apostolic for New South Wales, argued against the continued transportation of criminals to Australia:

We have taken a vast portion of God's earth, and have made it a cess-pool; we have taken the oceans, which, with their wonders, gird the globe, and . . . made them the channels of a sink; we have poured down scum upon scum, and dregs upon dregs, of the off-scourings of mankind²⁰⁰

In England, as well, commentators imagined Australia rather vividly as a place that the British were using as a sewer. Thus, in 1819, the Reverend Sydney Smith, an occasional consultant to Home Secretary Peel, wrote in the *Edinburgh Review*: "There can be but one opinion. New South Wales is a sink of wickedness

198. CORAL LANSBURY, *ARCADY IN AUSTRALIA* 13 (1970) (quoting Charles Lamb).

199. GODFREY C. MUNDY, *OUR ANTIPODES* (London, Richard Bentley, 2d ed. rev. 1852).

200. W. ULLATHORNE, *THE CATHOLIC MISSION IN AUSTRALASIA* at iv (facsimile ed. 1963) (1837).

. . . .”²⁰¹ Similarly, in 1849, *The Times* defended transportation with these words:

While . . . we recognize the wisdom and public spirit of those who deprecate the perversion of any colony into a mere *convict cesspool*, we must remind them that England has rights as well as her dependencies, and that . . . she will not submit to the shame and cost of maintaining an annual burden of 3,000 convicted felons on her own soil.²⁰²

But perhaps the most graphic and conspicuously anal language about Australia comes from *Our Antipodes*. Explaining why some Australian settlers opposed the revival of transportation, Mundy states: “He who steps backwards will tumble in the mire—and what mire blacker and fouler than the Botany Swamp!”²⁰³ Like Charles Dickens in *Oliver Twist* and Arthur Conan Doyle in *The Hound of the Baskervilles*, Mundy portrays the criminals’ habitat as an alluvial ooze.

In the passages quoted above, writers conceive of Australia as a slimy receptacle of filth—hence, a toilet, or an anus, not in the sense of an expelling organ, but of a passively receiving one. If Australia was an anus, then the criminals sent there were feces, as we see in the following eloquent example from Jeremy Bentham. Speaking out against the “thief-colony” in 1812, he observed that England was projecting “a sort of excrementitious mass.”²⁰⁴ Although not always this explicit, many observers portrayed the criminal exiles in anal terms, as refuse, scum, taint, and stain. For instance, in 1846, a colonial correspondent of *The Times* wrote: “[A]s the foundation of a permanent convict system, no change ought to be accepted which does not abandon at once and for ever the selfish and heinous sin of casting off on infant countries the *scum and refuse* of our own society.”²⁰⁵ Likewise, Colonel Mundy thought that “the privilege of shooting so much moral *rubbish* upon other and distant premises . . . [was] cheaply bought.”²⁰⁶

201. HUGHES, *supra* note 12, at 355 (quoting Sydney Smith, EDINBURGH REV., July 1819).

202. THE TIMES (London), March 29, 1849, at 5, *quoted in* MORRELL, *supra* note 12, at 404 (emphasis added).

203. 3 MUNDY, *supra* note 199, at 112.

204. 4 BENTHAM, *supra* note 164, at 176. Nor is this an accidental choice of images, for Bentham goes on to describe the banished convicts as “this fruitlessly expelled mass of corruption.” *Id.* at 191.

205. Letter to the Editor, THE TIMES (London), Dec. 18, 1846, at 3, *quoted in* MORRELL, *supra* note 12, at 396 (emphasis added).

206. MUNDY, *supra* note 199, at 485, *quoted in* A.G.L. SHAW, CONVICTS AND THE COLONIES 349 (1977) (emphasis added).

And again, the British *Quarterly* declared convicts “the refuse of the trading towns” and so “unsuitable for colonial employment.”²⁰⁷

Permanent settlers in Australia used the same metaphor, as we see in this 1851 example from the *Bathurst Free Press*: “[T]o invite the *scum* of the British Empire merely from pecuniary motives, would be to ask from the parent land her curse, instead of her blessing—would be to effect the complete destruction of the trifling claim to respectability, which we now possess”²⁰⁸ The word “scum” unites the concepts of wet dirt and darkness. Long used to mean a layer of impurities lying on top of a liquid, the word derives from a root meaning to “cover” or conceal—hence, to place in the darkness.²⁰⁹

The colonials often associated the convict-filth with the first point of contact between the criminal exiles and the continent, that is, the shore and its surrounding waters. Thus, orating from a bus roof, an English emigrant barrister proclaimed that “the stately presence of their city, the beautiful waters of their harbour, were this day again polluted with the presence of that floating hell—a convict ship.”²¹⁰ In a similar vein, the London *Times* editorialized in 1852 about the “polluted shores” of Van Diemen’s Land.²¹¹

Although words like “pollution,” “refuse,” “garbage,” and “scum” were commonly used to refer to the convicts, the dominant metaphor was “stain” or its closely associated term “taint.” In a typical example, a British official reporting on Van Diemen’s Land in 1847 wrote, “Vice of every description . . . is to be met with on every hand—not as isolated spots, but as a pervading stain.”²¹² In another instance, an article published in England in 1855 contains the following language about the convict who discovered gold in Australia: “[B]ut in this day and hour how many of the superior classes will be bold enough to aver that the wretched, contaminated, brutalised, *crime-stained*, flagellated Irish convict may not have discovered gold.”²¹³ The metaphor of taint occupied a central role in the debate over eligibility for the jury in Australia. In 1833, when selected ex-convicts were permitted to serve as jurors in

207. Q. REV. (1820), *quoted in* SHAW, *supra* note 206, at 143.

208. BATHURST FREE PRESS, January 11, 1851, *quoted in* STURMA, *supra* note 12, at 51 (emphasis added).

209. See WEBSTER’S, *supra* note 27, at 2252.

210. HUGHES, *supra* note 12, at 556.

211. THE TIMES (London), August 17, 1852, *reprinted in* CONVICTS AND COLONIAL SOCIETY: 1788-1853, at 236, 236 (Lloyd Evans & Paul Nicholls eds., 1976).

212. MORRELL, *supra* note 12, at 393 (quoting Latrobe’s report to Grey, May 31, 1847).

213. LANSBURY, *supra* note 198, at 164 (emphasis added).

Australia, one faction objected that "untainted" persons could not be expected either to sit on a jury with convicted felons or to be tried by them.²¹⁴

Stain and taint are discolorations that tend to spread; hence, it was a natural step from these images to the idea that criminals are diseased. Mundy explains the colonials' opposition to transportation with these words: "No one could desire the regrowth of an unsightly tumour which had once been painfully excised."²¹⁵ In addition to metastasizing within a single organism, the disease of criminality was thought of as spreading down through the generations. For instance, as late as 1889, a writer in the British journal *Nineteenth Century* laments: "New South Wales labours under the initial disadvantage of possessing . . . a population in whose veins there is an hereditary taint of criminality. . . ."²¹⁶

Besides spreading both within the body of convicts and to the convicts' descendants, criminality was conceived as radiating to noncriminals who came into contact with convicts. Thus, a key figure in the founding of the Australian penal colony, Prime Minister Pitt, adduced the notion of contamination to justify transporting criminals to Botany Bay. In a parliamentary debate in 1791, he argued "that it was the worst policy of a state to keep [the most incorrigible] offenders . . . at home to corrupt others, and contaminate the less guilty, by communicating their own dangerous depravity."²¹⁷ In the same vein, in 1828, the British *Quarterly* argued that the "entire removal of the individual to a new scene of life affords at once the only security to society against his future crimes and the contagion of his habits."²¹⁸

This same metaphor of criminality as a contagious disease that might spread to noncriminals played a role during the influential meetings of the House of Commons Select Committee inquiring into transportation in 1837 and 1838. At one point, the chair of the Committee, Sir William Molesworth, articulated the Committee's concern that the contaminating influence of a criminal influx would be greater at that time than it had been previously. In Australia's early days, he suggested, the free settlers might have

214. See 1 MUNDY, *supra* note 199, at 105; STURMA, *supra* note 12, at 20.

215. 3 MUNDY, *supra* note 199, at 112.

216. Ernest W. Beckett, *Australian Side Lights on English Politics*, 25 NINETEENTH CENTURY 110, 125 (1889).

217. 28 PARL. HIST. ENG. 1223-25 (1791), reprinted in CONVICTS AND COLONIAL SOCIETY: 1788-1853, *supra* note 211, at 34, 35.

218. 27 Q. REV. (1828), quoted in SHAW, *supra* note 206, at 143.

arrived with their characters already formed, and so were "less liable to be corrupted than their unfortunate offspring."²¹⁹

C. *The Origins and Meanings of the Anal Metaphor*

1. The Metaphor of Filth as a "Pupil's Metaphor"²²⁰

Metaphors involving filth and, by extension, contagious disease so pervade the debate over transportation of convicts to Australia that it would be hard to imagine the same debate without them. Just as *Macbeth* and *The Hound of the Baskervilles* are as much about slime and darkness as they are about plot and character, so also the story of Botany Bay seems to be as much about filth—about scum, refuse, mire, and stain—as it is about arguments and policies. It is now time to ask what these metaphors can tell us about the relationship between criminals and noncriminals during this period. Were the metaphors of filth accidental or essential? If writers and speakers had referred to criminals as fire-eating dragons, or to Australia as an iceberg or an oven, would this usage have implied something different about the meanings and functions of the criminal during the era of transportation to Australia?

Psychoanalysis, as well as literary criticism, maintains that the choice of metaphor is never accidental, for the vehicle of one's thought is inseparably entwined with its content.²²¹ That this is so, that the metaphors of filth were inextricably bound up with the noncriminals' understanding of criminality, can be seen more clearly with the aid of a distinction offered by C. S. Lewis in his essay *Bluspels and Flalansferes*. Lewis suggests that metaphors can be categorized into two types depending on their role in the mind of the user. The Master's metaphor, he explains, "is freely chosen . . . one among many possible modes of expression; it does not at all hinder . . . the thought of its maker."²²² The pupil's metaphor, by contrast, "is not chosen at all; it is the unique expression

219. THE MOLESWORTH REPORT 43, reprinted in CONVICTS AND COLONIAL SOCIETY: 1788-1853, *supra* note 211, at 76, 79.

220. LEWIS, *supra* note 3, at 185; see also *infra* text accompanying note 223.

221. This follows from the principle of psychic determinism: "[I]n the mind, as in physical nature about us, nothing happens by chance . . ." CHARLES BRENNER, AN ELEMENTARY TEXTBOOK OF PSYCHOANALYSIS 2 (rev. ed. 1973). Much of traditional literary criticism presupposes that the author's choice of metaphors provides insight into the author's mind. For a rare explicit acknowledgement of this assumption, see SPURGEON, *supra* note 5, at 4 ("In the case of a poet, I suggest it is chiefly through his images that he, to some extent unconsciously, 'gives himself away.'").

222. LEWIS, *supra* note 3, at 141.

of a meaning that we cannot have on any other terms; it dominates completely the thought of the recipient; his truth cannot rise above the truth of the original metaphor."²²³

These two types of metaphor lie, of course, on a continuum, and doubtless, most noncriminals in Australian history were capable of defining criminals without using metaphors of filth. Yet so widespread is this imagery, and so rare is the use of other images for criminals, that we seem justified in characterizing the metaphor of filth as a pupil's metaphor. For a powerful illustration of this point, consider the words of an emigrant's handbook published in London in 1851. The author endeavors to reassure prospective emigrants to Australia with this analogy: "The operation of the penal system has altered the face of the country where it has been set down . . . just as manure may have altered the character of a field."²²⁴ Thus, even a Britisher writing positively about the criminal exiles makes her point with the language of filth.

2. The Metaphor of Filth as a Defense Against Identification with Criminals

If the image of the criminal as filth was a pupil's metaphor, essential to the noncriminals' thinking about Botany Bay, then it is worthwhile to proceed further with our inquiry, asking why the metaphors of filth were employed so abundantly to refer to criminality. I have already suggested a partial answer: to wit, the resonance between Australia's literal remoteness from Britain and the remoteness of the anal region of the human body. Similarly, the prisoners who were transported to Australia literally dwelled in conditions of filth and darkness on board the ships.²²⁵ These actual qualities may have encouraged people to assimilate criminals to the concept of filth. Nevertheless, as we have seen in Part II, the origins of the filth-criminal equation go much wider and deeper than any mere literal similarity. I wish now to propose that these origins may be found in the similar emotional stance that we adopt toward criminals and filth: namely, a stance of ambivalence, or

223. *Id.*

224. HUGHES, *supra* note 12, at 285.

225. Chaplain Johnson, who witnessed the disembarkation of the Second Fleet, wrote that the prisoners were "covered, almost, with their own nastiness." SHAW, *supra* note 206, at 108. After the exceedingly high death rate on the Second Fleet, authorities made efforts to improve conditions; nevertheless, missionaries on later ships described the "loathsomeness," "perfect darkness," and "dreary darkness" of the convicts' habitation. *Id.* at 111.

simultaneous hatred and love, repulsion and attraction, toward the same object.

Putting aside for the moment the topic of our attraction to criminals, let us consider again our complicated emotional stance toward filth. As we saw in Part II, filth holds an unconscious allure for us all.²²⁶ Transparently revealed in children's play, this attraction gradually undergoes an almost-universal repression. In adults, it appears mainly in sublimated forms—in the appeal of a mud-wrestling competition, for example—or indirectly, in exaggerated defenses against messiness, such as the compulsive person's indiscriminating insistence on neatness and order. From a psychoanalytic perspective, the exaggerated quality of this repudiation itself betrays the continuing power of the underlying attraction—a truth that has made its way into popular consciousness with Shakespeare's *bon mot*, "The lady doth protest too much"²²⁷

If human beings generally are attracted to filth and if non-criminals equated criminals with filth throughout early Australian history, it seems reasonable to infer that these noncriminals harbored an attraction to criminals. Yet this attraction, their language suggests, was so repugnant that they barred its admission to their conscious minds via the mechanism of repression.²²⁸ And, because repression often requires reinforcement from other defense mechanisms, they also developed a reaction-formation, converting the feeling of attraction into its opposite: loathing, or disgust.²²⁹ Relatedly, the noncriminals may have used the criminal-exiles to avoid awareness of disavowed criminal qualities in themselves through the mechanism of externalization.²³⁰

But what is the evidence for these speculations? By themselves, the anal images only hint at the interpretation I have offered; nevertheless, additional evidence comes to our assistance, in several forms. First, not only the language but also the policy adopted toward criminals during this period displays a hyperbolic quality, as if the British were saying: "We want nothing to do with

226. See *supra* text accompanying notes 108-15

227. SHAKESPEARE, *supra* note 96, act 3, sc. 2, l. 214.

228. For a detailed discussion of "repression," see MUNROE, *supra* note 108, at 245-49.

229. See *supra* note 113 and accompanying text.

230. See Jack Novick & Kerry Kelly, *Projection and Externalization*, in 25 THE PSYCHOANALYTIC STUDY OF THE CHILD 69, 81 (Ruth S. Eissler et al. eds., 1970) (defining "externalization" as "those processes which lead to the *subjective allocation of inner phenomena to the outer world.*")

criminals, and to ensure that we do not, we will ship them to the moon!"

The extreme nature of the policy was noted by some observers at the time. For example, in 1786, the *Gentleman's Magazine* pronounced the Botany Bay venture "a most extravagant scheme."²³¹ Similarly, Sir Nathaniel Wraxall, a political commentator writing in 1787, ridiculed the Botany Bay expedition precisely for its outlandishness, characterizing the policy as "one of those extraordinary acts of State, which, as it never has . . . had any precedent; so I incline to apprehend, it will remain for ever without imitation."²³² To Wraxall, the almost-unbelievable remoteness of the new penal colony rendered the plan ludicrous. In parodied terms, he described the expedition's travels "through stormy seas, and inclement latitudes, form[ing] a new colony of thieves and ruffians, in another hemisphere, under the Southern Pole!"²³³ Wraxall could conceive of only one goal that Britain could be pursuing through this policy: to remove the criminals as far as possible from the home country.²³⁴

To highlight the strangeness of the Botany Bay expedition, Wraxall contrasted Britain's practice with that of other countries. "The Romans," he wrote,

who knew the value, of even the vilest and most flagitious of their subjects, . . . were content with sending their malefactors into Sardinia, or Corsica France has her gallies; and Russia her mines.—And could England discover no mode of availing herself of the strength and corporal functions of so many of her inhabitants, the far greater part of whom are in the vigour of life?²³⁵

231. GENTLEMAN'S MAG., Oct. 1786, quoted in SHAW, *supra* note 206, at 50.

232. NATHANIEL WRAXALL, A SHORT REVIEW OF THE POLITICAL STATE OF GREAT BRITAIN AT THE COMMENCEMENT OF THE YEAR ONE THOUSAND SEVEN HUNDRED AND EIGHTY-SEVEN 77-83, reprinted in CONVICTS AND COLONIAL SOCIETY: 1788-1853, *supra* note 211, at 33, 33.

233. *Id.* This language recalls the prison to which the fallen angels were banished in *Paradise Lost*:

As far removed from God and light of heav'n As from the center thrice to th' utmost pole.

MILTON, *supra* note 16, bk. 1, ll. 73-74.

234. WRAXALL, *supra* note 232, at 33. Compare Jeremy Bentham's view of transportation: "I sentence you," says the judge, "but to what I know not—perhaps to infectious disorders—perhaps to storm and shipwreck—perhaps to famine—perhaps to be devoured by wild beasts. . . . I rid myself of the sight of you" F.L.W. Wood, *Jeremy Bentham Versus New South Wales*, in 19 ROYAL AUSTRALIAN HISTORICAL SOCIETY: JOURNAL AND PROCEEDINGS 329, 343 (1933).

235. WRAXALL, *supra* note 232, at 33.

The British, Wraxall recognized, were discarding their fellow-citizens like refuse, or, more specifically, like *irreclaimable* refuse; that is, they were throwing them as far away as possible. To Wraxall's emphasis on the corporal strength of the exiles, we may add that many of the criminals had been charged with only trivial offenses;²³⁶ consequently, they might have been especially capable of making a contribution to their country. As I have already intimated, the exaggerated quality of Britain's Botany Bay policy is itself a sign that the policy may have had a defensive function. For what is important in the unconscious mind are polarities, and an extreme tendency in one direction often reflects an equally pronounced tendency in the opposite direction.

Not only the hyperbolic nature but also the mode of Britain's Botany Bay project points to a defensive function. As we have seen, the British took people who had been a part of their body politic and cast them out, telling them that they could not return—either for a lengthy period of years or forever. The structure of this punishment is familiar to us, for its model is defecation. In defecation, as in expulsion of criminals, something that was a part of one's body is removed from the body and becomes refuse. This similarity hints at the policy's anal meaning, and with it, the probability that the noncriminals felt an attraction to, as well as an aversion for, the lawbreakers.

Besides its resemblance to defecation, the punishment of exile bears an affinity with a psychological mechanism, externalization, which is the experiencing of inner impulses and feelings as if they belonged to the outer world. In a simpler, more vivid definition of the same mechanism, a little boy who was the scapegoat of his family once explained to his therapist: "They put the bad onto me and they feel good."²³⁷ Now this boy, Tommy, had, in reality, developed the characteristics that his parents perceived in him. Through the operation of a self-fulfilling prophecy, he had come to

236. HUGHES, *supra*, note 12, at 160 ("[M]any early convicts, up to the end of the Napoleonic Wars, went on board the 'Bay Ships' for small, often ridiculously slight, offenses.").

Whether the people transported to Australia were serious criminals or only trivial offenders has been the subject of much debate. On the one hand, many Australians maintain that the convicts were basically innocent victims of harsh laws—poachers who needed food for starving children, for example, or oppressed political prisoners. On the other hand, historians have increasingly come to reject this view, especially as regards the later period. *See, e.g., id.* at 158-60, 163; SHAW, *supra* note 206, at 146-65.

237. *See* Novick & Kelly, *supra* note 230, at 89.

be "a regressed, soiling, snot-eating child"²³⁸ with little self-control. Thus, at the time of Tommy's therapy, the parents' distortion of reality did not take the form of imagining things in their son that were not there at all. Rather, in a form of externalization known as projective identification, they saw qualities in Tommy that *were* there; however, they exaggerated them and used Tommy to avoid the painful recognition that they felt themselves to be damaged and messy.²³⁹ It is this same defense mechanism, projective identification, that I suggest the British noncriminals were employing in their Botany Bay policy.

I have argued that Britain's Botany Bay policy was a means of defending against an unconscious attraction to and identification with criminals. But defense mechanisms are rarely totally successful. If my interpretation has merit, we should see expressions of the other side of the conflict at the time the policy was decided, in eighteenth-century England. Specifically, we should see indications that, besides spurning lawbreakers and expelling them from their land, noncriminals also identified with criminals and regarded them with pleasure and esteem. Let us now examine the evidence that this was the case.

3. The Other Side of the Conflict: Popular Identification with Criminals and Delight in Their Ways

*The law locks up both man and woman
Who steals the goose from off the common,
But lets the greater felon loose
Who steals the common from the goose.*

—Anonymous, 1764²⁴⁰

It is surely no accident that this English folk song dates from the eighteenth century, for English literature of that era displays a profound ambivalence toward the criminal law. In his examination of eighteenth-century English fiction, David Punter finds three prominent themes, all reflective of this ambivalence. First, he reports that novels of this era consistently tend to discredit English legal mechanisms and institutions, presenting criminal subgroups as living by a set of rules more honorable than the rules that characterize the dominant legal system.²⁴¹ To mention but two exam-

238. *Id.*

239. *Id.* at 88-89.

240. BARTLETT, *supra* note 19, at 791 n.1.

241. David Punter, *Fictional Representation of the Law in the Eighteenth Century*, 16 *EIGHTEENTH CENTURY STUD.* 47, 47, 70-72 (1982).

ples, the prisoners in *The Vicar of Wakefield*²⁴² and the pirate band in *Captain Singleton*²⁴³ exhibit a decency and humaneness in their self-government that, the novelists imply, is lacking in the government of England.²⁴⁴

As a second major theme in the literature of this period, Punter finds that the line between officers of the law and lawbreakers is regularly blurred. Lawyers, for example, are portrayed as little different from criminals; like the criminals, they rob but with legal sanction. Besides lawyers, the thief-takers of this period, such as the famous Jonathan Wild, are depicted as straddling the law. On the one hand, they enforce the law by impeaching an occasional robber and returning stolen goods to the victims. On the other hand, they themselves operate gangs of thieves, forcing noncriminals into lives of crime by threatening to report them falsely to the authorities.²⁴⁵

As a third theme of eighteenth-century English fiction, Punter notes that the protagonists' crimes are often justified by circumstances. To take but one famous example, the heroine of *Moll Flanders*²⁴⁶ is a lifelong thief and prostitute who delights in her resourcefulness and shows little remorse for her crimes. As Defoe portrays her, Moll's life of crime is partly justified by the alternative she initially faces: a life of servitude.²⁴⁷

Because Punter confines his analysis to novels, he omits what may be the most famous example of a criminal hero in eighteenth-century English literature, the charismatic highwayman in John Gay's musical, *The Beggar's Opera*.²⁴⁸ Gay's portrayal of the highway robber MacHeath, with his glamorous clothes, his charm, and his success with women, makes the life of a highwayman appear greatly to be desired. Indeed, so captivating was he that numerous writers and preachers publicly lamented the criminal character's popularity; meanwhile, *The Beggar's Opera* became the most successful theatrical production of the eighteenth century.²⁴⁹

242. OLIVER GOLDSMITH, *THE VICAR OF WAKEFIELD* (London, John C. Nimmo 1886).

243. See DANIEL DEFOE, *THE LIFE, ADVENTURES, AND PYRACIES, OF THE FAMOUS CAPTAIN SINGLETON* (Shiv K. Kumar ed., Oxford Univ. Press 1969) (1720).

244. See Punter, *supra* note 241, at 70-72.

245. *Id.* at 47, 69.

246. DANIEL DEFOE, *MOLL FLANDERS* (J. Paul Hunter ed., Crowell 1970) (1722).

247. See Punter, *supra* note 241, at 47, 68-69.

248. JOHN GAY, *THE BEGGAR'S OPERA* (1986) (1728).

249. See CHRISTOPHER HIBBERT, *HIGHWAYMEN* 65, 103 (1967).

The eighteenth-century British fascination with fictional criminals carried over to real criminals as well. For instance, while highwaymen languished in Newgate prison awaiting death, members of society would pay them social calls.²⁵⁰ Then, as each condemned prisoner journeyed from Newgate Prison to Tyburn Tree, crowds would throng the road, tossing flowers and fruits to the convict, who, arrayed in his best apparel, might use the occasion of his hanging to make a speech to the supportive mob.²⁵¹ Summing up what some saw as the perverted flavor of these spectacles, Foucault writes: "In these executions, which ought to show only the terrorizing power of the prince, there was a whole aspect of the carnival, in which rules were inverted, authority mocked and criminals transformed into heroes."²⁵²

Besides admiration, identification with lawbreakers was also strikingly evident during this period. For example, victims of crime frequently petitioned on behalf of the very criminals who had robbed them, after the criminals had been sentenced to transportation.²⁵³ Bothered by the disproportion between a sometimes-trivial offense and the enormity of exile and unwilling to bear the guilt for the break-up of a family, some victims declared their own forgiveness of the crime and begged for a legal remission of the culprit's sentence to Botany Bay. On one occasion, when forwarding such a petition with the recommendation that it be denied, a magistrate vented his frustration at popular sympathy for criminals with the words: "These are times when the current of public opinion seems to disarm the law of *all* its terrors!"²⁵⁴

In addition to these indications from eighteenth-century England, twentieth-century Australia provides longitudinal evidence of an intra-psychic conflict over criminals. In recent years, it has become quite fashionable to claim descent from the First Fleet. Indeed, those Australians who can prove such descent have expressed their pride by forming a society in Sydney: the Fellow-

250. *See id.* at 23.

251. *See HUGHES, supra* note 12, at 31-33.

252. MICHEL FOUCAULT, *DISCIPLINE AND PUNISHMENT* 61 (Alan Sheridan trans., 1979); *see also HUGHES, supra* note 12, at 33-35. For a general analysis of the criminal's allure, *see* Martha G. Duncan, "A Strange Liking": *Our Admiration for Criminals*, 1991 U. ILL. L. REV. 1 (1991).

253. *See HUGHES, supra* note 12, at 136.

254. *Id.* at 137.

ship of First Fleeters!²⁵⁵ Thus, both contemporaneous and historical testimony confirms the existence of a polarity, an ambivalence embracing love and hate, idealization and devaluation of criminals.

Thus far, I have offered three kinds of evidence to corroborate my interpretation of the Botany Bay experiment. First, the policy of expelling criminals and transporting them to a place so far away has an exaggerated quality, which suggests a struggle with feelings and impulses in the self. Second, the policy (like the language about the exiles and their island-prison) exhibits an anal character, which implies the presence of the same ambivalence toward criminals that we all feel toward feces: not only an aversion but also an attraction to and an identification with the dark, viscous matter that was once part of the self. Third, the literature and history of eighteenth-century England provide substantial evidence of the other side of the conflict: identification with criminals and admiration for criminal deeds.

There remains one final kind of confirmation to offer. If my interpretation is correct, then the criminal-exiles had a profound meaning for the British noncriminals, serving as a split-off and punished part of themselves. We would therefore expect that any interference with the noncriminals' ability to use the exiles and Australia in this symbolic way would meet with an extreme reaction. In this light, let us consider the story of Alexander Macnochie's tenure as Superintendent of Norfolk Island.

4. The Revilement of Superintendent Maconochie: An Epitome

About nine hundred miles northeast of Sydney, in the Pacific Ocean, lies Norfolk Island, where authorities sent the worst of Britain's transported convicts. In 1827, Australian Governor Darling stated his intention to make this settlement "a place of the extremest punishment, short of death."²⁵⁶ In keeping with this goal, Norfolk Island came to be considered a hellish prison, where illegal tortures prevailed and where convicts were turned against each other by an elaborate system of informing. The awful nature of the place can be seen in an official report written in 1834, when the chaplain recounts that on one occasion all thirteen of the con-

255. See John Everingham, *Children of the First Fleet*, 173 NAT'L GEOGRAPHIC 233, 236, 243, 245 (1988); John Rickard, *Psychohistory: An Australian Perspective*, HIST. TODAY, May 1981, at 10, 10.

256. JOHN V. BARRY, ALEXANDER MACNOCHIE OF NORFOLK ISLAND 90 (1958). For a very thorough study of Alexander Maconochie and his "failure" on Norfolk Island, see *id. passim*.

victs sentenced to death knelt to thank God for their good fortune, whereas all those who received reprieves cried bitterly at the thought of a future in that place.²⁵⁷

In 1840, Alexander Maconochie, a retired naval captain and former prisoner-of-war, who had written extensively on prison reform, was appointed Superintendent of the Island. Unlike most Britons of his time, Maconochie viewed imprisonment as a sufficient punishment in itself; he saw no need for additional tortures and degradations. True to this philosophy, during his four years as Superintendent, he presided over many humanitarian reforms: building churches, reestablishing schools, demolishing gallows, and permitting the convicts to cultivate gardens. In addition, Maconochie established indeterminate sentences and then allowed the convicts themselves to determine the length of their terms by earning "marks"; for every ten marks earned, they shortened their sentence by one day.²⁵⁸

Maconochie's reforms proved remarkably successful in rehabilitating the supposedly unsalvageable offenders of Norfolk Island. Only three percent of the fourteen hundred and fifty prisoners discharged during Maconochie's tenure are known to have been reconvicted.²⁵⁹ Perhaps the most spectacular instance of rehabilitation concerned the convict Charles Anderson. Irreversibly brain-damaged, Anderson had been a violent and resentful person at the time he was convicted of burglary and placed on Goat Island, a rock in Sydney Harbor. For two years, he had been fastened, naked, to a chain on the rock, his only home a cavity carved out of the stone.²⁶⁰ Unhealed welts festered on his back, the result of hundreds of punishments with the lash. Residents of Sydney amused themselves by rowing out to his rock and throwing crusts of bread or offal for him to eat.²⁶¹

Following an investigation, Anderson was removed from Goat's Island to another prison, Port Macquarie. While there, serving a life sentence, he murdered an overseer in hopes of attaining escape through the gallows. His death sentence was com-

257. *See id.* at 91.

258. *See* HIBBERT, *supra* note 15, at 148-49.

259. *Id.* at 149.

260. BARRY, *supra* note 256, at 124. This punishment replicates that of Prometheus, who stole fire from the gods and gave it to man. For this crime, Zeus had Prometheus seized and chained "with iron bonds" to a "friendless rock" at the outer regions of the earth. Aeschylus, *Prometheus Bound* (J.S. Blackie trans.), in *WORLD DRAMA* 1, 1 (Barrett H. Clark ed., 1933).

261. BARRY, *supra* note 256, at 124.

muted, and he was sent to Norfolk Island, where he continued violent and unrepentant until Maconochie assumed control of the prison. Maconochie gave Anderson a job taming bullocks away from the ridicule of other prisoners. After Anderson succeeded in this first assignment, Maconochie put him to work managing a signal station. Although his brain damage precluded a full rehabilitation, Anderson improved enormously under Maconochie's reforms. When Governor Gipps visited Norfolk Island in 1843, he wrote of his astonishment at seeing Anderson transformed from a wild beast to a man "trimly dressed in sailor's garb, going importantly about his duties."²⁶²

Notwithstanding Maconochie's effectiveness in rehabilitating convicts, his reforms inspired ridicule and revilement among non-criminals in Sydney and London. Significantly, it was a one-time event, a largely symbolic one, that elicited the most vociferous criticism among the noncriminals. To show his trust for the men, on Queen Victoria's birthday in 1840, Maconochie gave the convicts a holiday, allowing the men to roam freely over the Island and providing them with good food, rum, fireworks, and a theatrical performance.²⁶³ In Sydney, news of the birthday celebration caused "a wave of execration"²⁶⁴ to break on Maconochie's head. As Governor Gipps described the situation, "every man was against him, every man derided his System."²⁶⁵ At least as early as 1842, the authorities in London made the decision to recall Maconochie, although no replacement became available until 1844.²⁶⁶ Maconochie's successor, Major Joseph Childs, obeyed his superiors' orders to make Norfolk Island the epitome of hell once again.

The question arises why the British noncriminals displayed such a hostile reaction to this man whose reforms were succeeding in transforming hardened convicts and who would later be recognized as a pioneer in penology, one of the "few exceptional administrators of these colonies of brutality."²⁶⁷ Several possible explanations come to mind: Perhaps the noncriminals feared that, by turning Norfolk Island into a more pleasant place, Maconochie was eliminating the Island's deterrent value. Or, by treating the convicts with kindness and respect, Maconochie may have

262. *Id.*

263. HUGHES, *supra* note 12, at 505.

264. *Id.*; see also HIBBERT, *supra* note 15, at 149.

265. See HUGHES, *supra* note 12, at 508.

266. See BARRY, *supra* note 256, at 146.

267. Sheldon Glueck, *Foreword* to BARRY, *supra* note 256, at vii.

thwarted the noncriminals' need to exact sadistic vengeance on convicts. Finally, by going his own idealistic way, Maconochie may simply have annoyed too many of his superiors, leading them to believe that he could not be trusted to obey orders.

Without denying that these factors may have played a part, I suggest that the negative reaction to Maconochie's reforms primarily stems from the noncriminals' need to use this Australian prison as a symbol of hell. In Part II, we saw that places of punishment are typically imagined as mirroring the qualities of the punished. Because criminals are seen as intimately related to filth, their prison must be filthy as well. Like Gehenna, it must be dark and stinking with garbage; it must be, as the writer of *Job* puts it, "a land of gloom and chaos."²⁶⁸ By undermining Norfolk Island's ability to function as a symbol of hell, Maconochie challenged the noncriminals' dualistic vision of the world and, with it, their dialectically-determined identity as the pure noncriminals, the untainted remnant. To appreciate the profundity of this challenge, one has only to remember Victor Hugo's character Javert in *Les Misérables*. Toward the end of the novel, forced to recognize the noble qualities in his criminal prey, Javert despairs of life's meaning and drowns himself.²⁶⁹

I have presented the story of Maconochie at some length to corroborate my view that the Australian criminal exiles played an important intra-psychic role for the British noncriminals, serving as externalized aspects of the noncriminals' selves—their disavowed greed, sadism, and hostility to authority. In developing this interpretation, I have employed a particular psychoanalytic paradigm, the conflict model, which views the mind as beset by inner polarities and conflicts. In the next section, I will attempt to enrich our understanding of the Botany Bay venture with the help of another, complementary paradigm: the narrative model. This model focuses on human beings as mythopoeic creatures, who "tell themselves stories in order to live."²⁷⁰

268. *Job* 10:22.

269. See VICTOR HUGO, *LES MISÉRABLES* 1107-14 (Charles E. Wilbour trans., Random House, Inc., Modern Library ed., n.d.) (1862).

270. JOAN DIDION, *THE WHITE ALBUM* 11 (1979). For the distinction between the conflict model and the narrative model in psychoanalysis, I am indebted to Robert Michels, Address at the Atlanta Psychoanalytic Society Meeting (Sept. 23, 1992). The writings of Charles Brenner have done most to establish the dominance of the conflict paradigm. See, e.g., CHARLES BRENNER, *THE MIND IN CONFLICT* (1982). Roy Schafer has advanced the "model of narration" to explain what happens in psychoanalysis. See, e.g., ROY SCHAFFER, *NARRATIVE ACTIONS IN PSYCHOANALYSIS passim* (1981); Roy Schafer, *Narration in the Psy-*

D. "Symbolism as a Motive";²⁷¹ *The Botany Bay Venture as a Reenactment of the Fall*

And the woman said unto the serpent, We may eat of the fruit of the trees of the garden:

But of the fruit of the tree which is in the midst of the garden, God hath said, Ye shall not eat of it, neither shall ye touch it, lest ye die.

. . . .

And when the woman saw that the tree was good for food, and that it was pleasant to the eyes, and a tree to be desired to make one wise, she took of the fruit thereof, and did eat, and gave also unto her husband with her; and he did eat.

And the eyes of them both were opened, and they knew that they were naked;

. . . .

. . . [And the Lord God said,] Hast thou eaten of the tree, whereof I commanded thee that thou shouldest not eat?

And the man said, The woman whom thou gavest to be with me, she gave me of the tree, and I did eat.

And the Lord God said unto the woman, What is this that thou hast done? And the woman said, The serpent beguiled me, and I did eat.

. . . .

Therefore the Lord God sent him forth from the garden of Eden, to till the ground from whence he was taken.

So he drove out the man; and he placed at the east of the garden of Eden Cherubims, and a flaming sword which turned every way, to keep the way of the tree of life.

—Genesis 3:2-24²⁷²

In eighteenth- and nineteenth-century England, when books were far less prevalent than today, one book was well-known to nearly every educated person: the King James version of the Bible.²⁷³ And of the many stories in the Bible, very likely one of the best-known was the myth of the Fall. For this myth—with its wonderful detail, its humor, its epiphany, and reversal of fortune—

choanalytic Dialogue, 7 CRITICAL INQUIRY 29, 29-53 (1980); see also DONALD P. SPENCE, NARRATIVE TRUTH AND HISTORICAL TRUTH *passim* (1982).

271. KENNETH BURKE, PERMANENCE AND CHANGE 275 (2d ed. rev. 1965).

272. Genesis 3:2-24.

273. See DONALD GREENE, THE AGE OF EXUBERANCE: BACKGROUNDS TO EIGHTEENTH-CENTURY ENGLISH LITERATURE 93 (1970) (noting that eighteenth-century English writers were "writing for an audience thoroughly indoctrinated from childhood onward, with the King James Bible, the Book of Common Prayer, the Articles, the Creeds, and Catechism").

possesses all the elements of a powerful drama. Moreover, from a theological perspective, the episode of the Fall is "the starting point of the Christian drama of redemption, and hence is a subject of the utmost importance and the utmost sublimity from the point of view of the author and his audience."²⁷⁴

As the story is related in *Genesis*, human beings disobeyed a law and, consequently, became morally polluted with a taint that would pass down through the generations. Referring to this taint, the *New Testament* declares: "[I]n Adam all die."²⁷⁵ Likewise, the *Articles of Religion*, another work that was known to the educated Britisher of this era, refers to the offspring of Adam as harboring an "infection of nature."²⁷⁶ As a punishment for having violated God's law and become tainted, Adam and Eve were banished from their original home to an unpleasant place, a place where Eve would bring forth children "in sorrow," and live in subordination to her husband, and where Adam would eat bread "[i]n the sweat of [his] . . . face," and finally return to dust.²⁷⁷

Earlier in this essay, I noted the strong resemblance between this story and the story that the British enacted in the late eighteenth and nineteenth centuries when they transported criminals to Australia.²⁷⁸ There too, people had violated the law, and there too, this violation was thought to have engendered a moral taint that would pass down to the criminals' descendants. Moreover, like Adam and Eve, the convicts were punished with banishment from their original home to a place that was conceived as unpleasant. The words that the *Interpreter's Bible* uses to describe the fate of the first humans could apply, with only slight modifications, to the British exiles: "So the past was to be irrevocable. The man and his wife must turn from all they had known to a future that was unknown. The gate was shut, and the angel with the flaming sword kept them from ever going back."²⁷⁹ The British criminal exiles were rarely accompanied by spouses, and the angel with the flaming sword was replaced by the British law, but with these exceptions, the two stories are remarkably the same.

274. ERIC AUERBACH, *MIMESIS: THE REPRESENTATION OF REALITY IN WESTERN LITERATURE* 131 (Willard Trask trans., 1957) (writing about the *MYSTÈRE D' ADAM*, a twelfth-century Christmas play, which is based on the story in *Genesis*).

275. *1st Corinthians* 15:22; cf. *Romans* 5:12 ("[S]in came into the world through one man and death through sin . . .").

276. *Articles of Religion*, in *THE BOOK OF COMMON PRAYER*, *supra* note 18, at 867, 869.

277. *Genesis* 3:16-19.

278. See *supra* p. 137.

279. 1 *THE INTERPRETER'S BIBLE*, *supra* note 147, at 515 n.24 (1952).

The time has come to inquire more closely into the meaning of this resemblance. Does the resemblance suggest that the story of the Fall contributed to causing the Botany Bay venture or merely that it added a layer of meaning to a decision made on independent grounds? Although this question cannot be answered with certainty, an argument can be made for the stronger inference. It goes as follows: when, in the late eighteenth century, the British needed a new way to cope with their burgeoning class of criminals, they assimilated these wrongdoers to a myth that was already deeply embedded in their culture, the myth of the Fall. When the Botany Bay solution was proposed, its correspondence to the Biblical story made it seem a natural choice.

If, on one level, the myth of the Fall can be understood as a *cause* of the Botany Bay venture, on another, deeper level, both the myth and the Botany Bay venture can be understood as *responses* to a third factor: namely, human beings' need for stories that symbolically grapple with the central concerns of their lives.²⁸⁰ We have already examined the themes of guilt and filthiness that pervade the story of Botany Bay. But there are also other concerns, related more to the metaphor's vicissitudes than to the metaphor itself, that are embedded in the narratives of the Fall and of Botany Bay. One is the disquieting recognition that we are all temporary sojourners on this earth—that our true home, if any, lies elsewhere, in a place from which we came, and to which we will eventually return.²⁸¹

This states the theme from the perspective of our existential predicament. In terms of developmental psychology, both the Fall and Botany Bay reflect the central fear of childhood, the fear of parental abandonment. Psychiatrist Gregory Rochlin writes: "Childhood is full of a need for people and the fears of being left by them. There was never a child who did not need an adult, nor

280. For works discussing human beings' need for stories to give meaning to their lives, see BRUNO BETTELHEIM, *THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES* 3, 65-66 (1976) (explaining how fairy tales externalize a child's inner conflicts, rendering those conflicts understandable and controllable); JOHN HELLMANN, *AMERICAN MYTH AND THE LEGACY OF VIETNAM* at ix (1986) ("A people cannot coherently function without myth."); J.R.R. TOLKIEN, *On Fairy-Stories*, in *TREE AND LEAF* 9, 55-70 (2d ed. 1988) (arguing that fairy tales promote recovery and afford escape and consolation); cf. Carl G. Jung, *Approaching the Unconscious*, in *MAN AND HIS SYMBOLS* 18, 89 (Carl G. Jung ed., 1964) (discussing the need for symbols to give meaning to life).

281. For a beautiful discussion of exile as human beings' essential condition, see HANS JONAS, *THE GNOSTIC RELIGION* 62-67 (1958); see also *Hebrews* 13:14 (Revised Standard) ("For here we have no lasting city, but we seek the city which is to come."); Edward Said, *The Mind of Winter: Reflections on Life in Exile*, *HARPER'S MAG.*, Sept. 1984, at 49 *passim*.

was there a child who did not fear losing an adult he had."²⁸² Owing to its importance in the child's mental world, the dread of abandonment has been elaborated in many fairy tales when the parent dies, voluntarily forsakes the child, or allows the child to be taken away.²⁸³

The fear of parental desertion is, of course, partly a reflection of actual danger, for abandonment of children has been widespread and accepted in many times and places. In sixth-century Europe, for example, such desertion was so common that a book of model forms included a form specifying the rights of anyone who found an abandoned child.²⁸⁴ As late as the thirteenth century, Spanish law provided: "'A father who is oppressed with great hunger or such utter poverty that he has no other recourse can sell or pawn his children in order to obtain food.'"²⁸⁵ Whatever the actual circumstances, children tend to blame themselves for their parents' desertion. As Rochlin writes, "[I]t is the child's view that there is no danger except if one is worthless because only what is no good is given up."²⁸⁶ Thus, in the child's fantasy, the parallel of abandonment with the Fall and the Botany Bay venture becomes more complete.

The narrative of Botany Bay gave symbolic form to human beings' deepest anxieties: the sense of being dirty and bad, the experience of exile, and the dread of abandonment. Although not a written text, or a dramatic production, the story of Botany Bay may have offered its listeners what all great stories offer: a way to avoid immersion in quotidian detail and to live life with a sense of transcendent meaning.

Thus far, in this Essay, I have attempted to accomplish two goals: to show the depth and cultural pervasiveness of the metaphor likening the criminal to filth, and to demonstrate that the theory of anality can shed light on an important episode in criminal justice, the Botany Bay venture. But the Botany Bay experiment is

282. Gregory Rochlin, *The Dread of Abandonment*, 16 *THE PSYCHOANALYTIC STUDY OF THE CHILD* 451, 460 (Ruth S. Eissler et al. eds., 1961); see also BETTELHEIM, *supra* note 280, at 145 ("There is no greater threat in life than that we will be deserted . . .").

283. See, e.g., *Hansel and Gretel*, in *THE COMPLETE GRIMM'S FAIRY TALES* 86, 86-94 (1944); *The Pied Piper of Hamelin*, in 1 *ROBERT BROWNING: THE POEMS* 383, 383-91 (John Pettigrew ed., 1981). For a discussion of abandonment in fairy tales, see DAVID BAKAN, *SLAUGHTER OF THE INNOCENTS: A STUDY OF THE BATTERED CHILD PHENOMENON* 65-68 (1971).

284. See JOHN BOSWELL, *THE KINDNESS OF STRANGERS: THE ABANDONMENT OF CHILDREN IN WESTERN EUROPE FROM LATE ANTIQUITY TO THE RENAISSANCE* 202-03 (1988).

285. *Id.* at 328 (quoting *Siete Partidas* 4.17.8).

286. Rochlin, *supra* note 282, at 453.

now finished, and Britain no longer uses transportation to punish criminals. The question arises, then, whether the theory I have proposed has application beyond this particular historical instance—to the criminal justice system of the United States, for example, and to more recent times. In Part IV, I will address this question, briefly identifying three areas of criminal justice that invite exploration in terms of anal themes: vagrancy law, penology, and juvenile justice. In addition, I will discuss American legal cases in which lawyers and judges describe defendants with the metaphor of filth.

IV. STIRRING THE "ODOROUS PILE":²⁸⁷ VICISSITUDES OF THE METAPHOR IN BRITAIN AND THE UNITED STATES

A. "Perfect Order and Perfect Silence":²⁸⁸ *The Obsessional Motif in Criminal Justice*

1. Vagrancy Law

Laws against vagrants criminalize a life style that many people find aesthetically offensive, in part because of its association with filth. For example, a county court in New York State characterized vagrants as the "sordid individuals who infest our stations such as the dirty, disheveled, besotted character whose state is but a step short of intoxication."²⁸⁹ In a similar vein, a 1941 Supreme Court opinion describes vagrants as follows: "They avoid our cities and even our towns by crowding together, in the open country and in camps, under living conditions shocking both as to sanitation and social environment."²⁹⁰

Besides being, by the standards of the dominant culture, actually grimy, vagrants are associated with filth in a more profound way. In her classic study *Purity and Danger*, anthropologist Mary Douglas defines dirt as "matter out of place."²⁹¹ She elaborates: "Shoes are not dirty in themselves, but it is dirty to place them on the dining table; food is not dirty in itself, but it is dirty to leave cooking utensils in the bedroom, or food bespattered on clothing

. . . .²⁹²

287. *Taylor v. Strickland*, 411 F. Supp. 1390, 1395-96 n.15 (D.S.C. 1976); see also *infra* note 368 and accompanying text.

288. HIBBERT, *supra* note 15, at 160; see also *infra* note 323 and accompanying text.

289. *People v. Bell*, 125 N.Y.S.2d 117, 119 (Ct. Cl.), *aff'd*, 115 N.E.2d 821 (1953).

290. *Edwards v. California*, 314 U.S. 160, 167 (1941).

291. DOUGLAS, *supra* note 58, at 35.

292. *Id.* at 35-36.

Now vagabonds are, by definition, people who lead an unsettled existence. For instance, in one old English formulation, they are "all persons wandering abroad."²⁹³ In Blackstone's more colorful description, they are "such as wake on the night, and sleep on the day, and haunt customable taverns, and ale houses, and routs about; and no man wot from wence they came, nor wither they go."²⁹⁴ Modern American statutes likewise make wandering central to the offense of vagrancy, as we see in this definition of a night walker: "An idle or dissolute person who roams about at late or unusual hours and is unable to account for his presence."²⁹⁵ Moreover, many modern vagrancy statutes use language such as "tramps,"²⁹⁶ "gypsies,"²⁹⁷ and "railers"²⁹⁸—all terms that harken back to the old British condemnation of "persons wandering abroad." Because vagabonds either have no place or are out of their place, by Douglas's definition, they are dirt.

The idea that wandering bears an essential, not accidental relationship to filth finds confirmation in the traditional figure of Satan. Called the Prince of Darkness, and typically depicted as "black and filthy," Satan leads a wandering existence. As Daniel Defoe writes in *The History of the Devil*:

Satan being thus confined to a vagabond, wandering, unsettled condition, is without any certain abode; for though he has, in consequence of his angelic nature, a kind of empire in the liquid waste or air, yet, this is certainly part of his punishment, that he is

293. An Act to amend and make more effectual the Laws relating to Rogues, Vagabonds and other idle and disorderly Persons, and to Houses of Correction, 6 Geo. 2, ch. 5 (1744) (Eng.). For a fascinating account of vagrancy laws and vagrants during the Elizabethan period, see FRANK AYDELOTTE, *ELIZABETHAN ROGUES AND VAGABONDS* (1913).

294. 4 BLACKSTONE, *supra* note 173, at *169, quoted in Gary V. Dubin & Richard H. Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U. L. REV. 102, 104 (1962).

295. Dubin & Robinson, *supra* note 294, at 109 (definition representing two scholars' attempt to summarize a number of statutes).

296. OHIO REV. CODE ANN. § 2923.28 (Page 1954) (providing a one to three year maximum sentence for "tramps") (repealed 1974).

297. DEL. CODE ANN. tit. 11, § 881 (1953) ("commonly known as gypsies") (repealed 1971).

298. FLA. STAT. ANN. § 856.02 (West 1959) (repealed 1972); see Arthur H. Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CAL. L. REV. 557, 560 (1960). Increasingly, courts have struck down vagrancy laws, usually on a void-for-vagueness rationale. For articles discussing the recent history and status of vagrancy laws, see Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631 *passim* (1992); Jordan Berns, Comment, *Is There Something Suspicious About the Constitutionality of Loitering Laws?*, 50 OHIO ST. L.J. 717 *passim* (1989). For detailed analyses of recent cases, see 25 A.L.R.3d 792-826 (Supp. 1993); 25 A.L.R.3d 836-48 (Supp. 1993).

... without any fixed place, or space allowed him to rest the sole of his foot upon.²⁹⁹

In vagrancy—as we also saw in our examination of Botany Bay—the metaphor of dirt leads naturally to the metaphor of contagious illness. Thus, in the traditional view, the vagrant is “the chrysalis of every species of criminal,”³⁰⁰ and vagrancy statutes are designed to prevent the spread of “a parasitic disease.”³⁰¹ As the New York Court of Appeals graphically articulated, the goal of vagrancy laws is to “prevent crime by disrupting and scattering the breeding spot.”³⁰² This conception of vagrancy is particularly interesting in view of statistics showing little correlation between pauperism and serious criminality, between dirtiness and lawbreaking.³⁰³

Because vagrancy is imagined as a contagious disease, the solution to this problem is conceived as segregation. More specifically, the goal of vagrancy laws, today as it was in the sixteenth century, is to keep vagrants in their own place.³⁰⁴ If they have drifted into other areas, they are banished from those areas back to the districts where they belong. Once returned to their place, presumably, they are no longer dirt.

2. Penology

A second episode of criminal justice that calls for analysis in terms of anal themes is the creation of the penitentiary in the late eighteenth and early nineteenth centuries. Before that era, prisons played a relatively minor role in punishment; they served mainly as holding places prior to execution or, in the case of debtors' prisons, as places to keep people temporarily, until they paid their creditors. Prior to 1775, prisons were rarely used, as they are today, to punish for felonies.³⁰⁵

299. DANIEL DEFOE, *THE HISTORY OF THE DEVIL* 94-95 (Rowman and Littlefield 1972) (1819).

300. CHRISTOPHER G. TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES* 117 (St. Louis, The F.H. Thomas Law Book Co. 1886).

301. *State v. Harlowe*, 24 P.2d 601, 603 (Wash. 1933).

302. *People v. Pieri*, 199 N.E. 495, 498 (N.Y. 1936). I am indebted to an article by Caleb Foote for calling my attention to this quotation and the two preceding ones. See Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 625-26 (1956).

303. See Foote, *supra* note 302, at 627-28.

304. See *id. passim*. Foote quotes magistrates who repeatedly admonish vagrants to “stay where you belong” and to “go back where you belong.” *Id.* at 606.

305. See IGNATIEFF, *supra* note 169, at 15.

The earlier prisons differed from their successors in other ways as well, above all in the blurring of lines between dissimilar categories of people. Men and women, grownups and children, hardened criminals and more innocuous offenders, convicted felons and those awaiting trial—all were confined together. As a historian writing in the early eighteenth century described Newgate prison, it was “a confused Chaos without any distinction, a bottomless pit of violence, and a tower of Babel There is mingling the noble with the ignoble, the rich with the poor, the wise with the ignorant, and debtors with the worst of malefactors”³⁰⁶ In addition, the very boundary between prisoners and nonprisoners was a much more fluid one than we are accustomed to today. As one student of the eighteenth century writes: “An easy familiarity existed between prisons and the world they so pungently distilled. Crowds of visitors sustained familial communication . . . and prisons, like Bedlam, were treated as holiday curiosities.”³⁰⁷

When, in the eighteenth and nineteenth centuries, prison reformers in Europe and America pressed for a new system of punishment, revulsion against this indiscriminate mingling was a prominent theme. Thus, after an inspection tour of the Cook County Jail in 1869, the Chicago Board of Visitors observed: “The effect of herding together of old and young, innocent and guilty, convicts, suspected persons and witnesses, male and female, makes the jail a school of vice. In such an atmosphere, purity itself could not escape contamination.”³⁰⁸

There are, to be sure, rational reasons for protesting such conditions, but there is also an obsessional-compulsive undercurrent to these protests. For the reformers were objecting to confusion, and confusion may lie at the heart of what we imagine as dirt. As Mary Douglas explains: “For us dirt is a kind of compendium category for all events which blur, smudge, contradict, or otherwise confuse accepted classifications.”³⁰⁹ In a similar vein, psychoanalyst Janine Chasseguet-Smirgel emphasizes that forbidden mixtures, mixtures that confound dissimilar things, are the essence of

306. ALEXANDER SMITH, *A COMPLETE HISTORY OF THE LIVES AND ROBBERIES OF THE MOST NOTORIOUS HIGHWAYMEN* 108 (Arthur L. Hayward ed., 1933) (1719), *quoted in* JOHN BENDER, *IMAGINING THE PENITENTIARY* 26 (1987).

307. BENDER, *supra* note 306, at 14.

308. FREDERIC L. FAUST & PAUL J. BRANTINGHAM, *JUVENILE JUSTICE PHILOSOPHY* 31 (1974) (quoting *FIRST BIENNIAL REPORT OF THE BOARD OF STATE COMMISSIONERS OF PUBLIC CHARITIES OF THE STATE OF ILLINOIS* 175-84 (1871)).

309. Mary Douglas, *Pollution*, in *12 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 336, 338 (David L. Sills ed., 1968).

analogy. The prototype of such chaotic mixtures is excrement, a homogeneous blend of substances that were originally distinct. In contrast to the Biblical world of division and separation stands this "universe of perversion."³¹⁰

If one sign of the obsessional theme in prison reform is a revulsion from the indiscriminate mingling of the old-style prisons, another is the preoccupation with order and separation in the new prisons. This preoccupation can be seen in the following passage from the First Annual Report of the Boston Prison Discipline Society, written in 1826:

At Auburn, we have a more beautiful example still, of what may be done by proper discipline, in a Prison well constructed. . . . The whole establishment, from the gate to the sewer, is a specimen of neatness. The unremitting industry, the entire subordination and subdued feeling of the convicts, has probably no parallel among an equal number of criminals. In their solitary cells they spend the night, with no other book than the Bible, and at sunrise they proceed, in military order, under the eye of the turnkeys, in solid columns, with the lock march, to their workshops; thence, in the same order, at the hour of breakfast, to the common hall, where they partake of their wholesome and frugal meal in silence. Not even a whisper is heard through the whole apartment.³¹¹

In a detail that brings to mind the French expression *la manie de précision*,³¹² the report goes on to describe how convicts were obliged to raise their right hands to obtain more food and their left hands to relinquish unwanted food.³¹³ At the end of the day, the prisoners returned to their cells, where they ate supper and spent the evening and night in solitude.³¹⁴

The system at Auburn was named "the silent system," because prisoners were allowed no verbal intercourse with each other at any time.³¹⁵ Alexis de Tocqueville and Gustave de Beaumont, who visited Auburn in 1831, wrote this description of the prison's awful stillness: "[E]very thing passes in the most

310. JANINE CHASSEGUET-SMIRGEL, *CREATIVITY AND PERVERSION* 12 (1984).

311. LOUIS DWIGHT, *FIRST ANNUAL REPORT OF THE BOSTON PRISON DISCIPLINE SOCIETY* 36-37 (1826), *quoted in* HARRY E. BARNES & NEGLY K. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 523 (1945).

312. This expression means "a compulsion for exactness." von Gebattel, *supra* note 117, at 177.

313. BARNES & TEETERS, *supra* note 311, at 523.

314. *Id.*

315. *Id.*

profound silence, and nothing is heard in the whole prison but the steps of those who march, or sounds proceeding from the workshops."³¹⁶ At night, the authors continued, "the silence within these vast walls . . . [was] that of death. . . . [W]e felt as if we traversed catacombs; there were a thousand living beings, and yet it was a desert solitude."³¹⁷

Although isolated at night, prisoners under the Auburn plan were allowed to work together silently during the day. In a competing model, known as the "separate" system, prisoners were kept apart both day and night.³¹⁸ On the occasions when they had to venture from their cells, prisoners in the separate system wore dark hoods with only two holes cut for their eyes. By this means, they were prevented from recognizing and contaminating each other.³¹⁹ Here we see a fanatical striving after purity that implies, by its very fanaticism, an attraction to the opposing qualities of dirtiness and defilement.

To the nineteenth-century reformers, the silent and separate systems were sufficiently different to warrant a prolonged, often-heated debate over their respective merits: was it best to keep prisoners silent *and* separate both day and night, or only silent during the day and separate at night? An "epic struggle" over this question raged in American penological circles from 1800 to 1870.³²⁰ Vitriolic attacks on one's opponents and flagrant misuse of statistics permeated the conflict,³²¹ which even attracted the attention of distinguished European reformers and novelists. To the twentieth-century interpreter, the very fact of this debate over two such similar systems may appear as yet another sign of the reformers' compulsiveness, for the controversy reflects a cognitive style that is typical of the obsessive-compulsive—a style characterized by an

316. GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE* 32 (Francis Lieber trans. & ed., Augustus M. Kelly 1970) (1833).

317. *Id.*

318. See BARNES & TEETERS, *supra* note 311, at 523.

319. For descriptions of the "silent" and "separate" systems, see BARNES & TEETERS, *supra* note 311, at 505-45; DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* 82-83 (1971). For a discussion of the hood that prisoners wore, see NEGLEY K. TEETERS & JOHN D. SHEARER, *THE PRISON AT PHILADELPHIA* 75, 78 (1957).

320. BARNES & TEETERS, *supra* note 311, at 533.

321. See *id.* at 533-34, ROTHMAN, *supra* note 319, at 81.

absorption in technical detail and a failure to notice what David Shapiro has called "the flavor or impact of things."³²²

As to impact, it is not surprising that these extraordinarily rigid systems of "perfect order and perfect silence"³²³ led to a high incidence of insanity among the prisoners. For example, in the English prison of Pentonville, which followed the separate system, there were "twenty times more cases of mental disease than in any other prison in the country."³²⁴ That the reformers' preoccupation with order was not entirely rational can be seen in these results.³²⁵

3. Juvenile Justice

The assumption that criminality is fundamentally a problem of dirt and disorder, which must be corrected through various kinds of cleansing, neatening, and segregating measures, pervades nineteenth-century juvenile justice, as it does vagrancy law and adult penology. A thorough examination of juvenile justice is beyond the scope of this essay; I wish only to intimate the obsessional motifs in two important "child-saving" institutions: the Houses of Refuge and the Orphan Train Movement.

Prior to the early nineteenth century, children were not punished by confinement, but rather by a variety of other measures,

322. DAVID SHAPIRO, *NEUROTIC STYLES* 49-50 (Austin Riggs Ctr. Monograph Ser. No. 5, 1965); cf. FENICHEL, *supra* note 9, at 288 (describing the obsessional neurotic's "inhibition in the experiencing of *gestalten*").

323. HIBBERT, *supra* note 15, at 160.

324. *Id.*

325. A modern recreation of the separate system exists at Pelican Bay State Prison in California, which is based on "extreme, around-the-clock isolation of prisoners from virtually all human contact." Jennifer Warren, *A Modern Day Dungeon*, L.A. TIMES, Sept. 7, 1993, at A3.

During a visit to this prison in 1993, *60 Minutes* correspondent Mike Wallace expressed his amazement in language that evokes de Tocqueville and de Beaumont's description of Auburn a century and a half earlier:

WALLACE: Do they mix with each, the—all the guys in this pod?

Lt. DEINES: No they do not. Any communication they have is through the door. If they come out of their pods, they will come in contact with no other inmate. They can talk, but they have no physical contact.

WALLACE: Good God. And—and this can go on for years in here?

Lt. DEINES: Depending on the circumstances of the case, it could go on for years.

WALLACE: There's an eerie quality here, Al.

Lt. DEINES: Its different from—you get when you walk into most prisons, in the—in the old prisons. You don't have the yelling and screaming.

WALLACE: Right.

Lt. DEINES: It's very quiet.

WALLACE: What goes on inside those cells? What goes on inside the minds of those people in there? I mean, in this silent, otherworldly atmosphere?

60 Minutes (CBS television broadcast, Sept. 12, 1993).

including corporal punishment, apprenticeship, banishment from the community, and, in a few cases, capital punishment.³²⁶ In the 1820s and the succeeding decades, many states established places of confinement for incorrigible and delinquent children; these institutions were called by such names as "houses of refuge," "reform schools," and "houses of reformation." Similar to the penitentiaries, the houses of refuge placed "discipline, routine, and cleanliness" at the core of their philosophy.³²⁷ Also like the penitentiaries, these institutions exhibited an obsessional ethos in which extreme orderliness and cleanliness became ends in themselves. For an illustration of this point, consider the following passage from August Aichhorn's 1925 classic, *Wayward Youth*:

The superintendent of [the reform school] . . . once called my attention to wash basins that had been in use for twenty years. He was proud of the fact that they had remained so long undamaged and still shone like new. In the dormitories the beds stood in a row, twenty-five on each side, like rows of soldiers, not an inch out of line. The covers were all folded at correct right angles and fell like a plumb-line. Everywhere was the same meticulous order.³²⁸

Besides orderliness with respect to objects, the houses of refuge also endeavored to inculcate orderliness with respect to time. This purpose comes through vividly in the following excerpt from a report of the New York Society of the Reformation of Juvenile Delinquents. The passage describes life in the New York House of Refuge in the early 1830s.

At sunrise, the children are warned, by the ringing of a bell, to rise from their beds. Each child makes his own bed, and steps forth, on a signal, into the Hall. They then proceed, in perfect order, to the Wash Room. Thence they are marched to parade in the yard, and undergo an examination as to their dress and cleanliness; after which, they attended morning prayer. The morning school then commences, where they are occupied in summer, until 7 o'clock. A short intermission is allowed, when the bell rings for breakfast; after which, they, proceed to their respective workshops, where they labor until 12 o'clock, when they are

326. See FRANCIS B. MCCARTHY & JAMES G. CARR, *JUVENILE LAW AND ITS PROCESSES* 11-12 (1980).

327. Ruth S. Eissler, *Scapegoats of Society*, in *SEARCHLIGHTS ON DELINQUENCY* 288, 297 (K.R. Eissler ed., 1949). For a detailed discussion of the houses of refuge, see ROTHMAN, *supra* note 319, at 207-36.

328. AUGUST AICHHORN, *WAYWARD YOUTH* 147 (Northwestern Univ. Press 1983) (1935).

called from work, and one hour allowed them for washing and eating their dinner. At one, they again commence work, and continue at it until five in the afternoon, when the labors of the day terminate. Half an hour is allowed for washing and eating their supper, and at half-past five, they are conducted to the school room, where they continue at their studies until 8 o'clock. Evening Prayer is performed by the superintendent; after which, the children are conducted to their dormitories, which they enter, and are locked up for the night, when perfect silence reigns throughout the establishment. The foregoing is the history of a single day, and will answer for every day in the year, except Sundays, with slight variations during stormy weather, and the short days in winter.³²⁹

In the last sentence of this remarkable report, we glimpse the authors' pride in their rigid time schedule, which varies so little, even during bad weather.

Attentiveness to time is, of course, a well-known obsessive-compulsive trait. Beyond observing a scrupulous punctuality, some obsessional neurotics display a great interest in all sorts of timetables and even organize their entire lives by detailed schedules.³³⁰ In extreme cases, such persons become like "living machines."³³¹ But what exactly is the function of such orderliness in time? As Otto Fenichel explains: "The compulsion neurotic who is threatened by a rebellion of his . . . sensual and hostile demands feels protected as long as he behaves in an 'orderly' manner, especially concerning money and time."³³² Spontaneous behavior, then, represents danger—the danger that one will commit, or has committed, the sins that one fears.

For some obsessional neurotics, it is not enough that they themselves observe the prescribed system, but other persons are required to serve as "witnesses"; they too must follow the system, and thereby validate its demands.³³³ The severity of the regimen in

329. NEW YORK SOC'Y OF THE REFORMATION OF JUVENILE DELINQUENTS, 10TH ANNUAL REPORT 6-7 (1835), *quoted in* McCARTHY & CARR, *supra* note 326, at 26 n.2. According to Rothman, historians agree about the central features of the prisons, reformatories and other asylums that arose in the nineteenth century. As he summarizes, "all the institutional routines were segmented into carefully defined blocks of time, scrupulously maintained and punctuated by bells. There was nothing casual or random about daily activities." ROTHMAN, *supra* note 319, at xxv.

330. *See* FENICHEL, *supra* note 9, at 284.

331. WILHELM REICH, CHARACTER ANALYSIS 215 (Vincent R. Carfagno trans., 3d enlarged ed. 1972).

332. FENICHEL, *supra* note 9, at 284.

333. *Id.* at 285.

the houses of refuge can perhaps be understood in terms of this compulsive need for witnesses to a system of ordered time. If this explanation has merit, it follows that these reformatories were unconsciously designed to meet the psychological needs of the reformers as much as the needs of the confined children. Indeed, it is unlikely that delinquent children would improve under such orderly regimens when they had failed to meet far less rigorous standards in the world outside.³³⁴

Besides the houses of refuge, the nineteenth century witnessed the rise of another child-saving institution, the "placing-out system," or Orphan Train Movement. One of its founders, Charles Loring Brace, criticized the houses of refuge as too controlling and prison-like for children;³³⁵ yet, his movement too exhibited pronounced obsessional features. The goal of the Movement was to save children from lives of delinquency and crime by removing them from the city to the countryside—from what was conceived as a dirty, contaminated place to a place of supposed purity and order. Notice, for example, the images in the following passage from the 1857 Annual Report of the New York Children's Aid Society:

The poor vagabond boy, or the child whom misfortune has made wretched and homeless, goes to a quiet country home. . . . [T]he poor lad remembering the dirty cellars, and the alleys piled with garbage and the filthy holes of the great city, wonders with delight at the orchards and lilacs and the green grass and the pure air of his new home.³³⁶

In addition to the New York Children's Aid Society, the Boston Children's Mission also transplanted city children to farm families for "moral disinfection."³³⁷ Several thousand children per year were uprooted in this way between the mid-nineteenth century and 1929.

334. See AICHORN, *supra* note 328, at 147; EISSLER, *supra* note 327, at 297.

335. See ROTHMAN, *supra* note 319, at 258-59.

336. STEVEN L. SCHLOSSMAN, *LOVE AND THE AMERICAN DELINQUENT* 45 (1977). This passage recalls Dickens's *Oliver Twist*, in which Oliver oscillates between a filthy city environment, where he is a captive of Fagin's thieving gang, and an idyllic country home, where he is, temporarily at least, safe from the corrupting influence of criminals. See DICKENS, *supra* note 88, at 55-57, 237-39.

337. See Mason P. Thomas, Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 307 (1972).

The Orphan Train Movement is now considered controversial and even, in some quarters, discredited.³³⁸ Nevertheless, one of the driving assumptions behind the Movement remains embedded in our culture: to wit, the assumption that criminality is natural to the cities and alien to the suburbs and the country. That we associate criminality with cities is a commonplace, but this idea is usually thought to spring from the actual correlation between high crime rates and urban concentration. I suggest that the roots of the idea lie deeper, that criminality and cities are linked by their common association with filth. If this is so, then our nation's inability to fight crime effectively may stem partly from a belief that the affinity between crime and cities is deep-seated and inexorable.³³⁹

B. "Into the Dirt, Into the Slime":³⁴⁰ *The Metaphor of Filth in American Case Law*

Besides its manifestations in discreet areas and episodes of criminal justice, the anal metaphor runs through criminal trials generally. My research has turned up thirty-four American cases in which the prosecutor's characterization of the defendant as filth was an issue on appeal.³⁴¹ Ranging from 1885 to 1990, these cases show prosecutors calling defendants by such terms as "little scums,"³⁴² "slimy creature,"³⁴³ "type of worm,"³⁴⁴ and "skunk."³⁴⁵ Because not all cases are appealed and because some prosecutors may suppress the impulse to use such language to avoid reversal, we can assume that these thirty-four cases represent only a fraction of the instances when the metaphor appeared in a prosecutor's mind.

338. For a highly critical discussion of the Orphan Train Movement, see RICHARD WEXLER, *WOUNDED INNOCENTS* 33-36 (1990) (citing religious bigotry and child stealing in the placing-out system). Even the more balanced account of Marilyn I. Holt concludes on this profoundly negative note: "The image of human 'cargoes' . . . or 'human freight' . . . is more reminiscent of America's history of slavery than of humanitarian efforts." MARILYN I. HOLT, *THE ORPHAN TRAINS: PLACING OUT IN AMERICA* 181 (1992) (footnote omitted).

339. Cf. Lewis H. Lapham, *Notebook: City Lights*, *HARPER'S MAG.*, July 1992, at 4, 4-6 (decrying Americans' longstanding prejudice against cities, and defending urban disorder and danger as the inevitable price of freedom).

340. *Peterson v. State*, 376 So. 2d 1230, 1231 (Fla. Dist. Ct. App. 1979) (emphasis added); see also *infra* text accompanying note 347.

341. For a list of these cases, see Appendix.

342. *Ferguson v. Commonwealth*, 512 S.W.2d 501, 504 (Ky. 1974).

343. *Commonwealth v. Cicere*, 128 A. 446, 447 (Pa. 1925).

344. *United States v. Walker*, 190 F.2d 481, 484 (2d Cir. 1951).

345. *Volkmar v. United States*, 13 F.2d 594, 595 (6th Cir. 1926).

Among the themes that appear in these cases, one of the most fascinating is the idea that law-enforcement personnel may, in the course of their duties, become defiled. Consider, for example, this language from the prosecutor's closing argument in *Peterson v. State*:³⁴⁶

This is sale of heroin, sale of cocaine, and this is a case that was done in the only way it could be done by a police officer, trained, that had to go undercover, that had to go *down into the dirt, into the slime* with the pushers, deal with them at their level, and to bring the case to court.³⁴⁷

This case was reversed in part because of these evocative metaphors, but what is important for our purpose is the insight this passage gives into the prosecutor's mind: specifically his conception of the police officer, Dante-like, descending into a filthy hell.

The risk of contamination from such a descent, which was only implicit in *Peterson*, was overtly stated in *United States v. Corona*.³⁴⁸ In this Fifth Circuit case, the prosecutor made the following observation about undercover agents of the Drug Enforcement Agency who had testified at trial: "[The] agents are human beings, and they're doing a dirty, nasty job, and they're associating daily with dirty, nasty people . . ." ³⁴⁹ To justify the use of another government witness, a former co-defendant who had pleaded guilty before trial, the prosecutor remarked: "The [agents are] handling garbage, ladies and gentlemen, and there's an old saying, 'When you handle garbage, your hands are going to stink.'" ³⁵⁰ Believing that criminals inevitably contaminate those they touch, this prosecutor would have reason to imitate Dickens's barrister Jaggars, washing his hands with scented soap after every foray into the criminal realm.³⁵¹

Like prosecutors, defense attorneys too sometimes see criminals through the lens of filth. For example, in language reminiscent of Magwitch's in *Great Expectations*,³⁵² a defense attorney described the government witness against General Manuel Noriega

346. 376 So. 2d 1230 (Fla. Dist. Ct. App. 1979).

347. *Id.* at 1231 (emphasis added).

348. 551 F.2d 1386 (5th Cir. 1977).

349. *Id.* at 1388 (quoting the prosecutor at trial) (first alteration in the original).

350. *Id.* (alteration in the original).

351. See *supra* text accompanying note 139.

352. See *supra* notes 89-92 and accompanying text.

as "the slimiest of eels."³⁵³ In a similar vein, the Supreme Court of Delaware quoted the defense counsel as describing the state's witnesses, who had admitted to various felonies, as "scum" and "snakes."³⁵⁴ In yet another example, in a New York case from the 1970s, the court censured the defense attorney for characterizing the prosecution witness, a man with a criminal record, as "the scum of the earth" and for closing his cross-examination with the words, "I think I have to throw up."³⁵⁵ Of course, these attorneys may only be using the metaphor of filth as rhetorical hyperbole—to evoke strong reactions from the judge or jury. Nevertheless, in view of the risk that such imagery may lead to censure, it seems likely that the language also reflects the speakers' genuine feelings about criminals.

Let us turn now to the way judges regard the metaphor comparing criminals to filth. At times, judges acknowledge the metaphor's power, for in six of the thirty-two cases in which the prosecutor compared the criminal to filth, the appellate court reversed in part on this basis.³⁵⁶ Moreover, in another case, the appellate judge himself introduced the metaphor to explain why the defendant had not received a fair trial. Here, the prosecutor had exceeded the legitimate bounds of cross-examination, questioning defense witnesses about the defendant's involvement in eighteen different kinds of egregious misconduct—from coercing women into prostitution to attempting to incite arson. In reversing the conviction of conspiracy to commit arson, the judge stated: "[T]he jury must indeed have thought this defendant to be a slimy gutter rat"³⁵⁷

Significantly, in seeking to explain why the prosecutor's conduct was prejudicial, the judge could find no better language than a metaphor of filth. Like Captain Hook,³⁵⁸ he chose the image of the rat, a creature that dwells in sewers and ravenously eats garbage, a

353. Douglas Frantz & Robert L. Jackson, *The Spooks, the Kooks, & the Dictator: If Noriega Goes Down, He's Threatening to Take the CIA, the DEA, and the White House with Him*, L.A. TIMES, July 21, 1991, Magazine, at 8, 10.

354. *State v. Bennefield*, 567 A.2d 863, 864 (Del. 1989).

355. *In re Castellano*, 361 N.Y.S.2d 23, 24 (App. Div. 1974).

356. See *Volkmar v. United States*, 13 F.2d 594, 595 (6th Cir. 1926); *Rogers v. State*, 157 So. 2d 13, 17-18 (Ala. 1963); *Duque v. State*, 498 So. 2d 1334, 1337, 1339 (Fla. Dist. Ct. App. 1986); *Peterson v. State*, 376 So. 2d 1230, 1232, 1235 (Fla. Dist. Ct. App. 1979); *People v. Nightengale*, 523 N.E.2d 136, 141-42 (Ill. App. Ct. 1988); *State v. Young*, 12 S.W. 879, 879, 884 (Mo. 1890).

357. *People v. Tucker*, 331 P.2d 160, 163 (Cal. Ct. App. 1958).

358. See *supra* note 93 and accompanying text.

creature that is "filth incarnate."³⁵⁹ Whereas in this case, and in the others that were reversed, the court recognized the metaphor's evocative power, more typically, the court merely criticized the prosecutor, holding that the metaphorical language was nonprejudicial error.

Four of the thirty-two cases are especially interesting.³⁶⁰ In these, the courts neither reversed on the basis of the metaphor nor treated the metaphor as nonprejudicial error; rather, they held that the metaphor was, for one reason or another, appropriate.³⁶¹ For instance, in a 1951 Oklahoma case, the court stated, "We agree with the prosecutor that an adult who would commit the acts done by the defendant shows that he is 'lowdown, degenerate, and filthy.'"³⁶² Or again, in a 1966 case concerning the murder of a ten-year-old girl, the Supreme Court of Illinois declared that the prosecutor's description of the defendant as a "slimy beast" with morals "like a snake" was "a legitimate reply to the defense argument concerning normality."³⁶³

And yet again, in a 1986 case before the United States Army Court of Military Review, the court upheld a conviction where the prosecutor had referred to the defendant as a "slavering animal" and "degenerate scum."³⁶⁴ According to the court, these metaphors did not prejudice the defendant's rights, because they were "based on evidence found in the record" and on "reasonable inferences drawn from that evidence."³⁶⁵

What is striking about all the cases in this group is the judges' failure to appreciate the difference between metaphors, with their special power, and more literal approximations of reality. It is as if, for these judges, criminals *were* slime. Yet, as philosopher Owen Barfield reminds us, "the aptness of a metaphor to mislead varies inversely with the extent to which it continues to be felt and understood *as* a metaphor and is not taken in a confused way semiliterally"³⁶⁶

359. Christopher Herbert, *Rat Worship and Taboo in Mayhew's London*, 23 REPRESENTATIONS 1, 14 (1988).

360. *United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986); *People v. Myers*, 220 N.E.2d 297 (Ill. 1966); *State v. Conners*, 76 So. 611 (La. 1917); *Williams v. State*, 226 P.2d 989 (Okla. Crim. App. 1951).

361. See *McPhaul*, 22 M.J. at 814; *Myers*, 220 N.E.2d at 311; *Conners*, 76 So. at 612; *Williams*, 226 P.2d at 997.

362. *Williams*, 226 P.2d at 997.

363. *Myers*, 220 N.E.2d at 311.

364. *McPhaul*, 22 M.J. at 814.

365. *Id.*

366. Barfield, *supra* note 3, at 63.

Besides the cases in which judges agreed with prosecutors who described criminals as filth, judges themselves have sometimes employed the metaphor uncritically in their opinions. For example, in the 1920s, a judge on the Supreme Court of Ohio referred to the "slimy . . . trail of the man who committed the crime."³⁶⁷ In a more elaborate illustration from the 1970s, a district court judge had been asked to decide whether a prisoner was entitled to more than two showers a week. In a footnote to his opinion, the judge wrote": "[T]his court has too much work to do to call for additional pleadings, or stir the odorous pile this and other cases of this sort represent."³⁶⁸ Ostensibly objecting to the waste of his time that such cases entailed, the judge vented his disgust by characterizing prisoners' concerns as smelly. In another footnote, the same judge asked: "Is the next opinion going to require the district judge to say how many times a prisoner should brush his teeth, go to the bathroom, wipe his nose, comb his hair, or scratch?"³⁶⁹ Here the judge went out of his way to remind the reader of prisoners' bodily functions; by his choice of examples, he made one think of prisoners eliminating urine and feces, and oozing with mucous and sweat.

Judges have characterized criminals as filthy by implication as well, typically in cases focusing on the improper behavior of government agents. Thus, in *United States v. Valencia*,³⁷⁰ the government had used a lawyer's secretary as an informant to obtain evidence of the lawyer's involvement in a criminal conspiracy with his clients. Reluctantly dismissing the charges against the lawyer and three co-defendants, the district court refused to allow "the law in its majesty . . . to be equally slimy."³⁷¹ Justice Frankfurter used similar language to express a similar admonition in his dissenting opinion in *On Lee v. United States*.³⁷² He wrote that criminal prosecution "should not be deemed to be a dirty game in which 'the dirty business' of criminals is outwitted by 'the dirty business' of law officers."³⁷³

367. *Barnett v. Ohio*, 135 N.E. 647, 649 (Ohio 1922).

368. *Taylor v. Strickland*, 411 F. Supp. 1390, 1395-96 n.15 (D.S.C. 1976) (emphasis added).

369. *Id.* at 1395 n.13.

370. 541 F.2d 618 (6th Cir. 1976), *cited with approval in United States v. Omni Int'l Corp.*, 634 F. Supp. 1414, 1440 (D. Md. 1986).

371. *Id.* at 621.

372. 343 U.S. 747 (1952), *cited with approval in United States v. Ross*, 541 F.2d 690, 703-04 (8th Cir. 1976).

373. *Id.* at 758.

An unusual twist on the theme of contamination by criminals appears in *County of Oakland v. City of Detroit*.³⁷⁴ In this case several counties had brought suit under federal antitrust laws and RICO against the City of Detroit in its capacity as a provider of sewage services. Dismissing the complaints for lack of standing, the district court granted summary judgment for the defendants. The court of appeals reversed. In a footnote to its opinion, the court of appeals wrote as follows: "Given the nature of their crimes and the element in which these dabblers in sludge and scum worked, Shakespeare could almost have been speaking for the convicted defendants when he wrote: 'And almost thence my nature is subdu'd to what it works in, like the dyer's hand'"³⁷⁵ By working in actual filth, the court suggested, people become metaphorically filthy, or criminal.

Even if the metaphor of filth means only what it says, it can have damaging effects on the criminal justice system, affecting both the process and the result, the appearance of fairness and actual fairness. Beyond this, when the metaphor of filth functions to defend against a deep-seated, illicit attraction to criminals, undesirable consequences follow. First, the attorney or judge's anticriminal behavior will tend to be exaggerated and indiscriminating. Second, because repression is never complete, there will be occasional expressions of the other side of the conflict—admiration for criminals and attraction to their ways.³⁷⁶ Although we cannot predict exactly what outward form the inner conflict will take, we can say this: when an attorney uses criminals to maintain his own intrapsychic equilibrium, his behavior toward criminals will often be inappropriate, because he is responding to internal, as well as external, forces.

With these points I come to the end of the argument I have developed through literary works, legal history, and American case law, and it is time now to reflect on where this journey has brought us.

374. 866 F.2d 839 (6th Cir. 1989).

375. *Id.* at 843 n.3.

376. For example, prosecutors sometimes cross over the line into illegal behavior in the very act of attempting to bring criminals to justice. Such illegal behavior can be understood as a breakthrough of previously repressed admiration for criminals. See Duncan, *supra* note 252, at 50.

V. CONCLUSION

In these pages I have endeavored to explore the metaphor likening the criminal to filth—to penetrate its origins and unravel its vicissitudes in criminal justice policy. In the course of this exploration, I have sometimes treated the metaphor of filth as a cause, at other times as a symptom of a deeper dynamic. Viewing it as a cause, I have argued that the metaphor of filth has functioned as a powerful determinant of criminal justice policies. In particular, it has led to a view of criminals as contaminated and contagious. This perspective, in turn, has promoted an emphasis on various pollution-avoidance measures, such as segregation and banishment of the criminal. In addition, when combined with the measure-for-measure theory of punishment, the metaphor has fostered a tendency to immerse criminals in dark, dirty, fetid places.

On a deeper level, I have examined the metaphor of filth as a symptom of noncriminals' unconscious ambivalence, or simultaneous love and hate, toward criminals. Viewed in this way, the metaphor serves to explain the hyperbolic quality of some criminal justice practices: for instance, the masks that prisoners were required to wear in the separate system, the ousting of Alexander Maconochie, when he rehabilitated the most hardened offenders, and the transportation of convicts to a little-known place on the far side of the globe. Such practices, which some historians have looked on as bizarre or reckless, become readily comprehensible in light of the metaphor of filth and the theory of intrapsychic conflict. For the exaggerated nature of these practices reflects the noncriminals' struggle with powerful feelings in themselves—feelings of attraction to, and identification with, criminals. As we have seen, these feelings have sometimes emerged transparently, as in the crowds that cheered the condemned criminals who rode to Tyburn tree in eighteenth-century England. More often, these feelings are barred from consciousness, finding expression only in excessive condemnation and shunning of criminals, to prevent succumbing to their allure. It would seem then that, in the course of our efforts to understand the metaphor likening the criminal to filth, we have arrived at a new metaphor—one that likens the criminal justice system to the expression of noncriminals' inner conflict over criminals.

This perspective, I have said, can enhance our understanding of past and present criminal-justice policies, but can it do more? Can this model go beyond explanation to evaluation and prescrip-

tion? It is at this juncture—where a theory is obliged to address practical and future-oriented concerns—that efforts to apply psychoanalysis to law encounter their greatest difficulty. For whereas law is a system designed to transform gray into black and white,³⁷⁷ psychoanalysis is a system designed to transform black and white into gray. And a discipline that yields black-and-white results is better suited to offer unequivocal proposals for action than a discipline that focuses on complex idiosyncratic meanings.

To make this point more compelling, let us consider what options might be available to us were we to try to squeeze blood from the stone—to make our psychoanalytic model yield normative judgments and practical solutions. If we were to take such an approach to our subject, our reasoning might go something like this: The metaphor of filth, like all metaphors, abstracts from reality and, in so doing, obfuscates some aspects of its subject, while highlighting others. For example, the equation of the criminal and filth tends to hide the criminal's humanity while encouraging us to see the criminal as an object. Moreover, the metaphor invites a particular emotional response to the criminal, the same one we consciously feel toward slime: disgust.

Having judged the metaphor to be a problem, we might proceed to consider appropriate solutions. For instance, we might try to abolish the metaphor of filth and supplant it with another, such as the criminal as "an unfortunate one"³⁷⁸ or one who made a mistake.³⁷⁹ But this solution seems utopian, for several reasons. First, unlike other figures of speech such as "standing," "ripeness," and "fruit of the poisonous tree," the metaphor equating the criminal with filth has never been incorporated into legal doctrine. Because it has not been adopted by law, the metaphor of filth cannot be

377. For this way of characterizing law, I am indebted to my colleague, Professor Donald Fyr. *But see* *Estin v. Estin*, 334 U.S. 541, 545 (1948) ("But there are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable."). Professor Walter Weyrauch has suggested that elite American law schools teach law as gray, whereas less prestigious law schools teach law as black and white. *See* Ekkehard Klaus, *Legal Education*, 25 *AM. J. COMP. L.* 164, 167 (1977) (reviewing WALTER O. WEYRAUCH, *HIERARCHIE DER AUSBILDUNGSSTATTEN, RECHTSSTUDIUM UND RECHT IN DEN VEREINIGTEN STAATEN* (1976)).

378. In fact, Russian peasants have traditionally employed this metaphor for the criminal. *See* HAROLD J. BERMAN, *JUSTICE IN THE U.S.S.R.* 248 (rev. ed. enlarged 1963); *cf.* JOHN MAYNARD, *THE RUSSIAN PEASANT* 189 (1942) ("The Russian people . . . pit[y] the condemned criminal.").

379. Aristotle used this example in discussing the importance of metaphor: "So we may speak of the wrong-doer as 'making a mistake,' or the erring man as 'guilty of a wrong.' We may say that the thief has merely 'taken,' or that he has 'plundered.'" *THE RHETORIC OF ARISTOTLE*, *supra* note 3, at 150.

supplanted by law. In addition, the metaphor is extraordinarily pervasive and deep-seated. As we have seen, it goes back millennia, traversing cultures and continents in a way that suggests an archetypal symbol. Besides, the metaphor of filth seems uniquely suited to reflect our emotional stance toward the criminal—our mingled loathing and admiration, our repudiation and attraction.

If it is not possible to supplant this metaphor with another, might we dispense with metaphors altogether when talking about criminals? On reflection, this solution too must be rejected, for virtually all our words are metaphors, or originate in metaphors. We are left, as C. S. Lewis notes, with only one option: "Either literalness, or else metaphor understood: one or other of these we must have; the third alternative is nonsense. But literalness we cannot have."³⁸⁰ To many lawyers, "metaphor understood" will seem a poor solution, or no solution at all, but I believe, as Socrates did, that there is no voluntary evil, only ignorance.³⁸¹ It follows that understanding automatically leads to change; more exactly, understanding, in itself, *is* change.

380. LEWIS, *supra* note 3, at 153.

381. 1 DIOGENES LAERTIUS, *LIVES OF EMINENT PHILOSOPHERS*, bk. 2, § 3 (R.D. Hicks trans., 1925) ("There is, [Socrates] said, only one good, that is, knowledge, and only one evil, that is, ignorance."). Aristotle attributed three distinctive tenets to Socrates: "(a) virtue, *moral* excellence, is identical with knowledge . . . ; (b) vice, bad moral conduct, is therefore in all cases ignorance . . . ; (c) wrong-doing is therefore always involuntary, and there is really no such state of soul as . . . 'moral weakness' (*arcasia*), 'knowing the good and yet doing the evil.'" A.E. TAYLOR, *SOCRATES* 140-41 (1953).

APPENDIX

American Cases Where Prosecutor Described Defendant or Defendant's Acts or Milieu with a Metaphor of Filth

- a. *United States v. Lowenberg*, 853 F.2d 295, 302 (5th Cir. 1988) ("filthy");
- b. *Lindsey v. Smith*, 820 F.2d 1137, 1155 (11th Cir. 1987) ("scum");
- c. *United States v. Tisdale*, 817 F.2d 1552, 1555 (11th Cir. 1987) ("dirty");
- d. *United States v. Fowler*, 608 F.2d 2, 9 (D.C. Cir. 1979) (prosecutor characterized offenses charged against defendants as "dirty");
- e. *United States v. Crane*, 445 F.2d 509, 520 (5th Cir. 1971) ("dirty work");
- f. *United States v. Moran*, 194 F.2d 623, 625 (2d Cir. 1952) ("slimy underworld");
- g. *United States v. Walker*, 190 F.2d 481, 484 (2d Cir. 1951) ("type of worm");
- h. *Volkmar v. United States*, 13 F.2d 594, 595 (6th Cir. 1926) ("skunk," "slimy crook");
- i. *United States v. Wolfson*, 322 F. Supp. 798, 825 (D. Del. 1971) ("viruses," "germs");
- j. *United States v. McPhaul*, 22 M.J. 808, 814 (A.C.M.R. 1986) ("slavering animal," "degenerate scum");
- k. *Rogers v. State*, 157 So. 2d 13, 17 (Ala. 1963) ("slimy crow");
- l. *State v. Comer*, 799 P.2d 333, 346 (Ariz. 1990) ("filth");
- m. *People v. Apalatequi*, 147 Cal. Rptr. 473, 474 (Ct. App. 1978) ("scum");
- n. *People v. McMahan*, 254 P.2d 903, 906 (Cal. Dist. Ct. App. 1953) ("filthy");
- o. *Biondo v. State*, 533 So. 2d 910, 911 (Fla. Dist. Ct. App. 1988) ("slime");
- p. *Peterson v. State*, 376 So. 2d 1230, 1231 (Fla. Dist. Ct. App. 1979) ("into the dirt, into the slime");
- q. *People v. Myers*, 220 N.E.2d 297, 311 (Ill. 1966) ("slimy beast," "like a snake");
- r. *People v. Stiff*, 542 N.E.2d 392, 395 (Ill. App. Ct. 1989) ("dirty, filthy . . . needs");
- s. *People v. Nightengale*, 523 N.E.2d 136, 141 (Ill. App. Ct. 1988) ("scum");

- t. *People v. Buckner*, 293 N.E.2d 622, 623 (Ill. App. Ct. 1973) (“snake,” “dirty, rotten”);
 - u. *Anderson v. State*, 4 N.E. 63, 67 (Ind. 1885) (“dirty”);
 - v. *Ferguson v. Commonwealth*, 512 S.W.2d 501, 504 (Ky. 1974) (“two little scums”);
 - w. *State v. Connors*, 76 So. 611, 612 (La. 1917) (“filthy hides”);
 - x. *State v. Burge*, 515 So. 2d 494, 505 (La. Ct. App. 1987) (“scum”);
 - y. *People v. Guenther*, 469 N.W.2d 59, 65 (Mich. Ct. App. 1991) (“scum”);
 - z. *Monk v. State*, 532 So. 2d 592, 601 (Miss. 1988) (“scum”);
 - aa. *State v. Young*, 12 S.W. 879, 883 (Mo. 1890) (“dirty”);
 - bb. *State v. Greeno*, 432 N.W.2d 547, 550 (Neb. 1988) (defendant and her sister, a defendant in another trial, described as “two worms”);
 - cc. *Ohio v. Watkins*, No. 46144, slip. op. at 11 (Ohio Ct. App. Nov. 23, 1983) (“scum and filth”);
 - dd. *State v. Earich*, No. 80-C-54, slip. op. at 14 (Ohio Ct. App. Nov. 19, 1981) (“scum”);
 - ee. *Hathcox v. State*, 230 P.2d 927, 937 (Okla. Crim. App. 1951) (“dirty rats,” “three rats”);
 - ff. *Williams v. State*, 226 P.2d 989, 997 (Okla. Crim. App. 1951) (“filthy”);
 - gg. *Commonwealth v. Cicere*, 128 A. 446, 447 (Pa. 1925) (“slimy creature”);
 - hh. *Brito v. State*, 459 S.W.2d 834, 836 (Tex. Crim. App. 1970) (“dirty”);
- cf.* *Duque v. State* 498 So. 2d 1334, 1337 (Fla. Dist. Ct. App. 1986) (in closing argument, prosecutor referred to defense witness as “the type of person characterized around this courthouse as a scum bag.”).