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THE VALUE OF PUNISHMENT: A RESPONSE TO JUDGE RICHARD L. NYGAARD

JEFFREY C. TUOMALA*

I. INTRODUCTION

Judge Richard L. Nygaard's essay, *The Myth of Punishment*,¹ is a moving and compelling plea to rethink and reform American penology. His willingness to let down his guard and speak from the heart is a powerful reminder that law is more than an intellectual exercise and that the legal calling demands much more than technical expertise. What we believe, the counsel we give, and the judgments we make will profoundly affect many individual lives as well as the communities we serve.² That such basic issues of justice as crime and punishment remain so troublesome gives us pause to consider our human limitations. Therefore, in a desire to act justly we must treat each other mercifully and walk humbly with God³ as we pursue our callings as ministers of justice.⁴

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1. Richard L. Nygaard, "The Myth of Punishment," 5 REGENT U. L. REV. 1 (1995).

2. Robert Dabney, one of the preeminent nineteenth century American theologians, made this observation about the role of lawyers in society:

It is, therefore, obvious that this profession must have fearful influence in forming the moral opinions of the community. The concern which the country has in their professional integrity, and in their righteous and truthful exercise of these vast powers, is analogous to that which the church has in the orthodoxy of her ministers. Nor are these influences of the legal profession limited to things secular; for the domains of morals and religion so intermingle that the moral condition of a people, as to the duties of righteousness between man and man, greatly influences their state towards God. It may well be doubted whether an acute and unprincipled bar does not do more to corrupt and ruin many communities than the pulpit does to sanctify and save them.

ROBERT L. DABNEY, DISCUSSIONS 1-2 (1892).

3. *Micah* 6:8 ("And what does the Lord require of you? To act justly and to love mercy and to walk humbly with your God.") (All quotations are from the New International Version unless otherwise stated.).

4. *Romans* 13:4.

As a judge on the U.S. Court of Appeals, Judge Nygaard provides a unique and extremely valuable perspective on the hard choices faced in making sentencing decisions. He offers interesting insights into the political dynamics that drive sentencing policy. However, I disagree with his conclusions that a penology which gives primacy to punishment does not work and is morally wrong. I believe that punishment, properly understood, is an essential moral value of a justice system. Additionally, when properly applied, punishment is valuable since it can work to rehabilitate criminals and secure public safety. After analyzing Judge Nygaard's thesis and defending my own, I will make a practical proposal that would give judges a fair and effective sentencing alternative to imprisonment.

II. AN ANALYSIS OF JUDGE NYGAARD'S THESIS

A. *Punishment Doesn't Work*

Judge Nygaard is correct in observing that American penology, both practical and theoretical, is in shambles. Evidence of this includes ever-increasing crime,⁵ a high rate of criminal recidivism⁶ and the failure of criminologists to reach consensus on a basic theory of penology.⁷ Judge Nygaard believes that the crime problem will not be solved as long as Americans are wed to the myth that punishment reduces crime. Unfortunately, as he observes, politicians acting in their own self-interest exploit

5. In the past thirty years there has been a 550% increase in violent crime. *Close to Home—A Citizens Corps Keeps Kids Out of Gangs*, WASH. POST, July 17, 1994, at C8. Over one million inmates are in jail, which is "one of every 193 adults in America." Pierre Thomas, *U.S. Prison Population, Continuing Rapid Growth Since '80s, Surpasses 1 Million*, WASH. POST, Oct. 28, 1994, at A3. "At the end of 1980, approximately 1.8 million adults in the United States were incarcerated, on probation, or on parole. By 1989, that number had increased to a record 4,053,946." Justin Brooks, *Addressing Recidivism: Legal Education in Correctional Setting*, 44 RUTGERS L. REV. 699, 702 n.3 (1992).

6. "Within three years of their release, 62.5% of all inmates are rearrested, and 41.4% are reincarcerated." Brooks, *supra* note 5, at 704.

7. Criminologists will not be able to function in this role [implementing policy choices] until they achieve some agreement among themselves on the facts about crime and the basic theoretical interpretation of those facts. . . . Until then, policymakers are able to select as experts those criminologists who support policies similar to the policymaker's own ideas.

GEORGE B. VOLD & THOMAS J. BERNARD, *THEORETICAL CRIMINOLOGY* 356 (3d ed. 1986).

this myth by running "get tough on crime" campaigns.⁸ Since tougher sentencing policy, when implemented, results in more crime, our government breaches its most important trust which is to secure the public safety.

To convince Americans that they should consider alternatives to punishment, Judge Nygaard appeals to public self-interest. Citizens must consider the evidence and recognize that the myth of punishment threatens everyone's safety. Instead of punishing criminals, Judge Nygaard calls for a return to rehabilitation and attempts to bolster the hope that criminologists can discover the causes and cures for crime. Apparently this would entail the application of the empirical method of medical science to cure social problems.

For nearly a century (1870-1970) the rehabilitation ideal held sway as the "enlightened" rationale for corrections.⁹ Theories of crime causation varied from individualistic factors of biology and psychology to social factors.¹⁰ Crime was viewed as pathological, requiring treatment based on a medical model of diagnosis and prescription.¹¹ The demise of the rehabilitation ideal was due in large measure to a loss of faith in the ability to change the character or behavior of criminals.¹² Judge Nygaard explains the

8. This is true at the federal level where there was intense partisan debate over President Clinton's \$30.2 billion Crime Bill in an attempt by both parties to appear tough on crime. The bill included \$9.9 billion for more prisons, life imprisonment for three-time felons, an increase from two to sixty in the number of federal capital offenses and limited early release for first-time nonviolent drug offenders. Helen Dewar, *Senate Gives Up on Health Care, Passes CRIME BILL: \$30.2 Billion Package Approved, 61 to 38, Despite GOP Assault*, WASH. POST, Aug. 26, 1994, at A1. "Get tough on crime" campaigns are prominent at the state level as well. "Virginia Governor George Allen's administration produced an \$850 million crime plan today that would abolish parole, increase sentences for violent criminals by as much as 700 percent and require the construction of dozens of new prisons in the next decade." Peter Baker, *Allen Offers Plan to Abolish Parole: \$850 Million Proposal Requires New Prisons*, WASH. POST, Aug. 17, 1994, at A1.

9. FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 1 (1981).

10. *Id.* at 40-42.

11. Use of the term *treatment* has come into corrections through the analogy with medicine. A sick patient is treated to the end that he may recover from his illness and be restored to normal functioning. . . . By the same logic, in corrections the term implies a knowledge of crime causation together with procedures whereby the criminal may be studied and treated appropriately in order to control and change his behavior and restore him to normal functioning in society.

VOLD & BERNARD, *supra* note 7, at 350.

12. Perhaps the single greatest blow to the rehabilitation theory was the publication of Robert Martinson's research and his conclusion that nothing works. Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22 (1974). His views were modified in *New Findings; New Views: A Note of Caution Regarding*

failure of social scientists to find the causes of, and cures for, crime as due to a lack of public commitment and funding.¹³

But the problem with the rehabilitation theory is far deeper than a lack of funds and commitment. Although utilitarian theories of justice have not worked, they enjoy the continuing perception of being empirically verifiable, and therefore, scientific. This perception is based on the supposition that given time the "social sciences" will make the same types of evaluations and predictions as the natural sciences.¹⁴ In reality, there are a seemingly infinite number of social variables, most of which cannot be controlled for purposes of experimentation, making it impossible to trace cause-effect relations of social phenomena.¹⁵ The empiricist is in the untenable position of having to know everything in order to know anything for certain.¹⁶ Since causal relations can't be proven, it is impossible to empirically predict

Sentencing Reform, 7 HOFSTRA L. REV. 243 (1979). The demise of rehabilitation was also due in large measure to ideological attacks from the radical left. See ALLEN, *supra* note 9, at 34-40, 64-65; VOLD, *supra* note 7, at chs. 15 & 16; William Chambliss, *Toward Radical Criminology in THE POLITICS OF LAW* 230-41 (David Kairys, ed. 1982).

13. Martinson, *What Works? Questions and Answers About Prison Reform*, *supra* note 12, at 22.

14. Empiricism gains its plausibility, I think, from the popular understanding of the scientific method. . . . Verify your hypotheses by going to the facts. Experiment. Observe. Measure. Gradually, observed facts will accumulate into a dependable body of knowledge. Is that not the method that made the modern age a time of enormous scientific advance?

JOHN M. FRAME, *THE DOCTRINE OF THE KNOWLEDGE OF GOD* 115 (1987).

Often in philosophy, however, the "fact" is thought to be a kind of reality-in-itself, a reality totally devoid of any interpretation—divine or human—by which all attempts at interpretation are to be tested. . . . [T]here are no "brute facts". . . . A "fact" devoid of any normative interpretation would be a fact without meaning, without characteristics—in short, a nothing.

Id. at 71.

15. Roberto M. Unger's assessment of the empirical/historicist method as chief theoretician of the Critical Legal Studies movement is strikingly similar to that of Christian philosophers who follow Cornelius Van Til.

If [the historicist-empiricist] wants to maintain clear lines of causality, in which cause and effect are neatly matched in one-to-one sequences, he has to tear certain events out of the "seamless web" of history, in which everything seems to bear on everything else. But in so doing he willfully disfigures the truth of history, which it was his aim to establish. . . .

Suppose the historicist refuses to sacrifice complex historical truth on the altar of one-way causation. . . . Having discovered that all things cause each other in social life, as in the world at large, he wants to find a way to represent this insight in what he says about society. Alas, his eagerness is self-defeating. The more causes he takes into account, the less he is able to distinguish discrete relationships of cause and effect. In the end, the very notion of causality flounders in ambiguity.

ROBERT M. UNGER, *LAW IN MODERN SOCIETY* 12-13 (1976).

the effect of social policy decisions. Yet in the past, without ever proving a theory of causation, policy-makers have set out to treat not only criminals, but even the population generally.¹⁷ That this entire enterprise is based on empirically unproven and unprovable assumptions is usually ignored.

B. *Punishment Isn't Right*

In light of increasing crime and the abysmal failure of our penal system, it is necessary to explain why Americans cling so tenaciously to the myth of punishment. Judge Nygaard's explanation is that people have a very deep-seated and illicit desire for vengeance. To deal with this problem he appeals to man's conscience by simply confronting him with his guilt. This approach appeals to man's moral sense that some things are just plain wrong, while the self-interest approach, discussed above, appeals to people as rational decision makers who base their decisions on a utilitarian calculation of costs and benefits.¹⁸

Judge Nygaard appears to believe that punishment, or at least corporal and capital punishment, is basically wrong as a fundamental moral postulate, regardless of any effectiveness in reducing crime. This is evident in his treatment of the Michael Fay caning incident.¹⁹ Judge Nygaard treats caning as wrong despite uncontroverted evidence, which he himself offers, showing that corporal punishment promotes public safety in Singapore.

If we consistently followed an empirical approach to knowledge, we would have to abandon many claims to knowledge that otherwise we would make without hesitation. (i) Empiricism cannot justify a *general* proposition, such as "all men are mortal". . . . Such general propositions always go beyond anything we can observe, because they encompass the whole universe. . . . (ii) Empiricism cannot justify any statements about the future, for no one has known the future by sense-experience (iii) As Hume pointed out, empiricism cannot justify any statements about ethical values. Statements about sensible facts do not imply anything about ethical goodness or badness, right or wrong, or obligation or prohibition.

FRAME, *supra* note 14, at 117-186.

17. Unfortunately, criminologists have not come up with the right theory. Nevertheless, the problem of crime is so great that Vold states, "[P]ractical measures cannot wait on theory—society must do something about crime." GEORGE B. VOLD, *THEORETICAL CRIMINOLOGY* 394 (2d ed., Thomas J. Bernard 1979).

18. JEREMY BENTHAM, *THE RATIONALE OF PUNISHMENT* 19-41 (1830) *quoted in* PETER W. LOW et. al., *CRIMINAL LAW* 8-9 (1987).

19. *Delay Sought in Singapore Caning Penalty*, ARIZONA REPUBLIC, Mar. 26, 1994, at A24.

Under this second approach—that punishment is simply wrong—Judge Nygaard is left with the problem of proving that punishment is an improper value. But value judgments are not subject to empirical proof. While the utilitarian approach discussed above may appear to avoid the problem of justifying values, such is not the case.

Utilitarian philosophy has been the handmaiden of legal positivism²⁰ and enjoys the perception that morally neutral policy decisions can be made solely on the basis of empirical studies. Law is then viewed simply as an instrument to implement policy decisions.²¹ The utilitarian approach gives the illusion that law is separate from moral values.²² With utilitarianism something is “good” if it works in achieving a particular end. But how does one prove that the end is good? The perception of moral neutrality belies the fact that utilitarian approaches entail fundamental moral choices that cannot be empirically legitimized or proven to be good.²³

In Judge Nygaard’s case the end to be achieved is the moral value of public safety. Not only is the empirical method unable to prove an efficient means for achieving that end, but it is also unable to legitimize the end because the end is a moral value. Certainly everyone would agree that public safety is a legitimate end or good. However, it is not an absolute good or even the highest good. For instance, no one would give up all liberty to secure safety. The relation that safety will bear to other values calls for moral judgment.

Whether a person takes a utilitarian or moral postulate approach one must justify basic values. Empiricism is simply incapable of justifying values. Therefore, appeal must be made to some other methodology.

III. PUNISHMENT AS A LEGITIMATE VALUE

A. *The Value of Punishment*

Let me suggest that the desire to see criminals punished is a legitimate value, just as the desire for public safety is a

20. EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 84-109 (Rev. ed. 1974).

21. *Id.* at 95.

22. *Id.* at 290-300.

23. FRAME, *supra* note 14. See also MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 64-85 (1987) for a discussion of the relation of facts to values and reason to desire.

legitimate value. As values they cannot be scientifically "proven" to be right or wrong. However, this does not mean that they are simply matters of preference or that they cannot be validated and supported in a satisfactory manner. It is important to remember that just because values may be misconstrued does not mean they have been invalidated. For example, punishment is often excessive or imposed with improper motives or for improper ends, but that does not mean punishment is not a legitimate value. Likewise, the desire for public safety may improperly lead to a loss of freedom or be used to summarily rid society of undesirables, but that does not mean public safety is not a legitimate value.

If punishment is a legitimate value, and if it is applied fairly, then we should expect it to promote public safety. However, punishment is not legitimized just because it promotes safety. Nor is punishment necessarily a subordinate value which we promote as a means to the greater value and end of public safety. Instead we should expect that all values are interrelated and foster one another. We should also expect in a society where proper values are applied, to find supportive evidence of their effectiveness, although not necessarily in the nature of "empirical proof."

The problem then is to establish the legitimacy of particular values. Few people are willing, and none are able, to live consistently with the relativistic view that all values are equally legitimate.²⁴ At the same time, few people, if any, are willing to accept the views of the most powerful, or the brightest and best, or even the majority as necessarily right.²⁵ However, people inevitably founder on the rocks and shoals of relativism if they are unwilling to recognize that it is God who reveals truth and establishes legitimate values. In fact, the surest guide to securing

24. FRAME, *supra* note 14, at 119-121.

25. In his review of ROBERTO M. UNGER'S KNOWLEDGE AND POLITICS (1975), Arthur Leff, speaking as the devil, poses the dilemma very aptly:

You were trapped in what, to save time, I might call a Godel problem: how to validate the premises of a system from within itself. "Good," "right" and words like that are evaluations. For evaluations you need an evaluator. Either whatever the evaluator says is good *is* good, or you must find some superior place to stand to evaluate the evaluator. But there is no such place in the world to stand....

Or put it another way, one more congenial, I think, to both of us, by dispensing with God we did more than just free ourselves of some intellectual anachronism. We also dispensed with the only intellectually respectable answer to the ultimate "Why is it right to do X?"

Arthur Allen Leff, BOOK REVIEW, 29 STANFORD L. REV. 879, 887-88 (1977) (*reviewing* ROBERTO M. UNGER, KNOWLEDGE AND POLITICS (1975)).

genuine public and self-interest is to value what God values and to act accordingly. Because God knows everything and reveals some things to man, man can know some truths without knowing everything.²⁶ He is spared the empiricist's dilemma of having to know everything in order to know anything.

The critical importance of Christian theology in the development of Western criminal law is well-documented.²⁷ Legal doctrines are justified by, and maintain coherence as part of, a particular worldview.²⁸ In Christian theology, the supreme demonstration of the principles of justice is found in the doctrine of atonement.²⁹ The Christian doctrine of atonement is of singular importance for theories of punishment, as it is the judicial archetype of the way in which God deals with sin and crime.³⁰ The civil magistrate, as God's agent and minister of justice, should deal with crime and civil wrongs according to the same principles by which God deals with sin through the atonement.³¹

Christian Scripture teaches that all men have sinned and are therefore deserving of death.³² Sin is a personal offense against God, and his disposition toward sin is one of wrath and determination to exact justice.³³ Because punishment is a necessary component of atonement, men must be punished, or Christ must vicariously suffer the punishment that they deserve.³⁴ The

26. See FRAME, *supra* note 14; Job 28:20:

"Where then does wisdom come from? Where does understanding dwell? It is hidden from the eyes of every living thing, concealed even from the birds of the air. Destruction and Death say, 'Only a rumor of it has reached our ears.' God understands the way to it and he alone knows where it dwells, for he views the ends of the earth and sees everything under the heavens."

27. See HAROLD J. BERMAN, LAW AND REVOLUTION (1983), and sources cited therein.

28. What happens when the positive rules of the state lose all touch with a higher law and come to be seen as nothing more than the outcomes of a power struggle? Can the ideals of autonomy and generality in law survive the demise of the religious beliefs that presided over their birth?

ROBERTO M. UNGER, LAW IN MODERN SOCIETY 83 (1976).

29. God presented him as a sacrifice of atonement, through faith in his blood. He did this to demonstrate his justice, because in his forbearance he had left the sins committed beforehand unpunished—he did it to demonstrate his justice at the present time, so as to be just and the one who justifies the man who has faith in Jesus.

Romans 3:25-26. Hugo Grotius notes that "[n]othing is more influential with men than examples of justice." Quoting Valerius Maximus in A DEFENSE OF THE CATHOLIC FAITH CONCERNING THE SATISFACTION OF CHRIST AGAINST FAUSTUS SOCINUS 98 (Frank Foster trans., 1889). Conversely, few things are so demoralizing as demonstrations of injustice. *II Corinthians* 2:13.

30. Jeffrey C. Tuomala, *Christ's Atonement as the Model for Civil Justice*, 38 AM. J. JURIS. 221, 221-24 (1993)

31. *Id.*

32. *Romans* 1:32.

33. *Psalm* 51:3-4; *Romans* 1:18.

34. *Romans* 5:9-11; *Ephesians* 2:4-5; *Colossians* 1:21; *I John* 4:7-12.

essence of the atonement doctrine is that Christ died a substitutionary death as both a punishment and a payment for man's sins. God could not simply remit man's punishment nor accept less than full satisfaction without himself acting unjustly.³⁵ The reason for this is that God's very character is just. Consequently, all his laws and ways reflect his just character. Justice is therefore not the product simply of God's will, but rather of his unchanging nature.³⁶

The primary effect of Christ's death was to change God's judicial disposition toward man, not man's disposition toward God. But Christ's death also establishes an objective basis for man's reconciliation to God.³⁷ However, it is the peculiar work of the Holy Spirit which makes reconciliation a reality by revealing the truth to men and thereby transforming their lives.³⁸

God has established civil authority; it does not come into existence simply as a matter of social contract.³⁹ He has called judges to serve as his "agent[s] of wrath to bring punishment on the wrongdoer."⁴⁰ As an agent exercising delegated authority, the judge must administer civil justice according to the same principles by which God dealt with all sin through Christ's atonement. Our justice system should reflect two key principles: that an offender deserves to be punished (retribution), and that he owes payment (restitution) to the offended party.⁴¹ It is true that vengeance is the Lord's, but vengeance also belongs to God's human agents of wrath and ministers of justice.⁴² The desire to see criminals punished need not be irrational or vindictive. In

35. Christ's death as a punishment is reflected in the following passages: *Isaiah* 53:5 ("But he was pierced for our transgressions, he was crushed for our iniquities; the punishment that brought us peace was upon him, and by his wounds we are healed."). *I Peter* 2:24 ("He himself bore our sins in his body on the tree, so that we might die to sins and live for righteousness; by his wounds have you been healed."). Similarly Christ's death was a payment for our debts. *Psalms* 49:7-9 ("No man can redeem the life of another or give to God a ransom for him—the ransom for a life is costly, no payment is ever enough—that he should live on forever and not see decay."); *I Peter* 1:18-19 ("For you know that it was not with perishable things such as silver or gold that you were redeemed from the empty way of life handed down to you from your forefathers, but with the precious blood of Christ, a lamb without blemish or defect.")

36. *Deuteronomy* 32:4; *Psalms* 92:15; *Matthew* 5:48; *Revelation* 4:8.

37. *Romans* 3:25; *Hebrews* 2:17; *I John* 2:1-2, 4:10.

38. *John* 3:1-21; *Romans* 8; *Ephesians* 2:1; *Titus* 3:5-7.

39. *Romans* 13:1.

40. *Romans* 13:4.

41. Tuomala, *supra* note 30, at 229-33.

42. *Romans* 13:4 ("For he [the civil magistrate] is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer.")

fact, we should be reluctant to call a man good who does not respond with indignation toward the wickedness he sees in the world. We should respond with satisfaction in seeing wickedness punished,⁴³ not out of vengeance, but out of respect for justice.

Punishment of sin is a necessary condition of Christian salvation. If that requirement is rooted in the very nature of a righteous, just and holy God, punishment should be viewed as a positive moral value.

B. *Punishment is Valuable*

Judge Nygaard finds a system of justice that focuses on punishment to be faulty because it is backward-looking. Instead, he believes our focus should be on rehabilitation because it is valuable in securing our future safety.⁴⁴ However, I believe the biblical atonement model teaches that we should focus on satisfying the demands of justice. Restitution restores victims, and retribution expiates the guilt of offenders, thereby establishing a sound basis for reconciliation of the offender to his victim, the community and himself. When the system focuses on changing the criminal's behavior through deterrence, or on changing the criminal's character through rehabilitation, the victim is left with a sense of injustice and the offender is left with the burden of guilt. The opportunity for reconciliation and restoration is then lost. Just as Christ's death establishes the objective basis for reconciliation, retribution and restitution establish the basis for rehabilitation.⁴⁵

Although the state is appointed to serve as God's agent of justice, is it similarly appointed to serve as his agent of reconciliation and rehabilitation? Judge Nygaard assumes the answer is yes. Therefore, it becomes the state's role to tax and spend for the purpose of finding the causes and cures for crime and administering rehabilitation programs. However, I believe on this

43. *Psalm* 45:7 ("You love righteousness and hate wickedness; therefore God, your God, has set you above your companions by anointing you with the oil of joy.")

44. While it is generally considered positive to be forward-looking rather than backward-looking it is not a virtue in courts of law. It is a court's duty to ascertain what happened in the past and apply a rule of law to determine culpability or liability. Sanctions are then applied to restore the *status quo ante*. For a court to focus on the prospective effect of its ruling is to confuse law with politics. When a court designs a sentence for deterrence or rehabilitation it makes a decision which is inherently political rather than legal in nature.

45. Tuomala, *supra* note 30, at 229-233.

point that Scripture gives quite a different answer. It is the Church, not the state, that has been primarily entrusted with the ministry of reconciliation.⁴⁶ While the state exercises the ministry of justice through the sword of steel,⁴⁷ the Church performs the ministry of reconciliation through the power and sword of the Holy Spirit.⁴⁸ The modern state is notorious for neglecting justice and appropriating for itself the role of the Church under the guise of "social justice." But it is a role for which the state is neither entrusted, empowered nor competent.

I believe that acceptance of a criminal justice system which focuses on state-imposed rehabilitation entails a massive threat to liberty. This is especially true if the medical model of detection and treatment forms the basis of penology. Logically, criminals could be indeterminately incarcerated until cured. Procedural protections, such as trial by jury, proof beyond a reasonable doubt, and a right to remain silent, impede detection of illness. These procedures should then be eliminated since they hamper diagnosis and treatment. Criminals and potential criminals would be dealt with on the basis of what they might do rather than what they have done.⁴⁹

Judge Nygaard quite properly believes that the key to rehabilitation lies within the individual. But what if social scientists "discover" that the real problem lies with unjust social and economic systems? A rational policy might then include a comprehensive preventive program of social hygiene that would encompass all potential offenders.⁵⁰ Eventually, rehabilitation would become indistinguishable from theories of social justice which focus on a statist reordering of social structures and control of the entire population. After all, preventive medicine is always more effective than curative or remedial treatment.

Rather than using the adjudication of particular wrongs as an occasion to promote some vision of the public good by means of deterrence or rehabilitation, the state would then engage in

46. *II Corinthians* 5:18-19 ("All this is from God, who reconciled us to himself through Christ and gave us the ministry of reconciliation: that God was reconciling the world to himself in Christ, not counting men's sins against them. And he has committed to us the message of reconciliation.").

47. *Romans* 13:1-7.

48. *Acts* 2:8 ("Take the helmet of salvation and the sword of the Spirit which is the word of God."); *Ephesians* 6:17 ("But you will receive power when the Holy Spirit comes on you; and you will be my witnesses in Jerusalem, and in all Judea and Samaria, and to the ends of the earth.").

49. Tuomala, *supra* note 30, at 241-44 and the sources cited therein.

50. *Id.* at 243, 248-50.

an increasingly comprehensive, continuous and purposive intervention in all human affairs. This perspective demands that regardless of the source of a problem the state must take corrective action. If the "causes" of crime are illiteracy, poverty, inadequate housing, unemployment, malnutrition, substance abuse, or broken homes, the state must act. The state then ends up usurping the role of individuals, families, voluntary associations and churches. Individuals and other institutions in turn default on their responsibilities with the ready excuse that only the state has the adequate professional skills and resources to deal with the problems.⁵¹

Rehabilitation, like punishment and public safety, is a legitimate value, but it is not the immediate goal of a justice system. Punishment establishes a basis for rehabilitation, and it may incidentally deter, but its primary purpose is to satisfy justice. The state's role should be limited to punishing criminals and requiring restitution.⁵²

Although the empirical method is unable to prove the causes of crime or to legitimize values, certainly evidentiary considerations have a role to play in supporting a theory of penology. The facts that the penal system is such a failure and that the crime rate is so high are good indications that we are doing something wrong. Judge Nygaard does us a great service in stressing the importance of penal theory. Without a theory there is no direction to look for evidence nor a framework to order and explain the meaning of our observations.⁵³

51. A. A. Stone's critique of government involvement in the mental health system and the role of experts is intriguing:

3. The acceptance of this inflated technological posture has led to the development of a huge array of mental health technicians ... few of whom in fact have significant technical skills. Rather, much of what they do is the providing of personal care, attempting to engraft a meaningful human relationship on what poses as a technical service.

...

5. In this framework the family has been encouraged to evade certain of its historic human and moral responsibilities by defining them as technical problems which require scientific solutions provided by the State.

A.A. STONE, *MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION* (1975), excerpted in FRED COHEN, *THE LAW OF DEPRIVATION OF LIBERTY* 214, 224 (1980).

52. Tuomala, *supra* note 30, at 225-35.

53. George B. Vold recognizes this problem:

But it is obviously impossible to search with any degree of effectiveness [for causes of crime] unless one knows what one is looking for.... [I]t is the underlying theory of criminality that determines what it is that one is looking for.... "[R]esearch in criminology" can find only that which the theory of criminality underlying the project makes it possible to look for.

VOLD, *supra* note 17, at 381.

A criminology based on scriptural principles recognizes that the causes of crime are linked to the sin nature of man.⁵⁴ Social conditions may influence people for good or for bad,⁵⁵ but the heart of the problem is the human heart.⁵⁶ Do social theorists factor this into their theories? If they do not, and if Scripture is true, they will look forever and never identify the problem. Likewise, do their theories, as they relate to cure, take into consideration the power of God's word and of the Holy Spirit to change lives? Most likely they begin with the assumption that these claims are false, or at best irrelevant.⁵⁷ As a result, studies do not focus on these religious factors.

Scripture repeatedly links obedience to God's blessing and disobedience to his curse.⁵⁸ Part of his blessing is to live in safety.⁵⁹ This applies to nations as well as to individuals. Perhaps the number one assumption that criminologists share is that the state can and must go beyond punishment and compensation to rehabilitate criminals and establish vast social programs designed to control human behavior. That these programs seem to be such a failure is a good indication that they are unlawful. That we have such a crime problem should give us cause to examine how we do criminal justice and how we order ourselves socially. We must interpret events and "facts" in light of God's word, because it gives them meaning.

Perhaps an example would be helpful. Compulsory state school attendance was offered as the first panacea for the crime problem.⁶⁰ Even to this day it is promoted as the surest solution

54. *Mark* 7:15 ("Nothing outside a man can make him 'unclean' by going into him. Rather, it is what comes out of a man that makes him 'unclean.'").

55. *I Corinthians* 15:33 ("Do not be misled: 'Bad company corrupts good character.'").

56. *Mark* 7:21-22 ("For from within, out of men's hearts, come evil thoughts, sexual immorality, theft, murder, adultery, greed, malice, deceit, lewdness, envy, slander, arrogance and folly.").

57. VOLD & BERNARD, *supra* note 7, at 6-8.

58. *Deuteronomy* 28:1-2 ("If you fully obey the LORD your God and carefully follow all his commands I give you today, the LORD your God will set you high above all the nations on earth. All these blessings will come upon you and accompany you if you obey the LORD your God."); *Deuteronomy* 28:15 ("However, if you do not obey the LORD your God and do not carefully follow all his commands and decrees I am giving you today, all these curses will come upon you and overtake you.").

59. *Jeremiah* 32:37b-39 ("I will bring them back to this place and let them live in safety. They will be my people, and I will be their God. I will give them singleness of heart and action, so that they will always fear me for their own good and the good of their children after them.").

60. Horace Mann (1796-1858), the "Father of the Common Schools," expressed a hope shared today that state schools, as the primary instrument of social order, would

to a plethora of social problems, including crime. But consider the facts. Most criminals are young, most have had six to twelve years of compulsory schooling. The state spends ever-increasing amounts of money on schooling, yet crime increases, even within the schools.

One of the primary conditions of God's blessing is to train our children in God's truth and law.⁶¹ But we have rejected this as a society in a massive way and are reaping the results. Just as jails become a training ground for criminals, state schools have become the spawning pond.⁶² In part, the celebrated cure for crime has become a cause. This is not to suggest that religious instruction be added to a state school curriculum. Instead, it is a call to examine the legitimacy of state schools.⁶³ Has God commissioned the state to serve as society's broker of truth and molder of character? Other government programs and laws have weakened the family. The breakdown of the American family is perhaps an even greater cause in the rise of crime.⁶⁴

cure most of society's maladies, and in particular, the problem of crime.

The Common School is the greatest discovery ever made by man. . . . Other social organizations are curative and remedial; this is a preventive and an antidote; they come to heal diseases and wounds; this to make the physical and moral frame invulnerable to them. Let the Common School be expanded to its capabilities, let it be worked with the efficiency of which it is susceptible, and nine-tenths of the crime in the penal code would be obsolete

E.I.F. WILLIAMS, HORACE MANN, EDUCATIONAL STATESMAN 248-49 (1937) (quoting from *Introduction*, 3 THE COMMON SCH. J. 1st (Jan. 1, 1841)).

61. *Deuteronomy* 6:6-7 ("These commandments that I give you today are to be upon your hearts. Impress them on your children. Talk about them when you sit at home and when you walk along the road, when you lie down and when you get up."). This kind of education certainly provides a sharp contrast to that provided in public schools where the Ten Commandments, Bible reading, and prayer are curtailed. See *Stone v. Graham*, 449 U.S. 39 (1980); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

62. See Donald L. Beci, *School Violence: Protecting Our Children and the Fourth Amendment*, 41 CATH. U.L. REV. 817 (1992).

63. This is definitely not a call for prayer or religious training in public schools. First, nowhere has God given the state jurisdiction over the education of children. Secondly, the First Amendment quite properly forbids establishing the state as the arbiter of truth or establishing an orthodoxy of belief. The state necessarily engages in impermissible activity when it establishes schools. See Herbert W. Titus, *Education, Caesar's or God's: A Constitutional Question of Jurisdiction*, 3 JOURNAL OF CHRISTIAN JURISPRUDENCE 101 (1982).

64. Francis Allen notes:

The displacement and diminution of family authority in the modern world constitute one of the most thoroughly documented phenomena in Western society. . . . The reality of the modern American family is that its authority in the area of child rearing has been significantly displaced by the state, the

Scripture makes it clear that punishment is valuable and that it contributes to rehabilitation and public safety. When law-abiding people see justice done they should rejoice, and the wicked should be terrified. Criminals realize they deserve punishment because their consciences bear witness to that fact.⁶⁵ Civil punishment reflects God's justice and expiates that burden of guilt. It also reminds men of their own sin and accountability ultimately to God and their own need to be reconciled to Him.⁶⁶ For this reason punishment, including capital punishment, has a rehabilitative effect where it counts most—for eternity.⁶⁷

IV. A MODEST PROPOSAL

Even if we agree that punishment is a legitimate value of the justice system, we are faced with a very real problem—what specific forms of punishment are just? Although I do not share Judge Nygaard's belief that execution of criminals is too severe and unmerciful, serving no rehabilitative or deterrent goals, I do believe that capital punishment is unjustly disproportionate for most offenses. I do share his concern that public anger about crime, combined with political opportunism, will lead to the unjust enactment of sentencing standards and to an unjust application of punishment generally. I suspect that Judge Nygaard's charge that prisons only make criminals worse at incredible expense to the state is also true. Additionally, because prisons are so full and imprisonment is such a drastic sanction, judges are reluctant to impose it even when at least some punishment is deserved.

schools, "experts," peer groups, and the market. [P]ublic policy in the twentieth century has generally promoted increasingly broad interventions of state power into areas of decision making formerly reserved for parental authority. . . . The rise of sciences of human behavior provided a rationale for such interventions by transforming child rearing into an area of community concern demanding the ministrations of practitioners trained in medicine, social work, and other behavioral disciplines.

ALLEN, *supra* note 9, at 20-21.

65. *Romans* 3:3 ("For rulers hold no terror for those who do right, but for those who do wrong."); *Romans* 2:15 ("[T]hey show that the requirements of the law are written upon their hearts, their consciences also bearing witness, and their thoughts now accusing, now even defending them.").

66. In fact, All Soul's Day was instituted to remind Christians that all men will stand before God in judgment. It is a guard against spiritual arrogance as all men reflect upon their own sin as well as the promise of forgiveness. BERMAN, *supra* note 27; at 170-71.

67. See HERBERT W. TITUS, *GOD, MAN, AND LAW: THE BIBLICAL PRINCIPLES* 285 (1994), in which Titus makes the case that a purpose of all punishment, including capital punishment, is restorative in nature.

This further aggravates the problem of crime and public outrage.

Of course it is easy for members of the public, and perhaps politicians, to call for more severe punishments. They are not as immediately accountable for their actions as are judges. I suspect that it is upon the judge's conscience that sentencing decisions weigh most heavily. Judges realize that crime affects real people, but so does punishment.

The problem is that there appear to be no real alternatives to the current costly and ineffective system of prison and parole.⁶⁸ Judge Nygaard raises the issue of corporal punishment, but only to illustrate the vengeance-guilt of the American public. He does not describe corporal punishment as "cruel and unusual," and therefore, inhumane as well as unconstitutional, but his essay certainly reflects that sentiment.⁶⁹ However, my belief is that prison, by nearly every standard of measurement, is more "cruel and unusual" than corporal punishment. Of course corporal punishment is subject to abuse, but the abuses are not as inherent to it as they are to imprisonment.

No doubt corporal punishment is painful and severe, but it need not be cruel. There is no reason for corporal punishment to result in disfigurement or disability or to threaten loss of life. It is quickly over. By way of comparison, consider prison.⁷⁰ The convict is isolated from family, friends and home—those who possibly would be a good influence on him. He associates mostly with other criminals, many perhaps far worse than himself. Most likely he has little meaningful work and faces constant boredom. There are all sorts of dangers to his person—beatings, homosexual rape, increased risk of disease, and even death. There is a loss of privacy and dignity and perhaps the mental torture of an indefinite sentence. Such physical abuse does not follow a trial, it is not supervised and administered by lawful authorities, and it is not over once and for all.

Since corporal punishment is just one form of punishment, the basic issue is still a moral one: "Is it right?" Scripture

68. See Charles W. Colson, *Is There a Better Way? A Perspective on Criminal Prisons*, 2 CHRISTIAN LEGAL SOC'Y Q., Summer 1981, at 12, in which Colson suggests eleven alternatives to prison and eight more involving some incarceration. Neither capital punishment nor corporal punishment are included among them.

69. The Eighth Amendment to the U.S. Constitution forbids "cruel and unusual" punishment. Although state practice at the time of the Constitution was not necessarily constitutional, the fact that corporal and capital punishment were the mainstays of the criminal justice system is significant.

70. See KENNETH C. HASS & GEOFFREY P. ALPERT, *THE DILEMMA OF PUNISHMENT* 85-199 (1986), where the authors give an excellent description of what prison is like.

authorizes it as a form of punishment both within a disciplinary system such as the family, and within a criminal justice system, which is the state's jurisdiction. For example, parents are warned of the dangers of not punishing their children when it is deserved.⁷¹ The benefits of corporal punishment are that it drives out foolishness,⁷² imparts wisdom,⁷³ cleanses evil from the inmost being⁷⁴ and saves the soul from death.⁷⁵ In fact, the man who refuses to punish his son hates him.⁷⁶ Likewise, criminals are to be corporally punished if found guilty at a trial. The punishment must be proportionate to the offense. The person punished may not be degraded.⁷⁷ The New Testament testifies to the fact that corporal punishment is based on just desert.⁷⁸ Prison has often been promoted as a humane alternative to other punishment, but it definitely is not. As the Proverbs state, "The kindest acts of the wicked are cruel."⁷⁹ No doubt prisons are cruel.

It is often asserted that corporal punishment is unconstitutional as a cruel and unusual punishment. The federal courts have never ruled directly on the matter for criminals. They have, however, held that corporal punishment of school children does not violate the Constitution.⁸⁰ In school discipline cases, children who have not reached the age of majority are presented with no formal charges, are not represented by counsel, have no right to confront or cross-examine witnesses, have no public trial before

71. *Proverbs* 23:13 ("Do not withhold discipline from a child; if you punish him with the rod, he will not die.").

72. *Proverbs* 22:15 ("Folly is bound up in the heart of a child, but the rod of discipline will drive it far from him.").

73. *Proverbs* 29:15 ("The rod of correction imparts wisdom, but a child left to itself disgraces his mother.").

74. *Proverbs* 20:30 ("Blows and wounds cleanse away evil, and beatings purge the inmost being.").

75. *Proverbs* 23:14 ("Punish him with the rod and save his soul from death.").

76. *Proverbs* 13:24 ("He who spares the rod hates his son, but he who loves him is careful to discipline him.").

77. When men have a dispute, they are to take it to court and the judges will decide the case, acquitting the innocent and condemning the guilty. If the guilty man deserves to be beaten, the judge shall make him lie down and have him flogged in his presence with the number of lashes his crime deserves, but he must not give him more than forty lashes. If he is flogged more than that, your brother will be degraded in your eyes.

Deuteronomy 25:1-3.

78. *Hebrews* 2:2-3a ("For if the message spoken by angels (Old Testament) was binding, and every violation and disobedience received its just punishment, how shall we escape if we ignore such a great salvation?").

79. *Proverbs* 12:10b.

80. *Ingraham v. Wright*, 430 U.S. 651 (1977) (The Supreme Court held that schools may corporally punish students without notice or a hearing.).

their peers nor a judge trained in the law, and have not violated any standard of criminal law, may be corporally punished. It seems anomalous to suggest that it is unconstitutionally cruel and unusual to so punish an adult who has the full range of procedural protections.

Consider the case of a typical child abuser or spouse abuser and the dilemma a judge faces. If the father or husband is sent to prison he loses his income and perhaps his job. Now we likely have a dislocated family on welfare. Fearing these consequences, the wife or children may never report the abuse in the first place. The chances of rehabilitation and reconciliation are greatly reduced. Corporal punishment in such a case makes sense. It mirrors the wrong done and leaves the family intact. It also seems to be an appropriate sentence for a vast array of nonviolent behavior—drug abuse, drunk driving, theft, and even vandalism. In an attempt to be merciful to first-time offenders and nonhardened criminals, police, prosecutors and judges go easy because the severity of prison is so great. But the effect of unpunished crime is also great.

Even though calls for tougher prison sentences and capital punishment may be politically expedient, calls for corporal punishment apparently are not. Let me make a recommendation that may be easier for policymakers to sell. Give convicts a choice in the matter. Let them choose between the option of jail or corporal punishment. What would you do if faced with that choice? Now, by comparison, do you really believe corporal punishment is cruel and unusual?