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The Death of Punishment: Searching for Justice among the Worst of the Worst

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THE DEATH OF PUNISHMENT

THE DEATH OF PUNISHMENT

SEARCHING FOR JUSTICE AMONG THE WORST OF THE WORST

ROBERT BLECKER

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THE DEATH OF PUNISHMENT
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PART I

MAN THE MEASURE

1

KILLING THE WRONG PEOPLE

It is easy to get angry—anyone can do that . . .
but to feel or act towards the right person to the right extent at the right time
for the right reason in the right way—that is not easy

—Aristotle, *Ethics*

AS A SMALL CHILD, I KNEW THAT NAZIS WERE EVIL AND Adolf Hitler deserved to die. My mother staunchly opposed capital punishment, but she made an exception for Hitler. I was five when controversy flared in our house as the United States executed Julius and Ethel Rosenberg, accused Soviet spies. My ultraliberal mother believed the Rosenbergs innocent and insisted they were killed because they were Jews. My father, always sober and rational, taught me that any citizen who gave or even tried to give Joseph Stalin the atom bomb deserved to die.

In elementary school, kids would pull legs off spiders and laugh as the creatures struggled. I once pulled two limbs from a daddy longlegs. Then I thought about it from the spider's point of view. I felt sick and tried to make it up to this creature I'd crippled by leaving dead bugs for him to eat.

But Leech Rock was different.

At summer camp, we'd come in after swimming in the lake, bleeding, slimy leeches still clinging to us. You couldn't rip them off without losing your skin too. So we flicked them off with a lit match. The animals fell, helpless at our feet. Now what to do? We certainly wouldn't throw them back to attack us again. So we burned them in a ritual at Leech Rock. After all, unprovoked, they had shed our blood. It never occurred to us they were

just being leeches. But then, too, maybe by killing them, we were just being human.

During the Cold War of the 1950s, the Soviets killed political dissenters and prepared to destroy the United States. I learned in school that tyrants have always killed dissenters. But never here. I loved the United States, and in fourth grade I wrote patriotic poetry.

As I grew up, freedom became a big issue for me. I refused to keep my parakeet Tippy locked in a cage; he had a right to fly around the room whenever he wanted. My mother threatened to abandon my room to filth. I took her dare. Amanda, our black housekeeper, hated the dirt and scolded me for letting the bird make a mess. But when I explained why, Amanda snuck into my room to clean droppings from my shelves. My parents detested racism and racists. In Mississippi in 1955, the Klan murdered Emmett Till, a 14-year-old black boy, for flirting with a white woman.[1] I wasn't focused on the details, but I remember how upset they were when an all-white jury in Mississippi acquitted young Emmett's killers.

My parents also told me the story of Leo Frank. How in 1913, someone murdered young Mary Phagan in the basement of an Atlanta pencil factory. An ambitious prosecutor pressured witnesses and convinced a jury to convict Frank, the prominent Jewish factory superintendent. The real killer—a janitor there—"cooperated" with the prosecution. Frank's lawyers desperately fought to postpone his execution date while the judge who sentenced Frank to die admitted serious doubts about his guilt. Even the real killer's lawyer urged the governor to spare Frank's life. On his last day in office, the Georgia governor commuted Frank's death sentence, then fled the state with his family.[2] Vicious anti-Semitic attacks in the press stirred up public passions, and a Klan-led mob stormed the prison. They drove Leo Frank back to Mary Phagan's childhood home. While Frank protested his innocence and begged the mob to return his wedding ring to his wife, they lynched him.[3] No one prosecuted Leo Frank's killers[4]; his prosecutor, Hugh Dorsey, went on to become governor.

So I knew early on that prejudice stained the system; trials did not guarantee justice. The guilty might walk free while innocents were wrongly accused, falsely condemned, and killed. Those in power would make it murder or make it all right with a wink. And yet I still felt certain that Hitler and the racists who killed Emmett Till deserved to die.

Then came that day in eighth grade when I discovered Abraham Lincoln did not free the slaves. I idolized Lincoln and carried around Carl Sandberg's multivolume biography.[5] My social studies teacher, determined to strip me of idolatry, demanded I actually read the Emancipation Proclamation and

report to the class exactly which slaves Lincoln in fact freed. Of course it turns out that the Great "Emancipator" freed exactly no one he could. Slaves living in the Confederacy were now "free" to rebel and die in the attempt. But everywhere the Union Army controlled—in Maryland, for example—the commander in chief left all slaves in bondage.

Lincoln fell, and then came God. Reading the Old Testament in Bible study class revealed a divine support for genocide[6]—a God who would command the death penalty for homosexuality,[7] failing to keep the Sabbath,[8] or mouthing off to your parents.[9] A God who let the Holocaust happen. And when I challenged my Sunday school teachers, they could only insist, "No man can comprehend His ways," while they had no problem preaching against the death penalty, although the Bible clearly called for it.

First slavery, now segregation, tore America apart. I grew up looking down on the South. How could segregation be the *law?* I hated Southern sheriffs with attack dogs tearing up freedom fighters. Civil rights crusaders became my new heroes. The Soviets might be ahead of us in the space race, but Martin Luther King Jr. stirred me, while John and Bobby Kennedy glamorously and gloriously forced racial integration.

November 22, 1963, eleventh-grade social studies, seventh period. Studying the American Civil War again, only this time I knew that Lincoln hadn't freed the slaves. So no big surprises. The principal's metallic voice crackled on the intercom: President Kennedy had just been assassinated. Then Jack Ruby assassinated Kennedy's assassin, Lee Harvey Oswald, on TV![10] What was happening?

Off I went at 17 to Tufts University, loving my country, still grieving Kennedy, and believing in the death penalty. In 1965, we college freshmen fought to keep our door nearly closed with a woman in our dormitory room, while the women fought for the right to wear pants on campus. By our senior year in 1969, we had occupied buildings in protest and shut down the school. In addition to sex, drugs, and the Beatles, the war in Vietnam consumed us. And not only because we might be drafted to fight and die. Our political science professors taught us that Ho Chi Minh strove for a more just society. An admirer of the United States, although a Communist, Ho had modeled Vietnam's Constitution on ours. Only he wanted Vietnam—and not American big business—to control his country's natural resources. So President Eisenhower canceled promised elections because, as he explained, "If free elections had been held, Ho Chi Minh would have won 80 percent of the vote."[11]

In 1966, I marched against the war. We protesters formed a thin, ragged line down the middle of Manhattan's Fifth Avenue, while large, hostile

crowds lined the sidewalks. That summer in Chicago, Richard Speck murdered eight student nurses in their dorm. As he took them off to a bedroom, one by one, to strangle or stab each one to death, Speck lost count. Curazon Amurao, his would-be ninth victim, numb with terror, witnessed the scene from under a bed. She lived to identify Speck by his tattoo: "Born to Raise Hell."[12] Richard Speck, a monster by any measure, awaited society's verdict. Most of America cheered the jury that sentenced Speck to die. I wanted him killed, badly.

I was no law junkie, but the US Supreme Court made it exciting: *Miranda v. Arizona*[13] led an avalanche of opinions applying the Bill of Rights to the states, while court orders restrained local prosecutors and police from violating defendants' rights. Back on campus, along with the war, guilt at our nation's racist legal past tore at the breasts of moderate whites. We the People had screwed the Indians and then the blacks. And now, at last, our Supreme Court took seriously constitutional commands of equal protection and due process. The most radical among my fellow antiwar activists hated the United States and sneered at the justices' token gestures, laying their liberal guilt trip on the nation. They denounced the court as just another part of the system and characterized me and my fellow patriotic protesters as only "halfway."

The death penalty, though, really got me ostracized from the antiwar movement. Capital punishment provoked volatile arguments among us 19-year-olds. An unofficial national moratorium covered the United States, as judges and governors stayed all executions while a hundred different constitutional challenges from abolitionist lawyers made their way through the courts. For several months, no state had executed a condemned killer. But to me, that made the Vietnam War all the more perverse: In Asia we napalmed and killed thousands of innocent women and children, while in Chicago corrections officers served condemned killer Richard Speck his breakfast each morning.

Hugo Adam Bedau, this nation's leading academic opponent of capital punishment, chaired the philosophy department at Tufts. In 1968, students and faculty organized to abolish the death penalty in Massachusetts by popular referendum. The department could not be my home. When the people of Massachusetts voted decisively to keep capital punishment, campus abolitionists bitterly reacted in defeat, attacking my "absurd inconsistency."[14] How could anybody be antiwar yet pro–death penalty? (You hear echoes of that even today—how can a person oppose abortion, be "pro-life," and also be pro–death penalty?)

To me it was simple: We were killing the wrong people.

My protests against authority became my own. In college, I refused to major and almost did not graduate. But a tolerant administration bent the rules. After school, while my friends camped out at Woodstock and the United States fixated on the moon walk, I wandered around Europe on a playwriting fellowship and taught American culture at Vincennes, a left-wing French university. In the library there, I discovered the Great Books of the Western World.

For the next several months, I tried to soak up the wisdom of the classics—those highest lights of abandoned skies. Different worlds reached out to connect me to the Great Scene. Much of it is a blur now, but from the start, Plato's struggle with the Sophists struck home. The Sophists insisted that everything was relative, subjective, and arbitrary, including justice.

"Man is the measure of all things," proclaimed Protagoras.[15] Whatever a person could be made to believe became the truth—for him.

But Plato clung to real, objective, absolute truth and justice. And I clung to Plato. Of course the Sophists might have a point: Smoking pot, resisting the draft, and gay sex could get you punished. But only because those in power outlawed it. Killing eight student nurses in their townhouse or 6 million Jews in gas chambers made a man deserve to die. Not because I wanted it, not because most of us wanted it—but because objectively, in fact, he deserved to die.

Aristotle's concept of "equity" grabbed me: The strictest justice—legal justice, by the book, according to the rules—can sometimes be the greatest injustice.[16] We need equity—fuller justice, particular-to-the-situation justice. Did equity include mercy, I wondered? And how did it relate to poetic justice?

I was soaking up this stuff in Paris when Charles Manson hit the *International Herald Tribune.* Fiend *du jour,* this counterculture perversion had commanded his crazed followers to butcher the pregnant actress Sharon Tate and other innocent victims, smearing "PIG" and "HELTER SKELTER" on the walls in the victims' blood.

"The voice of your brother's blood cries to me from the ground," God said to Cain in Genesis. "Blood pollutes the land, and no expiation can be made for the blood that is shed in it except by the blood of him who shed it," the Bible later declares. "Blood pollution" may sound archaic, but it still captured my feelings of anger and disgust. Manson and Speck deserved to die regardless of whether anybody else would be deterred by their deaths—regardless of whether they continued to threaten us. As long as they lived, I felt polluted.

I moved on in the Great Books to John Stuart Mill, which led me to his mentor, Jeremy Bentham. According to these great utilitarians, people seek pleasure and avoid pain. Because a crime brings a criminal immediate pleasure, in order to restrain these rational, calculating pleasure-seekers from satisfying their harmful desires, society must make its threatened punishments more certain, swift, and severe.[17] Bentham's utilitarian calculus appealed to me—so orderly and crisp, with costs offsetting benefits. But in the end, Bentham's worldview, although rational and logical, *felt* wrong and unreal.

Bentham would have executed only those traitors whose lives posed a continuing threat of massive violence and social disruption. (Contrary to popular opinion, the Catholic Church, even today, tolerates the death penalty in this very unusual circumstance.[18]) But who counted as a "traitor"? War supporters labeled Americans who refused to fight as "traitors," although many of us loved our country. The British Crown in 1775 ordered Samuel Adams and John Hancock to hang for treason.[19]

History had taught us: Might makes right. Nobody described it better than the ancient historian Thucydides. In their great war, Athens controlled the seas and Sparta the land. The little country of Melos only wanted to be left alone. But the Athenians would not allow this tiny island nation to remain neutral. So they gave the Melian representatives an ultimatum: Pay tribute to Athens or die. When the Melians tried to protest this injustice, the Athenian representatives cut them off: "Justice depends upon the equality of power to compel. The strong do what they can; the weak accept what they must."[20] Perhaps there was no truth, no justice. Perhaps everything was relative, arbitrary, subjective. Maybe, as the Sophists insisted, justice *was* nothing but the interest of the stronger.

For an extended moment I doubted my commitment to moral truth. Then I remembered Charles Manson and Richard Speck. I felt certain that whatever the future costs and benefits, they should die—for the sake of the past. Plato had it right. Evil was real. When it came to justify punishing it, however, Plato disappointed me:

> In punishing wrongdoers, no one concentrates on the fact that a man has done wrong in the past or punishes him on that account, unless taking blind vengeance like a beast. No, punishment is not inflicted by a rational man for the sake of the crime that has been committed—after all one cannot undo what is past—but for the sake of the future, to prevent either the same man or, by the spectacle of his punishment, someone else, from doing wrong again.[21]

According to Plato, we may only kill those criminals we cannot correct, incorrigibles whose souls were beyond repair.[22] I needed a great mind to tell me that Hitler, Speck, and Manson must die, regardless of whether they could someday be converted into amiable golfing companions. The suffering of their tortured victims simply demanded it.

My flirtation with Plato and Bentham's pragmatic justification for punishment ended. Back in the Great Books I found Bentham's arch-opponent, Immanuel Kant: "A human being can never be manipulated merely as a means to the purposes of someone else. He must first be found deserving of punishment before we give any consideration to the utility of this punishment for himself or for his fellow citizens. Only the law of retribution can determine exactly the kind and degree of punishment."[23] At last a kindred spirit? "If he has committed a murder, he must die," Kant insisted. "There is no sameness of kind between death and remaining alive even under the most miserable conditions."[24] I carefully copied these passages into my notebook: "But the death of the criminal must be kept entirely free of any maltreatment that would make an abomination of the humanity residing in the person suffering it."[25]

Kant came closer to how I felt. But Kant, too, ultimately disappointed me, simplistically lumping all murderers together. Hitler, Speck, and Manson deserved a fate much worse than that reserved for common killers. Besides, Kant seemed too detached and devoid of anger. I understood our abstract duty to kill these monsters: They had committed capital crimes. But unlike Kant, I hated Charles Manson, Richard Speck, and other vicious predators like them. I wanted them to feel their victims' pain before they died. I searched further in the Great Books but could not find my voice.