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## THE MYTH OF PUNISHMENT: IS AMERICAN PENOLOGY READY FOR THE 21st CENTURY?

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Michael Fay, an American teenager who had earlier pleaded guilty to several acts of vandalism, was “caned” on May 4, 1994 in Singapore. He was stripped, bent at the hip over a padded trestle, tied down at his ankles and wrists and a martial arts specialist lashed his buttocks four times with a four-foot long, half-inch wide stick of rattan soaked in a diluted antiseptic. Fay, eighteen, who has lived in Singapore since 1992, was sentenced to four months in prison, a fine of \$2,230 and the caning after he pleaded guilty to various acts of vandalism and mischief.<sup>1</sup> All were relatively minor offenses by our standards.

The corporal sentence attracted great media attention in the United States. Few Americans did not express some view on the caning of Michael Fay. President Clinton urged Singapore President Ong Teng Cheong in a personal letter to “spare the rod” in Fay’s case and rescind a punishment that Clinton had earlier described as “extreme.”<sup>2</sup> In separate appeals to President Ong,

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\* Circuit Judge, United States Court of Appeals for the Third Circuit. This speech was delivered to The Pennsylvania Bar Association Eleventh Annual Symposium On Criminal Law on May 4, 1994.

1. William Branigin, *American Teenager Awaits Caning in Orderly, Unbending Singapore*, WASH. POST, Apr. 13, 1994, at A20.

2. *Id.*

twenty-four U.S. Senators said clemency would be “an enlightened decision.”<sup>3</sup> American public opinion, however, expressed surprisingly solid support for the punishment.<sup>4</sup> Indeed many even wrote the Singaporean Embassy in Washington, D.C. to express their approval.<sup>5</sup> The predominant reason for the support was clearly articulated—Americans are fed up with crime and consider the punishment given U.S. offenders to be “too lenient.”<sup>6</sup> In Dayton, Ohio where Fay’s father lives, citizens supported this punishment by a 2-1 margin.<sup>7</sup>

Apparently buoyed by an outpouring of support from crime-fearing Americans, the Singaporean courts and government stood firm against the appeals from U.S. officials and, except for reducing the number of lashes, rejected the pleas for mercy and clemency. The Home Affairs Ministry said in response to criticism from the U.S. Embassy, “It is because of our tough laws against antisocial crimes that we are able to keep Singapore orderly and relatively crime-free. We do not have a situation where acts of vandalism are commonplace, as in cities like New York, where even police cars are not spared the acts of vandals.”<sup>8</sup> Singapore’s Senior Minister, Lee Kuan Yew, supported the Ministry statement, saying, “The punishment is not fatal. It is not painless. It does what it is supposed to do, to remind the wrongdoer that he should never do it again. And it does work.”<sup>9</sup> A Singaporean doctor who has seen the scars left by caning, corroborated this conclusion adding, “They don’t forget it.”<sup>10</sup>

America long ago discontinued the practice of corporal punishment as a criminal sanction. Any violence incurred by a convicted offender is a byproduct of incarceration. It is not institutionalized nor acceptable in our constitutionally supervised penology, that is, of course, with one notable exception — we kill. American criminal punishment is simple: probation, incarceration or death. Offenders are either swept from public view to prison, where few visit or even care to, or they are spectacularly

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3. *Id.*

4. *Id.*

5. Jason Vest, *Justice Under the Lash: Did Singapore Beat a Confession Out of a Young American?*, WASH. POST, Apr. 15, 1994, at D1.

6. Branigin, *supra* note 1.

7. *Id.*

8. *Id.*

9. Robert Benjamin, “Kiasu” Society Seeks To Save Face, THE SUN (Baltimore), Apr. 17, 1994, at 24A.

10. *Id.*

executed. Since we abolished corporal punishment, criminal laws have come and gone. For the most part, however, the number of acts proscribed by law has expanded geometrically. We are prosecuting, convicting and punishing greater numbers of people than even before—but we do not seem to progress.<sup>11</sup>

The United States recently passed a new crime bill.<sup>12</sup> Among other things, it grasped onto a sports analogy and enacted into law the spirit of the slogan, “Three strikes and you’re out,” the concept that third-time offenders of certain crimes should be put “out of society” and “in prison” for life.<sup>13</sup> Unfortunately, this law and this concept, like their predecessors, will not control crime, will not stem the tide of lawlessness, and, unfortunately, will evade the real issue—public safety.

Cicero said, “*Salus populi suprema lex esto*”—the safety of the public shall be the first law.<sup>14</sup> I am deeply concerned because the safety of the public is now given insufficient concern in the calculus by which we determine how we will treat our criminals. I fear that safety is no longer America’s first law.

Citizens increasingly feel that America has a gun to its head and someone has a finger on the trigger. Crime in America has

11. The citizenry has, in reality, turned over to the government the right to protect itself. In the interest of society it has in a practical sense ceded to the government its right to shoot back, and in the actual sense the right to shoot first. But in doing so, society is entitled to expect that the treatment given those convicted of crimes will not only punish them, but will also correct them so that when released; they have not only served time, but that society will be safe when they are reinculturated. This is not now happening.

12. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

13. Specifically, this section of the act provides:

Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if—

(A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of—

(i) 2 or more serious violent felonies; or

(ii) one or more serious violent felonies and one or more serious drug offenses; and

(B) each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant’s conviction of the preceding serious violent felony or serious drug offense.

*Id.* (to be codified at 18 U.S.C.A. § 3559).

14. CICERO DE LEGIBUS III. iii. 8.

grown significantly and grows steadily more serious.<sup>15</sup> Our theories of criminal law are not necessarily at fault. Our trial mechanism, prosecutors, attorneys and judges, although overburdened and underfunded, systemically work well. Our prison system does what government intends it to do. American penology, however, is in shambles. It is critically important in any omnibus approach to crime control that we examine and reconsider the theoretical underpinnings of American penology which is now guided by a philosophy that has been parodied and condemned by writers, penologists and philosophers since the time of Aeschylus, and it simply does not work well.<sup>16</sup> The entire belief in punishment as the sole response to crime is a myth. The simple truth is that punishment alone does not and will not control crime.

Let me illustrate by referring to two individuals: two very opposite people whose paths crossed and created a textbook paradigm which generates many, but answers few, questions about American penology. This case points out the serious and unending deficiencies in the American sentencing system.

The first person is not a member of your society and mine. He is a member of a criminal counter-culture, whose only interest

15. *E.g.*, *For the Record, From Remarks by FBI Director Louis Freeh at a Senate Judiciary Committee Hearing Yesterday*, WASH. POST, Feb. 15, 1995, at A18.

The level of crime in the United States is tragically and unequivocally high. From 1960 through 1993 . . . the number of violent crimes reported in America increased 567 percent. In the last 10 years only, it increased 51 percent. The level of fear in America is even higher. A recent survey showed 93 percent of those polled said addressing America's crime problem should be an absolute priority for the federal government. . . .

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Despite the many battles and wars of this century, Americans never before have been the subjects of a foreign dictator. Ironically, they now fear becoming the victims and prisoners of violent crime and a fear imposed on America by an army of home-grown criminals.

*Id.* For a discussion of the explosion of crime in America, *see, e.g.*, Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment*, 34 S. TEX. L.J. 443 (1993).

16. There are really only four principal penological or philosophical bases for sentencing: Retribution, Containment, Deterrence, and Rehabilitation. For two centuries America has followed the theories of Locke, Hume, Kant, Hegel and others – retribution. But justice is not a Kantian or Hegelian balance sheet, and the role of retribution, or “just deserts,” is legitimate solely as an outer limit of punishment, not its *raison d’être*. A “get tough,” retributivist sentencing system does not correct man; it tends to harden him and render him more cruel. If one is punished beyond just deserts, the sentence merely becomes a part of the spiral of violence as recrimination between our laws and the rebellious escalates.

in our system is to avoid it or subvert it for his own benefit. He cares nothing for our laws or morality. The second person graduated from college, became an artist and typifies the traditional American way: law abiding, employed. A product of an average home. She carried no gun, knew no self-defense maneuvers, and had no "street smarts."

The first person wanted no part of our system; the second person depended upon it. But the system failed Kristen Huggins, and she is dead. People in the Philadelphia area were shocked to learn that she had been kidnapped and brutally murdered. Not long after she disappeared, the police arrested one Ambrose Harris. The newspapers reported that he, while out to conduct a carjacking, had abducted Ms. Huggins, placed her in the trunk of her own car, and when she made too much noise and he realized she was a potential witness to his crime, put two bullets in her head. Harris was just days out of prison. He was not released by some bleeding-heart judge who gave him a light sentence, or who was misguided by some notion that Harris did not deserve imprisonment. He was released from prison after serving the full nine years of a four-to-nine year sentence. Indeed, between the years of 1976 and 1992, Harris spent all but ninety of those days behind bars. For fifteen and three-quarters of the last sixteen years, Harris was exactly where he belonged. He was exactly where he had been placed by the system.

But what went wrong? Why is it that after controlling his life in minute detail for the last sixteen years, we could not change him, or alternatively keep him locked up until it was safe to return him to society? Because what was done with Harris is exactly what the law requires be done. The American sentencing system requires nothing more of him than to just "do his time." The incarcerate need not improve — just do time.<sup>17</sup> I do not know if sixteen years of effort would have resulted in any positive changes to him, but this I do know: we must change our system so that if we cannot change the Harrises and protect society, we

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17. Rehabilitation in our current system is a false hope. The system itself rehabilitates nobody. If one comes out of the prison better than one went in, it is because he dug down deep inside of himself, found something he did not like and decided to change it. The system probably does more to discourage rehabilitation than encourage it. Indeed, if one were to design a system specifically to break down cultural skills, social desire, to destroy and corrupt morals and to provide criminal instruction, one would have to give very careful thought to design a better institution for doing so than the American prison.

will at least not release them back into society to harm it again.<sup>18</sup>

Let me continue. When the court sentences a person to a term of years in prison, it is making a statement that this is what it believes is necessary to punish him for his transgression. Its intention is offense-based *punishment*, and really no more. My point, however, is that we should also be able to say something more. We should be able to say that the sentence imposed is sufficient in both its duration and its demands upon the malefactor to *protect society*. This latter half, unfortunately, has no place in our sentencing calculus. It exists, if at all, only as a coincidental byproduct of the first. Safety is only a myth of punishment.

I submit that punishment, for one whose behavior is not improved by it, has no utilitarian value except as reinforcement for the lawabiding.<sup>19</sup> The system can punish, but then what? What follows? Only treatment aimed at modifying behavior, a correction-based system of sentencing has any enduring functional value. From the point of view of public safety, most sentences we now impose cannot be substantiated philosophically, psychologically, or practically. The theory of "lock 'em up and throw away the key" is fine, I suppose, if we truly do throw away the key. But if the person sentenced will ever be returned to society, and if safety is truly our product, logic dictates that *correction* must be the primary goal.<sup>20</sup> Any other goal defies reason.

18. Under the penological theory of "containment" or "preventative detention," we use the conviction for one crime to predict that the malefactor will commit another and we contain the criminal, or separate the criminal from society to protect it. Even if we are philosophically prepared to accept the notion of preventative detention, for a system following the containment theory to be a success, it is logical to assume that the malefactor will be contained until society is safe when he is released. Unfortunately, the safety factor is simply not an integer of the equation used to determine either the minimum threshold of a sentence, or the ultimate date of release. We simply cannot now say that society will be as safe when one is released as it was before or during the time that person was contained. Therefore, containment is only a shot of morphine for a sick and painful society. When it wears off, the disease is still there and the pain is worse.

19. Punishment performed as a part of a social vendetta against criminals does not work, because while retribution assuages the punisher's need for revenge—it does nothing for the punished. Retribution only provides a fertile bed for the malignant growth of hatred. The public has said that the sinner must suffer, but an odious punishment imposed upon a person who has committed a vile act, while cathartic to a victimized society, has short-lived effects. A sentencing system must answer real needs, and not pander to the immediate passions of society.

20. Retribution, vengeance lives wholly in the past. It has no future. It is an expression of society's anger and a revulsion from the past in spite of the future. There is, however, nothing so futile as regret. I suggest that our system cannot really call itself enlightened or productive unless all sentences take a view towards the future, towards change, towards correction.

To digress: I was giving a speech several years ago on the evening the Camp Hill, Pennsylvania, prison riot broke out.<sup>21</sup> Of course, everyone was alarmed and much of the question and answer period was devoted to the riot, not the pearls of wisdom I had brought with me and delivered to them that evening. One lady asked me, "Judge, how many of these people do you think will get out?" I told her, "98% of them." I could hear the gasps all across the room. Then I went on to explain — 98% of the people whom we incarcerate there will be out on the streets within twenty-four to thirty-six months. I admonished them that perhaps society should give some thought to what it is that causes these people to become so barbaric, and should give some thought to what the penal system ought to do with them. Because if we do not, we had then better plan what to do when they become our neighbors once again.

Following the prison riots, I was shocked to hear sophisticated, educated people express their horror that some who looted, sacked and burned the prison, and committed assaults upon guards and fellow inmates alike, had indeed escaped. If you were among those who felt this way, let me repeat: these prisoners, or most of them, would have gotten out anyway when their time was served. And if you believe prisoners will magically become model citizens when released, think again. All the halfway houses of the world cannot undo the damage that is done by incarceration in the contemporary American prison. When one goes to prison, one does change. The only issue is whether we will begin to require that they change for the better, or whether we allow them, or systemically encourage them to change for the worse.<sup>22</sup>

When we lock people up for periods of time, what do we really accomplish? Are we making that person any less criminal?

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21. For two days in October of 1989, a riot raged at a medium security state prison in Camp Hill, Pennsylvania. The prison, designed to hold 1826 juvenile detainees, housed 2607 adult inmates with sentences ranging from two years to life imprisonment. During the course of the riot, over 100 persons were injured, three seriously, five people were taken hostage, and nearly one half of the prisons buildings were gutted by fire. Purportedly, the riots started as a result of the prisoners' anger over new rules restricting access to health care and prohibiting relatives from bringing them home-cooked food twice a year. *E.g., Pennsylvania Prison Riot Ends*, ST. LOUIS POST-DISPATCH, Oct. 28, 1989, at 8A; Laurie Goodstein, *Search for Answers Follows Prison Riot; Changes in Rules, Crowding Cited in Violence at Camp Hill, Pa.*, WASH. POST, Oct. 29, 1989, at A8.

22. One will change only to the extent one believes he or she is free to choose another lifestyle. To the extent one feels locked-in socially or frustrated from moving to a socially acceptable lifestyle, punishment will not coerce change.

Quite the contrary, Ambrose H. Harris is no different from the hundreds, the thousands of other people who are placed in prisons. They become meaner. They become more dangerous. They become more antisocial. They become better schooled criminals.<sup>23</sup> Are we making society any safer? I think not — unless you count the period of time that the person is actually behind bars.

The law predetermines to hold responsible and punish any should they transgress the law. For most, the punishment is prison. Few question why. Society seems somehow to think collectively that we must only imprison. It is a seemingly fitting epilogue to a criminal trial. The system is simply following the myth.<sup>24</sup> But that is not the real world. Prison is systemically unsuccessful except as a temporary human warehouse, a social bandaid. Beyond that, unless and until prisons are turned loose and turned on to correct, they cannot, and will not, provide an incentive for a significant and growing portion of society to abide by the law.

Is it not time we recognize the hard fact that our system is not correcting significant numbers of malefactors? Not preventing crimes? Not deterring criminals? Not assuring anyone's safety? If your doctor followed eighteenth century theory and if your hospital followed nineteenth century practices, would you not seek

23. For a discussion of the effects of incarceration on the prisoner, *see, e.g.*, Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment* 34 S. TEX. L.J. 443 (1993).

24. We simply give malefactors too much credit or credit them with too much analysis if we delude ourselves into thinking that the duration of jail time is any consideration whatsoever. Crime has more an emotive genesis than intellectual. Deterrence by punishment, I am afraid, accounts for little.

Moreover, our philosophy of sentencing fails to make an adequate adjustment for the free will of ordinary, mainstream American culture and the determinism one finds on the fringes. Our penology is libertarian, which maintains that the only circumstantial equality to which all are entitled is equality of opportunity. Equality of opportunity, however, is insufficient in our social republic to provide a stable economy, a stable workforce, or a stable political equilibrium. So too, it is an inadequate basis to determine appropriate treatment of criminals and the socially maladjusted.

Penology is based upon a theory that presumes a free will: that each person, regardless of whether a resident of the ghetto or tree-shaded suburbia, is equally free to choose between right and wrong — free to do acts which are legal or illegal — free to abide by the law or disregard it — and hence, free to change. This theory is almost totally inapplicable to sentencing as we approach the 21st Century.

Since punishment only modifies to the extent of one's perceived free will to change, the fact of the matter is that the freer one sees himself able to choose, the more effective punishment is as a deterrent. The more one's acts are perceived determined by forces external and exclusive of one's will, the less effective punishment will be and the more critical a correction-based sentencing structure becomes.



change? If your educational system had a 60-70% failure rate, would you not require that something else be done? The American penitentiary system has advanced little in the 200 years since it was conceived and some American prisons have an 80% failure rate. Our penological system stumbles uncertainly in darkness, clinging to antiquated and ineffective notions. The American prison is like a cathedral to a false god. Our response — build more of them.

Few in our legislatures seem to know how to cure the socially destructive malaise of crime. One thing, however, is sure: we cannot effect cures unless we discover causes. Until now, little effort has been made in the institutional sense to research and discover the causes of crime, which are, I am sure, as legion as viruses. But I am equally sure that if the behavioral sciences had the resources and applied them with a vigor equal to the physical and medical sciences, breakthroughs would begin. Behavior can be studied scientifically. Antisocial behavior can be modified.

I suggest that criminals be treated like dreaded diseases and examined just as closely to see what caused them to err. We must “discover” why one commits crimes before we set about in any deliberate fashion to develop appropriate remedies.<sup>25</sup> Getting “tough” on crime sounds good, but standing alone as it does now, it is an empty slogan that does not work. I have nothing against tough remedies. I do not make a plea of mercy for the criminal, but for society. Let us be practical. It is time to also get “smart” on crime. We must study the motives that produced the offense, with an eye towards the future and prevention, not towards the past and punishment. As Thomas Fuller said centuries ago, “To punish and not prevent is to labor at the pump and leave open the leak.”

Do not misunderstand me: no one wants to be punished. So any punishment has corrective value for some. But it is painfully obvious that punishment, as now administered by the American penal system, is not enough. Beyond punishment, we must dis-

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25. Traditionally one committed a crime predominantly for one of two reasons — greed or passion. But now we have to contend with another. It has arisen in the last two decades from a lesser statistic to the point where it now predominates. Indeed, it has been described as the number one health problem in the county. It is a third reason which has come to dominate all other reasons — need.

In *The Politics*, Aristotle also described the need-driven criminal. He is the one who steals of necessity — to eat. Today, however, there are few crimes in the United States motivated by the need to eat. We, nevertheless, have a close analog — drugs. Drugs too create crimes driven by need — not the need of an empty belly, but the need born of an addiction.

cover what inside this individual makes him socially tick so that we can design a system that will effect change.<sup>26</sup>

I believe we should move towards a system of correction that is organized along the same lines as our triage system for treating the wartime wounded. I believe we must segregate our thinking, our treatment, and our sentencing into at least three discrete groups: the benign for whom nothing need be done, the truly dangerous for whom nothing can be done, and those for whom the expenditure of some effort may effect change.

As Michel Foucault said, "Even the shallowest emotions and the weakest intellects can meet and master punishment; few can confront change."<sup>27</sup> Rehabilitation? Perhaps we should dust this concept off and try it again. I am not talking about the goody-goody rehabilitation of the fifties and sixties. I do not bleed for the criminal. I bleed for the society which must reassimilate him after he has served his time. What I propose is real, honest-to-goodness, sincere, no nonsense, severe if necessary, attempts to say to this person in a way he cannot ignore, "You are all screwed up and we are going to change your mind. *You* must convince *us* you are capable of living in society, or you are here until you do." The sentenced individual must be made to realize that he must change in such a way that society remains safe, or know that he will not be reinculturated at all. The key to behavioral change lies with the individual — whether we are treating alcoholism, drug addiction or antisocial behavior.<sup>28</sup>

Recently, while watching a Hollywood awards ceremony, I was struck that nearly all who appeared on television were

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26. We must recognize that we simply cannot punish a person away from committing a crime to supply himself with that which he must have (or feels he must have) to live. We cannot control crime if it is motivated by a perceived necessity, whether to fill the stomach of the starving or the bloodstream of the addict willing to die for a "hit." Drugs have given the theory of determinism new life.  
*Id.* at 15.

27. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 1979).

28. America is slowly coming to the conclusion that in the penological sense drugs may be little different from food. More and more people are becoming convinced that we will never control the crime that feeds the appetite; we must do something *about* the appetite. We can, as some propose, begin by labeling addiction a health problem and placing drugs under the control of the medical profession. Or we can, without appearing to sanction drug use, engage in massive measures to cure the habits or fully incapacitate sellers *and* users. One thing is sure, treatment as a goal is no longer an option: we must seek a cure for the habit or contain the transgressor. We must question everything, focus on safety, seek solutions and accept the answers.

wearing a red ribbon signifying their concern for finding a cure for AIDS. The response of this country to the AIDS epidemic has been a blossom of red ribbons, a great public awareness, public fear, and consequently, increasing interest in and dollars for a cure. I take no issue with that: AIDS is a killer disease. Yet in my thirteen years as a judge, there has been little collective interest in doing something to discover the causes and cures for the greatest, the costliest, and the most potentially deadly social evil of all time: crime. Society, too, is sick and it begs for a cure. But all it has been given is a placebo.

We are seriously considering the prospect of spending billions "correcting" the best health care system in the world — the system which cures the sick and encourages systematic and ongoing research. But health care is costing us peanuts compared to our failed penal theories and systems. Our method has simply become too expensive to continue in its present form, the streets have simply become too dangerous as they are, and something must be done. I am afraid that our penology—punishment—is a theory that thrives politically but is a failure in the cultural crucible.

Immanuel Kant said, "Man's innate right to liberty consists in the right to be free from violence . . ." <sup>29</sup> Kant further stated that we not only have the right to live under a political order but to *demand* that others join us in it. <sup>30</sup> Kant believed this to be a necessary condition of the rule of law. So do I. Jean Rousseau contended that all persons' legal rights are derived from the single concept of social order, which he called a "sacred right." <sup>31</sup> So do I. John Locke presumed that public safety was the consideration given the public in the contractual relationship among the citizens and between the citizens and their government. <sup>32</sup> So do I. I am deeply concerned, however, that government is not fulfilling this contract with society; that government is not meeting its obligation to protect society.

No social system can survive long unless its members have some hope that their government will protect them. Unless our government can protect us, the value of that which it offers us

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29. IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* xix (John Ladd trans., Bobbs Merrill 1965) (1797).

30. *Id.* (emphasis added).

31. See generally, 38 JEAN J. ROUSSEAU, *THE SOCIAL CONTRACT* (Great Books ed., 1952) (1762).

32. See generally, 35 JOHN LOCKE, *CONCERNING CIVIL GOVERNMENT* (Great Books ed., 1952) (1690).

is eroded in direct proportion to our insecurity, perceived or actual, and the value will depreciate until the numbers of those who have lost faith reach such a percentage that self-help is perceived by the public to be a viable response to crime. That would be wrong. Because if the system breaks down, what we have then is antithetical to society — lawlessness.

The caning of Michael Fay became a national topic of discussion. But for all the sometimes heated discussions, for all the ink spread about the country before the caning, America grew strangely silent after Singaporean officials executed the sentence. Perhaps, after the sentence was actually executed the public's cry for blood, its desire for revenge, left it feeling a bit guilty for having pointlessly advocated a cruel act. Most of us know how we feel, but few of us know why. Indeed, among the news briefs, the magazine articles and the editorials, none confront the reason why — why do we punish? Why do we have such an urge to punish? The painful truth is that the same society that urges vengeful punishment exposes its own desire for violence. Vengeance needs a victim. Michael Fay was as good as any.

Such is the frailty of mankind that we have through the ages rationalized our existence, explained our environment, and understood ourselves by myths and mythical images. And they have historically served us well by imaginatively filling the interstices in our intellectual fabric between what we wanted to know and what we knew, and in our psychological fabric between what we wanted to be and what we really were. Yet society is and has historically been caught in a paradox. We purport to seek truth. Yet we live by treasured and unsupported myths.

The government made a deal with its citizens to make the laws and enforce them so as to protect society. The deal is going sour. Punishment is not making us safer. The cancer of violence which we feed by punishment and permit to fester in our prisons is becoming thoroughly metastasized in society. The myth of punishment is becoming evident to any who think even casually about its results. And the myth is dangerous because the urge to punish, although emotionally gratifying to some, is turning aside the rational desire to do something constructive. American penology follows the tenets of a moribund philosophy and is neither prepared nor preparing for the 21st Century. It is time that more be done. The Ambrose Harrises of this land must be corrected or they must not be released.

*Salus populi suprema lex esto.*