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IDEOLOGY AND EUPHORIA IN CRIME CONTROL

Franklin Zimring* and Gordon Hawkins**

Hans Mattick was our teacher, colleague, and friend. His was a rare combination of moral commitment to the values of decency and a tough-minded skepticism of ideologues who prowl the provinces of criminal justice reform armed only with first principles. We would be gratified if these comments are in the spirit and close to the standards of a remarkable man we sorely miss.

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A broad and distinct division of opinion exists in the United States on how to best address problems of crime — an ideological cleavage that transcends any particular issue. Whether the subject for discussion is police use of deadly force or mandatory prison sentences for serious offenders, youth crime policy or preventive detention, it appears that the same people are consistently at odds. Frequently, this division is characterized as a struggle between liberal and conservative ideologies. Generally speaking, those of the liberal persuasion, often labelled as “treaters,” are prone to condemn the system and condone the criminal. The conservatives, on the other hand, are apt to condone the system and condemn the criminal and are frequently characterized as “beaters.”

The striking contrast in crime control positions between former Attorney General Ramsey Clark, a liberal, and his immediate successor, John Mitchell, a conservative, is illustrative of this ideological split at the political level. At a more sophisticated level, this division is reflected by the opposing viewpoints toward crime taken by President Johnson’s Commission on Law Enforcement and Administration of Justice and the conservative attitudes of writers such as James Q. Wilson and Ernest van den Haag.

At the same time, however, there are anomalous features within both

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the liberal and conservative ideologies. Former President Nixon, for example, while declaring that the only way to attack crime was to do so without pity, nonetheless expressed sympathy for the Watergate conspirators. And, on the other hand, many whose attitude toward criminals is generally compassionate, favored vigorous prosecution and punishment of those involved in Watergate. This paradoxical attitude of liberals and conservatives is also revealed in their respective positions on gun control and white collar crime. Recognition of these anomalies is significant, for it demonstrates the similarities between the two ideologies, in thought as well as method.

The purpose of this essay is to examine characteristic differences as well as similarities in style and substance in American crime control ideology. In so doing, it will become evident that much of the apparent difference in positions is a matter of political posturing that ignores empirical evidence and relies wholly on value judgments for its justification.

“You Can’t Tell the Players Without a Program”

Depicting the ideological polarity on the issue of crime control in the United States as a struggle between liberals versus conservatives has merit. For purposes of prediction, this characterization is useful since those who subscribe to Clark’s position on crime control are most often politically liberal, whereas those who support the Nixon-Mitchell position on crime control are identified with political conservatism.

Furthermore, these labels are useful, for they indicate where the significant differences lie within the ideological split. Beaters are indeed more apt to desire the beating of the convicted burglar or car thief. In contrast to this “hard line” attitude, “treaters” are more likely to be concerned with the offenders’ sensibilities. Moreover, it is often asserted that coddlers favor the criminal, whereas their opponents are devoted to looking after the interests of the rest of society. And, while liberals strive to decentralize police power and expand and protect civil liberties, most of those labelled as crime control conservatives welcome policies that tend to center authority in the police, often at the expense of individual liberty.

Major difficulties are encountered, however, when one attempts to extend this hard-line/soft-line analysis to the relative enthusiasm of each group for the task of crime control. “Liberals,” for example, often seem willing to spend a great deal more money than their less permissive brethren to achieve crime prevention and to compensate victims of crime. Moreover, on some issues, such as gun control, the “liberal” position seems
wildly punative to many "conservatives," who, in defense of their position, invoke cherished individual liberties and the right of the law-abiding population to defend themselves.

The recognition of the apparent anomaly posed by the gun control issue is important to this essay's analysis; for any attempt to pinpoint and explain the ideological dispute on crime control in this country must take into account the fact that internal inconsistencies appear to exist within both the conservative and liberal ideologies. How can the lines of battle be so strangely drawn?

I. SIN OR SOCIAL DISEASE?

A clue to the underlying nature of the differences in crime control ideology is found in the contrast between the way each party views the origins of criminal behavior. Liberals tend to view the origins with an institutional cast, noting elements which transcend the individual. Those who adhere to the position put forth by Ramsey Clark and President Johnson's Commission, for example, are apt to mention characteristics such as poverty, unemployment, lack of opportunity, racism, and peer-group influence. Viewing the same situation, conservatives are likely to concentrate, instead, on the personal qualities of the criminal. J. Edgar Hoover and John Mitchell, two representatives of the conservative bent, spoke in terms of selfishness, lack of discipline, lack of respect for and fear of the law, and occasionally in terms of the evil that lurks in the hearts of men. Likewise, Richard Nixon stated during his presidency that he totally disagreed with the view that "the criminal was not responsible for his crimes against society, but that society was responsible." "Society is guilty," he maintained, "only when we fail to bring the criminal to justice." In a similar vein, Ernest van den Haag argues that those idealists and reformers who believe that "bad social institutions . . . corrupt naturally good men" ignore "[t]he possibility that naturally bad man corrupt good institutions. . . ." James Q. Wilson adds that "Wicked people exist. Nothing avails except to set them apart from innocent people. We have trifled with the wicked, [and] made sport of the innocent. . . ."

This fundamental difference of opinion about the origins of criminal

1. President's Radio Address on Law Enforcement and Drug Abuse Prevention, 9 WEEKLY COMP. OF PRES. DOC. 246 (Mar. 10, 1973) [hereinafter cited as President's Radio Address].


behavior is reflected not only in the text of these men's works, but in the title of their works as well. When Ramsey Clark wrote a book, he entitled it *Crime in America.*4 Addressing the same subject, one would expect John Mitchell or J. Edgar Hoover to title his contribution *Criminals in America.* Significantly, Ernest van den Haag entitled his book *Punishing Criminals.*5 J. Edgar Hoover certainly preferred such personalized titles as *Persons in Hiding*6 and *Masters of Deceit*7 and gave a prefatorial imprimatur to *Ten Thousand Public Enemies.*8 This preference by conservatives for personalization was also reflected in Hoover's denunciation of particular criminals (as in the case of John Dillinger, for example: "a cheap, boastful, selfish, tight-fisted plug-ugly, who thought only of himself"),9 and in his emphasis on "self-interest uncontrolled" or "selfishness" as a principal "factor of crime-making."10

The personal/individual and the societal/institutional views of crime causation each have their implications for both the prevention of crime and the treatment of offenders. The proper method of treatment for an offender is closely related to and largely dependent upon which of these two views is adopted. Consider, for example, the long prison sentences that are recommended by "hard-line" advocates as a specific for criminal behavior. Frequently, severe punishment is justified on the ground that it is required to "teach the offender a lesson." The model is that of a pupil being submitted to an especially rigorous educational process. The lesson to be inculcated is usually described in such terms as discipline, self-control, respect for the law, or respect for authority. Since "liberals," by contrast, explain criminal behavior as the product of social and institutional forces, harsh punishments appear to be totally irrelevant. How can one teach unemployment a lesson?

Robert Martinson has pointed out that many liberal criminologists in recent years have acted as "advocates and spokesmen for the . . . treatment ideology, and [have done] everything in their power to ridicule the very idea of deterrence."11 As an alternative to punitive measures,
"liberals" are likely to recommend the "therapeutic" treatment of offenders. Although some have argued recently that rehabilitative programs should not be coercive but simply facilitative, this does not represent abandonment of the treatment ideal. Rather, the analogy with that branch of medicine concerned with the treatment of disease and the action of remedial agents implies that the offender is suffering from a morbid condition, one for which he cannot be regarded as fully responsible. The disease of criminal disposition is perceived as arising from underlying social and economic circumstances that, in some cases, have rendered it more or less endemic.

Another important dimension of this ideological antinomy is that hard-liners regard criminals as a class apart from the rest of society. As James Q. Wilson puts it, there are "the wicked" and "the innocent." 12 "The true criminal," wrote Hoover, is "nearer to the beast than others of us." 13 "The criminal brain," he said, works in a way "different from that of our own minds." 14 On the one hand, there are the "vicious lawbreakers" who are dangerous predators, and, on the other, the "honest citizens" who are their victims. Hard-liners are prone to attack as soft-headed today's judges and probation officers, who appear to be more concerned about convicted criminals than the innocent victims of crime.

Those who regard crime as the product of social conditions reject this division of society into two discrete groups — the lawless and the law-abiding. Criminals, they assert, cannot be clearly distinguished from the rest of the community. They point to studies of self-reported crime as evidence that participation in crime is widespread throughout society. As one criminology textbook puts it, "almost all persons have at some time deliberately committed crimes, often of a serious nature." 15 The authors argue that it is a combination of adverse social conditions and the highly selective operations of our law enforcement agencies that creates the illusion that there is "a criminal class" preying upon the rest of us.

The personal-institutional disagreement over the origins of criminal behavior has, in addition to its differential approach to the treatment of the convicted criminal, spawned model crime prevention programs at total variance with one another. Viewing crime as a sin, the conservative speaks in terms of "fighting crime" and catching more criminals. The rhetoric

13. PERSONS IN HIDING, supra note 6, at 16.
14. Id.
frequently has a martial ring; politicians talk of "the war against crime." Society must be protected from the assaults of criminals by more effective law enforcement. The predominant emphasis is on the need for larger, better-trained, better-paid, "unhandcuffed" police forces. In addition, conservatives stress the need for a greater number of more effective weapons for the police and for investment in technological aids designed to facilitate the apprehension of criminals.

Contrastingly, the "liberals" speak of a "cure for crime" rather than "a war on crime." They tend to regard the police ambivalently, as a necessary evil, and to view the prospect of more arms for the police with little enthusiasm. Basically, crime can only be reduced by fundamental social changes. Such things as the physical deterioration of our cities, economic dependency, broken families, discrimination against minority groups, poor educational facilities, and the like, must be removed before crime will diminish. As for technology, the "liberals" argue that crime prevention will not be attained by building "gadgets," though they are not entirely opposed to "gadgets." It is significant that they favor such devices as cashless buses and no-change service stations, which are designed for specific crime prevention, rather than offensive weapons for use against criminals either during or after the commission of a crime.

The preceding discussion makes it possible, we think, to explain the apparently paradoxical attitudes of both sides on the gun control issue referred to earlier. Two things make gun control unattractive to traditional law-and-order advocates. First, the "liberals" demand for gun control is predicated on something other than the notion that evil intent is the principal cause of homicide. The "conservative" argues that few, if any, homicides due to shootings would be prevented if firearms were unavailable, since the criminal would merely select some other weapon to achieve this goal. James Q. Wilson asserts, for example, that tougher penalties are likely to "contribute more to gun control than passing unenforceable laws calling for civilian disarmament."16 Ernest van den Haag argues that "outlawing handguns is not likely to be more effective than outlawing alcohol: zip guns are even easier to produce at home than bathtub gin."17 And, in the second place, gun control is seen as something that imposes costs and controls on the honest citizen, rather than on the criminal. This, from the conservative perspective, is not only pointless, for "crime is caused by criminals," but also unjust.

17. E. VAN DEN HAAG, supra note 2, at 154.
Two things make gun control attractive to the "liberal." First, the characteristic emphasis on the number of guns available in the community is attractive because it suggests that homicide is a function of the availability of guns, which is a societal or an institutional matter, as opposed to individual wickedness. Secondly, the proposition that weapon-dangerousness is the crucial factor in most cases of homicide, rather than any deliberate homicidal purpose, once again focuses attention on a circumstantial aspect, rather than on an intentional or individual one.

A similar approach can be used to explain other apparent anomalies that exist within each ideology in areas other than gun control. White collar crime provides such an example. "Conservatives" raise the question "Is 'white-collar' crime really crime?" The implication is that such "crime" is not criminal in nature. The "white-collar criminal," it is argued, may be a violator of conduct norms, but his behavior is really no more than venial; as such, referring to him as criminal is mere name-calling, based on political prejudice. Thus, while Richard Nixon said that crime should be attacked without pity, Henry Kissinger pleaded for compassion for the Watergate conspirators, Governor Reagan told us that the people involved in Watergate were stupid and foolish but not criminal, and Gerald Ford said that he could understand how highly motivated individuals could have felt justified in engaging in criminal activities. The conclusion is inescapable that when crime is elevated from the "street" level to the "white collar" level, the conservative no longer distinguishes offenders from "normal persons."

The "liberal" also adopts an approach to white-collar crime at variance with his attitude to other types of offenses. Indeed, the phrase "white-collar crime" is denounced as "a revealing example of dual-standard labeling by which actions are excused, mitigated or trivialized by reference not to the nature of the conduct but to the status of the actor." The "liberals" say that large-scale theft by deception or exploitation on the part of middle- and upper-class persons goes unpunished. They emphasize that when it is prosecuted, generally more benign treatment is accorded white-collar offenders than traditional offenders.

Once again, this curious, apparent reversal of roles is explicable on an ideological basis, in terms of which neither party is really being inconsistent. For the "conservative," crime is something that, almost by


definition, cannot be committed by one's friends and associates, and, if it is, cannot be real crime. Viewed from this angle, the concept of white-collar crime represents an attempt to break down the "us" and "them" dichotomy. Nor is this merely a conceptual matter, because, in practice, some of "us" (law-abiding citizens) are, in fact, sometimes treated as though we were "them" (criminals).

The "liberal," on the other hand, views the categorization of certain offenses as white-collar crime as a refusal to recognize that such offenses, and, thus, their perpetrators, are really criminal and that crime is a pervasive social phenomenon which is not a reflector of wealth, power or class. It is argued, therefore, that such a refusal indicates a systematic bias and helps to perpetuate the myth that crime is committed by a class of patently malevolent persons, significantly different from the rest of us.

II. Ideology and Euphoria

What general propositions emerge from this simplified and abbreviated account of the crime control debate? At the fundamental level, of course, this debate is merely one aspect of an overall difference in world view that divides liberals and conservatives. This difference is likewise exhibited in disputes about a variety of other basic social problems, such as the proper distribution of wealth, opportunity, and liberty in society. But perhaps one of the most striking features of the confrontation relates not to the differences between the two ideologies, but rather to their apparent similarities, particularly in respect to the modes of argument employed.

There are three similarities in dialectical method that are most notable. Initially, there is the way in which propositions about matters of fact appear to be "deduced" from propositions about matters of value. Secondly, there is the use of the type of argument that rests on the assumption that, to be effective, crime control measures must be addressed to the "cause" or "causes" of crime. Third, there is the immunity to rebuttal or counter evidence, an immunity that appears to be characteristic of many of the arguments and hypotheses advanced by both sides in this field. Particular examples of this similarity of method have been made in passing. But, because it is sometimes obscured by the fact that diametrically opposed conclusions are reached, it may be helpful to demonstrate briefly the pervasiveness of that parallelism.

A. From "Ought" to "Is"

The "deduction" of factual conclusions from value judgments can perhaps best be illustrated by reference to the differences in opinion that
arise in the debate on the treatment of offenders in the penal system. Many "conservatives" contend that severe penalties and rigorous regimes in penal institutions are fitting or appropriate in that they are deserved. The notion of desert is not entirely clear (indeed it is extremely obscure) but it is clear that judgments about desert are value judgments and that they rest upon ethical principles. As van den Haag states, "Justice is done by distributing punishments to offenders according to what is deserved[;] . . . justice is a moral concept. . . ."\(^{20}\)

Having made a value judgment that harsh punishment is appropriate, it is then implicitly assumed that extreme punitive measures will necessarily be effective. This inferential step is, of course, implicit rather than explicit; but the tacit assumption seems to be that since the punishment is painful and deals with the right target group, it must be effective in diminishing recidivism and reducing crime. It is this assumption that apparently was the basis of President Nixon's faith in the effectiveness of "tougher penalties" and, in particular, the death penalty. "Contrary to the views of some social theorists," he said, "I am convinced that the death penalty can be an effective deterrent against specific crimes."\(^{21}\) Ernest van den Haag asserts that "people find nothing more fear-inspiring than death"\(^{22}\) and identifies three groups of offenders to which "the death penalty is the only threat that could . . . deter."\(^{23}\)

The "liberals" employ the same mode of argument, although they start from an opposite premise and, hence, reach an antithetical conclusion. For the "liberal," punitive methods of treatment are regarded as morally objectionable, if not obnoxious. Such methods are condemned, being regarded by the liberal both as expressions of a reprehensibly vindictive attitude toward criminals and as assaults on the human dignity of those who are subjected to them. From this value judgment it is inferred that since harsh punishments are morally distasteful, they cannot possibly be effective. But, at the same time, many "liberals" employ the same type of reasoning to reach their own positive conclusion about such currently fashionable therapeutic programs as job training, diversion from the criminal justice system and expanded employment opportunities. It is inferred that because the treatment methods recommended are therapeutic in intent, the methods must necessarily be therapeutic in effect. On both

\(^{20}\) E. van den Haag, supra note 2, at 25, 28.
\(^{21}\) President's Radio Address, supra note 1, at 246 (emphasis added).
\(^{22}\) E. van den Haag, supra note 2, at 214.
\(^{23}\) Id. at 208. The three groups are abolitionists, humanitarians, and utilitarians.
sides in this debate, the degree of conviction evinced by the participants is commonly in inverse relation to the degree of evidential support adduced or available.

B. The "Root Causes"

A second parallel that can be drawn between the dialectical methods of the two parties relates to crime prevention. Here, the essence of the argument is that if crime control measures are to be effective they must deal with the "root causes" of crime. The "root cause" argument appears to rest on the unstated assumption that all human behavior can be explained in terms of the simple cause/effect model employed in mechanics. Given such an assumption, it follows that the only effective way to handle any undesirable social phenomenon is to deal with the particular condition or conditions that invariably precede, and are unconditionally followed by, the phenomenon in question. Moreover, in view of the fact that no particular condition or conditions have been demonstrated to be causes of crime or delinquency in this sense of "cause," those who employ this mode of argument are free to make their own nominations. Thus, "conservatives," who maintain that "crime is caused by criminals," reason that the way to reduce crime is to apprehend, convict, and incarcerate criminals. The "liberals" respond by arguing that, since such a program does not deal with the fundamental social and economic conditions, which are the real causes of crime, it will inevitably prove ineffective.

Fred Inbau and Frank Carrington, of Americans for Effective Law Enforcement, admirably exemplify the "conservative" approach. The answer to the crime problem, they maintain, lies in "first recognizing that crime is committed by criminals, and second, in getting as many criminals as possible out of circulation so that they are no longer free to victimize the law-abiding."24

Other conservatives take a somewhat different approach to this issue. James Q. Wilson, who emphasizes the role of "human volition"25 in

24. Similarly, the conservatives argue that reducing the number of guns in circulation must be ineffective in reducing crime. "Human nature being what it is, can it be doubted that the 75% of homicides which are crimes of passion will continue unabated? Only the weapon used will be different." Glassen, A Matter of Distinction, TRIAL, Jan.-Feb. 1972, at 52, 54.


26. J.Wilson, supra note 3, at xv.
criminogenesis, writes, "The gains from . . . incapacitating convicted criminals may be very large . . . Separating repeaters from the rest of society, even for relatively brief periods of time, may produce major reductions in crime rates."\(^{27}\) He also says, "We know that confining criminals prevents them from harming society, and we have grounds for suspecting that some would-be criminals can be deterred by the confinement of others."\(^{28}\) On the other hand, Ernest van den Haag does not believe that incapacitation, per se, would reduce the crime rate (because the incapacitated offender is likely to be replaced by others), but does, nevertheless, maintain that "post-punishment confinement of very likely recidivists is a necessary measure of social defense."\(^{29}\)

Ramsey Clark provides an excellent example of the "liberal," "root causes" approach. "If we are to deal meaningfully with crime," he says, we have to deal with what he refers to as both "the fountainheads of crime" and the "sources of crime."\(^{30}\) These comprise a vast miscellany that includes slums, racism, ignorance, congenital brain damage, prenatal neglect, sickness, disease, pollution, overcrowded housing, alcoholism, narcotics addiction, anxiety, fear, hopelessness, and injustice. Clark has also stated, "Today, change is the main cause of crime."\(^{31}\) Elsewhere he identifies "the automobile, the high-rise, television, and chemistry" as "causes of crime."\(^{32}\) In addition, he provides a list of the "elemental origins of crime," which are "heredity and environment, the interaction of individual and society, the totality of human nature and human experience."\(^{33}\)

There are, in fact, a number of different types of logical confusion involved in the "root causes" argument. In the first place, the notoriously ambiguous notion of causation makes it possible to select arbitrarily from among a variety of factors or conditions, and, therefore, to arbitrarily designate some particular factor or factors as the root cause or causes of crime. At the same time, there is ambiguity in the notion of prevention, which may denote a variety of processes from hindrance or obstruction to absolute preclusion. Given the ambiguous notions of causation, one could conceivably identify a variety of conditions as the cause of automobile

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27. \textit{id.} at 173.


29. E. van den Haag, \textit{supra} note 2, at 251.


31. \textit{id.} at 23.

32. \textit{id.} at 31.

33. \textit{id.} at 15.
theft, including the existence of automobiles, the existence of potential automobile thieves, the gross inequality of incomes in our society, the ease with which the ignition mechanism of cars can be short-circuited, and the failure of automobile owners to lock their cars. At the same time, a variety of anti-theft stratagems and devices — from ignition systems that automatically eject the key when the engine is turned off or that are constructed so that ignition jumping is impossible, locks on steering wheels and alarm systems, to stiffer prison sentences and more police — may properly be described as preventive measures.

It is true that compulsory anti-theft devices as preventive measures would not reduce the degree of inequality of income in America or even the number of automobiles on the road. It would thus be legitimate to assert that such a measure would not deal with the "root causes," as conceived by either the liberal or conservative, of automobile theft. Nonetheless, there is little doubt that such preventative measures would substantially reduce the amount of automobile theft. Thus, while even the most effective regime of gun control would not totally eliminate homicide, nor anti-theft devices entirely preclude automobile theft, the failure to achieve absolute prevention would only make the argument that the "root cause" of the problem had not really been dealt with a spurious one. If preventative measures, such as gun control and anti-theft devices, though admittedly stop-gap measures, can effect a substantial reduction in crime, and if the identification of "root causes" is necessarily, as it must be, an arbitrary selection process, then we must, for the present, put aside ideological prejudice and examine such measures in light of their relative efficacy in the reduction of crime.

C. "Don't Bother Me with the Facts"

A third characteristic that "conservative" and "liberal" arguments have in common relates to the almost euphoric, fact-free ambience in which the discussion takes place. There are two ways in which participants in the crime control debate appear to regard themselves as exempt from the normal demand that they should adduce, and address themselves to, factual evidence.

In the first place, facts seem to be regarded as superfluous because the persons arguing already know that they are correct. In the death penalty debate, for example, with the "conservatives" traditionally supporting and the "liberals" traditionally opposing capital punishment, protagonists on both sides admit that evidence to support their assertions is lacking, but
they are, nevertheless, unrestrained in making very positive assertions. Thus, it is significant that, until very recently, few supporters of the death penalty felt that it was necessary to adduce any evidence at all in support of the assertion that the death penalty is an effective deterrent.

This proposition is well illustrated by contrasting the positions of J. Edgar Hoover and Warden Clinton T. Duffy of the San Quentin Correction Institution on the death penalty. Hoover stated that: “The professional law enforcement officer is convinced from experience, that the hardened criminal has been and is deterred from killing based on the prospect of the death penalty.”34 In rebuttal, Duffy asserted that: “The prison man knows this threat is no deterrent, for convicts have told him so again and again.”35

Conservatives are quick to downplay, as irrelevant and inconclusive, empirical evidence on the deterrent effect of capital punishment. Hoover dismissed the statistical evidence as “completely inconclusive” and condemned those who look to the figures for evidence, for “wishful thinking or a futile groping for proof that is not there.”36 Similarly, James Q. Wilson asserts that all available studies that attempt to measure the deterrent effect of capital punishment have “serious methodological weaknesses” and that “it is most unlikely we shall ever have a study that settles the matter one way or another for the obstacles in the way of a conclusive study are probably insuperable.”37 Ernest van den Haag argues that “[t]hough we have no proof of the positive deterrence of the penalty, we also have no proof of zero, or negative effectiveness,” and that, therefore, “our moral obligation is to risk the possible ineffectiveness of executions.”38

The dismissal of the available statistics and in some cases, of the possibility of obtaining any determinative evidence from statistical research is significant not because it represents a careful assessment, but, rather, because it expresses an attitude that is shared by many on both sides of the death penalty debate. In fact, our view is that the available evidence points to the conclusion that the existence or nonexistence of the death

35. C. Duffy, 88 Men and 2 Women 22 (1962) (emphasis added).
37. J. Wilson, supra note 3, at 190.
penalty seems irrelevant to the murder or attempted murder rates. But it is unlikely that if further research were to reveal evidence pointing conclusively the other way, many abolitionists would be persuaded to support the death penalty on account of it. It is doubtful that many people have ever been persuaded to change their minds on this issue by the evidence presented.\footnote{Zeisel, \textit{The Deterrent Effect of the Death Penalty: Facts v. Faiths}, 1976 \textit{Sup. Ct. Rev.} 317, 337-43.}

Factual information is likewise disregarded in discussing the deterrent efficacy of penal sanctions. On the one hand, it is axiomatic to the “conservatives” that attaching unpleasant consequences to behavior will reduce the tendency of people to engage in that behavior. “[A]ll of us,” says Ernest van den Haag, “in some situations are tempted to do what the law forbids. [M]ost people, however, are law-abiding at least most of the time. The threat of punishment keeps it so.”\footnote{E. van den Haag, \textit{supra} note 2, at 21.} This is frequently said to be a matter of “common sense.” “And many people,” writes James Q. Wilson, “neither wicked nor innocent, but watchful, dissembling, and calculating of their opportunities, ponder our reaction to wickedness as a cue to what they might profitably do.”\footnote{J. Wilson, \textit{supra} note 3, at 209.} Edward J. Allen, writing in \textit{The Police Chief} some years ago, said that “common sense alone, without the benefit of knowledge, wisdom, and experience,” was enough to refute “the gratuitous statements of wishful thinkers” who maintain “that the death penalty is not a deterrent.”\footnote{Allen, \textit{Capital Punishment: Your Protection and Mine}, 27 \textit{The Police Chief} 22 (1960), \textit{reprinted in} H. Bedau, \textit{The Death Penalty in America} 135-36 (1964).}

On the other hand “liberals” regard it as equally self-evident that attempts to control or suppress behavior by intimidation and the threat of punishment are bound to be hopeless failures. The “liberal” attitude toward deterrence was well expressed by Warden Kirchwey of Sing Sing, who, like Warden Duffy, was no doubt influenced by the fact that much of his time was passed in the company of persons who had not responded to the threat of punishment for crime. As the late Paul Tappan reported, Kirchwey stated

\begin{quote}
[Punishment] cannot deter the mentally defective, they cannot appreciate their danger. It cannot deter the insane, their minds are too distorted to reason. It cannot deter the anti-social, they are at war with society and the
\end{quote}
danger but gives pleasing zest to the contest. It cannot deter the thoughtful and deliberate, for they have no intention of getting caught. Nor can it deter the impulsive, for impulse is always quicker than reason.\textsuperscript{43}

Kirchwey's conclusion is that the only people who could conceivably be deterred are those who do not require deterrence; they "have high standards and much personal pride, and are law-abiding anyway."\textsuperscript{44}

The interesting feature of Kirchwey's argument is that it consists merely of a series of \textit{a priori} assertions. No evidence is cited in support of any of his propositions. Each category of offender is described in such a way that it consists of persons who by definition are undeterrable. Thus, once his generalizations about the nature of the criminal population are accepted, the chain of reasoning is unassailable, but only because it is uninformative.

The Kirchwey argument illustrates a second way in which many participants in the crime control debate are able to dispense with facts. Not only is factual evidence seen as superfluous, but, in addition, premises are selected from which conclusions \textit{must} necessarily follow. Arguments are thus logically inviolable and immune to refutation; nothing can count decisively against them. Since conclusions are not dependent on the nature of the evidence, no empirical study, no matter how rigorous, could conceivably produce results that would prove embarrassing.

This is just as true of the "conservatives" as it is of the "liberals." The "liberals" will sometimes point to the fact that there are high rates of recidivism among released prisoners as evidence that punishment does not deter, or they may, at other times, point to "our experience with Prohibition" as a demonstration of the ineffectiveness of the threat of punishment. But such evidence presents no difficulty whatsoever to the convinced believer in deterrence. The "conservatives" start from the premise that it is possible to control human behavior by the threat of punishment. In the light of this premise, all failures to achieve a deterrent effect can easily be interpreted as indicating the need for more severe punishments, for it is always possible to argue that some imaginable threat might have been more effective than that actually employed in a particular instance.

\textbf{III. IDEOLOGY AND REALITY}

One result of the indifference to factual evidence, as displayed in these examples, is that the great public debates about crime control tend to deal

\textsuperscript{43} P. TAPPAN, CRIME, JUSTICE AND CORRECTION 245-46 (1960).
\textsuperscript{44} \textit{Id.} at 246.
not with major problems but with marginal, symbolic issues. For instance, one of Nixon's Presidential messages to Congress dealt at length with the death penalty, although no one has been executed for a federal crime since 1963. Nixon also described "the most significant feature" of the proposed new codification of defenses available to a defendant as the "new formulation [of the] insanity defense." Yet, insanity defenses in the federal courts are about as frequent as train hijackings. Furthermore, the President, as part of his "war against dangerous drugs," proposed a mandatory sentence of life imprisonment for second offenders convicted of trafficking, whereas the principal problem is convicting anyone once for selling narcotics.

Another example of dealing with symbolic issues, rather than practically important ones, may be found in the late Senator John McClellan's speech, made in the Senate, when introducing the Criminal Justice Codification Revision and Reform Act of 1973. In the course of his speech, the Senator said he wanted "to highlight major policy questions of general concern," and he identified ten issues as coming within that category. The issues thus designated included not only the death penalty and the defense of insanity, but obscenity, abortion, and also sodomy, which the Senator explained was not presently covered by any federal criminal statute. No mention, however, was made of income tax evasion, the interstate transport of stolen vehicles, or illegal immigration.

An excellent example of symbolic legislation was the 1973 revision of the New York State Drug Law. This act, as part of a "War on Drugs," proscribed severe and mandatory penalties for drug offenses at all levels of seriousness. The new drug law had two principal declared objectives. One avowed purpose was to frighten drug users out of their habit and drug dealers out of their trade, and, thus, reduce illegal drug use, or at least

46. Id.
47. Id. at 263.
48. Id. at 264.
49. Id. at 268.
50. Id.
52. Id. at 993-98.
contain its spread. The second purpose was to reduce crimes commonly associated with addiction, particularly robberies, burglaries, and theft.

Shortly after the 1973 law went into effect, the Association for the Bar of the City of New York and Drug Abuse Council jointly organized a research project to systematically collect data about the operation of the 1973 law and to evaluate the law's effectiveness. Since the New York Legislature again significantly changed the drug laws in 1976, the project dealt with developments over the period September 1973 — June 1976, when the law was in full force. When the Final Report of the Joint Committee on New York Drug Law Evaluation was published in 1977, it revealed that “despite the expenditure of substantial resources neither of the objectives of the 1973 drug law was achieved.” There was no evidence of a sustained reduction in heroin use after 1973; the evidence suggested that “the illegal use of drugs other than narcotics was more widespread in 1976 than in 1973”; and “serious property crime of the sort often associated with heroin users increased sharply between 1973 and 1975.”

“The key lesson to be drawn from the experience with the 1973 drug law,” said the report, “is that passing a new law is not enough.”

In fact, in relation to drug abuse, the maximum penalties available to deal with trafficking are, everywhere, already extremely severe and include life imprisonment. The new fashion of legislating for mandatory minimum sentences appears to be the result of the realization that, in reality, the present system of prosecution and punishment is a chaotic lottery, bearing no resemblance to any legislative design. This is blamed on “permissive” or “soft-headed” judges; but, in fact, it is to a large extent the direct outcome of political and legislative posturing. The courts are embarrassed with the war surplus of last year’s war on crime. When criminal codes become political platforms, the actual operations of the criminal justice system come to bear much the same relationship to the criminal laws as political realities do to political platforms.

It is true, of course, that some symbolic issues such as drug abuse, are practically important. Other issues, such as the death penalty, deserve public attention even though they are not statistically important aspects of

55. Id. at 3 n.1.
56. Id. at 7.
57. Id.
58. Id. at 8.
59. Id. at 9.
60. Id. at 25.
the criminal justice system in America. But concentration on the symbolic level means that the actual operation of the criminal justice system tends to be ignored. Thus, while indulging in the luxury of symbolic legislation, we are likely to lose control of the system.

IV. CONCLUSION

In an area where ideological commitment and an anti-empiricist ethos dominate debate, there is often surprisingly little difference between dialogue among "experts" and barber shop discussions. This is not to say, however, that in the crime control area, what is required is purely empirical analysis of cost effectiveness and policy-making that is divorced entirely from questions of value or sentiment.

Recently, it has become fashionable for criminal justice policy analysts to operate in a mode of mechanical utilitarianism; and since many values cannot be quantified or costed, expressed in equations, or illustrated in tables or graphs, they slip imperceptibly out of the calculus of choice. The approach is analogous to "the scientific creed that matter in motion is the one concrete reality in nature . . . ." The proposition was criticized by Whitehead in Science and the Modern World, on the ground that it treated values as "an adventitious, irrelevant addition."

Values are important. If it is fallacious to assume that a particular method must be effective because it reflects principles that we value, it is equally fallacious to assume that anything that is effective must, therefore, be morally acceptable. But there is something fundamentally wrong when discussions of complex policy issues become almost exclusively clashes of symbols or exchanges of sentiment.

The "experts" should know better. We have now lived through successive "soft-line" and "hard-line" administrations with little, perceptible change in the nature or extent of the crime problem. Of course, insight into the ideological content of our own sentiments and ideas does not ensure that we shall be able to solve it. But understanding the ideological roots of our beliefs can increase the likelihood of our becoming aware of unexamined premises. At the same time, it can make us sensitive to unconsidered possibilities of compromise and collaboration.

When there are differences of opinion in crime control policies, it is common for one party to accuse the other of disingenuousness. Yet, both sides may be utterly sincere in their beliefs. The trouble is that sincerity is

61. A. WHITEHEAD, SCIENCE AND THE MODERN WORLD 293 (1926).
not enough. Indeed, as Oscar Wilde observed, "a great deal of it is absolutely fatal."62 It is all too easy to become intoxicated by our own rhetoric.

A return to sobriety and some degree of humility in our dealings with this problem is essential. In 1973, Richard Nixon told America that "[t]o accept anything less than a Nation free from crime is to be satisfied with something less than America can be and ought to be for all our people."63 Yet, there is no doubt that we shall have to accept something less. It may be that, in crime control, there is light at the end of the tunnel. At the present time, however, too many people see the light and too few the tunnel.

63. President's Radio Address, supra note 1, at 248.