

# LEFT OUT

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## I

### INTRODUCTION

What happened to the progressive position on criminal law? There was a time when criminal justice issues were at the core of the left's agenda. Yet at a moment when approximately two million Americans are behind bars,<sup>1</sup> when the right to habeas corpus has been decimated,<sup>2</sup> when racial profiling has again become acceptable policy,<sup>3</sup> and when protections against government surveillance and coerced confessions are collapsing,<sup>4</sup> progressives have lost their voice on matters of criminal justice. To make double use of a bad pun, one can fairly ask: What is left to talk about when the issue is crime and punishment?

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1. Paige M. Harrison & Jennifer C. Karberg, *Prison and Jail Inmates at Midyear* (2002), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim02.pdf> (last visited June 6, 2003) (2,019,234 incarcerated in nation's jails and prisons in 2002).

2. See Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) (providing that habeas corpus is unavailable on behalf of a state prisoner when the claim has been adjudicated on the merits in state court, unless the decision involved an unreasonable application of clearly established federal law as determined by the United States Supreme Court, or resulted from a decision that was based upon an unreasonable determination of fact.)

3. See, e.g., JAMES X. DEMPSEY & DAVID COLE, *TERRORISM AND THE CONSTITUTION* 168 (2002) (citing polling data showing that approximately eighty percent of Americans rejected racial profiling before the World Trade Center attack, but sixty percent favored racial profiling after the attack); Samuel Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1414 (2002) (noting that support for racial profiling has emerged across the political spectrum after the World Trade Center attack); cf. Eric Lichtblau, *Bush Issues Racial Profiling Ban But Exempts Security Inquiries*, N.Y. TIMES, June 18, 2003, at A1 (reporting that federal policy bans the use of race and ethnicity for ordinary investigations but permits its use for investigations involving national security and border integrity).

4. See U.S.A. PATRIOT Act, Pub. L. No. 107-565, § 203(b)(1), 115 Stat. 272 (2001) (permitting the sharing of information from national security wiretaps); *In re Sealed Case*, 310 F.3d 717 (U.S. Foreign Int. Surv. Ct. of Rev. 2002) (holding the government need not demonstrate that the primary purpose of electronic surveillance was not criminal prosecution when it secures permission for a national security wiretap); Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facility*, WASH. POST, Dec. 26, 2002, at A1 ("While the U.S. government publicly denounces the use of torture, each of the current national security officials interviewed for this article defended the use of violence against captives as just and necessary. . . . 'If you don't violate someone's human rights some of the time, you probably aren't doing your job,' said one official who has supervised the capture and transfer of accused terrorists.").

There are plenty of external explanations for the left's collapse. Whether because of bad luck or bad policies, it is simply a fact that Warren Court reforms coincided with a huge rise in crime rates—a rise that served to discredit the left's position.<sup>5</sup> An important ingredient in Bill Clinton's success in delaying the long-term secular decline of the Democratic party was his ability to convince the public that Democrats, too, could be tough on crime.<sup>6</sup> When the crime rate finally began to moderate,<sup>7</sup> there was again, for a brief moment, political space to discuss issues like capital punishment and overincarceration. Then came 9/11, and, as the cliché has it, everything changed.<sup>8</sup>

In this essay, I do not want to dwell on these external explanations, as powerful as they are. Instead, my thesis is that the left's problem regarding criminal justice is at least partially of its own making. Specifically, the problem stems from deep contradictions in the left's positions. Progressives have not one position on crime, but at least seven different ones, and these positions cannot be reconciled. Most of this essay consists of a taxonomy of conflicting progressive views on criminal justice. Before I begin, however, I need to qualify my thesis in three important ways.

First, as will become obvious, what I present below amounts to no more than brief descriptions—really evocations—of attitudes, arguments, and predispositions, rather than anything like the detailed analysis that these positions deserve. My purpose is not to offer a full defense or critique of the views I describe, but to demonstrate the ambivalence and contradiction that are hallmarks of leftist and liberal analysis of crime and punishment.

Second, crime is not only an academic preoccupation; it is also a subject of political debate. It is important, therefore, to distinguish between what might loosely be labeled highbrow positions and low- or middlebrow positions on criminal justice. In much of this essay, I will be discussing highbrow positions; at the end, I will turn briefly to low- and middlebrow views.

Finally, because I will present this taxonomy as if I were an outsider, it is important to make clear at the outset that I consider myself a criminal justice

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5. In 1960 there were 286,220 violent crimes in the United States. By 1968, the number of violent crimes had reached 590,640. Federal Bureau of Investigation, UNIFORM CRIME REPORTS 59 (1973).

6. Paul J. Quirk & Joseph Hinchliffe, *Domestic Policy: The Trials of a Centrist Democrat*, in THE CLINTON PRESIDENCY: FIRST APPRAISALS 262, 277-79 (Colin Campbell & Bert A. Rockman eds., 1996) (“Clinton staked out a centrist position on crime.”); Ann Devroy & Rene Sanchez, *Clinton Calls for New Ban on ‘Cop-Killer’ Bullets; During Chicago Speech and in Campaign Ads, President Reiterates Anti-Crime Message*, WASH. POST, July 1, 1995, at A7 (reporting polling data showing that “[a]fter years in which a large margin of the public generally considered Democrats weak on [crime] the two parties now are virtually even”); Dennis Shea, *Clinton and the GOP Options; Winning Back Reagan Democrats*, WASH. POST, Feb. 16, 1993, at A13 (noting that in 1992, “the Bush campaign ceded the crime issue to Clinton, even though a tough-on-crime stance had been one of the key reasons for Bush’s success in 1988.”).

7. Between 1993 and 2000, the number of violent crimes fell from 1,926,017 to 1,424,289. Federal Bureau of Investigation, UNIFORM CRIME REPORTS 66 (2000).

8. See William J. Stuntz, *Local Policing after Terror*, 111 YALE L.J. 2137, 2138 (2002) (stating that “even before the fires in the rubble that was the World Trade Center burned themselves out, some politicians were calling for broader powers for law enforcement and greater restrictions on citizens.”).

progressive. The confusion I present here is, therefore, my own confusion, and the map I outline plots my own uncertainty.

## II

### A TAXONOMY OF POSITIONS

#### A. The Scientific Model

Perhaps the earliest identifiable left position on criminal law was associated with the broader progressive movement in the first third of the last century. An important part of early twentieth century progressivism associated progress with a rational, scientific approach to social problems.<sup>9</sup> Scientism as applied to criminal law rejected regressive ideas like freedom of the will, retribution, and blame. Instead, crime was a social problem subject to causal explanations and rational solutions.<sup>10</sup> Implications for criminal law policy, never fully embraced by progressive scholars, included changing underlying social conditions that produced crime and turning criminals over to experts. These experts, in turn, were likely to advocate abandonment of blame, of the mens rea requirement for crime, and of punishment proportional to moral guilt. Instead, they recommended a regime of indeterminate sentencing, with treatment provided for those capable of rehabilitation, and indefinite but humane incarceration for incorrigibles.<sup>11</sup>

The scientific model had an important influence on the left's effort to medicalize crime—most closely associated with David Bazelon and the D.C. Circuit—in the middle decades of the last century.<sup>12</sup> Today, it survives in the sociology of crime on the left<sup>13</sup> and, in ideologically transmuted form, in the law and economics approaches to deterrence theory and criminal justice.<sup>14</sup> The scientific model is closely allied with, but not identical to

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9. See HAROLD U. FAULKNER, *THE QUEST FOR SOCIAL JUSTICE: 1898-1914*, at 244-47 (1971).

10. See, e.g., DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* 50-59 (2002); Thomas Green, *Freedom and Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915, 1919-20 (1995). For an influential post Progressive-era statement of these views, see KARL MENNINGER, *THE CRIME OF PUNISHMENT* (1968).

11. See, e.g., ALEXANDER W. PISCIOTTA, *BENEVOLENT REPRESSION: SOCIAL CONTROL AND THE AMERICAN REFORMATORY-PRISON MOVEMENT* 104-05 (1994); ROTHMAN, *supra* note 10, at 52-59; Green, *supra* note 10, at 1950. Perhaps the most influential statement of this view came after the Progressive period. See BARBARA WOOTTON, *CRIME AND THE CRIMINAL LAW* (1963); BARBARA WOOTTON, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* (1959).

12. See, e.g., *United States v. Moore*, 486 F.2d 1139, 1260 (D.C. Cir. 1973) (Bazelon, J., concurring in part and dissenting in part); *United States v. Alexander* 471 F.2d 923, 957 (D.C. Cir. 1972) (Bazelon, J., dissenting); *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954); David Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976).

13. See, e.g., Robert Agnew, *Foundation for a General Strain Theory of Crime and Delinquency*, in *THE CRIMINOLOGY THEORY READER* 177, 177-94 (Stuart Henry & Werner Einstadter eds., 1998).

14. The seminal works are Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968), and George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970). See generally *THE ECONOMICS OF CRIME* (Ralph Andreano & John J. Siegfried eds., 1980).

## B. The Anti-Lochnerian Model

Progressive attacks on the regime of *Lochner v. New York*<sup>15</sup> included important critiques of the notion of unmediated freedom located in a private sphere. Some legal realists attacked the very idea of a private sphere, arguing that it was always constructed by public government choice, and that supposed freedom in this sphere amounted to nothing more than a government license for coercion by market actors.<sup>16</sup> Advocates of the progressive critique of right constitutionalism eventually gained control of the Supreme Court, and this victory is captured, symbolically if not quite chronologically, by Justice Stone's effort to teach us what might be called the "lesson of the cedars and the apples." In *Miller v. Schoene*,<sup>17</sup> the Court was confronted with a Virginia statute that ordered the destruction of cedar trees when they were located near apple trees because cedar rust, harmless to the host cedar trees, is fatal to apple trees.<sup>18</sup> Justice Stone rejected the argument that the statute constituted an uncompensated taking of property.<sup>19</sup> Conceding that the statute led to government destruction of the cedars, he pointed out that a government decision to do nothing was "none the less a choice"<sup>20</sup> which would lead to the destruction of the apples.

The lesson of the cedars and apples has obvious implications for criminal justice issues: It makes talk about the rights of criminal defendants incoherent. Recognizing the rights of criminal defendants violates the rights of criminal victims, just as protecting the cedars leads to the destruction of the apples. Leaving the victims of crime unprotected is "none the less a choice" for which government also bears responsibility. Thus, instead of involving rights on one side and mere policies on the other, criminal justice issues require a choice between rights.

There are some traces of this analytic insight in what there is of a Critical Legal Studies perspective on criminal law.<sup>21</sup> However, most leftists who think about criminal law have failed to assimilate the "law and order" implications that the insight holds. Although liberals and leftists have appreciated these implications regarding a few specialized criminal justice problems like the failure of government to control child abuse, rape, hate crimes, and domestic violence,<sup>22</sup>

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15. 198 U.S. 45 (1905).

16. The most well-known statement of this view is Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

17. 276 U.S. 272 (1928).

18. *Id.* at 279.

19. *Id.*

20. *Id.*

21. See, e.g., Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981); Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231 (1993). For my contribution to this literature, see Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 J. CONTEMP. LEGAL ISSUES 97 (1996).

22. See ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999) (child abuse); SUSAN ESTRICH, *REAL RAPE* (1987) (rape); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT 47, 47-50

anti-Lochnerism has not produced a generalized leftist argument for crime control. This failure is partially caused by the fact that, at the very moment that the Anti-Lochner model seemed to be at the height of its power, it was overtaken by

### C. The Civil Liberties Model

The civil liberties model is fundamentally inconsistent with anti-Lochnerism. It is not coincidental that George Sutherland, the author of *Powell v. Alabama*,<sup>23</sup> the first Supreme Court decision invalidating a state criminal conviction on due process grounds, was also one of the “Four Horsemen of Reaction”<sup>24</sup> who defended *Lochner* to the bitter end. As William Stuntz has brilliantly demonstrated, most building blocks of the civil liberties model derive from Lochner-era conceptions of prepolitical property rights.<sup>25</sup> Nonetheless, beginning in the 1930s, and picking up momentum throughout the 1950s and 1960s, progressives abandoned scientism and anti-Lochnerism for the civil liberties position.<sup>26</sup> This model crucially depends on the distinction between the government acting and letting happen, the very distinction undermined by the lesson of the cedars and the apples. It privileges the exercise of rights in the private sphere and condemns government action that infringes upon those rights. Why did progressives who cut their teeth on anti-Lochnerism buy into a set of views fundamentally inconsistent with their own critique of *Lochner*? The shift was almost certainly overdetermined,<sup>27</sup> but one large reason was because of the emergence of

### D. The Civil Rights Model

Properly speaking, this is not really a model, but a set of motivations or predispositions. Since the Civil War, the criminal justice system has served as a

(1993) (hate speech); Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2158 (1994) (domestic violence).

23. 287 U.S. 45 (1932).

24. FRED RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 – 1955*, at 217 (1955).

25. William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 395 (1995) (“Fourth and Fifth Amendment history thus has more in common with the First Amendment and *Lochner v. New York* than with criminal procedure as we know it today.”).

26. The movement was led in the academy by the tireless efforts of Yale Kamisar. See, e.g., Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the “New” Fifth Amendment and the Old “Voluntariness” Test*, 65 MICH. L. REV. 59 (1966); Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on “the Most Pervasive Right” of an Accused*, 30 U. CHI. L. REV. 1 (1962). See generally YALE KAMISAR, *POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY* (1980). For an early and influential summary and evaluation, see Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PENN. L. REV. 1 (1964).

27. For example, in addition to the explanations I emphasize here, the shift was related to increased concern about poverty and to still salient revulsion against Nazi and Fascist practices in Europe. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 62-63 (1996).

crucial adjunct to the systematic subjugation of African Americans.<sup>28</sup> It is not surprising, then, that when the civil rights movement began to gain ground, its proponents turned their attention to criminal justice issues. Thus the landmark case of *Powell v. Alabama*,<sup>29</sup> involving the notorious framing of black teenagers for the supposed rape of two white women, served as an important organizing tool for civil rights activists. For decades, the futile struggle to pass anti-lynching legislation in Congress was at the center of the civil rights agenda.<sup>30</sup> The struggle against the third degree largely centered on race, symbolized by *Brown v. Mississippi*,<sup>31</sup> the first case in which the Supreme Court invalidated a state confession. As Chief Justice Hughes reported in his opinion for the Court, when the arresting officer was asked whether he had beaten Brown, he unself-consciously replied, "not too much for a negro; not as much as I would have done if it were left to me."<sup>32</sup>

Today, lynching has pretty much ended,<sup>33</sup> and use of the third degree is much less frequent,<sup>34</sup> but the link between criminal justice and race remains politically important, as the controversy of racial profiling and the continuing gross disproportion in arrest and incarceration rates for African Americans illustrate. Controversies surrounding these issues can still make criminal defense work seem like part of the fight for racial liberation.<sup>35</sup> But this view has lost force as the country has turned away from preoccupation with race. Moreover, it is in obvious tension with the lessons of the cedars and the apples. Minorities are disproportionately victimized not just by the criminal justice system, but also by crime (a point that the anti-*Lochner* model brings to the fore).<sup>36</sup> And to some degree, the specifically racial focus of the civil rights model has been diluted by

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28. See, e.g., KATHERYN K. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS* 14-25 (1998).

29. 287 U.S. 45 (1932).

30. Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 59-61 (2000).

31. 297 U.S. 278 (1936).

32. *Id.* at 284. On the association between the civil rights revolution and the emergence of criminal procedure protections, see Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1305-06 (1982); see Klarman, *supra* note 27.

33. *But see* James Brooke, *Gay Man Beaten and Left for Dead; 2 are Charged*, N.Y. TIMES, Oct. 10, 1998, at A-9 (reporting assault of Matthew Shepard, an openly gay student who was beaten and tied to a fence for eighteen hours in Laramie, Wyoming); *Trial of Three Men to Begin Today in Lubbock Hate-Crime Rampage*, DALLAS MORNING NEWS, Nov. 6, 1995, at 7A (reporting race-based attack on three men in Lubbock, Texas).

34. *But see supra* note 4.

35. See, e.g., DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999).

36. For an argument along these lines, see Randall Kennedy, *Changing Images of the State: The State, Criminal Law, and Racial Discrimination*: 107 HARV. L. REV. 1255, 1255 (1994) ("Like many social ills, crime afflicts African-Americans with a special vengeance . . . . Many of those who seek to champion the interests of African-Americans, however, wrongly retard efforts to control criminality."); see also RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 19 (1997) ("[T]he principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws.").

### E. The Human Dignity Model

According to this view, the government owes a duty of concern and respect to all of its citizens, including the least advantaged. The association between crime and economic and racial subservience makes our treatment of criminals a kind of test case for government concern for the underprivileged.<sup>37</sup> This model is clearly in tension with scientism and anti-Lochnerism. It is difficult to reconcile a human dignity concept with a deterministic model of human behavior like scientism that treats human beings as the playthings of genes and the environment. Similarly, adherents to the anti-Lochnerian model are bound to ask, “What about the human dignity of the victims of crime?” What may be less obvious is that the human dignity model is also in some tension with the civil liberties and civil rights models. To be sure, an aspect of the protection of human dignity is fair procedures. But treating criminal suspects as full human beings also requires treating them as morally responsible agents.<sup>38</sup> This realization led to the development of a kind of left retributivism beginning in the 1970s.<sup>39</sup> According to this perspective, following Kant, one can see harsh sentences as something to which criminal defendants have a right.<sup>40</sup> Punishment is actually a recognition of the humanity of defendants. Similarly, a turning away from rehabilitative theories morphs into respect for human freedom and mental integrity by treating criminals as capable of choice. But left retributivism is in sharp conflict with

### F. The Romantic Model

This model is not much discussed any more, but it animates some left reaction to the criminal justice system. At least, it animates my own reaction. The image plays off the left’s historic hatred of authority and attraction to unmediated freedom. This model suggests that the criminal is a romantic outlaw, unconstrained by bourgeois inhibition and fighting against an unjust social order.<sup>41</sup> It is captured perfectly by the old Woody Guthrie song, “Pretty Boy Floyd”:

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37. For my own defense of this model, see Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281, 2324-26 (1998)(book review).

38. Perhaps the leading twentieth century proponent of this view was Herbert Morris. See Herbert Morris, *Persons and Punishment*, in ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 31, 31-63 (1976) (arguing that human beings have a right to be punished).

39. See, e.g., Andrew Von Hirsch, *Doing Justice: The Choice of Punishments: Report of the Committee for the Study of Incarceration* (1976). For a modern restatement, see Paul Butler, *Retribution, for Liberals*, 46 UCLA L. Rev. 1873 (1999).

40. The canonical statement of this position is IMMANUEL KANT, THE PHILOSOPHY OF LAW 195 (W. Hastie trans. Lawbook Exchange 2002) (1797) (“The Penal Law is a Categorical Imperative; and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment, or even from the due measure of it.”).

41. See, e.g., JEAN-PAUL SARTRE, SAINT GENET: ACTOR AND MARTYR 652-53 (Bernard Frechtman trans., George Braziller, Inc. 1963) (1952).

Now as through this world I ramble,  
 I see lots of funny men,  
 Some will rob you with a six-gun  
 And some with a fountain pen.  
 But as through this life you travel,  
 And as through your life you roam  
 You won't never see an outlaw  
 Drive a family from their home.<sup>42</sup>

It is not easy to reconcile the lives that many real criminals actually lead with these romantic notions,<sup>43</sup> but the stance nonetheless captures the left's hatred of a deeply inequalitarian social order. It is made marginally more plausible by quasi- or pseudo-Marxist accounts of the system,<sup>44</sup> which treat any punishment of criminals as unjust under current social conditions. Unfortunately, however, the romantic model once again produces tensions and contradictions. Left anti-statism is in tension with the anti-Lochnerian view, which treats the state as the principal engine for redistribution and the opponent of market power. Similarly, Marxist accounts, to the extent they are deterministic, run up against the human dignity model. The urge to reconcile human dignity, determinism, and anti-statism helps explain the attraction of the final stance,

#### G. The Contingent Fate Model

Here, the relevant folk artist is Phil Oches:

Show me the prison  
 Show me the jail  
 Show me the prisoner whose life has gone stale.  
 And I'll show you a young man  
 With so many reasons why  
 And there but for fortune  
 Go you or I<sup>45</sup>

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42. Woody Guthrie, *Pretty Boy Floyd*, on BUFFALO SKINNERS (Smithsonian Folkways 1999).

43. As my friend, Stephen Morse, has pointed out to me, some "outlaws"—the ones described by TRUMAN CAPOTE in *IN COLD BLOOD* (1965), for example—do not "drive a family from its home," because they murder the family in its home.

44. For a sophisticated Marxist account that is neither quasi- nor pseudo-, see Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217 (1973).

45. Phil Oches, *There But for Fortune*, PHIL OCHES IN CONCERT (Rhino Records 1966). Perhaps it says something important that all the cultural references here are hopelessly dated. My wife and kids regularly tell me that I live under a rock. But just to show that I am not entirely out of step with modern culture, I suppose I should say that a modern updating of this view is contained in Steve Earle's *John Walker's Blues* on JERUSALEM (Artemis Records 2002). I'm thankful to Mark Tushnet (who does not live under a rock) for this suggestion.

I must confess a special weakness for this model. When I think back on my brief career as a public defender, the thing that most surprised me then, and continues to haunt me now, is how similar many of my clients were to me and my friends. Despite differences in race, class, education, and religion, they turned out not to be “other” in the way that I had expected.<sup>46</sup> Many of them were smart, funny, friendly, and interesting. They were just in a different line of work. For me, at least, the left is most admirable and least tendentious when it is most empathic and least judgmental. The contingent fate model manages to combine the deterministic insight that we have not chosen our fate with the humanistic insight that life’s losers deserve our sympathy rather than our condemnation. It is easy to see why the model is attractive.

It would be expecting too much, though, to suppose that this model can escape the contradictions that bedevil all the others. To begin with, there is a fine line between empathy and condescension. Empathy, like its companion virtue, mercy, often arises in contexts of power imbalance. Empathy identifies with its target, but paradoxically, also subtly devalues it. If fortune has nothing to do with choice, then there is no reason to respect or care about the choices that the unfortunate have made. Thus, the contingent fate model risks running up against the human dignity model.

Moreover, if fate is really contingent, then one has to imagine oneself not just as a criminal, but also as a victim, a prosecutor, a judge, or (heaven forbid) a right-winger. Some of these people turn out to be smart, funny, friendly, and interesting, too. Empathy, once loosed, is not easily cabined. The upshot is a dilution of the indignation that fuels each of the other six models.

### III

#### CONCLUSION

So what in the end is left to say about crime and justice? The answer is, I am afraid, not much. Riven by contradiction and confusion, the left can hardly be surprised when its views are disparaged and parodied, despised and ignored. Still, there is one thing to say in defense of the left, and, come to think of it, this one thing is pretty important: The left is not the right. When contrasted with the right, the left’s moral confusion begins to seem like a virtue.

When the left’s highbrow position gets transmuted into low- and middle-brow politics, the result is a kind of paralysis. If one believes, as I do, that the biggest risk in the criminal law is the slide toward barbarism, then paralysis is not such a bad state of affairs. To the extent that criminal law is about the imposition of pain on other human beings, a taste for moral ambiguity can serve as an important brake on the natural tendency toward rage and sadism.

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46. Some of the literature that best captures this destabilizing reality has been produced by my colleague, Abbe Smith. See Abbe Smith, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443 (1999); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (2000); Abbe Smith, *Rosie O’Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C. R.-C.L. L. REV. 1 (1993).

Unfortunately, though, we do not live in an age when moral ambiguity is much valued, and, for this reason as well, the left has little current influence on criminal justice policy. Still, those of us on the left can be proud that our high-brow positions do not get transmuted by popular culture into worse evils: mindless and heartless lashing out against people with the least social power, simplistic and hypocritical moralizing, barely disguised racism, pandering to fear and intolerance, and the cynical manipulation of public opinion to achieve sordid ends. True, there's not much left of the left, but neither is there much right about the right.