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*BOOK REVIEW*

## Unconscious Meanings of Crime and Punishment

ROMANTIC OUTLAWS, BELOVED PRISONS: THE UNCONSCIOUS MEANINGS OF CRIME AND PUNISHMENT. By Martha Grace Duncan. New York and London, New York University Press, December 1996. Pp. xi, 272. \$29.95 (cloth), also forthcoming in paperback, New York University Press, Fall 1999.

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There is a dearth of contemporary writing that deals with the fundamental premises of criminal law. Martha Duncan's book deals with the motivations behind crime and punishment. The urgency of this publication is accentuated by the current trends in the criminal justice system that seem to escalate toward a legal and political crisis,<sup>1</sup> building more and more prisons at ever increasing

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1. The United States has one of the highest incarceration rates in the world. According to projections released by the U.S. Department of Justice, any black male, now born, has a greater than a two in four chance of imprisonment in a state or federal prison. The probability of Hispanic males of being imprisoned is one in six, as compared to a lesser chance of one in 23 for white males. If gender and race are disregarded, the projections are still high; one of every twenty U.S. residents now born is likely to spend time in prison. These projections do not even include imprisonment in local jails for less than a year, often only for a few days, and arrest records. The local figures on county jails are about 30 times as high as the admissions to state and federal prisons. Thomas P. Bonczar & Allen J. Beck, Lifetime Likelihood of Going to State or Federal Prison, Bureau of Justice Statistics Special Report, U.S. Dep't of Justice (1997). Most recent Justice Department statistics confirm the continued rise of the American jail and prison population, in spite of decreasing crime rates. Fox Butterfield, 'Defying Gravity,' Inmate Population Climbs, N.Y. Times, Jan. 19, 1998, at A8; Id., Number of Inmates Reaches Record 1.8 Million: Data Show Crime Rate Continues to Decline, N.Y. Times, Mar. 15, 1999, at A12.

expense and stressing capital punishment and legislatively mandated sentencing guidelines. While political campaigns continue to capitalize on the "war on crime," it can be predicted that the legal, financial and social costs of the system will, in the foreseeable future, lead to an untenable situation and breakdown. The author cites the voice of a concerned observer, Richard Posner, who has deplored that exceptionally severe criminal punishments have made the United States "one of the most penal of civilized nations." (p. 224, n.6).<sup>2</sup>

Our present system of long-term incarceration of large numbers of people, as the author points out, is not much more than two hundred years old (pp. 173-4). The public, at some point, will be unwilling to shoulder the accelerating costs of the criminal justice system and will demand drastic changes that, since they result from emergency conditions of national crisis, are not likely to be based on sound reflection. The author illuminates the historical and emotional background of the current criminal justice dilemma. In describing and interpreting the unconscious meanings of crime and punishment, she is attempting to increase our level of insight. She is moved by the Socratic premise that understanding is the key to change (p. 187). My review emphasizes Part III, *In Slime and Darkness: The Metaphor of Filth in Criminal Justice*,<sup>3</sup> because it contains the culmination of the author's reasoning. The author, as she recognizes (p. 143), deals with matters that are taboo in our society. This, in itself, creates a problem, namely to present effectively a

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2. Richard A. Posner, *Courting Evil*, *New Republic*, June 17, 1991, at 36, 42 (reviewing Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (Deborah L. Schneider trans. 1991)). See also Francis A. Allen, *The Poignant Paradoxes of Criminal Justice: A Review*, 48 *Fla. L. Rev.* 539 (1996) (reviewing Martha G. Duncan, *Romantic Outlaws, Beloved Prisons*, 1996, suggesting that "America increasingly displays the attributes of a prison society"). Since 1982 more prisons have been built in rural areas than in the preceding two centuries. Eric Schlosser, *America Busted*, *New Yorker*, Feb. 24 & Mar. 3, 1997, at 49 (discussing *The Real War on Crime: The Report of the National Criminal Justice Commission* (Steven A. Donziger ed. 1996)).

3. Part III is a revision of an article, published under the same title. 68 *Tul. L. Rev.* 725 (1994).

substance that has been relegated to spheres of the unconscious.<sup>4</sup>

### I. CRIMINALS AS FILTH

The metaphors of slime and filth as applied to criminals and prisons are not based merely on the author's interpretations, but have been amply documented by her in numerous writings, both legal and nonlegal, and even more persuasively in judicial opinions.<sup>5</sup> The concluding heading, *Into the Dirt, Into the Slime: The Metaphor of Filth in American Case Law* (pp. 179-84), demonstrates beyond doubt that the author's reasoning is not a mere figment of her imagination, but is based on solid evidence from the pronouncements of judges and prosecutors.<sup>6</sup> The cited

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4. Duncan has effectively used psychoanalytic concepts and reasoning, as discussed by two reviewers of her book. Allen, *supra* note 2, at 540 and Perry Meisel, *In League With the Bandits: A Law Professor Examines the Deeper Meanings of Crime and Punishment, Confinement and Freedom*, N.Y. Times Book Rev., Jan. 26, 1997, at 17. Because she has employed psychoanalytic notions as tools of interpretation, I see no problem with her approach. Alan A. Stone has recently suggested that Freudian theories continue to be of value in the humanities, although they do not belong to the sciences. Alan A. Stone, *Where Will Psychoanalysis Survive: What Remains of Freudianism When Its Scientific Center Crumbles?*, Harv. Mag., Jan.—Feb. 1997, at 35-36. However, the distinction between the humanities and science, while traditional within the Anglo-American academic context, does not have the same meaning on the Continent. Freud was educated and creative within an environment that stressed universal knowledge (*Bildung*). The universities used (and still use) the term science in a broader sense than customary in the United States, including the *Geisteswissenschaften* or spiritual sciences, such as philosophy and law. Aside from differences in academic classifications, as traditional in the United States and continental Europe, Freudian theories have been so thoroughly incorporated into and permeate American thinking that it becomes almost a matter of mere style whether specific reference is made to them.

5. Duncan's data mostly involved abusive prosecutorial language that became an issue on appeal, but sometimes derogatory labeling was confirmed in the appellate courts. See, e.g., *People v. Myers*, 220 N.E.2d 297, 311 (Ill. 1966) (considering a prosecutorial reference to the defendant as a "slimy beast" a legitimate response to an argument by the defense).

6. Duncan acknowledges that, since many criminal cases do not reach the appellate level, the incidence of derogatory metaphorical language can be assumed to be more frequent than shown in the cited cases (pp. 179-80). Actually, the overwhelming majority of criminal cases terminate by plea bargain.

cases span more than one hundred years, from 1885 to 1990, and abound with language describing criminals as “filthy,” “slimy,” “scumbag,” “type of worm” and “skunk.”<sup>7</sup> Judicial opinions traditionally are not indexed according to the epithets that they use. No traditional research tools, including computers, possibly can locate the widely scattered references to filth, slime and dirt that are the basis of this work. The cited references, also in regard to the numerous literary sources, attest to an extraordinary knowledge of the literature, both in the English speaking world and elsewhere.

Essentially, the author exposes the irrational sources of criminal punishment.<sup>8</sup> The sources from English history are especially valuable because they show that unconscious motivations reach beyond retribution and rehabilitation, propagating results that in effect try to rid society of elements that are perceived as unworthy. These attitudes, as persuasively documented, tend to surface as metaphors describing criminals as filth and prisons as places where refuse and garbage are collected. Efforts at rehabilitation popularly have been ridiculed and reviled in England (pp. 164-5) or, one may add in the contemporary American context, decried as a waste of taxpayers’ money. The equation of criminals and prisons with stench and filth is chillingly illustrated with a quote from a United States

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Fear of abusive prosecutorial language, whether realistic or not, may sometimes have a bearing on entering a plea. The adversarial system and the discursive style of American judicial opinions may also encourage the use of negative metaphors, keeping in mind that the majority of judgments are rendered without written opinions. Folke Schmidt, *The Ratio Decidendi: A Comparative Study of a French, a German and an American Supreme Court Decision* 17 (*Acta Instituti Upsaliensis Iurisprudentiae Comparativae* No. VI, 1965), reprinted in Folke Schmidt, *Six Essays in Jurisprudence* 149-86 (1973) (noting excessive length and discursive nature of American judicial writing); Jan Gillis Wetter, *The Styles of Appellate Judicial Opinions: A Case Study in Comparative Law* 36, 247 n. D74 (1960) (suggesting a dual character of American judicial style, allowing for “both greatness and vulgarity”).

7. A complete listing of the cited cases is contained in the Appendix (pp. 195-96).

8. See also Markus D. Dubber, *Recidivist Statutes as Arational Punishment*, 43 *Buff. L. Rev.* 689 (1995).

Supreme Court decision in *Euclid v. Ambler*.<sup>9</sup> Issues of zoning in the city of Euclid dealt with sewage disposal, garbage and refuse incineration, cemeteries, crematories and penal and correctional institutions in one breath (p. 145).

In the historical context of England, this unconscious attitude has resulted in the banishment of prisoners to remote parts of the world to prevent their return forever, expunging this potential source of contamination from the homeland as if it were some contagious disease. The establishment of the penal colonies of Australia, after North America was no longer available for this purpose, is discussed in detail in Chapter 11, *Projecting an Excrementitious Mass: The Metaphor of Filth in the History of Botany Bay* (pp. 147-70).<sup>10</sup> This discussion is instructive because it alludes to the contemporary dilemma in the United States where expulsion or banishment to some remote part of the world is no longer possible, and where the rush to build more and more prisons and get criminals off the streets has its obvious natural limits.<sup>11</sup>

The accumulation of metaphors equating criminals and prisons with filth, dirt, contamination, and stench, as depicted by the author, is so overwhelming that a sensitive reader may be repulsed by the presentation. Yet, Duncan cites Judge Cardozo's warning that metaphors tend to get

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9. 272 U.S. 365, 381 (1926).

10. One may note that, contrary to the original intentions, the Australian descendants of the criminals who were in large numbers expelled from England have over time established a nation that has the respect of England and the world.

11. See James Brooke, *With Jail Costs Rising, Arizona Wants to Build Private Prisons in Mexico*, N.Y. Times, Apr. 20, 1997, at 12. The proposal, originating from a private business firm in Sarasota, Fla., has the support of Governor Fife Symington of Arizona. The Arizona prisons in Mexico would be manned by Mexican nationals at a substantial saving in costs for labor. Spanish would be spoken, and the cuisine would be Mexican. The program, as presently conceived, is primarily designed for the growing number of aliens of Mexican extraction in Arizona prisons who, in this fashion, would be "repatriated" and still serve their sentences. Yet under the tax savings rationale, any convicted criminals, regardless of citizenship or national origin, could potentially be included. Members of Spanish speaking minorities, even if American citizens, may become primary targets.

out of hand and are to be narrowly watched (p. 223 n. 2).<sup>12</sup> She has not created the metaphors of filth; they are commonplace in the literature and court opinions. They are even more disturbing if one realizes, from their accumulation, that they express unconscious trends that permeate our whole criminal justice system. In view of the sensitive nature of much of the discussion and the deep rooted social taboos that are articulated, the author deserves credit for courage.<sup>13</sup>

The author's task is formidable, indeed. More than any other area of knowledge, law is based on a system of taboos. The effectiveness of Duncan's work may hinge upon whether she has been able to negotiate between being too circumspect to be understood and too explicit in her reasoning to be acceptable. Much of the author's discussion relating to the impact of race on criminal sanctions is left to allusion. For example, she mentions in detail the metaphor of darkness in its unconscious association with crime and criminals (pp. 123-9). Yet, most of her sources are from England, and she avoids explicit reference to racial problems in the United States. The inferences are obvious to the reader, but articulating them could have made an already sensitive subject unbearable.<sup>14</sup>

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12. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J.: "(m)etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.").

13. According to Konrad Zweigert, the purpose of any true scholarship is to combat taboos and advance knowledge. This scholarly pursuit, he continues, can only be successful if actual contact with the taboos is avoided. Zweigert concedes that taboos may have legitimate functions, but does not raise the question whether the same is true of ignorance. See Konrad Zweigert, *Tabus in Deutschland*, *Zeit*, Jan. 8, 1965, at 8 (quoting Stanislaus Letz, while discussing taboos in postwar Germany). Although Zweigert includes any discipline, also law, in his quest for knowledge, one can hardly overlook that a large part of legal scholarship and the activities of the courts consist in defending, rather than combating, taboos.

14. Duncan refers to darkness of skin color as being associated in the minds of white Americans with fear of uncleanness, illness and contamination (p. 125), quoting Robert Coles, *Children of Crisis* 357 (1967) and Patricia Williams, *The Alchemy of Race and Rights* 198 (1991). She also speaks generally of the association between darkness and crime, but avoids stressing the fact that a large part of the American prison population consists of black people. Foreign

## II. PRISONS AS HAVENS, CRIMINALS AS HEROES

The earlier parts of the book are necessary stepping stones to its conclusion. Part I, *Cradled on the Sea: Positive Images of Prison and Theories of Punishment*,<sup>15</sup> maintains, based on extensive quotations from inmate biographies, that prisons are often experienced in positive terms, regardless of the objective horrors of the confinement. The account contains reports of literary luminaries, such as Solzhenitsyn, Dostoyevsky, Genet and Verlaine,<sup>16</sup> but also of more ordinary persons, such as James Blake who spent thirteen years in Florida state penitentiaries,<sup>17</sup> as well as

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observers have pointed out that in any society the underclass, in particular ethnic minorities, tend to be criminalized by the dominant society. Martti Grönfors, *Ethnic Minorities and Deviance: The Relationship Between Finnish Gypsies and the Police* 13-26 (University of Helsinki Sociology of Law Series No. 1, 1979) (reporting on criminalization of Gypsies in Finland, with comparative references to blacks and Mexican-Americans in the United States, Indians in the United States and Canada, and Maoris in New Zealand); Angelika Pitsela, *Straffälligkeit und Viktimisierung Ausländischer Minderheiten in der Bundesrepublik Deutschland* (1968) (reporting on criminalization of foreign minorities in Germany).

15. Part I is a revision of an article, published under the same title, in 76 Cal. L. Rev. 1201 (1988).

16. Perhaps Duncan's book is an early example of a new form of legal writing, a combination of criminal law and literary criticism. See also Cynthia Ozick, *Dostoyevsky's Unabomber: Raskolnikov Lives On*, *New Yorker*, Feb. 24 1997, at 114 (describing "the philosophical criminal of exceptional intelligence and humanitarian purpose, who is driven to commit murder out of an uncompromising idealism."). The author has incorporated numerous references to world literature into her book. She effectively uses them as illustrations of her theories, perhaps in a similar vein as field research. Since Greek antiquity concern with crime has enriched creative thought. The Greek drama of the fifth century B.C. took its substance from events that today are viewed as crime, but then were seen as tragedies ending in catastrophe for the protagonist. See David Daube, *Greek Forerunners of Simenon*, 68 Cal. L. Rev. 301, 304-05 (1980). For an extended version of the same article, see *id.*, *Die Geburt der Detektivgeschichte aus dem Geiste der Rhetorik* 12-32 (Konstanzer Universitätsreden No. 123, 1983) (discussing Sophocles, *Oedipus Rex*). See also Duncan's references to Sophocles' *Antigone* (pp. 76-77) and *Oedipus Tyrannus* (pp. 139, 142).

17. James Blake, *The Joint* (1971). References to Blake appear throughout the book, in particular on pp. 10-11, 29-30.

observations of prison wardens. Prisons are depicted as places of refuge where the pressures of life outside are eliminated, where time stands still, and where some form of mental repose and spiritual rebirth can take place.

Duncan's methodological discussions are of special value (pp. 44-7). She examines closely whether the biographies of prisoners actually mean what they say, to what extent criminals bring about their incarceration deliberately and whether the inmate reporters are representative of notions that prevail among the general prison population.<sup>18</sup> She finds the same themes, regardless of time and place of observation, in Tsarist Russia, Florida in the 1950's, Elizabethan England and contemporary South Africa (p. 47). The analyses of how the author's observations relate to the theories of deterrence, retribution, and rehabilitation are also valuable (pp. 48-55). These theories reflect more the conceptions of the outside world, regardless of what the subjective experiences within the prisons might be.

In Part II, *A Strange Liking: Our Admiration for Criminals*,<sup>19</sup> the author shifts from the perspectives of the criminals to those of the outside world. She finds, again based on numerous sources, a theme that comes to its culmination in Part III, namely a deep-seated and unconscious ambivalence that admires the criminal on the one hand, but represses that admiration on the other. This part is perhaps easiest to follow by the reader. The American popular culture with its preoccupation with crime and glorification of violence makes the ambivalence

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18. Since most prisoners belong to the low educated underclass, incarceration may be experienced with mind numbing boredom, as one reviewer has remarked. Allen, *supra* note 2, at 545 (quoting Norval Morris, *The Contemporary Prison*, in *The Oxford History of the Prison* 228 (Norval Morris & D.J. Rothman eds., 1995)). One of the effects of long-term imprisonment may be that prisoners age slower than people on the outside.

19. Part II is a revision of an article, published under the same title, in 1991 *U. Ill. L. Rev.* 1. This book addresses itself to a circle of readers who are different from the readers of the articles. Their responses are likely to alter the content of the book's message. Also in other respects the book is more than the sum of its parts. Although its three parts were published separately as articles, they are now presented as a whole in a powerful way.

fairly obvious.<sup>20</sup> The descriptions of the author confirm what can be observed daily on television, the popular fascination with crime and criminals and any form of deviant behavior, combined with loathing and persecution of those persons who actually live out these fantasies (pp. 102-15). Due process has no place in these mental states.<sup>21</sup> Duncan stresses that she does not want to minimize the pain inflicted upon the victims of crime and the tremendous costs of crime for society. She maintains in her conclusion to this part that there might be a relation between the ambivalence and the causes of criminality (pp. 116-8, 222). She posits that our reliance on penitentiaries, without consciousness of our own ambivalent impulses, can only aggravate the problems of criminality.<sup>22</sup>

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20. The bibliography contains a heading, Films and Television Shows (p. 262). Current mass media, especially of the kind commonly characterized as "trashy," should probably be explored in greater depth than this is done so far. Their influence, for example, on the perception of crime, is likely to be exorbitant. The existing literature is interesting, but possibly too value laden. See, e.g., James B. Twitchell, *Carnival Culture: The Trashing of Taste in America* (1992); Pierre Schlag, *This Could Be Your Culture: Junk Speech in a Time of Decadence*, 109 *Harv. L. Rev.* 1801 (1996) (reviewing Ronald K.L. Collins & David M. Skover, *The Death of Discourse* (1996)). Words like "trashing," "taste," "junk" and "decadence" may imply a conservative bias. A closer look at the relationship between so-called junk communications and social taboos may be needed. Are the tabloids, for example, more subject to social taboos than "ordinary" communications, or (and this is quite possible) less so? However, veiled admiration for criminals is not confined to the tabloids. See, e.g., Paul M. Barrett, *Through the Cracks: Bureaucratic Bungling Helps Drug Fugitives Evade Capture by Feds: Pot Smuggler Pat Waldrop, Snared After 6-Year Hunt, Still Remains Outside U.S.*, *Wall St. J.*, Aug. 7, 1991, at A1. On the relationship between violence and crime, see Franklin E. Zimring & Gordon Hawkins, *Is American Violence a Crime Problem?*, 46 *Duke L.J.* 43 (1996); id., *Crime Is Not the Problem: Lethal Violence in America* (1997).

21. The ambivalent states of mind described by the author may also involve oral legal traditions. They too are remarkably devoid of any standards of fairness and due process. Walter O. Weyrauch & Maureen A. Bell, *Autonomous Lawmaking: The Case of the "Gypsies"*, 103 *Yale L.J.* 323, 394, 397 (1993).

22. Emile Durkheim, whose work is cited by Duncan (p. 222 n. 1 & 2), had maintained more than one hundred years ago that any society needs its criminals. Their presence, Durkheim suggested, strengthens group solidarity by a common bond of righteousness. Emile Durkheim, *The Division of Labor in Society* 108-09 (N.Y. Free Press, 1933); Kai Erikson, *On the Sociology of Deviance, in Crime, Law, and Society* 87 (Abraham Goldstein & Joseph Goldstein eds., 1971) (quoting Emile Durkheim). Durkheim actually considered some

## III. SELECTIVE CRIMINALIZATION

Duncan's book represents an effort of ingenuity, shedding light on one of the most serious and obscure problems that our society faces today. Obviously, large-scale expulsions and deportations are no longer available options in contemporary society. The criminalization of whole segments of our population, mostly belonging to the underclass and racial minorities, and use of national and local resources to construct more and more prisons are incompatible with the ideals that are the foundation of our nation.<sup>23</sup> The author does not suggest any particular solution, but propagates insight into the causes and meaning of criminality. The book is addressed to a broad spectrum of readers and may well become a classic in criminal theory.

Although pathbreaking in this country, Duncan's work is in line with similar efforts that are taking place in Europe. I point toward a recent German publication containing contributions of twenty-eight legal scholars and entitled (in translation): *On the Absurd State of Criminal Law*.<sup>24</sup> The German book clarifies in its introduction that an "impossible situation" has been created by the frantic efforts of legislatures, law enforcement and some scholars to modernize criminal proceedings in the interest of an assumed greater efficiency in combating crime.<sup>25</sup> A whole field of research (*Dunkelzifferforschung*) that examines the

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measure of criminality to be an incidence of a healthy society, leaving open the question whether this phenomenon can get out of hand.

23. Cf. Walter O. Weyrauch, *Aspiration and Reality in American Law*, in *Law, Morality, and Religion: Global Perspectives* 217 (Robbins Collection Publication, Univ. of Cal., Berkeley, Studies in Comparative Legal History, Alan Watson ed. 1996) (discussing the function of unfulfilled aspirations).

24. *Vom unmöglichen Zustand des Strafrechts* (Institut für Kriminalwissenschaften Frankfurt Main, ed., Frankfurter kriminalwissenschaftliche Studien No. 50, 1995).

25. *Id.* at 5-6.

social functions of criminal impulses of the ordinary population has been developed in Germany.<sup>26</sup> Within the American realm Markus Dubber has formulated succinctly what might be involved:

With very few, if any exceptions, onlookers will themselves have broken the law at one time or another. One could therefore affirm the community of onlooker and offender in a classic way by first pointing out that onlookers are also lawbreakers and then asking who would throw the first stone. The problem is that onlookers will either deny they have broken the law or distinguish between the "crimes" they committed - say, speeding or tax evasion - and the crime of the offender - say, robbery. In fact, onlookers may deny to themselves and to others their commonality with an offender even if they had engaged in the very same criminal conduct.<sup>27</sup>

Dubber's thought is developed more or less incidentally in discussing Hegel's philosophies on crime and punishment. On the whole, there seems to be little inclination in the United States to engage in research on submerged criminal activities and propensities of the general population, corresponding to the German *Dunkelzifferforschung*. The presence of large ethnic minorities, such as blacks and Latinos, and their overrepresentation in crime statistics and incarcerations, may be responsible for this.<sup>28</sup> The matter is too sensitive.

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26. Dunkelzifferforschung means in literal translation "dark figure research." Empirical research in Germany has concluded that about 80 to 90% of the prison population belong to the social underclass. The same percentage of the total population, 80 to 90%, have also violated criminal law but for a variety of reasons have not been discovered, prosecuted or convicted. See Klaus Lüdderssen, *Kriminologie* 70-93 (1984) (discussing the concept of Dunkelziffer, methodology and estimates); Arthur Kreuzer, *Kriminologische Dunkelfeldforschung*, 1994 *Neue Zeitschrift für Strafrecht* 10.

27. Markus D. Dubber, *Rediscovering Hegel's Theory of Crime and Punishment*, 92 *Mich. L. Rev.* 1577, 1611 n. 149 (1994) (reviewing Mark Tunick, *Hegel's Political Philosophy: Interpreting the Practice of Legal Punishment* (1992)).

28. Perhaps it is significant that such research has been conducted in Canada, which has fewer racial problems than the United States. See Jolanta Juszkiewicz,

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Even Duncan, as discussed earlier,<sup>29</sup> merely alludes to issues of race.

#### IV. THE ROLE OF AMBIVALENCE IN THEORIES OF CRIME

The author has stressed the general ambivalence toward crime and punishment that prevails in the public. Ambivalence has been defined as the “simultaneous attraction toward and repulsion from an object, person, or action.”<sup>30</sup> Such powerful emotional feelings toward criminals and prisons cannot possibly stay confined to persons and institutions. They are bound to affect the whole of criminal law and procedure. This raises a range of problems and questions that were beyond the scope of Duncan’s book. Without going into details or attempting solutions, some hypotheses of what might be involved are suggested.

Plea bargaining, for example, seems to be an aberration of normal proceedings, purely dictated by the necessities of expedient adjudication with limited resources. Theories of ambivalence may view it in a different light. The accused negotiates for a solution without necessarily admitting guilt. The prosecution and public are also satisfied, although an actual clarification in one way or another has not taken place. Important cultural myths are preserved in principle, although they are not adhered to in fact. Thus, the fundamental rights to a jury trial, to confront one’s accusers, to present witnesses in one’s defense, to remain silent, and to be convicted by

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We have met the Criminals, and They’re Us!, Fed. Probation, Mar. 1995, at 85 (reviewing Thomas Gabor, *Everybody Does It! Crime by the Public* (1994).

29. See supra note 14 and accompanying text.

30. Webster’s Third New International Dictionary of the English Language Unabridged 66 (1971).

proof beyond reasonable doubt are left intact and waived at the same time.<sup>31</sup> That the overwhelming majority of criminal cases terminate in this fashion may not be merely a matter of time pressure and limited resources, but may also respond to ambivalent emotional needs of the American public.

Similarly, the apparent contradictory results of criminal and civil trials, as experienced in the proceedings against Bernhard Goetz and O.J. Simpson, although logically explainable in terms of differences in burden of proof, jury selection and verdict, may satisfy the needs of the public to have it both ways, an acquittal and a "conviction" in the same breath.<sup>32</sup> Whether the logic involved is sound or strained is beside the point. Ambivalent emotional needs follow their own rationality and are not confined to a narrow determination of whether they make sense. Furthermore, the issue of race is ever present. In *Goetz*, a white man shot and severely injured four black youths who had approached him in a New York subway in an allegedly threatening manner, asking for five dollars.<sup>33</sup> O.J. Simpson, a black man, was accused of having murdered his white former wife and her white male companion.<sup>34</sup> The two cases can be seen within the

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31. *Santobello v. New York*, 404 U.S. 257, 263-64 (1971) (Douglas, J., concurring). Many Americans believe fervently that, in contrast to other countries, people are presumed to be innocent here, until proven guilty by a jury of their peers.

32. Nina Bernstein, *The Simpson Verdict; the Law: Views of a Legal Ordeal*, N.Y. Times, Feb. 5, 1997, at A1 (quoting Yale Kamisar & John H. Langbein, and also containing references to the criminal and civil trials against Bernhard Goetz). In discussing the 43 million dollar jury award in the civil trial against Bernhard Goetz, George P. Fletcher has stressed the uniquely American aspects of these forms of double adjudications:

Maybe we like this messy inefficiency. It bespeaks our tolerance for there being some truth on both sides. Perhaps we are relieved that we never have to make up our mind, once and for all, about whether Bernhard Goetz did the right thing when he pulled his gun and shot four young black men on the subway.

George P. Fletcher, *Justice for All, Twice*, N.Y. Times, Apr. 24, 1966, at A21.

33. *People v. Goetz*, 497 N.E.2d 41 (NY Ct. App. 1986). See also George P. Fletcher, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (1988).

34. See, e.g., Kenneth B. Noble, *Not Guilty: A City Reflects; In the City of the*

framework of a more general American ambivalence that tends to see crime in racial terms of black and white.

The inclination of reducing issues racially to black and white, as has been pointed out, is unrealistic because it disregards other shades of ethnicity, such as Latinos, Orientals and Native Americans.<sup>35</sup> Yet, the paradigm also represents an emotional state of ambivalence, and as such, acquires a power that is beyond reason and reality. It may permeate every aspect of substantive criminal law. A black colleague has expressed this emotional state by giving two basic illustrations. Whenever a crime is reported, every black, regardless of social class or educational level, voices inwardly the concern, "I hope no black man is involved." No equivalent concern, the colleague maintained, such as "I hope no white man is involved," would ever enter a white person's mind.<sup>36</sup> However, a white person might very well ask if the perpetrator is black, especially if a violent crime is committed.

Since this frame of mind may relate to almost any violation of criminal law, perhaps with the exception of some white collar crimes, one faces a pervasive state of fear and suspicion.<sup>37</sup> At the source of both sentiments is fear of harm; the black community fearing danger of persecution and the whites fearing black retribution through violent and other assumed criminal behavior. It is almost as if, in disregard of all other ethnic communities, the blacks and

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Beautiful People, Trial Hinged on Uglier Issues, N.Y. Times, Oct. 4, 1995, at A13.

35. Juan F. Perea, The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought, 10 *La Raza L.J.* 127 (1998); also published in 85 *Cal. L. Rev.* 1213 (1997).

36. Interview by Walter O. Weyrauch with Professor Michelle Jacobs, University of Florida College of Law (Mar. 28, 1996).

37. Statutes punishing rape, seemingly race neutral, have been applied in a patently discriminatory fashion against black men. It has been argued that the policy behind this one-sided enforcement was less directed against coerced intercourse and more likely was designed to discourage any form of sexual contact between black men and white women. Jennifer Wriggins, Rape, Racism, and the Law, 6 *Harv. Women's L.J.* 103, 111-17 (1983). See also Hubert S. Feild & Leigh B. Bienen, Jurors and Rape 117-18 (1980); Toni M. Massaro, Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony, 69 *Minn. L. Rev.* 395, 407 n. 61 (1985) and accompanying text.

whites were hostages of each other, or at least perceive themselves as such, and uneasily have to learn to live with each other. That this dilemma results in ambivalence has been amply described.<sup>38</sup>

As far as substantive and procedural criminal law are concerned, one may examine whether they satisfy merely the need for cultural rituals and myths or they are what they are supposed to be, namely intellectual tools that facilitate thinking about, discussing, and deciding complex issues that otherwise would be left to arbitrary disposition. In all these instances, we may ask whether ambivalence has harmful results or facilitates social processes, or perhaps both. Clearly, Duncan had good reason not to have stepped on this level of discourse. It would have raised controversial issues prematurely and thus would have detracted from the message of her book, a comprehensive theory of crime and punishment.

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38. The phenomenon is known in the literature as the "Stockholm syndrome," following a 1973 bank robbery that took place in Stockholm, Sweden. Four bank employees were held for 131 hours and, during this period, developed strong identifications with their captors that continued even after their captivity had ended. Thomas Strentz, *Law Enforcement Policy and Ego Defenses of the Hostage*, FBI L. Enforcement Bull., Apr. 1979, at 2; Georges Gachnochi & Norbert Skurnik, *The Paradoxical Effects of Hostage-Taking*, 44 *Int'l Soc. Sci. J.* 235 (1992). The emotional ambivalence of blacks and whites has been linked to the Stockholm syndrome. Barbara A. Huddleston-Mattai & P. Rudy Mattai, *The Sambo Mentality and the Stockholm Syndrome Revisited: Another Dimension to an Examination of the Plight of the African-American*, 23 *J. Black Stud.* 344 (1993). Incidents of hostage ambivalence have been the subject of extensive litigation. See, e.g., *United States v. Hearst*, 563 F. 2d 1331 (9th Cir. 1977), cert. denied 435 U.S. 1000 (1978). Request for post conviction relief denied, *United States v. Hearst*, 466 F. Supp. 1068 (N.D. Cal. 1978), affirmed in part, vacated in part, 638 F.2d 1190 (9th Cir. 1980), cert. denied, 451 U.S. 938 (1981) (concerning the kidnapping of newspaper heiress Patricia Hearst who, under the influence of her captors, repudiated her lifestyle and participated in criminal activities, including an armed bank robbery). For a review of the extensive literature on the emotional effect of long term captivity, see Penelope E. Bryan, *Holding Women's Psyches Hostage*, 69 *Denv. U. L. Rev.* 171 (1992).