

Fear of Crime and Punishment
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It was a back staircase, dark and narrow, but he was familiar with it already, and knew his way, and he liked all these surroundings: in such darkness even the most inquisitive eyes were not to be dreaded.

*'If I am so scared now, what would it be if it somehow came to pass that I were really going to do it?'*¹

*Sonia had long been accustomed to the room's being uninhabited. But all that time Mr. Svidrigailov had been standing, listening at the door of the empty room. When Raskolnikov went out he stood still, thought a moment, went on tiptoe to his own room which adjoined the empty one, brought a chair and noiselessly carried it to the door that led to Sonia's room. The conversation had struck him as interesting and remarkable, and he had greatly enjoyed it--so much so that he brought a chair that he might not in the future, to-morrow, for instance, have to endure the inconvenience of standing a whole hour, but might listen in comfort.*²

Fyodor Dostoyevsky
Crime and Punishment

Is fear the cornerstone of the law? If we think of the law as a list of prohibitions or injunctions enforced by punishments it is easy to conclude that it is. Could there be such a thing as law without punishment? Is the notion of punishment intelligible without understanding it as something to be feared? Is the threat of punishment ever made without the desire that it will instill fear – a fear sufficiently potent to act as a motivation to obedience? The authoritative “Do X, or else,” (or more usually “Don’t you dare do X, or else.”) marks the basic structure of law, or at least of the criminal law. And it is a structure that presumes the intention and ability to instill fear.

¹ Dostoyevsky, *Crime and Punishment*, translated by Constance Garnett, Part I, Chapter I. Online at <http://www.gutenberg.org/files/2554/2554-8.txt>.

² *Ibid.* at Part IV. Chapter IV.

One of the most famous legal theorists of all time, John Austin, championed a theory which strongly suggested that fear was central to the notion of law itself. He held that laws are the commands of sovereigns backed by threats of evil.³ The “evil” necessary for a legal sanction was – for Austin – at bottom simply something to be feared. Though fear was central to Austin’s notion of a command, “violence” was not. Threats of violence were a subset of the sort of “evil” a sovereign could use to coerce obedience. Fear not violence was the necessary ingredient.

Austin’s theory was roundly criticized on many fronts. But what many found objectionable about it was precisely his focus on coercion and its associations with fear. If laws are nothing but coercive commands how are they different from the demands of a gunman who says “your money or your life”?⁴ If fear is the cornerstone of law, what distinguishes the lawmaker from the bully? If fear is what motivates people to obey, how can the law claim legitimacy? To view law as a mechanism for securing obedience by instilling fear debases not only law, but also legitimate law makers and loyal subjects. If law is to be respectable, civilized, authoritative and legitimate it needs something more dignified, less craven than fear of punishment to support it.

Indeed, in well-ordered societies law *is* supported by a range of motivations for obedience that go beyond mere fear of punishment. Most law abiding people view law as a good enough replication of a set of moral norms to which they already feel bound. They respect the law as a kind of rough guide to decency and as a necessary condition of life in a peaceful community. These connections between law, decency and community mean

³ John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* excerpted in Frederick Schauer and Walter Sinnott-Armstrong, *The Philosophy of Law: Classic and Contemporary Readings with Commentary*. (Fort Worth: Harcourt Brace College Publishers, 1994) at 33.

⁴ See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 6-7.

that people feel obligated to obey the law even where they have no fear of getting caught. Thus authentic respect for law as a motivation for obedience persists even in the absence of fear of detection and punishment.

A reverential respect for law as a guide to morality may retain at least some connection to fear – albeit not the sort of material fear conjured up by the “Don’t do X or else”. The law abiding person is a person of conscience. Engaging the notion of conscience internalizes both the authority of law and the fear-like state it might inspire. Indeed, we might ask, if one’s conscience isn’t something to be feared, can it be any conscience at all? The conscience issues its own kind of threats. Disregard the dictates of conscience and you will be stuck with an inner life which you may find unbearable. You will not be able to look at yourself in the mirror. You won’t be able to sleep at night. You won’t be able to hold your head high in the community. You fear self-reproach which, though perhaps not a visceral fear, may count as a case of fear nonetheless. Conscience does not exactly frighten, scare or terrify. The feeling that conscience inspires is more in the neighborhood of reverence. It is perhaps adjacent to guilt and shame. But it is not unrelated to fear and may be considered at least its cousin.

There are also those who are not inclined by conscience to obey the law but who may be motivated to do so by pure calculation of self-interest. Such people don’t equate the content of the law with morality. Rather they weigh the benefit of breaking the law against the severity of the consequence discounted by the probability of getting caught. The law sets this purely self-interested person calculating. He reads the law not as “Don’t do X, or else Y.” but rather as “If you do X and there’s a Z% chance you will have to pay Y.” The possibility of punishment is a cost of doing business to be assessed like any other.

If that cost is too high then the self-interested person will comply. If he reckons he will come out ahead by disobeying, he will. He doesn't respect the law in the sense of viewing it as authoritative or binding on his conscience. But he also remains in a strategic relationship of awareness of the law and attention to it.

There may be something fear-like even in this purely self-interested motivation for obeying the law. What such a person does fear is making a wrong calculation and acting against his interests. He fears being a loser. And everything he does is driven by the anxiety that he might make a wrong move, a bad calculation, a bum deal. Because he is always aware of, and nervous about, the consequences of his actions, the law can simply presume and play with his obsessive anxiety to win. This is a kind of competitive tension more like anxiety, or compulsiveness than genuine fear. Nevertheless it would seem that such a fear-like feeling does play a role in animating the self-interested person's motivation to obey the law.

But having identified these not-quite-fear-but-fear-like states that can motivate obedience to law, we should return now to the core case of fear itself. That is the case where we really do hope that the law will function effectively as the command of a sovereign backed by a credibly frightening threat. Here we need to consider those potential law breakers who have no conscience, who don't abhor wrong action; those who are not good at calculating their own self-interest and have no skill in weighing the consequences of their actions. What kind of fear does the law want to inspire in these truly unruly types (often also losers) whose aggressive impulses always seem to get the better of them? Isn't it the case that in relation to these people law really does seek to be as much like the gunman as possible – motivating the criminal into obedience by

shouting: “Hold it right there or I’ll shoot!”? Indeed, we might go so far as to suggest that the law would like criminals to fear punishment something like the way that law abiding citizens fear crime?

The problem, however, seems to be that criminals – the ones the law really does want to scare – for one reason or another seem not to fear punishment. Unlike the person of conscience they have no respect for the law. Unlike the self-interested strategists they can never seem to think about the outcome of their actions beforehand. Their fear of punishment tends to turn up only after dirty deeds are done. They are distracted by other desires, passions, and projects before and during the commission of their crimes. The threat of punishment looms large only *ex post facto* when they have both the time to think and the concrete fact of the crime before them. A bloody hand to wash, or a corpse to dispose of, sets them thinking about prison, or Siberia, or lethal injection in a way that murderous desire doesn’t. They may even, like Dostoyevsky’s Raskolnikov, be obsessed by fear of the deed itself, before the doing. They may question their own courage and capacity to pull off the stick-up, consummate the rape, or inflict the fatal wound. Fear of enacting the crime may eclipse fear of the consequences all the way up to the moment of commission.

“Deterrence” is law’s euphemism for striking terror into the hearts of would-be criminals. And the question about whether it ever works on those who are not already inclined by conscience or calculation to obey is famously debatable. At least part of the intractability of the debate stems from the fact that it is impossible to avoid tautology in our assessment of the deterrent effects of punishment. It only works on those on whom it works. The trouble is, it is intended to work on the other ones. As we have seen,

obedience can have multiple motives. Therefore, obedience is only ever equivocal evidence that fear of punishment has deterred. Crime, by contrast is always evidence that the threat of punishment has failed.

Today we proclaim the impotence of punishment as a deterrent as though this were a cutting edge discovery of modern social science. However, the feebleness of punishment as deterrent has long been apparent. Nowhere is this position more lucidly stated than in Diodotus' speech in the Mytilenian Debate in Thucydides *History of the Peloponnesian War*. Countering Cleon's arguments in favor of execution of all the Mytilenians as punishment for their revolt against Athens, Diodotus says: "One of Cleon's chief points is that to inflict the death penalty will be useful in the future as a means of deterring other cities from revolt; but I, who am just as concerned as he is with the future, am just as convinced that this is not so....No one has ever yet committed a crime which he thought he could not carry out successfully... So long as poverty forces men to be bold, so long as insolence and pride of wealth nourish their ambitions, and in the other accidents of life they are continually dominated by some incurable master passion or another, so long will their impulses continue to drive them into danger. Then too, the idea that fortune will be on one's side plays as big a part as anything else in creating a mood of over-confidence; for sometimes she does come unexpectedly to one's aid, and so she tempts men to run risks for which they are inadequately prepared."⁵

This is a rich passage and it gives us much insight into why those bent on disobedience are not swayed by fear of punishment. We will return to Diodotus several times again in what follows. But now, to get some help with setting up a conceptual

⁵ Thucydides, *History of the Peloponnesian War*, translated by Rex Warner (London: Penguin Books, 1972) at 219-220.

framework within which to examine some of the reasons why fear of punishment does not operate as a pre-emptive reason for action, let us turn to Aristotle's discussion of fear in *The Rhetoric*.

Aristotle tells us that "Fear may be defined as a pain or disturbance due to a mental picture of some destructive or painful evil in the future... And even these only if they appear not remote but so near as to be imminent: we do not fear things that are a very long way off."⁶ He later refines this by noting that: "All terrible things are more terrible if they give us no chance of retrieving a blunder either no chance at all, or only one that depends on our enemies and not ourselves." Having set out the things that enliven fear Aristotle also considered things that inhibit it. (That is, if we can speak of inhibiting fear.)

One such factor identified by Aristotle was desperation. Aristotle claimed that people do not fear when: "when they feel they have experienced every kind of horror already and have grown callous about the future." Another emotional state which Aristotle saw as inimical to fear was anger. Anger for Aristotle was a courageous emotion – one that inspired confidence and dispelled fear.

To get a clearer sense of why the criminals may not fear punishment the way the law wishes they would, we shall consider each of these in turn: 1. imagination i.e. the vividness of the criminal's mental picture of the future evil of punishment, 2. immediacy i.e. his estimation of how far away in time the evil is and 3. agency i.e. the question of how much control he believes he has in preventing the evil. 4. desperation – the criminal's sense of hopelessness about his future and finally 5. anger.

⁶ Aristotle, *The Rhetoric*, Part II, translated by W. Rhys Roberts online at <http://classics.mit.edu/Aristotle/rhetoric.2.ii.html>

1. Imagination

First we have imagination. Fear, as they say, is all in your mind. (Though, as any coward can attest, it may start in there but it quickly moves down to the throat, the chest, the heart, the stomach, the bowels, and the knees.) The link between fear and imagination reveals the potential irrationality of fear. We fear most those things which are most apt to inspiring in us vivid pictures, not those things which are objectively the most likely to cause harm.

Consider the difference in our mental pictures of crime and the criminal's mental picture of punishment. We have, of course, no end of texts and images to help us generate vivid pictures of crime. First, there is literature. I would venture to suggest that no tragedy, Greek, Shakespearian or otherwise, fails to give us a terrifyingly image of violent crime. From Medea's murder of her two sons, (not to mention her murder of Glauce by the device of the poisoned fire dress) to Claudius' poisoning of Hamlet the elder, to Orestes murder of his mother Clytemnestra to MacBeth's murder of Duncan, so much of drama is apt to assist us in imagining the horror of violent crime. It is probably easier to count the number of novels (even classics) that don't depict violent crime than the ones that do. Movies and TV are another ubiquitous source of mental pictures of crime. Likewise, real trials documenting and dissecting crime are an obsession of the news media and reports of them give us all kinds of assistance in calling to mind frightening pictures.

What then of mental picture – the imaginative fantasy - involved in fear of punishment? How vivid is it? Certainly states used to inflict horrific punishments and

make public spectacles of them in hopes of enliven the would-be criminals' mental picture of the future evil punishment had in store. One doesn't have to get past the first few pages of Michel Foucault's *Discipline and Punish* to feel actually violated by the gruesome images of the 18th century punishments he describes. Tortuous punishments have, however, come to be considered crimes in themselves. Thus when photos of the atrocities of Abu Ghraib are published the point is not to instill fear of punishment in potential prisoners – but rather to instill a sense of outrage at the actions of the torturers and to shame the torturers themselves. The state has ostensibly gotten out of the business of striking terror into the hearts of would be criminals, spurring their imaginations by exhibiting the evil to be feared from punishment.

So where is the criminal to turn for help in conjuring up scary fantasies of punishment? Once again, fiction plays a role. TV and the movies help to enliven the imagination in formulating mental pictures of the evil of punishment. Crime shows are also usually at least partly punishment shows. They show the offenders getting caught, being taken down by the police, being humiliated in the interrogation room, being found guilty in the courtroom, being taken off to jail, being sexually assaulted by other inmates or guards. Sometimes they even show the offender being led to execution and killed.

For the most part, however, one is protected from imaginative identification with these scenes because they are shown from the perspective of the law abiding victim. We feel *schadenfreude* rather than pity in relation to the criminal's suffering. Though we may have a vivid picture of the criminal's suffering we do not view the picture from their perspective.

In considering the question of whether the spectacle of one criminal's punishment can inspire a vivid picture and hence fear of punishment in prospective criminals it is interesting to consider the relation between fear and pity. In his analysis of the relation between pity and fear in Aristotle's *Rhetoric*, David Konstan remarks: "...in the case of fear there is no reference to merit or desert; criminals fear punishment even if they deserve it, whereas pity entails an assessment of whether the other is suffering justly or not. Fear, then, does not involve the kind of complex moral judgment that Aristotle ascribes to pity and to pity's contrary, *nemesis* or indignation." [131]

It may be, however, that the barriers to pitying a criminal's suffering in punishment also do double duty as barriers to fear of punishment in the potential criminal. If John Braithwaite is right that "most criminals are card carrying retributivists" and believe that guilty parties deserve harsh treatment it may be that they do not pity other criminals either. And the barriers to pity may also be barriers to fear. Aristotle's analysis suggests that we progress from fear to pity: "what we fear for ourselves excites our pity when it happens to others" [part II.] But it may be that the emotional current can also run in the other direction. Perhaps we also come to fear those things which we have occasion to pity. This is especially true when we have no experience of the evil in question- when our mental picture of it comes not from our memory but from our observation of others.

Imagine, for example that I have no fear of sexual assault. Then one day my neighbor is raped. I feel tremendous pity and compassion for her. I am brought close to her suffering and feel for her in it. But in the course of identifying with her suffering I am also pulled out of my former self-assurance. It happened to her. So why not me? Thus

proximity to suffering may first inspire compassion and that compassion may be a stepping stone to fear.

If a criminal doesn't pity the suffering other criminals experience through punishment, they may not fear it either. Or at least the suffering of other criminals, in the absence of pity, will not provide an occasion for the criminal to conceive a vivid picture of the suffering of punishment which would in turn inspire fear of it. Pity between and among criminals may be necessary to the instructive function the punishment of one criminal is supposed to have on others. In other words, if criminals don't pity each other, punishment may be powerless to achieve what we call "general deterrence."

As Konstan points out, however, there is the intervening element of desert. Aristotle says we pity only when we believe the suffering person innocent. The law breaker doesn't pity the other criminal because he thinks the other one deserves it whereas he himself does not. He has a story to tell himself about the extenuating circumstances that render his own actions innocent and punishment of him unjust. This may be simple hypocrisy, with perhaps a little predisposition to *schadenfreude* mixed in. Punishment, after all, is intended, at least in part, to give pleasure to others at the sight of the suffering. And what rogue would deny himself the joy of delighting in another rogue's misfortune?

But even in *schadenfreude* there must be empathy. Pleasure in another's suffering depends on awareness of that suffering and real awareness requires empathy. Our theories of general deterrence (the idea that the punishment of one criminal will deter other potential criminals) presume that empathy alone is enough to engender fear. Simple awareness of what the sufferer of punishment is going through – an awareness which

doesn't involve sympathetic concern - should suffice to enliven the putative criminal's imagination about what it would be like to endure the same and that should be sufficient to instill fear.

But is empathy without sympathetic identification enough? Here we need to ask whether Aristotle was right that we do not pity those who deserve their suffering. Certainly we pity where the extent of the suffering exceeds what is deserved. But we can also pity fully deserved suffering. The memory of the offender's transgression is eclipsed by the immediacy of his present plight, making way for compassion. If then the potential criminal can see the convict's fate as pitiable despite his deserving it, perhaps that pity would enliven his imagination in a way that would engender the sort of fear that theories of general deterrence hope for.

2. Immanence.

Again, Aristotle suggests that we do not fear those things which we believe are too remote to be worth worrying about. Criminals don't fear punishment because if they see it at all they see it as far off in the future.

Consider Susan Neiman's discussion in her book *Moral Clarity* of a scenario posed by Kant. Kant imagines a man (think Eliot Spitzer) who, as much as he may want to, can't resist a beautiful prostitute. He knows very well that getting caught would destroy his career and maybe his life, and perhaps he even feels hopelessly ashamed of his actions. Nevertheless, into the brothel he goes. "But," writes Neiman, "what if he knew he would be hanged immediately upon emerging from its satiating depths – and a gallows were installed before the brothel to remind him? Suddenly he discovers that he

can stand temptation very nicely, thank you.”[79] Neiman takes from Kant’s example the idea that the desire for life trumps all other desires. “For however bright our other desires may be – for sex or wealth or any other form or mortal pleasure – all of them pale before the desire for life itself. This is almost a matter of logic: without life no consumption.”

But surely the gallows are overkill (so to speak) in Kant’s example. Surely it is the immediacy and certainty of the consequence, rather than their severity that changes the fellow’s mind about whether to go into the house. Wouldn’t the example work exactly the same way if we were to install paparazzi (or their eighteenth century equivalent) outside the whorehouse instead of the gallows? Ironically, nothing really turns on the man losing his life as a result of his actions. In fact he might perhaps *prefer* an encounter with the hangman to one with his wife. But, with the consequences looming outside the door, he can no longer fear getting caught in a vague far off, distant sort of way. Immediate desires win out over remote possibilities lodged safely forward in the future.

“Who knows when?” slides effortlessly into “who knows whether?” In Kant’s example it is the immanence of the comeuppance, its future certainty, not just sometime, but as soon as the man walks out that door, that raises the fear of the consequence from a background anxiety that doesn’t trump desire to an overwhelming reason for action that does.

We have run certainty and immediacy together here in a way that may not be justified. Perhaps it is certainty of the punishment that engages fear rather than the immediacy of it. But immediacy itself actually secures certainty in a way that makes fear the most vivid. Aristotle’s initial discussion of immediacy makes this clear. Death is an

event that is certain. But it is the immediacy of death not its certainty that engages fear.

Aristotle writes: “we do not fear things that are a very long way off: for instance, we all know we shall die, but we are not troubled thereby, because death is not close at hand.”

The distant futurity of the event allows us to call its certainty into question. And that question places a barrier between the event and our fear of it. This buffer against fear is even more apparent, not to mention more rational, in relation all those future events less certain than death. The further off any consequence is, the more we rightly project that other causes may intervene to prevent that consequence from materializing. But where the consequence is undeniably immediate we no longer waver about certainty.

Immediacy brings an awareness of certainty that is not present when the consequence is far off.

Thus immediacy is the variable that would most enliven fear of punishment. However, given our commitment to due process, punishment is never immediate. The criminal process with all its lengthy stages and complex constraints intervenes between crime and punishment to ensure that the criminal is never faced with an immediate threat of punishment prior to the commission of the offence. It is never possible to carry out Kant’s thought experiment in real life – we can never erect the gallows outside the brothel. The criminal believes, and rightly believes, that punishment is far off in the future and that its certainty can be discounted relative to that futurity.

3. Agency.

Aristotle says we fear most those things we have no control over. Helplessness fosters fear. Conversely, we discount the risk relative to our own self-confidence.

Wherever, as Aristotle says, the happening of the future evil seems to depend on *us* (and here perhaps we rely not just on our good judgment but on our good luck) it seems less likely to occur. Indeed the very act of paying attention and concentrating on what we are doing dispels fear.

The concentration involved in the exercise of skill can take one's mind off fear even in the most terrifying circumstances. Sometimes even the smallest exercise of agency feels like a powerful guard against harm. As William Ian Miller notes in his book *The Mystery of Courage*, "Zigzagging was the way helicopter pilot Robert Mason would take off and land in hot landing zones... The guys teased him about it, telling him he was as likely to zig into a round as away from one... But Mason feels that he dodges the bullets that missed rather than that they just missed all on their own... The belief in the magic of his own agency brings a certain small measure of equanimity."⁷

Similarly, the criminal sees punishment as something he can exercise skill to avoid. He discounts the risk of punishment relative to his own confidence. He doesn't think it will happen to him. As Diodotus says: "No one has ever yet committed a crime which he thought he could not carry out successfully." And whether it is his skill or his luck that the criminal counts on he believes *himself* to be the significant variable. Indeed Aristotle's posits confidence as the opposite of fear and this sense of one's own particular invincibility is precisely what Aristotle is referring to. As a comic conversation between the two kidnappers (the sidekick and the leader) in the movie *Baby's Day Out* goes: "Do you really think we can pull this off?" "Gosh no, actually I just have a morbid curiosity about the electric chair."⁸

⁷ William Ian Miller, *The Mystery of Courage* (Cambridge: Harvard University Press, 2000) at 218.

⁸ 1994, directed by Patrick Reed Johnson.

The criminal fears punishment in the way most of the rest of us fear of accident. People consistently report a belief that the risk of traffic accident for them (as drivers) is significantly less than the risk for the general population.⁹ Viewing ourselves as good drivers we believe that by being careful or, better still, skillful, we can avoid becoming “a statistic.” We believe that the risk of death, though objectively high for the rest, is not nearly as high for us. Likewise the criminal views his own chances of getting caught as lower than average.

Given this, the law might go so far as to wish that the criminal feared punishment, not in the vague way that we law abiding sorts fear accident, but rather in the way that we fear crime. Consider the following snippet of a conversation I remember vaguely from my student days. One student says to the other: “Did you know that on average two students a year die in bicycle accidents in the city of Oxford?” The other replies: “Yeah, so?” Indignant at this nonchalance the first student says: “Well, what if I were to tell you two students a year are knifed to death in their sleep by their scout? You wouldn’t be so blasé about that would you? You’d be scared out of your mind. You wouldn’t be able to sleep at night. You’d give up your degree. You’d leave town. You’d run for your life. How can you be so indifferent to the one risk if the other would paralyze you with fear?”

The fellow had a point. Change the threat from accidental death to murder and the psychology is radically altered. The same objective risk is seen as more frightening at least in part because suddenly everything seems to depend on an “enemy’s” agency rather than one’s own. And as Aristotle suggests, fear is intensified when we believe that the

⁹ See Francesco Parisi and Vernon L. Smith, *The Law and Economics of Irrational Behavior* (Palo Alto, Stanford University Press, 2005).

enemy is in control. We can never know when someone is lurking in the shadows. As nothing depends on us, we feel vulnerable. Everything turns on someone else's diabolical intention, on someone else's nefarious skill. In relation to crime, we are sitting ducks.

And again, perhaps the law might wish that criminals would fear punishment in this way: that they would see it as depending not on their exercise of skill, or even their luck, but on the law that lurks in the dark and is waiting to pounce with all deliberate and disastrous intention.

A person's confidence in their own skill and agency in avoiding detection and punishment may not only allay their fear of punishment, it may actually act as a positive pull toward criminal activity. The pride a criminal takes in carrying out an offence and eluding the authorities may amount to a powerful sense of creative accomplishment. As Jack Katz notes in his book *Seduction of Crime*, people who commit crimes "may regard 'getting away with it' as a thrilling demonstration of personal competence."¹⁰ In relation, for example, to shoplifting he writes: "By doing something ugly to another, the sneak thief or vandal establishes that she can bring beauty into the world. Appreciated from within, a sneaky property crime by an amateur is not a failure of social control but a personal esthetic triumph....Then she faces a test of whether she can maintain a personal 'cool' and execute the sneaky theft through willful, calculating manipulations. If she can, she has proved that she will not 'freak out' from the pressures of pulling it off. The euphoria that rewards success, then, embodies the awareness that the sneak thief can allow herself to be seduced by the world without fear."¹¹

¹⁰ Jack Katz, *Seductions of Crime: Moral and Sensual Attractions in Doing Evil* (New York: Basic Books, 1988) at 9.

¹¹ *Ibid.* at 73.

Thus the exercise of agency in the commission of crime can be more than just a barrier against fear of punishment. Crime can become the site of a perverse realization of the Aristotelian virtue of courage. The criminal achieves the Aristotelian mean between cowardice and rashness. She is neither cowardly i.e. so fearful of punishment that she will not commit the crime at all, nor rash i.e. so excessive in confidence that she “courts the intervention of the authorities.”¹² But most importantly, from within the mindset of one who takes pride in her criminal agency and skill, fear of punishment can become a positive vice of cowardice.

4. Desperation

Aristotle tells us that those who “have experienced every kind of horror already and have grown callous about the future” do not fear. Law breakers very often fall into this category. Diodotus acknowledges this too when he talks about poverty forcing people to be bold. Perhaps even his mention of impulses driving people like the Mytilenians to danger refers to the role of desperation in dispelling fear of punishment. When straights are dire anyway; when death is certain from starvation, Athenian taxation, or some other peril – why not risk death by punishment so long as there is something to be gained by committing the crime? As William Ian Miller puts it “The assumption is that despair means torpor. But add a dash of hope and you get violent and often courageous action.”¹³ Miller is speaking about soldiers here. But the phenomenon he identifies is present in all kinds of situations. Children too can overcome fear when they are desperate. Charles Dickens’ David Copperfield, after walking penniless from London

¹² *Ibid.*

¹³ *Supra* note 7 at 213.

to Dover, now starved, filthy, and exhausted, appeals to his formidable aunt Betsy whom he otherwise would have been too frightened ever to approach: “Then, without a scrap of courage, but with a great deal of desperation, I went softly in and stood beside her, touching her with my finger.”¹⁴ Where the threat of punishment is no more terrifying than the risks of inaction, punishment will fail to deter.

Further, as Aristotle stresses, callousness about the future born of extreme circumstances eliminates fear. Perhaps even mental illness or addiction can be seen as causes of the kind of despair that inhibits the fear of punishment. Whenever one is utterly overwhelmed by ones own afflictions – whatever their nature or genesis - fear of punishment will be beside the point. Thus we arrive at a common place of criminology – that where there is despair there will be crime also. This recognition squarely places the burden on the state seeking obedience to its laws to try also to eliminate the conditions that give rise to despair.

5. Anger.

Certainly anger can dispel fear. Indeed, Aristotle goes so far as to claim that anger and fear cannot coexist. He writes: “...you cannot be afraid of a person and also at the same time angry with him.” Hundreds of counter-examples spring to mind. Vulnerable people treated unjustly almost invariably feel both rage and fear in relation to those more powerful people who victimize them.

¹⁴ Charles Dickens, *David Copperfield*, (Oxford: Oxford University Press, 1981) at 187 (Originally published 1850.)

But in considering the role of anger in dispelling fear of punishment in situations of domestic crime we are dealing with a relation that is triangular (the criminal, victim, and state) not dyadic as we had in the relation between the Mytilenians and the Athenians (the rebels and the state.) The Mytilenians (who were probably both very angry and very afraid) lashed out against the Athenians - the very ones who wielded the power to punish. But in our domestic crime situations part of the problem is that the third party state has no emotional presence in the moment at all. Though the criminal law conceptualizes crime as an offence against the state, the psychological reality for both the victim and perpetrator is between the two of them. In a barroom brawl or domestic dispute anger at the other person completely distracts the perpetrator from fear of punishment. And it is the immediacy of that anger toward the victim that ousts the offender's capacity to connect emotionally to the abstract threat of punishment. Fear of the absent state does not kick in when one is consumed by anger at the present victim.

Aristotle also saw the fear-dispelling properties of anger to be related to the connection between anger and justice. An angry person virtually always has some perception (however distorted it may be) that he or someone he cares about has suffered an injustice. In explaining why the angry are not fearful Aristotle writes: "The fact is that anger makes us confident-that anger is excited by our knowledge that we are not the wrongers but the wronged, and that the divine power is always supposed to be on the side of the wronged."¹⁵ Thus the angry criminal views himself not as the one to be justly punished but as the one doling out just punishment. This righteousness of anger also works to inhibit the fear of punishment. Feeling justified in his anger the criminal cannot follow the logic of the law that would hold him culpable and thus he has no fear of it.

¹⁵ Aristotle, *The Rhetoric*, Part II.

We see this idea vividly expressed in Jack Katz's discussion of "righteous slaughter." Katz describes a number of such murderers; from a father who beats his crying baby to death, to a husband who kills his wife over an argument about payment of a car loan, to a young man who kills a friend for splashing barbecue sauce on him. In each case the killer was propelled by the events into an extreme rage and in each case the killer saw himself as the defender of "both the morality of the social system and a personal claim of moral worth."¹⁶ They had, as Aristotle notes, a profound confidence that comes from the sense that they "are not the wrongers but the wronged" and that as such they were the beneficiaries of the divine power. Katz writes: "In rage, the killer can blind himself to his future, forging a momentary sense of eternal unity with the Good." In such a state of righteous indignation it is impossible for the killer to comprehend the logic of a law that would hold him to be the wrongdoer not the wronged. In that moment of anger, he cannot see that the divine power granted to the injured is on the side of his adversary.

The Criminal as Victim and the Law as Criminal

We have seen some of the inhibitors of fear and have looked at how they operate in the criminal context in a way that prevents the criminal from fearing punishment. Of course, the list here is not exhaustive. Miller notes that Mandeville identified "avarice, vanity and ambition" as fear-repressing emotions, to which Miller adds "hatred and lust."¹⁷[226-227.] With so many barriers to fear of punishment, what's the law to do? Perhaps sometimes the law really does want the ability to generate real fear of violation,

¹⁶ Katz, *supra* note * at 19.

¹⁷ *Supra* note 7 at 226-227.

to inspire real terror. Once again, perhaps we want criminals to fear punishment, not in the vague way that we law-abiding people fear accidents, but in the vivid way that we fear crime. We want punishment to seem to potential offenders to depend not on the skill of the criminal but on the will of the state.

How then might law inspire such fear? Should we revive the violent punishments that we now see as crimes: public executions, drawing and quartering, tarring and feathering? Certainly not. Should we step up our use of the increasingly popular shaming punishments which do have in them something of the cruelty of the carnivalesque? No, not that either. Or should we frighten them with images not of horrible prison conditions? No, such conditions should not exist. Perhaps then we should scare criminals with images of the brutality of other inmates - sexual violence and assault? Again no, the law must not tolerate, let alone issue indirect threats of, violence inflicted on criminals by others. What then is the law to do?

Let me make only a very modest very partial proposal. In trying to get criminals to be genuinely afraid of punishment, my suggestion is that we might scare them with a very vivid, very immediate, very intentional, and very creepy and criminal picture of...surveillance.

Perhaps what might be truly frightening is the thought that you are being watched, being seen, being heard. Perhaps it is not the punishment itself that is frightening but rather the moment of being exposed. Consider for example the wiretap.¹⁸ Like Svidrigailov listening through the paper-thin wall of Sonia's room as Raskolnikov confesses his murders of the two old women, the wiretap doesn't just catch the criminal; it reveals him hoisting himself on his own petard. What if we were to give the criminal a

¹⁸ See <http://www.hbo.com/thewire/>

vivid picture, not of Svidrigaïlov moving his chair towards the door so that he can sit comfortably while he listens, but of police, prosecutors, judges, jury members, news reporters all sitting comfortably reading, word for word, the naked transcripts of their conspiracies? Might we show them in graphic detail the naivety of others like them, sitting ducks, criminals more clever than they who have been stalked, who have been watched, who have, all the while thinking they were skillfully avoiding detection, been the object of casual but intimate observation by their enemies? Nothing inspires pity for criminals like reading their unknowing self-incrimination. The poor violated souls don't know that the stinking breath of the police officer is actually on their neck, they don't know that the voyeuristic gaze of the prosecutor is seeing everything. If only they did *really know* that all their private words could with but the stroke of a judge's pen on a warrant be taken from out of their unsuspecting mouths and put down onto the printed public page, then they would, perhaps, feel really afraid.

As a young judicial clerk I remember reading transcripts of wiretaps in drug cases. There was something so pathetically and ironically sad about the criminal's lack of awareness. They had no idea that, not only were they being heard perfectly clearly, but their words were being coolly transcribed for the eyes of everyone in the justice system. I will never forget reading the transcript of a conversation between two co-accused who were, in that moment, figuring out that a third man they had been dealing drugs with was an undercover cop. The quote read: "And this fucking, fucking, fucking ... (times 50) person." The sense of humiliation (as William Ian Miller puts it – their being stripped of their pretense to status)¹⁹ is so vivid and even funny. And as much as one is aware of the

¹⁹ William Ian Miller, *Humiliation: And Other Essays on Honor, Social Discomfort and Violence* (Ithaca: Cornell University Press, 1995).

guilt of the parties one can't help but feel the intrusion of the wiretap as a kind of violation of them. One can't help feeling a kind of pity for them.

HBO's recent smash hit TV show "The Wire" vividly and sympathetically takes the viewer into the perspective of the both the criminals and the law enforcement officers. The title of the show is evocative precisely because it encapsulates the wiretap as the way into identification with the fear of the criminal. The surveillance camera too creates the ultimate "gotcha" evidence eliminating all deniability. There is a moment in the film *Before the Devil Knows You're Dead* where we see Hank, played by Ethan Hawk, in a state of utter panic in a car rental office as he is trying to retrieve incriminating evidence.²⁰ He looks up and sees the surveillance camera looming over him. The sight of the camera arrests him psychologically. He is already terrified but it is the sort of fear that fuels the violence of desperation. He is perhaps on the verge of committing another crime. Yet when his eyes meet camera's gaze we see in them the recognition that he is cornered – that he cannot take any risks now while he is being watched.

The threat of surveillance can be immediate in a way that the threat of punishment never can. Surveillance happens in the present moment. Like the gallows outside the whorehouse, the wiretap is right there, right now.

Moreover, punishment can sometimes be a badge of honor for the hardened criminal – a kind of credential in a life of crime. By contrast, being observed by the authorities – being watched by the enemy – can never be anything but pure humiliation. It may be cool or tough to go to prison but it is always a humiliating failure to be caught in the act. There can be a kind of pride in doing time, but there is nothing but shame in having been outsmarted. Surveillance undercuts the criminal in a way that punishment

²⁰ 2007, Directed by Sydney Lumet.

itself doesn't. It establishes the superiority of the law and the fallibility of the criminal in a more concrete way than does punishment itself.

In suggest that making criminals aware of their vulnerability to surveillance might make them more fearful of the law, I am not advocating for more use of wiretaps or security cameras in law enforcement. In fact, I am not saying anything about what kind of policies a good government should have about wiretapping or surveillance cameras. That is a matter for another very different paper. I am only asking us to do the thought experiment of considering whether a real understanding of how vulnerable such technologies can render even the most skillful and confident criminal might not instill a kind of fear which punishment itself can never call up.

What if we were to show potential offenders all the vivid details of how others have been nabbed despite all their skill and luck? Why wouldn't we want to have potential criminals pity the law breaker who is hoist on his own petard and through that pity to engender in others the fear that it could happen to them. Perhaps even rage and desperation are controllable if one were afraid of being watched. Perhaps even the violent spouse might be able to control his fury were he scared that there might be a camera or a bug somewhere that would expose his deeds. Of course, we know that in a police state where people know they are always being watched and listened to, they are indeed afraid. Again, I am certainly not advocating the police state. Surveillance of any kind must be used and regulated with great care and attention to privacy interests. Having said that, however, we might still agree with Svidrigailov's quip to the indignant Raskolnikov: "if

you are convinced that one mustn't listen at doors, but one may murder old women at one's pleasure, you'd better be off to America and make haste."²¹

²¹ *Supra* note 1 at Part VI, Chapter V.