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Caldararo, Niccolo

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Human Sacrifice, Capital Punishment, Prisons & Justice: The Function and Failure of Punishment and Search for Alternatives

Niccolo Caldararo*

Abstract: »Menschenopfer, Todesstrafe, Gefängnisse und Justiz: Funktion und Scheitern des Strafens und die Suche nach Alternativen«. The history of prisons and methods of incarceration has been a subject of interest and popular distraction since the great European reform movement in the 19th century. Critics (e.g., Foucault 1977) have concentrated their efforts on demonstrating that the ends achieved in the design of prisons and methods of correction have had effects outside of the prison walls in the daily lives of free and innocent citizens, both in the loss of privacy due to increased police surveillance and in the creation of a population of criminals and personnel of the criminal justice system in an integrated culture. Whether we view a society regimented by a uniform ideology like the Soviet Union or one with a less systematic one like the USA, the effects are clear. This paper examines the practice and ideology of prisons, in historical context and in cross-cultural analysis. Worldwide incarceration of people takes up an increasing amount of state budgets and targets in many cases minorities or ethnic groups. This has economic effects on society at large and specifically those minorities as well as repressing the incomes of sectors of cities. Public health is impacted as is education and inequality enhanced. Prisons and punishment differ historically in the same culture and between cultures. The goal of punishment and discipline in society has many forms, to control certain populations, to enrich others and to define certain behaviors and people as dangerous. Inevitably we want to know, can we do without prisons in complex society? Is our system of punishment accelerating the collapse of social capital in America and social cohesion?

Keywords: Human sacrifice, capital punishment, prisons, criminal justice, law.

1. Introduction

Justice is great profit.
Medieval lawyers' proverb; Coulton (1925)

* Niccolo Caldararo, Department of Anthropology, San Francisco State University, 1600 Holloway Avenue, San Francisco, California 94132, USA; cald@sfsu.edu.

When Hernan Cortez came to the Aztec Empire the Conquistadores claimed that the Aztecs were engaged in human sacrifice (see Vaillant 1944; compare with De Solis 1798). Was this only a ritual sacrifice or was it also a punishment? While the debate over this issue has swung back and forth since then, the question of what we mean to do and what are the unintended consequences of our acts is worth discussing in this regard. The Inquisition was burning people at the stake at the time in Europe and so what the Spanish perceived in Azteca may have been colored by their experiences at home. Just as the Spanish saw Aztec altars made of human heads and felt this proved human sacrifice, so Islamic and Chinese visitors to European churches who saw a man nailed to a cross could think European Christians worshiped death and could interpret it in the same way as human sacrifice. The idea of the sacrifice and its origins were exhaustively studied in the 19th and 20th centuries by a number of scholars, Frazer (1922) being the most famous, and Bourdillon and Fortes (1980) a recent comprehensive view. The goals of human sacrifice are many, to placate the god and show devotion as in Abraham's Biblical case, or to show respect and honor and thus gain prestige for the group as in the Bara tribes of Madagascar (Linton 1936). This is argued to have been the goal of Mesoamerican human sacrifice (Tedlock 1996), but there is some disagreement among researchers as to the extent and intention of human sacrifice or if our information and interpretation of the evidence is accurate (Boone 1984).

The issues surrounding capital punishment are many. Ending life as carried out and sanctioned by a people or a state is one of the most significant demonstrations of social power society wields, according to Foucault (1977). Spierenburg (1984) has added to this analysis agreeing with Foucault that state power comes to monopolize the display of individual human suffering at the end of feudalism. Yet as Coulton (1925) so terrifyingly describes, torture, outright killing, maiming and imprisonment were all common means of social control in European feudalism. The elements of the Church, especially monks and high prelates routinely buried women alive for being rebellious or lacking submission. Spierenburg (1984) is quite correct to note the significance of the division of feudal society, as he states where there is not subordination, there is no punishment. Yet in many cultures violence against women is not considered a crime, certainly this has been true in many European areas (Coulton 1926) and only was notable in extreme cases (e.g., murder) given that women were considered the property of men has both a Biblical foundation and well-documented ethnological basis (e.g., Levi-Strauss 1973). That there has been selective reporting of violence against women (especially spousal abuse) is clear (Phillips 2006), yet some surveys suggest overall declines in this violence (Catalano, Synder and Rand 2009). The nobles into the late medieval period were subject to laws as Huizinga (1924) describes, but the equality of legal consequences was irregular and depended on the power of the individual and

the ability of a higher lord (e.g., Charlemagne or a King John or Pope Alexander VI) to execute the law (see examples in Machiavelli, 1520-1525).

Spierenburg (1984) notes that with the collapse of Roman order, citizenship and rights of the individual largely evaporate, most people become property and if damaged or killed a payment defined by Germanic law was required. But in an interesting sideline, Becker (1913) suggests how, by bringing the Berbers (who he asserts are blamed for much of the rape and pillage of the population of France during the 8th century Islamic invasion), the Arab leaders missed an opportunity to conquer Gaul as they had Spain which had largely welcomed them as liberators of the Germanic overlords. Had the Arabs allied themselves with the Gallic/Roman population a Moorish-like kingdom might have swept across the continent.

There are also economic considerations involved in the process of arrest, trial, incarceration and execution. The removal of one person from the many by death instead of exile or jailing is an act which defines more than just how a society regards different forms of behavior or what may be termed "crimes." An example of this is found among the Tanala (Linton 1936) where disownment is considered more serious than death. The sentence is carried out in front of the entire village and the disowned man is driven out and if he returns is killed. An economic unit is destroyed and yet a source of disturbance or disorder may also be removed with the idea that it might create order.

2. Crime and Punishment in Numbers

Figure 1: Theories of Crime Reduction

- | | |
|----|---|
| 1. | New generation of youth, drink less, take few drugs want education |
| 2. | Advances in policing: smart policing focusing on main crime producers |
| 3. | Legalization of abortion removed unwanted children who create crimes |
| 4. | Declining use of lead paint which caused neurological damage in fetuses & children resulting in crime. |
| 5. | Crime has not decreased but only changed from common forms: street robbery, etc. to cybercrime, online fraud, etc. |
| 6. | Crime began to fall in 1980s as internet kicked in causing a massive distraction from criminal behavior. |
| 7. | Steven Pinker's idea that violence of 1960s was an aberration and humans are becoming more peaceful. Related to this is Himmel-farb's idea of the "permissive 60s" causing crime. |
| 8. | Incarceration of criminals with long terms to keep them from producing criminal context for crimes. |

An article by Helen Warrell appeared in the *Financial Times* (2013) that attempted to summarize the policy issues that describe the need for prisons and punishments in general. Warrell interviews a number of public policy makers and scholars on the nature of crime and punishment. She notes that in the past three decades there has been a remarkable decrease in crime statistics and in perceived crime reduction.

There are problems associated with explaining this supposed drop in crime and with alternative scenarios. Theories abound (see Figure 1).

Theory 1 may have some legs as a recent article in the *Wall Street Journal* (Sharpe 2012) argues that youth are not taking fewer drugs but are taking more anti-depressants. Number 8 and number 2 both are often attributed to the work of Bill Bratton, former New York police commissioner and his policies, including the computer-assisted Compstat process. The policies of former Major Rudi Giuliani and the “broken window” approach to crime environments, first proposed by James Q. Wilson and George L. Kelling (1982) are also often cited as important. Number 3 put forth by John Donohue (2001) seems contradicted by the fact that a country like Ireland where abortion is illegal has seen a parallel drop in crime (see CSO Annual Garda Crime Statistics 2004 to 2012).¹ Number 4 has new support in recent studies summarized in an article in *Mother Jones Magazine* (Drum 2013). Number 5 seems logical, and some criminologists believe cybercrimes make up a significant loss to the world economy, as cited in Warrell’s article. However, a recent *New York Times* report found that cybercrime seems to be over-estimated (Florencio and Herley 2012). Number 6 is linked to number 5 in that new technology does seem to affect how people live their lives and as a distraction, the internet, video games, personal electronic devices and all the apps and related social interaction could form a major effect on crime. But can that explain the economic loss of not engaging in crime? As wages and earning power have remained stagnant since 1970, can distraction alone account for a drop in crime? Gurr (1981) argued that a number of factors were responsible for crime reduction, including culture change, sensitization to violence, increased controls on violence. One might include under culture change the rapid expansion and multiplication of technology, both as a distraction to the general population and as a control device. However, Gurr (1981) uses a variety of sources for his conclusion, producing a chart that only shows a dip in violence by smoothing the rather few data points above and below the projected trend line. Cipolla (1973, 1976, 1977, 1981) cautions historians about the reliability of ancient sources. He meticulously cross-referenced his source data but in every case realized that some individuals and classes of individuals were often not included for a variety of reasons. Eisner (2003) also treats historical materials with some healthy skepticism, yet comes to similar conclu-

¹ <<http://www.irishexaminer.com/crime/crimedata>>.

sions about a reduction in violence. Violence and mass murder against Native Americans was carried out without reference to individual suffering and in an extra-legal context (Sandos 2000). This seems to have been characteristic of most colonial possessions (Anstey 1966). This should cause us concern today related to general assessments of world violence.

Other data are contaminated by ideology, religious bigotry or racism. In the American South treatment of Africans held in slavery was not only harsh but often tinged with a violence that smacked of perversion and has continued long after the end of slavery (Blassingame 1979; Rothenberg 2001) while during Reconstruction extra-legal violence delivered at night by KKK and other groups intensified during and after martial law (Saville 1996). Here Roth's (2012) perspective on violence and disequilibrium of individuals can find utility, where a defeated and dispirited population turns to violence as an expression of their individual condition. Monkkonen (2001), using a meticulous methodology demonstrated that violence and murder rates varied across nations and time periods due to a number of factors, included level of prosecution and local economics, education, the police and crime. His work with Johnson (1996) pushed this approach back into the Middle Ages with similar findings.

Some scholars, like Marian FitzGerald argue that crime has not dropped only the perception of a drop manipulated by authorities and police (FitzGerald and Hale 2006). This idea was made famous recently by former New York police officer Adrian Schoolcraft though recent studies have found some support for this theory (Eterno and Silverman 2012). Other recent restudies of crime statistics have produced similar results as in the *L.A. Times* analysis that found 14,000 serious assaults had been misclassified as minor offenses and later analysis revised this to 25,000, which artificially lowered the city's serious crime level (Poston and Rubin 2015, 2015a). For number 7, Steven Pinker's idea of increasing peace, we have a torrent of critiques of this theory most of which have been summarized by Arquilla (2012). Himmelfarb's (1994) claims are quite interesting in how her argument, and the "culture war" ideas that emanated from it, contrast sharply with current data on crime. The 1960s may have been permissive in her view but crime statistics have shown a dramatic drop since then. Her idealized view of Victorian times is both unrealistic (the treatment of non-European peoples at the center of any morality was certainly lacking), but the lack of morality or moral behavior among the Victorians contradicts her view and the outcome, World War I was hardly an appealing climax. Child labor (Nardinelli 1980) did not feature as a negative in Victoria's world, nor did prostitution, which was denounced and criminalized but a significant feature of life (Joyce 2008). Below I will concentrate on prisons and policing to place these alternatives in contemporary and cross cultural context.

This survey does not ignore the fact that some determinations of crime and violations of order are often based on philosophical categories or essentialism, or are imposed by conquest. An example, from the period of European coloni-

alism, is described by Ferguson (1992) where claims of cannibalism among natives under Spanish law immediately made them subject to conquest, capture and slavery.

3. A General Cross Cultural View

Today Texas executes people for crimes and its rate of state sponsored death would put it among the top nations in the world in such acts if it were a country,² only Oklahoma has a higher per capita rate. In total annual executions Texas beats out Afghanistan, Yemen and Libya. While we call it justice, is it not a form of human sacrifice? Since Texas also has one of the highest incarceration rates it seems this policy is a failure. In their 1997 study Katz, Levitt and Shustorovich (2003) focus on Texas but note that the long period of time from arrest to execution distorts the effects of any deterrence. While in its present form capital punishment is negatively correlated with increased crime, this does not mean that a more public and immediate form of execution might be effective. It would seem, however, that Foucault's (1977) analysis worked against such a conclusion. This should be considered in the context of an individual society, where the nature of the public execution has significance for a number of institutions and relations of caste and class, and where the historical context relates to general outbreaks of general violence. Evans (1996) begins his study of rituals of violence in Germany at the beginning of the Wars of the Reformation, and the most devastating of those, the Thirty Years War. The fashioning of relations among groups of people, especially of religious differences could be clearly seen and is evident today in the conflict between Shia and Sunni. In fact, our perceptions of violence and the means of categorizing suffering and valuing its outcome are formed by these experiences. As Geoffrey Parker (1997) noted when speaking of the historiography of Europe after the end of the 16th century,

All of the publications discussed above were composed by Protestants who had an interest in emphasizing that the various wars fought in Europe during the decades following 1618 were linked together in a single struggle in defense of religious and constitutional liberty.

Beheadings were often the punishment for slave rebellion (Grandin 2014). While beheading was a frequent means of dispatching rebels in England, as in the famous beheading of Wat Tyler or Mary Queen of Scots, a beheading with a sword differs little from the use of a device like a guillotine except the latter is more effective and usually produces a uniform and effective end. Debating the issue of how humane such methods of execution are is only symbolic of

² <<http://www.deathpenaltyinfo.org>>.

relative power (Anyanwu 2005; Foucault 1977). Other beheadings by organizations who used the media as a vehicle to promote terror include some of the Mexican drug gangs (Taylor 2012).

We must, however, differentiate at this point between a number of categories. Are we speaking of criminals or deviants? This is a central question to ask in each case as cultural variations in acceptable behavior can be considerable (Edgerton 1976; Hsu 1961). In the 19th century this was an important issue as there were some who believed in moral deviants as diseased individuals and others saw them as rebels against the social order. There are the criminally insane, individuals who cannot control their sexual or other forms of behavior (compulsive thieves, for example) and psychotic forms without conscious acknowledgement of behavior control at all. Added to this, in the 19th century was the idea that behavior could be equated with divine grace and that beginning with Eden man had degenerated from that grace thus criminal behavior was an expression of evil (Osborne 1916). The degeneration concept was also present in other cultures, as in the Hopi and Hindu (Campbell 1949; Waters 1963).

A popular idea in the early 20th century was that crime was capable of transmission as in disease and to prevent such outbreaks of irrationality on a mass scale (revolution) it was necessary to isolate in jails those who might promote such actions so as not to “infect” crowds. As Foucault (1977) shows, prisons varied in their approach in the 18th and 19th centuries in Europe from treatment (or incarceration) of illness to punishment for possession of evil.

Wilson (1988) brings up a different model, that hunting and gathering was the main mode of life for most of humanity's existence and that sedentary behavior and the adaptation to life in structures created a new mode of life. Social control of behavior became increasingly important and Wilson (1988) gives significant importance to mechanisms like witchcraft in this regard. Here then the tendency to rebel against sedentary life and its control of the individual within a dense population of regulated behavior is seen as a rejection of domestication, one might even argue with reference to Sociobiology (Wilson 1975), that it is a “wild type” of genetic behavior, a reverting to nomadism like vagabonds or the homeless. Ember and Ember (1997) and Lambert (1997) emphasize violent disputes among hunter and gatherers, though mostly arguing from archaeological interpretation. Non-lethal interventions like the song duel and the effect of public opinion are well documented means of social control at the nomadic level of social complexity (Hoebel 1954), though group killings of repeated murderers or the authors of heinous crimes are not unknown. I have argued that the struggle against homelessness by more complex societies is a constant feature of urban life, both in the past and today (Caldararo 2011). Neuwirth (2006) has also placed homelessness in the context of squatter history.

To address the need for prisons and the role of punishment we must understand the nature of crime and its threat to the social order. Violations of taboos, especially those surrounding sexual boundaries are often believed by traditional

people to affect others, often with deadly outcomes or catastrophic consequences for an entire people. On the simplest level, combining powers like that of fertility with that of iron making can impede the production of workable goods, or in pottery it can cause defective objects, or in the fields destroy or reduce a crop (Gausset 2002). In other cases, it can result in individual illness or bring on epidemics (Rivers 1924).

In the ancient world banishment was the more frequent capital punishment as in the famous case of Zoroaster more than 2,500 years ago, or the ostracism of the Greeks where the entire community would vote to banish or not (Henning 1951). I say here, “capital punishment” as banishment was considered in antiquity to be the worst punishment. Not only was the banished person separated from his or her community, but shunned by them, so no aid could be expected. Famous figures were occasionally successful in being recalled from banishment, as in the case of Cicero. There has been a long debate over whether incarceration was applied as a punishment in Classical Greece (Hunter 1997), but the evidence seems to indicate that if it was it was rare. Most cases of imprisonment are of individuals who are awaiting trial and their supervision was quite slack, with examples of prisoners escaping without pursuit or being allowed temporary freedom for certain festivals. This must be seen in context with the fact that Republican Rome lacked a police force and a limited one only developed under the Empire (Lintott 1999). Those incarcerated for terms seemed to be limited to debtors, a species of crime that was included in definitions of illness, often contagious illness in some societies. Here it is interesting to note Hoebel’s (1954) comments on Ifugao law and its complexity in the debate in the twentieth century over the need for government to enforce law. Culture seems to be the central point, not the complexity of institutions or the size of government, as we find in comparing the practice of Roman laws and Ifugao law one is struck by the similarity of form and defects. One is a powerful government with highly structured institutions, the other lacking both, but in both it was the family members who were responsible for the acts of its members and functioned as the front line of criminal justice. In both cases the victim of a crime of robbery or assault can appeal directly to the community for assistance. Justice in most cases is extracted in both Rome and Ifugao in an immediate context of those present, though some delay can be assumed to arrange for full participation (Hoebel 1954; Lintott 1999).

The existence of an extended family is necessary for such a system to function effectively (Gluckman 1954). One might argue that recent studies showing a lack of close relatives among many Americans (Stone 2008) may partly explain why we have such a high rate of incarceration. “Having relatives,” however, versus having kinship relations is a significant difference. Where kin members have clear reciprocal duties and responsibilities is a central element.

A good example is the idea of addiction as disease, what Fabrega (1997) calls “disorders of habituation.” We find them in all societies, but they vary

significantly and take different forms given definitions of addiction. The degree to which such behavior is addictive, like gambling is important, but we cannot quantify the nature of why some people are affected and lose all control becoming bankrupt and accepting the social stigma it implies, sometimes more than once. Similar behavior can be seen in some traditional societies, for example, in the southern Niger region. Adeline Masquelier (1999) describes a condition where people are affected by a disease called “darwe.” This is a dreaded condition that reduces a person’s capacity to deal with money as a medium of value and exchange. It turns the most prosperous people into utter failures. At the same time this condition can act to anchor people, and act as a controlling force. Victims of darwe are unable to eat and reluctant to ingest food. They eventually waste away, they lose their self-control and ability to manage money or affairs.

Incarceration also varies in use in different historical contexts and as applied to members of different castes as in the examples Froissart (1373) gives of nobles and kings captured in battles or pillaging who are held until ransoms are paid. Others like villains, merchants, serfs were killed, or sold as slaves.

Fines, humiliation and corporal punishment were the more frequent methods to attempt to rectify behavior in traditional society and the ancient world (Hoebel 1954). Some other traditional societies had forms of incarceration, usually temporary, as in Great Dahomey (Herskovits 1938), though slavery might be considered as a “prison without walls.” We should separate slavery in most contexts, for example, where prisoners are taken in battle from slavery as the result of criminal behavior. Polanyi (1966) examines the role of slavery in Dahomey society from an economic viewpoint, but the etiology of slavery for individuals has a number of ideological and religious explanations in various cultures and the “sentence” of slavery is often due to a number of economic decisions, for example, a parent selling a child into slavery to pay a debt, or a debtor

serving time as a slave to pay off a debt. Often it was not the individual who paid, but the family unit, the clan, the lineage or extended family. This way the cost of one renegade person was a drag on the survival of a group, the group that created him or her and this social punishment caused the group to watch and to control the individual (Evans-Pritchard 1954).

In Roman society individuals could be charged with crimes but left at freedom until trial giving them an opportunity to escape prosecution in all but the most heinous or state crimes (Strachan-Davidson 1912; Jones 1972). However, Lintott (1999) stresses that “self-help” was often a common response to crime or debt, so that a victim could call on his or her relatives to punish an act that was seen by the community as a crime. A creditor could also seize a debtor until a debt could be paid by the debtor’s relatives or friends and if this failed he could be sold as a slave. But from all reports this seldom resulted in feuds or significant private violence until during the Civil Wars and it is the establishment of a police force by Augustus that was intended as one form of remedy. Though the general effects of this police force was initially punishing in con-

fiscations and executions, creating chaos in many parts of the empire both politically and economically, leading to a militarization of authority (Rostovtzeff 1926). This is interesting contrasted with Spierenburg's (1984) data from the middle ages and late medieval period.

Imprisonment was unknown among the Barotse before the arrival of colonial powers (Gluckman 1955). The Hausa are reported to have had prisons, but only for men (Smith 1978). Margaret Hasluck (1954) describes the mechanisms that come to play when a murder occurred among the Albanians at the time of the First World War. If relatives of the murderer paid blood money to the family of the victim, the murderer was released from the crime. If that was not available the perpetrator would be exiled, though a man who held a strong position in the community, or was powerful in other ways would have to be driven into exile by communal expulsion which took place under certain rules. A variant tradition existed in Northern Albania where if a murderer refused to go into exile he might remain "imprisoned" in his own home by the threat of revenge murder by the family of the victim. He could only go out at night and if caught in daylight could be killed by anyone. Today home incarceration is often seen as a substitute for prison for some criminals, but whether it can reduce recidivism and impede criminal behavior while the prisoner is "leashed" is unclear. In a comprehensive survey of new and innovative technologies applied to restrain criminals and replace traditional prisons, Murphy (2008) found little to celebrate. Reliability and cost in effective restraint and surveillance was absent.

Imprisonment was common in Medieval Europe, especially common in post-Conquest Norman England (Lea 1892). A great variety of treatment of criminals appears in the ethnohistorical and ethnographic record. I have produced the results of a survey of the information available in the Human Area Research Files below as Chart 1. The materials are quite uneven as some are the offhanded notations of travelers, others historical documents produced by conquerors or traders and some the reflections of ethnographers, often without a focus on what treatments are the result of local tradition and those of colonial agents.

Some of these cases in the HARF are vivid and detailed descriptions. One might compare these with punishments with associated crimes as in the case of the Japanese Buddhist visitor, Kamaguchi (1903) to Tibet at the end of the 19th century. In his book we are provided an analysis of an eyewitness, not only of the cultural basis of the crimes, but the philosophical explanation. For example, the lamas "executed" criminals without directly "killing" them. They delivered blows to eventually achieve death or by the drowning of political rebels and deviant priests where water delivers death not the acts of men.

4. Political Imprisonment

We should also distinguish political imprisonment from criminal punishment. The Amhara (Messing and Bender 1985) describe the political imprisonment of potential rivals to the throne. No prisons existed in Baganda society, though prisoners were kept in public in stocks, though the guard could release the prisoner to visit family or friends or to appeal to the king. The stocks were so devised that they maimed the prisoner or often resulted in death (Roscoe 1911). One of the earliest examples is that recounted by Xenophon in his *History of My Times*, when the leader of one faction in Thebes arrests and detains his opponent with the help of Spartan troops. The idea of political imprisonment is well-known in terms of celebrated cases like Nelson Mandela, Antonio Gramsci or earlier Niccolo Machiavelli. One could argue that whole peoples were incarcerated in the creation of Native Americas on “reservations,” or Africans in the “homelands” of the Apartheid regime in South Africa.

Prisoners of conscience are another category, as in the Protestants during the Inquisition or the anarchists in the Soviet Union.

5. Prison Labor

However, today in the same pursuit of order we put people in prison for a remarkable number of offenses. This is argued by many to be humane and Foucault (1974) provides a history of this debate. While Foucault places the origin of the prison at the beginning of the 19th century, Spierenburg (1991) found evidence of their beginning a century earlier and the Webbs (1927) as in the case of Foucault and Spierenburg find that in England the initial purpose is to confine and punish “vagabonds” and vagrants, but this is a result of the forced relocation of tens of thousands of the rural population after the Enclosure Acts. Today some voices argue that corporal punishment is more humane (Murtagh 2012), so the question of what is humane becomes a subjective topic. Usually (at least in the period from 1930 to 1980) the criminal justice systems of most cities and counties in the United States of America do not require prisoners to work or do hard labor. This is also true in most American state and federal prisons because this is also believed to be inhumane or a form of slavery. Exceptions to this were many and conditions have changed (Elk and Sloan 2011). However, the Constitution defines incarceration as involuntary servitude in the 13th Amendment:

According to the 13th amendment of the constitution;

Section 1. Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Prison labor in some cases has functioned in an ad hoc context as capital punishment. D.A. Novak (1978) reveals in *The Wheel of Servitude: Black Forced Labor After Slavery*, that the death rate of prisoners leased to railroad companies between 1877 and 1879 was 45% in South Carolina, 25% in Arkansas, and 16% in Mississippi.

Up until the 1930s prison labor profited locales and state governments and then Congress passed a law banning such labor (the Hayes-Cooper and Ashurst-Sumner Acts, which outlawed prison labor and made it a felony to move prison goods across state borders) as it also was the backbone of the Jim Crow laws.³ However, in the 1970s, Supreme Court Chief Justice Warren Burger pushed for prisons to become “factories with fences.” A new series of laws, beginning with the Justice System Improvement Act of 1979, loosened regulations to allow prisons to put people to work, provided they paid prevailing wages, consulted unions and did not displace workers outside prisons. So the essential foundations of Jim Crow laws are back in place. Some compensation is required but this has not kept some officials, even judges from exploiting the situation of power (Richey 2011).

We have abandoned corporal punishment as barbaric, when it was the main form of punishment by the world’s prisons until the 20th century. Jail time and fines are means of achieving justice in most nations today. In 1793 W. Bradford of Pennsylvania defined the theory of trial and punishment of the new American nation on the basis of the prevention of repeat crimes. By any measure this has failed. As Michel Foucault demonstrates in his book (1977), corporeal punishment was thought to be effective because it showed the criminal as the enemy of public safety, but also displayed the suffering in the context of the power of the civil authority. But to make the criminal an enemy of the people prevented any possibility of his recovery as a useful citizen. Displays of suffering also created a form of social entertainment rather than a manifestation of righteous punishment. We have to realize that neither alternative is humane, both corporeal punishment and incarceration are failures and certainly so in America. And we must keep in mind that fines, as noted in the introductory quote from the Middle Ages, reinforce and encourage agencies of law and the criminal justice institutions in general, to produce more arrests, punishments and fees from a population under its supervision. The U.S. Justice Department questioned the frequency and amounts of fines and fees for penalties regarding crimes and infractions of rules recently (Apuzzo 2016).

California has such a growing prison population that it is exporting prisoners to other states, though under court order due to prison crowding and inhumane

³ <<http://lpa.igc.org/lpv24/lp3.htm>>.

conditions, the state under the Brown administration has been shifting prisoners to county jails where crowding is also a problem.⁴ California is not alone. A number of other states are also shipping prisoners across state lines (Moore 2007). Despite a declining crime rate America's growing prison population is costing the states and the federal government nearly 40 billion dollars a year.⁵ A 2004 study by the Justice Policy Institute in Washington, D.C.⁶ found that California's Three Strikes law has doubled felony sentences and produced an inflexible sentencing structure that is a prime generator of prison crowding. The inmate population in 2002 was 2.1 million according to Bureau of Justice Statistics.

6. Drug War vs. Education

Drug offenders make up over half of all federal prisoners. The Department of Justice reported recently that there were more than 7 million Americans behind bars, on probation or on parole at the end of 2005. A similar number is reported by the International Centre for Prison Studies in 2009 (figures for 2014 show a decline to 6,851,000).⁷ Of these 2,193,798 were in prison, a 2.7% increase over 2004. The Pew Center for the States reports over 1.4 million people incarcerated in state prisons alone in 2009. The Bureau of Justice Statistics reports over 1.4 million people employed by state and local agencies in prisons or about 1 person employed for every person in jail, though this does not include people in county jails, Tribal jails or city and town jails.⁸ In 1991 there were more than 1 million Americans in prison, or 426 per 100,000. At that time South Africa had the second highest imprisonment rate of 333 per 100,000 with the then Soviet Union, a third at 268. In Europe the rate varied from 35 to 120 with Asian countries at 21 to 140 per 100,000. Between 1980 and 1990 the number of Americans in prison doubled; Andrew Sullivan, of University College, London, summarizes the current situation,

The U.S. rate is 724 for every 100,000 people – up from 505 in 1992. Of major countries, the only close competitor is Russia with 581, and Cuba at 487. Iran and Israel, to give examples of countries with internal conflict, clock in at 206 and 209 respectively. Most major U.S. allies are in the 130 range or lower. I'm

⁴ <<http://californiawatch.org/dailyreport/shifting-prisoners-counties-could-strain-local-services-13677>>.

⁵ <http://money.cnn.com/magazines/business2/business2_archive/2006/12/01/8394995/index.htm>.

⁶ <http://www.justicepolicy.org/uploads/justicepolicy/documents/04-09_rep_threestrikesnatl_ac.pdf>.

⁷ <<http://www.prisonstudies.org/publications/list/40-world-prison-population-list-8th-edition.html>>.

⁸ <<http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2216>>.

not sure what any of this proves. But this much we can say: the land of the free is also the land of the unfree. Millions of them. Texas, by the way, has an imprisonment rate of well over 1,000. There's no country on the planet – no dictatorship on earth – as comfortable with locking people up as the state of Texas.

This situation should be seen in the context of international trends in criminal justice. For example, recent surveys have been interpreted to show that Great Britain is the most violent developed country (see EU statistics).⁹ In an article in the *Wall Street Journal* on 17 June 2006, Joyce Lee Malcolm used this assertion to show how the jails in the United Kingdom are over-crowded and non-violent convicted criminals are being either sentenced to no incarceration or limited time with a variety of forms of diversion intended to produce a reduction in return rates. An example she used was the case Tony Martin a Norfolk farmer jailed for killing one burglar and injuring another who broke into his home. While it was the 7th break-in at his home he was denied parole while the surviving burglar got out early on the new program for release of non-violent criminals. This situation is by no means limited to Anglo-American culture, rising crime related to illegal drugs and illegal immigration, especial prostitution have caused the Italian government to request an amnesty for thousands of prisoners. An article in the *International Business Times* summarized the growth of the prison population (Ghosh 2013). The cost of incarceration has skyrocketed.

Rising drug use, especially over-the-counter drugs used by youth have contributed to a wave of hospitalizations, while use of methamphetamines has grown dramatically and hospital admissions jumped since 1990 by 100,000. Drug convictions make up a large and growing percentage of the national criminal population and it is clear that the War on Drugs has been a failure (see Connecticut General Assembly, Office of Program Review and Investigation).¹⁰ The war on drugs cost has exploded, the federal government spent \$1.5bn in 1985 but \$17.7bn in 2000 while the arrests and seizure of drugs remained flat. \$28 billion was spent in 2015 (Office of National Drug Control Police 2015).¹¹

7. Education or Gang Warfare

In Mexico authorities have identified functional illiteracy with increased crime. In the Dominican Republic new prisons and prison policies of education have reduced the reoffending rate to below 3% (*The Economist* 2012). Forcing prisoners to learn to read seems a means of reducing crime. Most educational pro-

⁹ <http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Crime_statistics>.

¹⁰ <<http://www.ct.gov/opm/lib/opm/cjppd/cjresearch/recidivismstudy/whatiscausingprisonovercrowding.pdf>>.

¹¹ <<http://usgovinfo.about.com/library/weekly/aa020101b.htm>>.

grams in American prisons assume that the inmates can read. Most prisoners in American prisons and in other nations are functionally illiterate (Dekkers 2003). American prison systems seem to be reinventing the wheel in prison inmate activities. Recent studies have found that prison generally increases the probability an inmate will return to crime, and that one learns new methods or vices while incarcerated. The crime recidivism rate continues to climb according to a Justice Policy Institute study in 2007,¹² and putting more people in prison or given longer sentences has not reduced crime¹³ or changed the behavior of repeat offenders. The French found this out in the 18th century as prison reformer G. de Mably published in 1789. What he found was that simply warehousing people is costly and inculcates idleness and brutality. Prison is not an effective deterrent to future crimes, either of those incarcerated or the general public. The experience of American prisons over the past 100 years of reform is certainly a proof of de Mably's proposition.

Brazil's 2007 street violence that turned many cities in battlegrounds between security forces and organized criminals is argued to be derived from a long period of profits from drug sales and the lax prison environments that give rise to organizing of prison gangs (*The Economist* 2012). America's prisons are functioning in just the same way today: They are creating armies of prison gangs where recruitment and training can be carried out. One of the most violent countries in the developing world is El Salvador (intentional murder rate 69.2 per capita UNODC, 2008) whose gangs have an intimate link with California and the illegal drug trade. A study by the Justice Policy Institute researchers in 2004 demonstrated that prison was not a cost effective way to deal with illegal drug offenders, and a 1999 study by New York's John Jay College found that imprisoning people produced more crime in communities by taking adults out of families (Austin et al. 2007). People in communities from which prisoners are drawn believe, due to the obscurity of prisons, that injustices are produced there and thus prisons act as a corrosive agent on society in two ways. Since punishment is private and away from the view of the public any amount of suspicion can and does develop about what takes place within the walls. But prisons also by removing adults from communities result in their impoverishment and the money families spend on the legal system is a drain on productive investments in family needs, the most important being the education of their children.

In the 1920s America's gangland wars arose from the vast profits produced from illegal alcohol. The end of prohibition virtually ended those profits and ended the gang wars. An end to America's Drug War will likely do the same and end corruption in the criminal justice system. But America must decide, and especially the people in states like California where the prison costs are so

¹² <http://www.prisonpolicy.org/scans/facts_crimeincontext_031507.pdf>.

¹³ <http://www.justicepolicy.org/images/upload/10-06_FAC_ForImmediateRelease_PS-AC.pdf>.

high, if they can afford to have prisons of the kind they have inherited. Perhaps a return to a system of public and corporal punishments for most crimes instead of the current system of fines and incarceration would be more effective and cost effective as well. As shocking as this consideration might seem at first, one should consider, as Michel Foucault (1977) did, that at the end of the 18th century French prison reformers argued that imprisonment was identified with tyranny in history, that it denied a family of its source of income and punished them as well as the criminal. It denied the principle of individuality of punishments for specific crimes by equating time to be served with all crimes defining severity with duration of sentence.

8. Chart of Prisons in Cross-Cultural Perspective

The argument is often made that putting people into prisons is more humane than executing them as mentioned. But what are the conditions of life in prisons and how do prisons vary in different cultures? We have noted some classical examples from ancient European history. We have also reviewed the record of prisons in other cultures. The magnitude of the problem is shown in outline by the World Prison Brief published by the International Centre for Prison Studies.¹⁴ Here I produce a chart of prison use by different cultures. The main problem with this chart is the data, it is unclear in most cases if the use of incarceration is derived from colonial administrations or contact. However, most of the data available from HARP argues that few people had jails prior to European contact and that jails also seem associated with complex societies with castes or class and unequal distribution of wealth. Evidence from recent research shows prison conditions in Africa are quite similar to the form of violence and overcrowding seen in most other countries in the developing world (Dissel 2001) and it seems that this similarity is likely a consequence of both colonial foundations and development policy inherited by developing nations. This chart, therefore, should be viewed with the above caveat. It gives us a picture of variation. I am preparing a more thorough analysis of the literature for future publication.

¹⁴ <<http://www.prisonstudies.org/info/worldbrief>>.

Table 1: Prisons and Types of Incarceration in Various Societies over Time

Society	Imprisonment	Types of Incarceration	Colonial Contact
Banga	Y	Stocks	?
Banga	N	0	?
Hausa	Y	Cell	?
Igo	N	0	?
Mossi	Y	Cell	Y
Berbers	Y	Cell	Y
Berbers (Rif)	N	0	Y
Chagga	Y	Cell	Y
Dogon	Y	0	Y
Shluh	Y	0	?
Burusho	N	0	?
Mongolia	Y	0	Y
Okinowa	N	0	Y
<i>Table 1 continued...</i>			
Tibet	Y	Cell	Y
Bagusi	Y	Cell	Y
Banyoro	Y	Stocks	?
Gikuyu	N	0	?
Amharan	Y	Exile	N
Burman (Burmese)	Y	Cell, stocks	?
Total	Y = 13 N = 6		

Source: HRAF.

9. State Murder, Human Sacrifice or Punishment

It is generally assumed that the execution of a person who has violated the law in some fashion that is defined as a complete break with social custom may be executed. The means of execution vary in time and in cultural context, but the act of social murder sanctioned by law or custom should be a subject for inquiry as to its functions. As mentioned above it is an extreme means of separation of one human actor from the group. We must ask if this act has any additional function than protecting order and punishing the guilty. In his analysis of slavery and human sacrifice in Yorubaland in the 19th century, Ojo (2005) finds that the control of the legal apparatus whereby victims for human sacrifice were often found was in the hands of members of the elite who benefited from the complex interrelations between warfare, slave taking and prestige displays. He also recognizes that group membership of victims could be associated with certain ethnic groups within Yorubaland and that slaves were the most frequent victims. Thus it could be argued that human sacrifice, criminal identification, ethnicity and slavery were linked in the process of warfare. Slaves, it could be said, were executed as a means of punishment and as a threat to their social group resistance.

In American history more members of African American and Hispanic ethnic groups have been executed than those of European origin or ethnicities. The “Espy File” lists 15,269 official executions by governmental agencies or authorized agents between 1609 and 1991. This underestimates the figures for African Americans and Native Americans. African Americans during slavery in the country were seldom counted as humans in murder cases as they were considered property. In his research covering the same period, Michael Radelet (1989) found that of 15,978 people executed for murder only 30 “White” individuals were executed for the murder of African Americans. From 1609 to 2011 48% of all people executed in America were African American according to the Espy File combined data. African Americans make up approximately 13% of the population of America based on U.S. Census data depending on self-identified single racial category or multiple categories. We might argue from this data that African Americans make up a disproportionate number of those executed. While those identified as “White” are sentenced to shorter jail terms than African Americans (Kansal 2005; Mauer 2006), one might suspect that convictions for murder and assignment of capital punishment are also skewed.

Usually we imagine human sacrifice as a means of communication with the divine, a way of gaining some end, so if we are to differentiate between American executions and say Ondo sacrifices what is the essential element that separates them? This is a complicated affair as sacrifice in Ondo was integrated into the economic and political system as Ojo (2005) describes. However, if discrimination in America is integrated into the economic and political system as racism, then are they not similar in function? Ojo (2005) finds that sacrifices were clustered seasonally, which is what we might expect given broad cross-cultural data. 37% of executions in the USA take place between midnight and 1AM, 26% between 6pm and 7pm. From a random sample of U.S. state’s websites it appears that 42.8% of all executions take place in the months February to June.

The executions of the Inquisition included 31,912 burned in the auto-da-fe according to church records (Roth 1964). These figures do not include Sicily, Sardinia and the Americas. Some modern scholars question these numbers (Dedieu 1987; Perez 2006). These events were mostly public where people were exhorted to pray for forgiveness, thus a similar rite to that of the Ondo where slaves were threatened by the sacrifices (Ojo 2005). All three cases, the United States, Inquisition and Ondo may, therefore, given this interpretation be similar in function. The role of such descriptions can have a number of functions, especially where colonialism intrudes. For example, the Spanish claims of Aztec and Mayan human sacrifice functioned in part to brand their cultures as savages and deserving of destruction. Vaillant (1965) quotes all European sources (Duran, Torquemada, the half Spanish Ixtlilxohitl, Bancroft and the Codex Telleriano-Remensis – printed on European paper) for the supposed Aztec custom of ripping the heart out of victims. But this idea was commonly attributed to the Irish by the English in the time of Richard II and appears in

Froissart's *Chronicles* as a vehicle to demonstrate how savage and barbaric the Irish were with the added relish of describing how the Irish were supposed to have eaten the hearts of victims. The fact that Foissart's work was written over one hundred years before the Spanish tell the same tale about the Aztec and Maya might lead one to suspect that it was a recycled means of producing the same idea of savagery for the Native Americans.

That does not mean that there is no evidence of human sacrifice in the ethnohistorical literature or archaeology that is authentic and not propagandistic (Pennock 2012). One example is found at Teotihuacan (Sugiyama 1989) where we find after comprehensive excavations of the site a total of 20 burials and perhaps the same number not exhumed and described. While these are described as "sacrificial" there is little to establish that idea. The individuals are mostly male (19) and the excavators believed all were buried with their hands behind their backs. The problem here is that the location of the bodies in pits would indicate the easiest way of carrying a dead person is by tying their hands behind their backs under their legs. The excavators also believe there are burial elements with the bodies and yet no clear idea of roles except to suggest they were priests or soldiers as all the men were fairly young. If we had a better sample of general burials from the same time period and location to understand burial practices, these ideas might be clarified.

We might contrast such a burial with those of mass graves in various German concentration camps or with burials at prisons where executed inmates were carried out. In modern Western society those executed are prepared in a ritual fashion for death; the process of killing them is also ritualized as is their burial (Fernandez 2012).¹⁵ However, given all the claims of human sacrifice for the Maya (Schele and Friedel 1990) it is surprising how few examples of it we have. On the other hand, given the density of Mayan population in the pre-contact period, one might assume that compared with the number of executions per capita in America, the Mayan numbers might be comparable.

10. Future Perspectives and Conclusion

The solution to the problem should be two-fold, removing the profit from the drug war seems essential by legalizing drugs and stopping government incentives inherent in confiscations. Second, there is a need to break the veil between prisons and community and cost. In their study of recidivism and prisons in Italy, and to other prison systems, Drago, Galbiati and Vertova (2008) found that the single most correlate of recidivism was the distance of the prison from the community of origin. The most direct way of doing this is to make prison

¹⁵ <<http://www.fdp.dk/uk/tdcj/exe-proc.htm>>.

more transparent, show people in communities that each prisoner is costing their community funds that could otherwise be used to educate and employ its residents. Lodge prisoners in communities and provide more educational services and fewer sports related activities. There is evidence that this approach can work.¹⁶ With drug profits gone, gang leaders will have greater difficulty controlling and employing members. It worked with Prohibition and America's illegal alcohol industry in the 1920s; it can work again. Taxes on drugs can be used to revitalize communities most affected by them and most suffering from the incarceration of its members.

California's reduction of its prison population in the past five years has been dramatic with a drop of about 50,000 due to early release, rehabilitation and diversion at sentencing (Editorial 2016). This can have both a result in reduction of costs of prisons and reduction of recidivism seen in other states with more investment in treatment and education.

Capital punishment is the ultimate rejection of the Other. It is the extermination of those whose transgressions so represent the alternative to common order, or who manifest such an extreme danger that they are a threat to all that must be extinguished. But the fact of extermination does register the idea of sacrifice, and whether the object is identified with evil and stoned with the pain of suffering described in myth, or is given up to assuage the failures of the group to thrive, the result may be essentially the same. There is a difference between the social milieu that creates the context for voluntary sacrifice as among the Siberian Chukchi Willerslev (2009). Incarceration is an act of concentration, the creation of a separate internal reality where those who are in rebellion against conformity and the expectations of normality can be exiled and transformed into semi-members of society, not dead, not alive to statuses of function, but in a stasis of social inhibition devoid of the congress of association. In either case, the result is a border, one that transects social life but marks the patterns of each being affected.

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¹⁶ <http://www.justicepolicy.org/images/upload/10-06_FAC_ForImmediateRelease_PS-AC.pdf>.

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