Bertrand Russell wrote that if he could take only one word to a desert island—you know, that same island where you can take only one book, either the Bible or the works of Shakespeare, or only one record, or even only one type of pain reliever, as television would have it—that word would be but. The structure of my effort now is to consider two hundred years of criminal law in this country—two centuries liberally strewn with buts.

PUNISHMENT

CONSTITUTION

by Norval Morris

During the quarter-century since I came here from another constitutional democracy, Australia—a country founded and settled by convicts, men and women who in the then contemporary phrase "left their country for
their country’s good”—I have tried to understand criminal law and criminal punishment in this country. I stand in a long tradition of foreign observers of crime and punishment in the United States. Beaumont, Toqueville, Dickens, to name just three, all came on that mission.

It is appropriate for an ex-Australian to reflect with you on the criminal law of the past two centuries—quite apart from Australia’s criminous origins. There is a great deal of similarity between the United States and Australia. Both have written constitutions—constitutions governing the relationships between states, and between citizens and their federal and state governments; both have constitutions subject to interpretation by a federal court empowered to invalidate in whole or in part any state or federal regulation that does not comport with that interpretation of the constitution; both have bicameral federal legislatures, consisting of a Senate with equal representation of the states and a House reflecting the national electorate as a whole; both employ similar separations and divisions of powers. These similarities are not the result of chance, of separate and equal inspiration. As one commentator phrased it, “the vision of the American Constitution dampened the fires of creativity in Australia’s constitution makers.” The Australian constitution is emulative of the American Constitution, as are the constitutions of many other countries.

When it comes to crime, however, the similarities disappear. Australia enjoys quite ordinary crime rates despite her convict ancestry, ordinary at least by comparison with those of most of the Western world. America’s crime rates, on the other hand, are luxuriant. Indeed, they are starkly higher than those of other Western nations.

**One aspiration of the 1787 Constitution** was, you will recall, “to ... insures domestic tranquillity...” In the two hundred years since that document began its journey from Philadelphia to New York to Virginia to Washington and on to the National Archives, it cannot be thought to have achieved this purpose. If one important element of domestic tranquility is freedom from excessive crime and excessive fear of crime, the success of the Founding Fathers in this area has been marginal at best. America suffers from too much crime. The lives of too many of our citizens are influenced by crime and by the fear of crime. To the student of comparative criminal statistics, America may or may not be the “land of the free,” but she is most certainly the “home of the brave.”

It seems harsh, perhaps a harshness bred of ignorance, but let me say that until the work of the American Law Institute’s Model Penal Code draftsmen, under the powerfully creative leadership of Herbert Wechsler, the substantive criminal law of this country tended to slavish imitation of the English common law of crime. And apart from the Model Penal Code, the courts of this country, particularly the United States Supreme Court, have not demonstrated an affection for close and creative analysis of the conceptual elements of the common law of crime. From the casebooks, it seems to me that there was a period from the 1850s to the late 1870s when some American courts emulated the courts of other common law countries, particularly England, in a close scrutiny of issues of mens rea and actus reus, but that spark of theoretical analysis was short-lived.

I am uncertain why that is so. It is certainly not the result of a lack of judicial creativity generally. In the application of constitutional doctrines to police powers and practices and to procedural issues of fair trial, the state and federal courts of this country have been creative and have struggled to hold true that balance between the state and the individual upon which freedom rests. Perhaps the explanation for the general neglect of the criminal law is this, though it is only a guess: Just as moral issues are in this country so often debated as constitutional issues, so too problems of the authority of the criminal law over the alleged miscreant are debated not as issues of the moral balance between autonomy and authority, but in terms of the constitutionality of the government’s police and trial procedures. On reflection, that is not a reason; it is, rather, a repetition of the statement. Nonetheless, it remains true that the theorist of the substantive law of crime finds little nourishment in the case law of this country’s courts.

**The exception to this depressing overview** is the Model Penal Code, and it is a huge exception. In my view, that code, now flourishing in thirty states and deeply influencing analysis in the remainder of the states and in the federal courts, provides a principled structure for the substantive law of crime equal to any in the world. But, to quote Bertrand Russell again, there remains the startling defect that the Congress of the United States has demonstrated its incapacity over the past fifteen years to bring shape and order to the federal statutes by adopting that code with amendments suitable to a federal code. The Brown Commission and Louis Schwartz followed Herbert Wechsler and his commissioners and showed the way. However, legislative incompetence and inertia, combined with the fear of alienating special interests, have prevailed. As a result, the federal statute book is a disgrace.

You may reject my suggestion that others than those who drafted the Model Penal Code have failed to contribute to the substantive criminal law. What, you say, of Holmes, of Roscoe Pound, and of the realists? What? Of Brandeis? Was not their insistence on the factual basis for judicial decision making a major contribution to jurisprudence? Yes and no. As a theoretical contribution, it is of central importance, but it left a yawning gap: In the criminal law, the realists seem to have assumed that the facts of the social impact of different judicial decisions, or of various legislative initiatives, would be relatively easy to find if one searched sincerely and read the available literature. It just ain’t so. Social facts of this nature are extremely difficult to find. It is, in my view, only in the last twenty years that a small scholars, and even fewer practitioners, have come to appreciate this truth and have begun to lay methodological foundation for analysis of the consequences of various criminal law initiatives.

I think the heart of the difficulty lies in legal reasoning, which tends to be individualistic and focuses on simple cause-and-effect relationships—direct relationships. Social science data, by contrast, tend to be essentially probabilistic and not individualistic, and enable one to make good statements about group behavior and likely outcomes, but rarely can be logically extended to the level of individual behav-

ior. This conflict between the group-based determinism of the social sciences and the individualist, nondeterministic structure of criminal law creates great difficulties. I don’t think the realists really have understood those difficulties. Finding social facts for judicial and legislative activity remains, I think, the essential gap in realism that hasn’t yet been appreciated.

If the courts in this country haven’t shown much initiative in defining crime, the legislatures surely have. Considering only nationwide movements, examples of legislative initiative are easy to find. The Comstock laws were passed to make us sexually pure in word, in thought, and in deed, and the Mann Act was a federal backup to ensure our compliance. Sexual expression was legislatively confined to marriage and to the “missionary position.” The Volstead Act was to dry up our thirst for the demon rum, or if not, to ensure that we stayed dry on pain of criminal punishment. The criminal law would preclude our fall, if not our temptation.

Few now think that these laws were either effective or wise, yet a similar undifferentiated and unexamined national legislative posture prevails in relation to drugs other than alcohol. The many distinctions between drugs in their effect on the human body, and more importantly, the proper roles of federal, state, and local authorities in their prohibition, interdiction, regulation, and control, have never been seriously addressed as issues of national importance. But they truly are issues of vital national importance. Sixty-five years of steady failure of the Harridan acts has lead to a national policy that can be succinctly stated: If the medicine fails to cure, give a larger dose.

The legislatures of this country have expected too much of the criminal law. The criminal law is a necessary but limited system of social control. At the same time, legislators reveal their true priorities as they consistently allocate too few resources to the criminal justice system. One result of this, particularly in the devastated high-crime area of our cities, is that the police and courts are overwhelmed by numbers. The result has been selective enforcement by the police and the evolution of that particularly American institution, plea bargaining, by prosecutors and defense counsel—developments that threaten the moral core of the criminal law, effectively making the prosecutor the overnight subject of that law, dominating in his or her discretion all but a small proportion of criminal charges.

There are few signs of improvement here. Current concerns with sentencing reform make clear the importance of preserving the judge as a controlling figure in sentencing—preserving judicial discretion, but guiding it along proper channels. The sentencing reform movement is pushed to recognize the need for controlling charge, plea, and sentence bargaining. This movement also must confront the question of whether there should be, as there is now, a three-tier sentencing structure for any given crime, with the severity of sentence varying according to whether the accused pleads and bargains, submits to bench trial, or demands a jury trial. Certainly, this cannot be justified on grounds that repentance properly attracts a lesser punishment. There just are not that many criminals on the road to Damascus. Sentencing reform thus lays bare the improprieties in our present plea-bargaining systems and promises their reduction and ultimate elimination.

As you know, the United States Supreme Court has spoken with towering imprecision about the Eighth Amendment—the two leading cases on duration of punishment and that amendment point in opposite directions and are enormously difficult to reconcile. The district courts, with some support from the courts of appeal, have used the eighth amendment to bring a modicum of decency to many of our overcrowded state prisons and city jails.

Let me lay the foundation for my but on this topic. The penal reformers of the late nineteenth century in this country created the modern prison. They praised the rehabilitative ideal and sought to convert the prison from a place of mere incarceration into an institution of social reclamation. Their motives were impeccable and their aims noble, but the realities proved less satisfactory. The prison remains, despite its critics—and prisons have few friends—one of the better American inventions. Furthermore, and this is not commonly recognized, several state and federal prisons in this country are equal in decency and in opportunity for the prisoner to turn from crime to a law-abiding life of any in the world. We know how to run decent prisons—punitive, but with decent opportunities for rehabilitation.

But, too many of our state prisons and city jails are now too large, and too crowded, and they are out of control of those who are to administer them. They are places in which the weak are helpless against the strong and where the isolate is preyed upon by the gang. Too many look like institutions for housing a dangerous underclass minority; such is too often the case.

Problems of race have bedeviled the criminal law in this country for two hundred years and continue to do so today. The solution will not be found in any modifications of our rules of criminal law or criminal procedure, or of sentencing and punishment guidelines. The criminal justice system will not provide solutions to the fearful intersection of race and crime in this country. But there is an amelioration to be achieved over time by a larger adherence to the more important principles of the Constitution—equality of opportunity for all—and by maintaining a
decent system for those who fall behind, along with their children. America seems to have drifted from those values at present, but she will return to them.

I should be more careful about the question of race and crime. Of course, though Blacks figure disproportionately in street crime, both as victims and as perpetrators, Blacks account for less than their proportionate share of corruption, of political crime, of crime subverting the marketplace, of criminal antitrust, of embezzlement, of insider trading, of fraud, and of crimes against the environment. I look forward to the day Blacks will be equally represented in major embelements—it will be a great leap forward.

Our mind-set toward crime and our police and prosecutorial and court resources for dealing with crime are understandably directed toward robbery and burglary and the fear of physical violence. But one result of this is that the Black and White imbalance in prisons per hundred thousand population is about seven to one. After correcting for age, it can be concluded that seven times as many Blacks will go to prison (and even more to jail) as Whites. This is so even after correcting for social and economic disadvantages. Those Blacks who move into the middle class, however, exhibit rates of crime comparable to their White counterparts—slightly lower, actually.

Narrowing the focus from those challenging problems that the criminal justice system cannot solve, let us return to the prison system. America invented the prison, changed its shape and purpose in the interest of individual redemption and reform, but we use prisons and jails altogether too much. Currently, there are more than one-and-a-quarter million of our fellow citizens eighteen years of age and older in prison and jail. Prison numbers grow by more than three thousand per month. Not three thousand new admissions—a net increase of three thousand prisoners each month. Far too many of these new admissions are criminals who would be better dealt with by nincarcenerative punishments.

There is little disagreement that expensive prison cells should be reserved for those guilty of more serious offenses. I am fortunate to serve as chairman of the advisory board of the National Institute of Corrections. This is a body that provides training and research assistance and about $12 million per year by way of support to prison and jail officers. It is a very conservative body. As a bleeding-heart liberal I am somewhat out of sympathy with most of my colleagues on the board, but we share the view that imprisonment is used excessively. Right-wing punishers who run prisons also share this view. If we adhered to this principle and incarcerated only the dangerous and those guilty of more serious crimes we would have a prison population much smaller than the present number. But it is not adhered to. Let me present one or two reasons for this.

First, the public attitude is that there is punishment or there is letting off; there is prison or no prison; there is prison or a slap on the wrist. This attitude is shared by the media, by the cocktail-party experts on correctional theory, and by the convicted criminals. It influences all the functionaries of the criminal justice system, judges included. (Although I should mention that whereas the prison population is increasing by over three thousand per month, the number of convicted offenders not in prison but on probation and other punishment also is increasing by many more than three thousand per month.)

To a considerable extent, this perception of nonincarcerative sentences is true. Too many of our community-based sanctions are in fact not enforced. They are gestures of punishment rather than punishment in fact. In the nation's cities, probation officers often carry case loads in excess of two hundred convicts, in addition to other duties such as presentencings consultations with judges. This means that there is no effective supervision at all in most cases.

Probation, too, often allows the judge to give the appearance of imposing a punishment when in actuality nothing is done. Special conditions of probation, including drug treatment, are not enforced. Fines are not collected. A study of five federal courts conducted by the GAO revealed a sixty-five percent delinquency of collectible fines. People who introduce new community-based nonprison treatments often do well in the early years of the programs. They are often funded by federal appropriations or foundations. When they become institutionalized, however, they become mere tokens. They are not properly supported or funded; they become part of the prison/no prison, punishment/slap on the wrist phenomenon.

By comparison, when a prison term is imposed, the convicted prisoner goes to prison—we are good at seeing to that. As we have seen, when other punishments are imposed, they are too often not carried out. We do not allocate sufficient resources to those supervising noncustodial sentences to ensure their enforcement. Thus, these sentences often become judicial gestures rather than punitive realities.

We imprison a larger proportion of our population than any other country with which we would care to be compared. Part of the reason for this is our unusually high crime rate. The criminal justice system bears only a marginal responsibility for this, but a part of it can with confidence be attributed to our failure to impose and enforce nonprison sentences in appropriate cases. This is not a plea for a sentimental softness toward the convicted criminal. Quite the contrary, it is a plea for a graduated and properly enforced spectrum of punishments suited to social protection.

This brings me to the final topic of my survey—the less than cheery topic of capital punishment.

I cannot in good conscience leave punishment and the eighth amendment without making one or two perhaps obvious points about capital punishment. We are out of step with the rest of the world (again, with those to whom we would care to be compared) on this subject. That does not mean we are wrong, but there is good historical precedent for the proposition that a decent respect for the opinion of others requires us to make a good case for our divergence. No such case has been made. As a matter of social science, the conclusion of the National Academy of Science remains not only correct but also unchallenged: Capital punishment, as compared to protracted imprisonment, shows no evidence of a differential impact on homicides or attempted homicides. This does not conclude the case against capital punishment, but it does go far in that direction.

Perhaps capital punishment would reduce the homicide and attempted homicide rates if we were prepared to apply it
PUNISHMENT, AS COMPARED TO PROTRACTED IMPRISONMENT, SHOWS NO EVIDENCE OF A DIFFERENTIAL IMPACT ON HOMICIDES OR ATTEMPTED HOMICIDES.

to all first-degree murderers, say, about twenty thousand per year in this country. In such a case, there may—I repeat may—be a measurable deterrent effect. But, the most this country has ever executed in any one of the past two hundred years has been 199. The current numbers are miniscule compared to the frequency required to hope to measure a probably illusory deterrent impact. We are unlikely to indulge in the sort of bloodbath that might test the question of a general deterrent effect. So again, we seem to be using even capital punishment symbolically rather than realistically in relation to the problems of crime. It is a little more than symbolic to the people who are executed, not that I care particularly about them. But overall, it is a symbolic rather than a realistic usage.

The Supreme Court has tried until recently to bring some principle to the selection of those murderers who may be executed. But no one has such delicate moral calibration, not even the nine on the Supreme Court, to make such a selection. It is far beyond human competence, unless the choice is made to execute all first-degree murderers who are not mad—this is a job for the advisers to God, not for the advisers to the Constitution. When the complicated factors of the race of the criminal and of the victim are added to the scales, the task becomes one of utter impossibility.

The decision of the United States Supreme Court in McClesky is a clear demonstration of the impossibility of this task. The five members of that Court who accepted the constitutionality of McClesky's execution did so while at the same time expressly accepting, as valid, social science data showing that capital punishment is racially skewed, particularly in relation to the race of the victim, even when all other factors relevant to the gravity of the crime and to the decision to execute are held constant. None of the nine justices dissented from that statement. They accepted that racial prejudice influences the decision to impose capital punishment rather than protracted imprisonment at many levels of the criminal justice system, but held the execution of McClesky to be constitutional, since racial prejudice had not been shown in his individual case.

This decision is difficult to reconcile with traditional due process or equal protection analysis in other types of cases. The only way one can reach that result is to say in effect that death is different, that the people want it, and that we must bow to their wishes. What is the lesson of these excesses of punishment and of the survival of capital punishment? It is, I think, that we have a tradition of expecting too much from the criminal justice system. Neither leniency nor severity has been shown to measurably influence crime rates. Reforms, either of the left or of the right are not likely to make much difference to crime rates. An English historian phrased it succinctly and completely: "Reform, sir, reform. Don't talk to me of reform, things are bad enough as they are."

It sounds like a cheap point, but it really isn't. As Herbert Wechsler pointed out in his introduction to the Model Penal Code, the criminal law controls the largest powers that the state exercises over its citizens in time of peace; it defines that difficult balance between state authority and individual autonomy on which a democratic society depends. If we get the balance right here and hold it steady, we won't likely go far wrong elsewhere. Justice, not social protection, is the overruling aim. If it were not, there would be little point in insisting, as we do, on high standards of proof of guilt in criminal matters. If social protection dominated, surely a balance of probabilities would suffice as a logical matter.

All I've said could be misinterpreted as a plea for leniency in punishment. It really is not. Within proper safeguards of approved investigative techniques, I believe that every effort should be made to catch and convict and appropriately punish by a graduated and principled range of enforced punishments even more criminals than we do now. But we have to realize that overloading the final punitive stage will not compensate for inefficiencies in, and adequate resources allotted to, the earlier stages of apprehension and conviction.

In sum, one lesson of the two hundred years just past is this: If we continue to maintain the social forces that create our excessive rates of crime, we will have to bring more resources and more intelligence to bear on catching, trying, and rationally punishing criminals.