# Toward the Abolition of the Death Penalty[†]

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## DE FACTO ABOLITION IN EARLY JAPANESE HISTORY

I would like to begin with a remarkable fact in Japanese history, a fact of which we are proud. The death penalty was stopped during the period from A.D. 810 to 1156. This was de facto, though not legal, abolition for a period of nearly three and a half centuries. In those days of the *Heian* period, every death sentence had to be approved by the Emperor. And it became customary in practice that every death sentence be commuted to a deportation of the criminal to a remote place by a separate order issued by the Emperor. The practice prevailed throughout this period, with only a few exceptions in particular cases.

But how and why was it possible at all that such a memorable practice materialized at the time of the *Heian* period? The answer will be twofold.

First, this was obviously due to the peace Japan was enjoying throughout this period. It is interesting to note that political struggles among the court nobles became violent and a rebellion known as the *Hōgen-no-Ran* burst out in 1156, the very year in which this glorious period ended.

When the leaders of the rebellion were caught, there was a debate among the court nobles. Many were of the opinion that the traditional commutation should be granted even in this case as well, but one influential noble insisted strongly on execution. Everybody, though rather reluctantly, obeyed him. The Emperor, consequently, did not issue an order of commutation, and all the leaders were executed. The author of the *Hōgen-Monogatari*, dating back presumably to the twelfth or thirteenth century, describing the story of *Hōgen-no-Ran*, expressed in it his great regret for this conclusion. Hatred and hostility gave rise to another even stronger hatred and hostility. It brought about a long age of civil wars, followed by the age of the *Tokugawa Shōgunate*, which was characterized by despotism. The glorious days of non-execution, which had lasted for such a long period, never came back again.

In this connection I would like to refer to Roman history. During the last hundred years of the Roman Republic the abolitionist tendency was strong enough to exclude the death penalty as a practical matter. This can also be ascribed to the peace they were enjoying at that time.

The second reason for de facto abolition of the death penalty during the *Heian* period was the influence of Buddhism. It was introduced into Japan from India via China at the middle of the sixth century, in A.D. 538. Under the patronage of the Emperors it became flourishing and influential. The doctrine of Buddhism is

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so immensely profound and multi-dimensional that you cannot put it in any simple way. But, at least, one of its basic features may be called "compassion-love,"[1] which, in turn, leads to mercy and leniency. It is quite natural that the flourishing of Buddhism at that time caused such a long extended practice of non-execution of the death penalty. I would add that virtues such as compassion-love, mercy, charity, and the like are not monopolized by Buddhism, but are shared by other important religions, including Christianity and Confucianism. As for Christianity, I will come back to it later.

## TRENDS IN THE CONTEMPORARY WORLD

What I have been talking about thus far cannot be applied directly to modern society, because of the substantial differences in cultural, social, and political structure.

So, let us now turn to the contemporary world. What comes first into our sight is the fact of complete abolition of the death penalty in the European Union countries. Among those countries I would like to mention the Federal Republic of Germany, where the death penalty was expressly and completely abolished by the Constitution as early as 1949.[2] In Italy, the death penalty was even earlier abolished by the Constitution of 1947,[3] though with exceptions as to wartime military law until recently. Noteworthy is the dramatic case of France. Here abolition was realized by the late President Mitterrand in 1982 despite unfavorable public opinion, with sixty-two percent being retentionists. He dared to perform this feat by declaring his policy of abolition in advance, during his presidential campaign. After having won the election, he soon nominated Professor Robert Badinter, a well known abolitionist, as Justice Minister, who admirably succeeded in performing the duty entrusted to him by the President.

The road toward abolition had been paved by the *Universal Declaration of Human Rights* ("*Universal Declaration*"), adopted by the United Nations at its 1948 General Assembly. It proclaimed, "[e]veryone has the right to life . . . ."[4] This was indeed of immense importance in the history of human rights, but legally speaking, it was little more than a moral proclamation. It had no binding power in terms of law.

So the next step to be taken was the implementation of this ideal. Thus, some twenty years later came the *International Covenant on Civil and Political Rights* ("*International Covenant*"), adopted by the United Nations at its General Assembly of 1966, and coming into force in 1976.[5] It provides, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his right."[6] This is not a mere moral proclamation

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1. HAJIME NAKAMURA, A COMPARATIVE HISTORY OF IDEAS 276-309 (rev. ed., 1986) (1975).

2. GRUNDGESETZ [Constitution] [GG] art. 102 (F.R.G.).

3. COSTITUZIONE [Constitution] art. 27, para. 4 (Italy).

4. G.A. Res. 217(III)A, U.N. Doc. A/810, at 71 (1948).

5. G.A. Res. 2200(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 53, U.N. Doc. A/6316 (1966).

6. *Id.*

like the *Universal Declaration*, but rather an international treaty in the strict sense. This was remarkable progress.

At the same time, however, from the viewpoint of the abolitionist movement, the *International Covenant* still is not our final goal. In this *International Covenant*, the protection of the right to life is not an absolute one, but a protection only by law—though, of course, with many restrictions imposed upon the legislature. This may be easy to understand, because in order to be supported by as many countries as possible, it was considered wise that even a rather loose type of guarantee of the right to life was much better than nothing at all. In fact, many countries, including the United States and Japan, ratified this *International Covenant*, sooner or later.

But, of course, we cannot be satisfied at this. The high ideal set by the *Universal Declaration* should be achieved at the earliest possible time. From the start, this was the plan of the United Nations. The efforts of the United Nations to achieve this goal have borne fruit in the form of the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty* ("*Second Optional Protocol*"), adopted by the General Assembly in December, 1989, and coming into force in 1991.[7] This *Second Optional Protocol* guarantees fully the right to life, with the least possible reservation, in a very elaborate way. It provides, "No one within the jurisdiction of a State party to the present Optional Protocol shall be executed. Each State party shall take all necessary measures to abolish the death penalty within its jurisdiction."[8] This protocol is designed to be embodied as an additional provision to the *International Covenant.*

This was what those of us who support abolition had been looking forward to for a long time. In Japan, we immediately organized our "Forum to Promote the Ratification of the Abolition Treaty" in December, 1990. I myself was invited to lecture at its opening convention, where hundreds of people gathered together. The manuscript of my lecture was translated into English by Amnesty International, and was distributed world-wide.

But our task was not, and is not, an easy one. Despite our best efforts, the Japanese Government, like the United States Government, does not want to ratify the *Second Optional Protocol.* Nowadays, almost all the industrialized countries, like the European Union countries, have ratified it and abolished the death penalty. It looks rather unnatural and unreasonable that our two major developed countries, the United States and Japan, still remain retentionists. Needless to say, on the state level in America there are many abolitionist states, some dating back even to the middle of the nineteenth century.

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7. G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49, at 206, U.N. Doc. A/44/824 (1989).

8. *Id.*

PUBLIC OPINION

But why is the Japanese Government opposed to abolition? The main reason is that public opinion is not favorable to abolition. This is true so far as the surveys carried out by the government are concerned. They show that around seventy percent of the respondents are retentionists. But, in my view, the questions put in the questionnaires were not very fair. They looked to be designed to lead to answers favorable to the retentionists. Sure, the government has improved the questions gradually, in accordance with our critiques, little by little every time. Still, even in the last poll, the questionnaire was far from satisfactory for us.

Moreover, public opinion is by nature governed by the information given to the public. Thus it may be manipulated by the government rather easily. This factor was clearly pointed out by Walter Lippmann in his *Public Opinion*,[9] first published in 1922, a classical work in this field.

And it is very deplorable that, in Japan, public information about the death penalty is extremely limited. The executions are carried out secretly. Even the fact that an individual execution was carried out is kept hidden—not only to the mass media, but even to the relatives of the prisoner. Even the relatives and defense lawyers are not given the opportunity to visit the prisoner before the execution. The details of how the execution was carried out in a particular case are not made known to anybody outside the execution process. Of course, we know from the Penal Code and other statutes and regulations the outline of the execution, such as: that the method of the execution is hanging in certain prescribed prisons, that a medical officer of the prison should certify the death of the executed person, who should attend the execution and make the protocol, and who should take off the rope from the body. But all this is in the abstract. Anything that actually took place in individual cases is shut out to the outside world. Only the total number of executions is published in the annual statistics of the Ministry of Justice at the end of each year. The situation of death row is kept rather strictly secret. Communications between the prisoners and the outside world are strictly prohibited except for very limited particular cases. Such being the case, people at large cannot get the information adequate to answer the questionnaires of the polls.

In this connection, I would call your attention again to the example of the French President Mitterrand, who, as I noted before, dared to realize abolition despite unfavorable public opinion.

A statesman who is deserving of the name should cherish a high ideal and materialize it through powerful political activities. In order to carry it out, he must strongly and wisely lead public opinion instead of blindly obeying it.

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9. WALTER LIPPMANN, PUBLIC OPINION (1922). Incidentally, we find of late a noteworthy research of polls, showing the majority preference for life imprisonment without parole with restitution to murder victims' families over the death penalty. William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77, 144 (1994).

## REVENGE; *LEX TALIONIS*

A more essential problem for us to consider is the popular sentiment underlying public opinion as to the death penalty. To be frank, we cannot neglect the naive sentiment of revenge in the case of murder, namely the "eye for an eye, tooth for a tooth" principle of *lex talionis*, which dates back to the most primitive age.

As is well known, it is written in the *Gospel According to Matthew*, "You have heard that it was said, an eye for an eye and a tooth for a tooth. But I tell you that you should not offer resistance to injury; if a man strikes thee on thy right cheek, turn the other cheek also toward him."[10] And in the *Epistle of Paul to the Romans*, "Do not avenge yourselves, beloved; allow retribution to run its course. So we read in scripture, 'Vengeance is for Me, I will repay,' says the Lord. . . . Do not be disarmed by malice; disarm malice with kindness."[11] Finally, according to the teaching of Jesus Christ, vengeance is a matter for God, not a matter for human beings. This is the teaching of Christianity.[12] As we saw before, in Buddhism as well, compassion-love is among the most important teachings, though there is no such particular sacred book in a single volume or two comparable to the Bible; instead, the teachings are scattered and hidden in the immensity of innumerable, enormous writings and traditions. Among the major religions in the modern world, Islam is probably the only one that holds fast to the talionic principle.

## JUSTICE

Of course, the dimension of the law is not the same as that of religion. According to common understanding, the ideal of law is justice.

But what is justice? We know that there are various categories of justice, for example: abstract and formal justice as opposed to concrete and material justice, distributive justice in contrast to commutative justice, and so on. In my view, the criminal law is to be governed basically by distributive, material justice, whereas in the law of contract, for example, the basic principle may be the commutative justice of equivalence.

In the field of criminal law, the relationship between the State and an offender is not that of equivalence, such as "give and take." Here, the State should not stand on the same level as that of the criminal. It should stand on a higher level than the latter by regarding the latter not as an opponent but as a component member. Therefore, the State should regard the offender from a much more comprehensive and inclusive aspect, taking into consideration not only the offender-victim relationship but all the factors conceivable, including, for

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10. *Matthew* 5:38-39.

11. *Romans* 12:19, 21.

12. *See* Jerome Hall, *Biblical Atonement and Modern Criminal Law*, *in* CONTEMPORARY PROBLEMS IN CRIMINAL JUSTICE: ESSAYS IN HONOUR OF SHIGEMITSU DANDO 39, 39-60 (Yasuharu Hiraba et al. eds., 1983).

example, the possibility of resocialization of the criminal. Of course, such matters as the sentiments and damages of the victims and their relatives, as well as the measures, remedial or otherwise, to be taken in this regard, are among the most important to be considered.

In this connection, it may be interesting to notice that in *The Merchant of Venice* Portia remarked, "And earthly power doth then show likest God's/ When mercy seasons justice."[13] According to Professor Henkel, a German legal philosopher, Saint Thomas Aquinas said: "iustitia sine misericordia crudelitas est," though "misericordia sine iustitia mater est dissolutionis."[14] This may be roughly translated, "justice without compassion is cruelty," though "compassion without justice is the mother of dissolution." In other words, there is a tension between generalizing justice and individualizing or specializing justice, as pointed out by Professor Karl Engisch, also a German legal philosopher.[15]

I have read with deep impression in a book of Doctor Karl Menninger that:

> Justice Oliver Wendell Holmes was always outraged when a lawyer before the Supreme Court used the word "justice." . . . The problem in every case is what should be done in *this* situation. It does not advance a solution to use the word *justice*. It is a subjective emotional word. Every litigant thinks that justice demands a decision in his favor.[16]

In a trial of a capital case, the naive sense of justice will be represented mostly by testimonies of the victim's relatives, who generally appear in the courtroom as witnesses for the prosecution. The court should pay adequate attention to them. But we must be aware that the sense of justice usually appears as a desire for revenge, a subjective psychology which widely and substantially varies from one individual to another.

If the sentence of the court is influenced by such testimonies too much, injustice rather than justice will be brought about. Much the more so, because as a matter of meting out punishment the line to be drawn between the death penalty and life imprisonment is extremely delicate. You may safely say that there is practically no distinct line. Particularly in capital cases, caprice or arbitrariness should be most strictly avoided. This is without doubt implied by the *International Covenant*.[17]

Usually the victim's relatives are very strong in their sentiments of revenge against the offender. This is quite natural and understandable. But we must know that there are some exceptional and admirable cases. A few years ago, I met one Mrs. Dorothea Morefield, an American lady, who was invited to lecture at our "Forum to Promote the Ratification of the Abolition Treaty" on her own experience and views on revenge. She lost her nineteen-year-old son, a college student, who, while working at a nearby supermarket, was shot to death by a robber. She wanted at first to strangle the criminal with her own hands. But in the course of time, she became aware that that would not ameliorate anything at all,

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13. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1.
14. HEINRICH HENKEL, EINFÜHRUNG IN DIE RECHTSPHILOSOPHIE 323 n.2 (1964).
15. KARL ENGISCH, AUF DER SUCHE NACH DER GERECHTIGKEIT 179 (1971).
16. KARL MENNINGER, THE CRIME OF PUNISHMENT 10-11 (1968) (emphasis in original).
17. *See supra* note 5.

and she finally decided to become an enthusiastic abolitionist herself. Her speech moved us all very deeply. Her original hatred was sublimated in this way. In Japan, too, we find sometimes such noble-minded people, though not many in number.

It follows consequently that the defendant will have either good or bad luck in getting the sentence of death or not, depending upon the personal character of such witnesses. From this aspect again, the problem of justice is extremely delicate. To put too much stress on justice, as many retentionists do, with respect to the death penalty, is a doubtful policy and would better be avoided.

### KILLING IN THE NAME OF LAW JUSTIFIED AT ALL?

Now we come to a fundamental question: Can we really say that taking the life of a criminal under the law is a demand of justice? Let us try another approach. The penal code provision concerning murder is naturally designed to respond to the command "do not kill." The law must function as a model for society of how justice should be applied. If the law permits the taking of human life by its own hand, while asking the nation to respect human life, the law can no longer exercise its discipline over society. In 1849, Dostoyevsky underwent the experience of being sentenced to death for assertedly participating in the "Petrashevsky Circle." His sentence was commuted by a special amnesty just before the execution date, and he was sent to Siberia. It is well understandable that Dostoyevsky called the use of the death penalty "an outrage on the soul."[18] In his novel, *The Idiot*, the leading character, Marquis Myshkin says: "It is written, Thou shalt not kill. Does that mean that because he has killed we must kill him? No, that's wrong."[19] In another context, A.J. Cronin, in his work *The Spanish Gardener*, let Halevy say to Brande, a little bit satirically, "No doubt. Revenge is a stimulating passion. But it may be dearly bought. Do not let it run away with you."[20]

### MISJUDGMENT

The problem of misjudgment is the most decisive one as to whether capital punishment should be maintained. Some retentionists argue that misjudgment is not peculiar to capital punishment but is common to every kind of punishment. But the significance of the problem is essentially different between capital punishment and other kinds of punishment, in terms of possible recovery in cases where an innocent person was executed. Of course, even in cases of life or long-term imprisonment, the time once lost (especially the youth lost) of the prisoner, found innocent thereafter, can never be recovered again by any pecuniary reparation or restitution. But as long as the convicted person is still alive, he or she can be compensated by some means or other, however insufficient it may be.

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18. FYODOR DOSTOYEVSKY, THE IDIOT 45 (David Magarshack trans., Penguin Classics ed. 1955) (1869).
19. *Id.*
20. A.J. CRONIN, THE SPANISH GARDENER 206 (1950).

In contrast, in the case of the death penalty, once executed, the dead person cannot be compensated at all, except that bereaved family members, if any, may receive something. The terrific agony felt by the innocent prisoner being executed must be far beyond the imagination of others. The anguish of the innocent person executed must be incomparably greater than that ordinarily felt by a prisoner who had actually committed the crime. Just imagine the prisoner who mounts the gallows shouting and crying aloud desperately: "I am not the offender! I did not commit the crime!" This is nothing but what Dostoyevsky called "an outrage on the soul." This is no longer a punishment for the criminal. This is indeed a crime, and a most atrocious one, committed by nobody else but the state itself. And we should notice that this kind of situation is inevitable in the death penalty as a legal system.

In 1975, the First Petty Bench of the Supreme Court, of which I was a member, passed the *Shiratori* Judgment,[21] which loosened the grounds for a retrial (more precisely, a reopening of the proceedings against a judgment which has become finally binding) of a convicted person. Since this judgment was passed, there have been four cases in which convicted people who were sentenced to death have been found not guilty. Incidentally, out of those four cases, the appeals in two cases happened to be heard later by the First Petty Bench. When I read through the records in great detail, I honestly felt that the original judgments in these two cases had been unreasonable. But not even these cases were able to pass through the gate of retrial until after the *Shiratori* Judgment was issued. In other words, among those executed people who were unsuccessful in gaining a retrial prior to the *Shiratori* Judgment, there is a high possibility that some were executed in spite of being innocent. I am afraid that the total number of such cases in the past has not been small.

Now the path to a retrial has become easier to a certain extent, and the courts charged with factfinding will be even more prudent than before, so I am sure that the incidence of misjudgment in cases involving capital punishment will be much lower than previously. But who can assure with absolute certainty that misjudgment will never occur? Of course, judges are well trained and have enough experience in dealing with findings. Even so, as long as they are human beings, nobody can claim that they do not make mistakes. They are not God; they are not omnipotent. Fallibility is inherent to human beings. Sir Karl Popper, famous philosopher of critical rationalism, founded his philosophy on what he calls fallibilism.[22] When I forwarded him a copy of the English translation of my paper, he soon wrote to me expressing his complete agreement with my argument from his standpoint of fallibilism. Condorcet, a famous mathematician and a great figure at the time of the Enlightenment, deduced mathematically the inevitability of misjudgment, and consequently abolition, from the laws of probability. I have learned about Condorcet from a book jointly written by Mr.

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21. Daniel H. Foote, *"The Door That Never Opens"?: Capital Punishment and Post-Conviction Review of Death Sentences in the United States and Japan*, 19 BROOK. J. INT'L L. 367 (1993). The author's detailed and precise analysis of the problems concerned, including the background of the *Shiratori* Judgment, is just admirable, even as compared with the bibliography in Japan.

22. SIR KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 374-76 (4th ed. 1962).

and Mrs. Robert Badinter.[23] Mr. Badinter is the very figure who, as Justice Minister under the Mitterand regime, succeeded in realizing abolition in France in 1981. Here I have referred to Condorcet's argument, because human fallibility may be considered even as a matter of logic or something transcendent.

We know that there are innumerable reasons, both theoretical and practical, to believe that the miscarriage of factfinding is quite inevitable, regardless of the ability and personality of those who carry out the investigation and the trial. Even the foremost scientific knowledge and techniques cannot provide any final guarantees.

In this connection, I would like to tell you my own modest experience while I was on the Supreme Court. It was a case of murder by means of poisoning that occurred in a small country town. There was only circumstantial evidence, which, however, was enough to obtain a conviction beyond reasonable doubt. But according to the assertion of the accused's lawyer, the police arrested the accused after checking only half of the area of the whole town. The police did not check the other half of the area. If they had done so, who could say that there would be no possibility of finding another suspect in similar circumstances? The accused himself strongly denied committing the crime, and he insisted that he was not the person who did it.

Such circumstances alone are not enough to outweigh individual testimonies and pieces of evidence, so it could not be said that it put a reasonable doubt on the accused's guilt. We could not dismiss the case on the grounds of a mistake of factfinding by the lower court. But, then again, how could we be absolutely sure there was no mistake in this trial? We must have a slight worry in such cases. Since we could, as we did, sustain the conviction beyond reasonable doubt, the finding of guilt followed from the principle of the law of evidence. And if the defendant was guilty, the sentence would have to be death, because the circumstances of the crime were extremely bad in this case. It was such a case. Though I was not the presiding justice, I was worried very seriously. But as long as the death penalty existed, there was no way out.

Finally, the day of the decision came, and the presiding justice pronounced the judgment, which was a dismissal of the final appeal. When we left the courtroom, one person, apparently a member of the accused's family or possibly one of his supporters, hissed the word "murderer" at us from behind. Since I had been harboring all the time an anxiety, though very, very slight, as to whether the accused really was guilty, this word stuck me in the heart. That voice still sounds in my ears as if it were recorded there. And I cannot forget it.

In this way, the problem of factfinding appears to take a special form in cases where the death penalty is applicable. In cases where the circumstances of the crime are so bad that the death penalty is virtually mandated, can we commute the sentence to one of life imprisonment because there may be a slight dent in the factfinding? This rationale cannot be supported theoretically.

So, in such cases, there is no escape as long as the death penalty exists. Certainly, there will be cases where life imprisonment may be made possible by

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23. ELISABETH BADINTER & ROBERT BADINTER, CONDORCET: UN INTELLECTUEL EN POLITIQUE 195 (1988).

some way or other of finding certain facts concerning the circumstances of the crime. But in cases such as the one I have been speaking about, the law leaves us no room to commute the sentence. Moreover, I do not think we can answer the basic question of whether to retain or abolish the death penalty through the use of cheap tricks such as temporizing.

## HUMAN DIGNITY

The inherent dignity of the human person is the foundation of human rights, as is expressed by the *Universal Declaration*[24] as well as by the *International Covenant*.[25]

Everyone as a human being has, in the innermost, one's own existential self—the entity of the highest and absolute value, human dignity, not only inviolable by anyone else but impossible to be abandoned even by oneself. Surely one may sacrifice even one's own life in certain extraordinary cases. This will be regarded as a heroic act. But that does not mean the abandonment of one's dignity. Human dignity is essentially more valuable than one's life. I would like to call this the existential self or existential subjectivity, inherent in everyone's personality.

The concept of human dignity leads us to many important conclusions. I will raise here some of them.

In the first place, human dignity is in itself inconsistent with the death penalty in practice, which, as stated above, involves the possibility, though very slight, of resulting in what Dostoyevsky called "an outrage on the soul."

Secondly, with human dignity borne in mind, we must consider that everyone's personality is able to develop infinitely at any stage of one's life. The "right to seek pardon or commutation of anyone sentenced to death," as guaranteed by the *International Covenant*,[26] presupposes the ability of anyone to infinitely develop one's own personality.

Any criminal, however cruel and wrong his or her act may have been, can possibly be rehabilitated, either on the criminal's own initiative or by aid from somebody else such as chaplains, volunteers, friends, relatives, or otherwise. I knew a certain murderer sentenced to death, who was a typical psychopath lacking moral sentiments or emotion. I had the chance to look into some notes written by him. I was surprised at reading lines which showed his coldbloodedness to the victim and the victim's family. Being a graduate from a first-class university with an excellent record, he showed a good talent in writing. But what he wrote showed nothing but his cold, egoistic calculation. It showed no sign of repentance at all. Then, however, the prisoner met the well-known French Father S.A. Candeau, born in the Basque district, and a veteran of the last war, who loved Japan and served in Japan until his death. Father Candeau's influence over this man was unimaginably great. The man soon became Christian and his obstinate character was gradually ameliorated, until at last it became even

24. *See supra* note 4.
25. *See supra* note 5.
26. *Id.*

so nice as to astonish people who knew his original coldbloodedness. Years later he was nevertheless executed, though with a good conscience. His correspondence with his mother and an intimate female friend as well as with psychiatrists familiar to him while on death row were edited and published by a writer, who happened to be one of those psychiatrists. I was deeply moved at reading the book.

As will be seen from this example, every person has an infinite possibility of personality formation. And the blameworthiness of a criminal act may change in accordance with such development of the criminal's personality. The punishment of imprisonment is well adaptable to such change in the criminal's personality by way of parole. In contrast, the death penalty totally lacks such flexibility. That means it is inconsistent with the human dignity of the criminal, even apart from the problem of misjudgment. As to my own dynamic theory of crime and punishment, I roughly outlined it in my previous lecture[27] and thus will not repeat it here.

## HUMANISTIC CRIMINAL POLICY

Another conclusion to be drawn from the concept of human dignity should be humanistic criminal policy.

The term "humanistic criminal policy" was first used by Judge Marc Ancel, French criminal law scholar and judge, in his work *La Défense sociale nouvelle*,[28] the subtitle being "Un mouvement de Politique criminelle humaniste." Judge Ancel's original intention was to criticize the then-prevailing old theory of social defense. The old theory of social defense had been asserted by the scholars belonging to the positivistic school initiated by Enrico Ferri, who had denied the "free will" as a "pure illusion." Judge Ancel wanted to overcome this type of old theory by a new approach based on humanism.

I do not deny the importance of the aspect of "law and order," since criminal law should be effective. But this aspect as such is not a self-evident principle, nor the only way of preventing crime. We have observed recently on both sides of the Pacific Ocean the resumption of executions of many people who had been on death row without being executed for a long time.

We also observe in the United States a tendency of reintroducing the death penalty such as in New York, where the death penalty had once been abolished. Moreover, both the American and the Japanese Governments alike obstinately refuse to ratify the *Second Optional Protocol*.[29] All this is explained in terms of law and order. This recalls to my mind Professor Francis Allen's critical remarks, which he made years ago: "The extreme law-and-order advocates—the group described as adherents of the war theory of criminal justice—constitute one of

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27. Shigemitsu Dando, *Basic Problems in Criminal Theory and Japanese Criminal Law*, 35 IND. L.J. 423, 431 (1960).

28. MARC ANCEL, LA DÉFENSE SOCIALE NOUVELLE: UN MOUVEMENT DE POLITIQUE CRIMINELLE HUMANISTE (3d ed. 1980).

29. *See supra* note 7.

the important and persistent realities of American political life and one of the principal limiting factors in American penal reform."[30]

Can we really ascertain that such measures, based upon law and order, have actually any preventive or deterrent effect on criminality? Let us take an example in Japan. In Japan there were no executions during the period of three years and four months from November, 1989, through March, 1993, when executions were resumed. It is interesting to note that the number of murder cases during this period was lower than the preceding and the following periods. The number of murder cases clearly went down in 1990 and up again in 1994. I do not claim that it is hereby scientifically proved that the death penalty has no effect on criminality. But at the same time, we can surely say, it is not proved either that the death penalty has any positive effect on criminality. Even the notorious affair of the Aum Shinrikyo cult, involving gas attacks in Matsumoto, Nagano Prefecture, and in the Tokyo subways, was planned and carried out after the resumption of executions.

As early as 1924, Professor Edwin H. Sutherland of Indiana University pointed out that "the significant difference is not between the states that have capital punishment and those that do not, but between the different sections of the country, regardless of whether the states have or do not have capital punishment."[31] This conclusion was later elaborated by Professor Donald Cressey, with more materials and statistics.[32]

From the viewpoint of human dignity, we should not treat anyone as a mere object or a mere means to a purpose. Doctor Georg K. Stürup, famous psychiatrist and longtime superintendent of the world-renowned Herstedvester Detention Centre of Denmark, begins his work with his belief that "most of our actions are voluntary."[33] Noteworthy are his following remarks: "We should not attempt to 'cure' any criminal; he has to develop his own way and remain himself. It is necessary, though often difficult, to retain respect for the human beings with whom we are working."[34] Here he cites Jung's words: "Cure may act as a poison which not everyone can tolerate."[35] I recollect that I was deeply impressed, and even moved, when I observed with my own eyes his way of treating the inmates there.

Viktor E. Frankl, psychiatrist, popularly known through his documentary book on his own experience in Auschwitz,[36] developed what he called "Existenzanalyse," or "existence analysis," modifying the Freudian theory of

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30. FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 62 (1981); *see also* FRANCIS A. ALLEN, THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW 35-47 (1996) (regarding the "war on drugs"); *id.* at 47-56 (relating to capital punishment).

31. EDWIN H. SUTHERLAND, CRIMINOLOGY 369 (1st ed. 1924).

32. EDWIN H. SUTHERLAND & DONALD R. CRESSEY, PRINCIPLES OF CRIMINOLOGY 292-95 (5th ed. 1955).

33. GEORG K. STÜRUP, TREATING THE "UNTREATABLE" at vii (1968).

34. *Id.* at 15.

35. *Id.*

36. VIKTOR E. FRANKL, EIN PSYCHOLOG ERLEBT DAS KONZENTRATIONSLAGER (2d ed. 1947).

psychoanalysis.[37] While Freud is usually considered a determinist, Frankl was not satisfied with determinism, because from his experience in a Nazi concentration camp, he became confident that a human being is well able to perform, in an extreme situation, something more than his or her born predisposition or environment may order or allow. As is well known, Father Maximilian Kolbe, while being imprisoned in Auschwitz, sacrificed himself by volunteering to go to a starvation room, instead of another prisoner who had his family to support at home. Father Kolbe's incredibly heroic act was really moving indeed, not only for the co-inmates of the camp but also for the whole world who later learned the fact, thus making the Roman Catholic Church canonize him after the war. Even apart from this episode, Frankl experienced that quite a number of his co-inmates, known or unknown, showed noble acts of various kinds and did not succumb to atrocities under marginal situations. Such experiences inside the camp helped Frankl believe firmly in the existential inner freedom of human beings.[38] May I add that, even Freud himself, who has been thus far believed to be a determinist, is of late starting to be regarded rather as an indeterminist by some scholars like Bruno Bettelheim.[39]

B.F. Skinner, an influential psychologist, contributed greatly to the development of the behavioral sciences by his theory of operant conditioning.[40] But I, frankly, cannot agree with the philosophy underlying his argument. He went too far when he denied the autonomous man, as suggested by the title of one of his works: *Beyond Freedom and Dignity*.[41] As persuasive and nice as his argument is, the denial of the autonomous man is inconsistent with human dignity, and accordingly with humanistic criminal policy. Sciences are without doubt invaluable for human life. But the belief in the almightiness of science is a different thing. We must distinguish between scientism and the sciences. Scientism is an enemy of humanistic criminal policy.

In the concluding part of *The Decline of the Rehabilitative Ideal*, Professor Allen suggested that one of the promising strategies would be to recognize a state obligation to facilitate the self-development of inmates.[42] This rehabilitative ideal should be considered essential to humanistic criminal policy. If this is true at all, and if every human being is able to develop his or her personality at any stage of life, the death penalty—which, by nature, deprives one of such chance of rehabilitation—is deemed inconsistent with human dignity and humanistic criminal policy.

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37. *See* VIKTOR E. FRANKL, ÄRZTLICHE SEELSORGE: GRUNDLAGEN DER LOGOTHERAPIE UND EXISTENZANALYSE (7th ed. 1966); VIKTOR E. FRANKL, PATHOLOGIE DES ZEITGEISTES 173 (1955).

38. *See, e.g.*, FRANKL, PATHOLOGIE DES ZEITGEISTES, *supra* note 37, at 136.

39. BRUNO BETTELHEIM, FREUD AND MAN'S SOUL (1983).

40. B.F. SKINNER, SCIENCE AND HUMAN BEHAVIOR 62-66 (1953).

41. B.F. SKINNER, BEYOND FREEDOM AND DIGNITY 191 (1971).

42. *See* ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL, *supra* note 30, at 85. As Professor Allen has pointed out, "[T]he growth in popular support for capital punishment and the decline of the rehabilitative ideal . . . must surely reflect common sourees." ALLEN, THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW, *supra* note 30, at 47.