3 Origins of American Criminal Justice: Fighting Fire with Fire

The ideas of crime and punishment seen in operation in America today are not universal nor are they as self-evident as one might believe. However, the public discourse has, in recent decades especially, generally taken these ideas for granted. It is paramount to understand that our contemporary conceptual framework around crime actually has a relatively brief history (centuries, not millennia), which is connected to a particular group of people whose views we have inherited (crime, 2014).[1] Furthermore, these ideas have evolved

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[1] To clarify, crime, and the corresponding criminal justice model of which it is a central component, is one of several fundamentally different ways of looking at or dealing with problematic human behaviors. This model grew up around something called the English Common Law, which is a distinct framework from other systems which have been used by different societies to deal with people's mistreatment of one another or acts against the common good. Other models include civil law (which is a separate body in this country, but which in others serves the same roles for which we have the criminal system), religious, tribal, and various other state based systems (for example, Germanic or Chinese), unique to their given political or traditional frameworks. In religions we see various codes of conduct and in some cases entire legal systems which have arisen from these. The distinguishing feature of criminal law is that a crime is an infraction against the state (or in its original context the crown). This makes criminal law very different in character than civil law which deals with the grievances between the involved parties directly. Criminal law is closer in construction to religious law wherein sin is an infraction is against God, but in criminal law, God has been replaced with the state. Civil law of course still allows for infractions against the state, but they would be more direct, such as espionage, treason, or even destruction of public property. The word crime itself, while having a Latinate root does not appear in the historical record until the 14th century (Miriam-Webster's Dictionary and Thesaurus).

Criminal law on the whole, while it may offer some advantages in terms of the use of case law to establish precedents in interpretation of the law, seems to lend itself to more punitive outcomes and less restorative ones than its civil counterpart, which is what takes its place in most European countries. One of the reasons is perhaps the diminished role of the person who was harmed in the decision making process surrounding what should be done with the person who is found guilty. It has been found for example that in places where Restorative Justice

considerably (Davis, 1998). However, they have not necessarily evolved in ways that are positively adaptive for the people they affect. Rather, they have evolved for the benefit of their own survival as ideas.

As schoolchildren many of us were taught that the ideas of criminal law we employ came down to us from England, and that we made some big changes such as the presumed innocence of the accused, which the state must prove guilty. While, in contrast, British law required the accused to prove her or his innocence.[2]

The legal system in the newly born U.S.A. was, for a time, advanced, even radical when compared to its British progenitor.[3] Its initial trajectory was toward a more

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(which is essentially a modified civil mediation process) has been employed, even after the most extreme of atrocities, such as the Rwanda Genocide, what those who were the targets of violence want from those who did the violence is often a lot less centered on punishment than what is seen when a third party makes the decision (FeldmanHall & Sokol-Hessner, 2015).

None of this is to say that there is no utility in recognizing the things we classify as criminal as having some ill effect on the social order. In fact, I propose that, as is the case in Restorative Justice circles, the community itself should be represented alongside any harmed parties, and responsible parties. There are likely to be in any complex situation various impacts felt in various degrees in various directions whenever some serious harms have been done. We should be aiming to look at the whole picture in every case.

[2] I have attempted to vary the use of gendered pronouns in this document using the following considerations: 1) wherein the choice seems arbitrary, I have tried to alternate between uses of the male and female pronoun. At present, due to time constraints I will not be able to make sure this is a perfect 50/50 match, but I intend to do that in the future; 2) wherein the choice seems loaded with presumptions, i.e. those areas where our cultural conditioning tends toward assigning this category or that of person to male or female gender respectively, I have attempted to reverse these for the most part (again, I have probably missed a bunch of these which I intend to fix in future versions as time allows).

[3] Although, this is meant to say strictly in relative terms, it was always harsh.

reformative or rehabilitative oriented model. This however did not hold steady moving forward. The initial steps toward reform were eroded and even turned back toward the punitive in various waves. The first significant roll-back was in response to the abolition of slavery, southern states, post-reconstruction, began during what is known as the Jim Crowe era,[4] to incarcerate black men at ever-increasing rates, reduce already poor living conditions within institutions and to initiate large-scale use of prisoners as a source of slave labor (leveraging the wiggle room left in the constitutional amendment abolishing slavery which allowed for its continued use) (Perkinson, 2010). Later, as the politics within the organization which sets prison standards in this country, currently known as the American Corrections Association (ACA), shifted, the organization moved from being an advocate for rehabilitation, reasonable housing standards and humane treatment for inmates toward the opposite on all fronts (Perkinson, 2010). More recently, along with "tough on crime" era legislative initiatives throughout the 1980s and '90s, virtually all vestiges of the reform model were uprooted (Alexander, 20xx).

Our British precursor's system at the time of the founding of the U.S.A. was at the time, on the whole, punitive, and incredibly harsh. For example, it called for a number of petty crimes to cease being punishable by torturously inflicted death, mutilation, or exiles,[5] all of which were common practices under monarchies

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[4] The period wherein segregation laws were imposed and harsh penalties were inflicted on African Americans for a wide range of petty crimes and social ordinances.

[5] Note here that prior to our independence, exile to the U.S. was a punishment frequently employed by the British courts.

(Pinker, 2013). Yet today, the U.K. sends a far smaller proportion of its people to jail or prison for less time than the U.S. does (World Almanac, 2016),[6] and it abolished capital punishment for most crimes in the 1960s, and totally in 1998, along with the rest of Western Europe and most other developed democracies (Capital Punishment, 2014).

A troubling pattern emerges when comparing former European colonies to the rest of the world. We tend to be more vindictive than our parent countries, perhaps due to long-lasting effects of the violent nature (which, as we will see, is transmitted socially, between generations, as a sort of disease of ideas rather

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[6] It should be appreciated here, that the current criminal justice system represents something which has already been doubled down upon multiple times under the pretext of so-called "tough on crime" legislation. The result, as has been widely reported, is that the U.S., which represents itself to the world and in its own imagination as a beacon of freedom, has the largest prison population on the planet. More to the point, we have the largest percentage of our people in prison. According to the 2019 World Almanac, we had 2,168,600 people in prison in 2015, or 872 people per 100,000, second after us was El Salvador at 798.63 per 100k, followed by Trinadad and Tabago, Grenada, Panama and Russia. The remainder of the list includes various politically unstable, impoverished countries, or those ruled by military dictatorships. China was not on this list, which was the top 25; however, in other places it has been said that they do rank among the top three in terms of raw numbers of people in prison (Prison, 2014), but still far below the U.S., at 1.5 million prisoners with a population 1.3 billion at the time of the cited Britannica article, making their incarceration rate 115 per 100k, or about 13% that of our own. None of the established western democracies made the list, and as will be discussed below, many of these employ programs more compatible with the ideas of PCJ. It is also worth noting here that as much as 29% of the US adult population has a criminal record, and 24% have an FBI file for having some arrest for a felony or serious misdemeanor (Petersilia, 2003).

than some in-born trait) of colonialism; this is especially true of the mainly British former chattel slavery countries (Norris, 1997).[7]

British law, the punitive kind we know today and have tried to adapt to our country's democratic goals, came into effect in England by the time of the Tudors.[8] It is in their worldview that we begin to see interpersonal harms treated as crimes against the public order (Norris, 1997), rather than strictly interpersonal matters.

Throughout the majority of mainland Europe, in contrast to the split between civil and criminal law employed under British systems and in keeping with Roman origins of European legal systems, all law is civil law (Encyclopaedia Britannica, 2007). While the Romans were no champions of human rights, European law, as it evolved over the ages, came to focus on achieving balance between the concerns of parties affected by what we would label as crimes (which we in the U.S. define as offences against the state, rather than conflicts between various people or groups, thus criminal cases with names such as State of Delaware v. Smith). This is part of the reason that European justice systems tend to focus on things such as

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[7] While it is beyond the scope of this paper, it is important here to recognize that the American form of slavery (including that which extended into the Caribbean), which has been designated here and elsewhere throughout the literature as chattel slavery, was a particular variety of slavery which was especially brutal and indifferent to human rights (Slavery, 2014), above and beyond the limits which many historically slave-owning societies allowed.

[8] An English royal dynasty of Welsh origin, which gave five sovereigns to England: Henry VII (reigned 1485-1509); his son, Henry VlII (1509-47); followed by Henry VlII's three children, Edward VI (1547-53), Mary 1 (1553-58), and Elizabeth 1 (1558-1603) (Tudor, House of, 2014).

reparations, community service and so-called rehabilitation.[9] The German legal system—which is used by Germany and a handful of other countries—does have a criminal component, not unlike the British-American system, as it shares some common historical roots, but is generally more akin to other European systems in how it remedies the aftermath of crimes. In fact, the British have become more European in their sentencing, and Germanic countries are among the most rehabilitation oriented (Lessons From European Prisons, 2013). Perhaps the biggest difference between European and Post-Colonial British systems, outside of the underlying assumptions of their theories of criminality, is their willingness to consider evidence in terms of what actually works to reduce crime and address the needs of those who have been harmed. On the other hand, our system and ones like it, is hooked on ideas that do not pan out when they are tested. Ideas

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[9] This term, rehabilitation, suggest a return to some better state, prior to the taking of some wrong turn in life. In fact, what is needed is, in many cases, more fundamental. Those of us who have caused harm more often need nurturance of and introduction to things which, up to the point of introduction, have been absent from our lives. Rehabilitation is the wrong word to describe the education, therapy and access to opportunities which are the things that most of us need. Note that Miriam Webster's in fact does not support a definition for rehabilitation which matches the way it is used in relation to the criminal justice system; rather, it defines this word as follows:

> [ML rehabilitatus, pp. of rehabilitare, fr. L re- + LL habilitare to habilitate] (ca. 1581)
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> 1 a: to restore to a former capacity: reinstate; b: to restore to good repute: reestablish the good name of
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> 2 a : to restore to a former state (as of efficiency, good management, or solvency), e.g. slum areas; b: to restore or bring to a condition of health or useful and constructive activity.

Reform is a word that used to be used—it's more accurate for what is being sought in the rehabilitation discussion—but at some point it took on negative associations, as it was applied to particularly punitive child reformatory institutions. Socialization, as in the definition provided by Webster's—to make social, esp. to fit or train for a social environment or treatment—would be more a appropriate term for what is being discussed in the various contexts discussed relevant to the subjects of this paper.

which do little to make our communities safer or relieve those who have been harmed.

America is where the ideas of prisons centering primarily on prescribed periods of confinement to remedy offences were invented. Prior to the 1800s, we mostly used either corporal (bodily) punishments, or capital punishment (death). Debtors' prisons and work camps prescribed hard labor for restitution. Prisons emerged as what was expected to be more humane alternatives to these (Encyclopaedia Britannica, 2007). Nevertheless, they maintained the popular assumption that punishment is the ideal response to some number of those things deemed unacceptable by the State. This position however is remarkably inconsistent when one considers that the list of offenses deemed criminal and therefore worthy of punishment does not include many of the kinds of harms one might cause another person or group of people. Such offences might for example include homicides that take on the label wrongful death under civil law, or forms of financial harm that do not earn the label larceny, which are still handled under civil law and call for restitution or remedies other than punishment.

The modern U.S. style prison, or penitentiary as it is still called in some states, is largely modeled after the ideas of some well-meaning, reform-minded members of the Society of Friends (a.k.a. Quakers) (Pennsylvania system, 2014). In 1829, at Eastern State Penitentiary in Philadelphia (Prison, 2014), they set up an institution with nothing but solitary confinement cells, modeled after the cells in which Christian monks spent large portions of their time praying and meditating. Prisoners had little to no human contact. Their meals were slid quietly under their

doors. A significant amount of these prisoners suffered lasting psychological damage, even after only brief exposure to these conditions (Zinn, 1998).

The belief which led the Quakers to conduct this experiment was that a person forced more or less to adopt the life of a monk, living in isolation in a cell (the same name given to a monk's quarters), would reflect on the error of his ways and turn to God, or at least somehow become penitent, thus the name, penitentiary, or place of penitence.[10] This belief was, within a few years, realized to be mostly in error. Some small number did appear to take to the path the reformers had had hoped for. However, what happened in a significant portion of the cases was that the prisoners became unable to cope with the requirements of unsupervised day to day living and typical social situations,[11] and upon release,

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[10] It is unclear that the Quaker reformers believed that their penitentiary model would or should inflict punishment; rather that solitude would generate introspection, as it is professed to do for the monk. Unfortunately, this view did not account for the fact that monks self-select solitude, and undergo substantial training and practice before diving into it (Monasticism, 2014).

[11] The Quakers ideas were not entirely misguided. One thing they perhaps did have right was the belief that those who are caught up in the middle of destructive behavioral patterns in close quarters with one another can, and often do bring out the worst in one another, and tend to reinforce destructive ideas, or worse, conspire to do more crimes together and educate one another in more effective strategies for causing such harms or avoiding detection. So, while there may be some psychological benefit in allowing the incarcerated to socialize with one another, it would be much wiser to create situations wherein their social interactions are more varied and largely among more functional members of communities who are able to live satisfying lives without causing harms. To this end, some institutions and prevention programs in this day and age offer mentoring situations, but a long term (longitudinal) study out of Harvard University (the Cambridge-Somerville Youth Study), which began in the 1930s and continues to this day, has found conclusively that these approaches are insufficient, and even counter-productive, toward the end of teaching good life skills and to the points of discouraging destructive behaviors, as the recipient of mentoring becomes reliant upon a mentor for advice and whenever that connection is broken can tend to lose the bearing of his moral compass. Conversely, though anecdotally, the Vietnamese Buddhist monk

not only did not act any less destructively, but in many cases were more destructive than before incarceration. This unfortunate experiment, in scientific terminology, proved to be a false hypothesis (Scientific Hypothesis, 2014). Nonetheless, while the reformers themselves realized the error and abandoned the project, this method, or variously modified versions of it, became a standard that proved popular with lawmakers throughout the U.S. and Europe. This was not because it worked, but because it appealed to public moods.[12]

The Quakers also believed that meaningful labor had some rehabilitative effect. This, when generalized to meaningful work or other activities which contribute to

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Thich Nhat Hanh speaks of a case wherein a very destructive youth was sent to live at his mendicant community, Plum Village in France, and was completely turned around within a single summer vacation in a way that persisted upon her return to her home and throughout the following years. Beyond this isolated example, the preponderance of sociological research shows that being surrounded by so-called good influences and living in what we would call a middle-class environment, rich with positive stimuli, produces people who are not destructive and can resolve the destructive behaviors of those who have been previously immersed in the kinds of social and environmental situation common both to poverty and prisons. In brief, a buoy of hope in a rough water is not as functional toward providing stability as is a patch of dry land.

[12] It is unclear however that public moods in the case of this and various other important social matters are reflective of anything other than the fact of bad or sensationalistic journalism which has led to widespread misperception of the facts surrounding the justice system. The reader will observe that the majority of contemporary news stories surrounding the criminal justice system are the daily reports of specific crimes or trial proceedings. The focus tends to be centered on the outrage and emotions evoked by the story of what happened (as is true in court proceedings), and rarely on what might best be done to remedy such situations or prevent them. A particularly disturbing outcome of this sort of coverage is that while in significant and demonstrable ways, crime rates have plummeted over the course of human history and continued to decline throughout the last several decades in most areas around the globe (they have risen in pockets, which is where news coverage tends to focus), the average person is under the impression that crime rates are on the rise and that doom lurks around every corner (The Violence Paradox, 2019).

some good, does seem to hold (Frankl, 1983 edition). Also the idea, that some amount of time in quiet solitude (although self-selected, not imposed) can have the effect of allowing one the opportunity to think introspectively in constructive ways, does have merit.

The perhaps correct aspects of the Pennsylvania system have been all but abandoned by the criminal justice model. On the other hand, many of the most destructive and deleterious of aspects of the Pennsylvania system have preserved, here and in other countries. We still have cells in most prisons, though most of these have become two-person (which leads to a lot of conflict and violence among those forced to share tight living quarters, often unsupervised for hours at a time, which are also bathrooms).[13] We—once again—put some number of people in isolation cells, sometimes for decades, with little to no human interaction (this practice had been banned in the U.S. between the late 1800s and 1970s, and remains banned in most developed nations (Special Report on the Use of Solitary Confinement, 2018). And, we still have a large pool of state officials who insist upon the ideas of forced penitence through social isolation and fear of

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[13] Many prisons have switched over to dormitory style housing in which a larger number of inmates (anywhere from 3 to upwards of 100) are housed in a large room with bunk beds. This situation also leads to a lot of conflict among inmates forced to live in open quarters with one another, including privacy issues and violent confrontations over personal space and use of shared space and resources, for example how cleaning responsibilities should be handled, who gets to sit at a given table, what television channel is watched at a given time, shower usage, toilet usage, telephone usage, usage of areas for exercise, study, game play, and so forth. The obvious solution is that those who must be confined should have private quarters and separate private bathroom facilities, and that shared spaces should be accessible at all times and should be staffed—with individuals who are there to help and to resolve conflicts, not to dole out punishments, and establish or contribute to an institutional pecking order.

punishment, in spite of a large body of evidence which proves such ideas to be faulty.

This experiment, even if it was never quite intended to be an experiment, was nonetheless, perhaps the most scientific thing that one will encounter in research relative to the U.S. criminal justice system evaluating its own practices for their effects.