

5 A Fundamentally Flawed System

The penal system is so fundamentally antithetical to anything which would be conducive to the approaches called for here, that it should be apparent that this set of institutions needs to be replaced, not reformed. Punitive justice, in any form, revolves around the primitive idea that the only way to get people cooperate is to keep them in-line by inflicting pain or instilling fear. Attempting to shape their behaviors through nothing but suppression of impulses or their corresponding behaviors, without helping people (typically the most in need of such help) find alternative means for managing those impulses. These specific methods, which as discussed above, have been proven not to work.

State violence, or however one wants to interpret the methods of putting a person in a cage to manage or respond to their behavior, is the result of frustration with the unwanted behaviors of others, wherein the agents of the state demonstrate through such action that they have a poor understanding of how to cope with such problems. It is the same basis people use to justify violence at home, in our communities and between tribes or governments. When we cannot figure out how to elicit cooperation with our goals, many of us turn to the use of force. Where in the individual instance one can see how emotional, in-the-moment reactions to such frustrations could lead to such responses, in the case of the republic, or democratic State, wherein the judicial system is meant to ensure measured and thoughtful response, this is a serious failure. Punitive Justice is, simply put, the authoritarian (authoritarianism, 2014) philosophy in action. It is a civilized looking construct of what otherwise might be labeled as

might makes right, or the law of the jungle. It is counter to all democratic principles.

At the time of its founding, a time when the U.S. saw itself as revolutionary in contrast to its European parents, there were relatively advanced ideas being discussed around justice. Thomas Paine once said: "Lay then the axe to the root, and teach governments humanity. It is their sanguinary punishments which corrupt mankind." Yet, this advice was ignored when the government which he fought to see established finally formed its criminal justice system. All subsequent attempts to reform it have proved futile, as this system itself is a chronic recidivist, because its basis is spite. Any changes made to it, however long they might last, eventually get dialed back, until reform is called for again.

We have been stuck in a loop for a while, going through periods of reform and creeping back to periods of severity (Pertsilia, 2003). In addition to solitary confinement coming, going, and coming back again on overdrive, we have seen a whole host of things do the same. There was a time when no state had a death penalty anymore (Zinn, 1998). Nonetheless it came back. Most states, at one time, even allowed prisoners weekends with their families either in special quarters at the prison, or even at their own homes (Zinn, 1998). The sentiment which lead to the ending of these reforms was that these things were somehow "soft on crime". However, this sentiment misses the point that getting rid of solitary and allowing prisoners more quality-time with loved ones was good for the rest of society, because it ensured that they would retain some sense of connection to other humans, which solitary confinement destroys, and which

social isolation at the least erodes. This is not a wise thing to do with people who will, for the most part, later be put back among the general population.

We should want people who may have ignored the needs of others to become more—not less— social. By isolating people, as solitary confinement does in the extreme—and as separation from family and community does in all forms of incarceration—we make them more likely to turn inward and reject the needs of others as well as the norms of society. We act against our own best interests, effectively cutting off our noses to spite our own faces¹ when we ostracize a person who has already done something which indicates a lack of compassion or empathy within that person.

Many things did once exist based on the understanding that the majority of all prisoners— currently, 93% or more—would go home from prison sooner or later and that it was smarter to keep them connected to some sense of normalcy than to get them too thoroughly habituated to institutional life (Pertsilia, 2003), or too alienated from normal social situations. Prior to the 1970s the overall trend in corrections was toward corrective measures and behavior-based sentence reduction (Zinn, 1998); —thus the name, corrections. Today this label— corrections—is largely nothing more than a euphemism applied to punitive institutions. Though, things appear to be starting to change back. The question is: then what? What is it that we can do now to stop the pendulum from swinging

¹ This term-cutting off one's nose to spite one's own face-roots back to a medieval practice wherein the wife of a man caught committing adultery was subject to having her nose cut as punishment for her husband cheating on her (Pinker, 2013).

back to where it is at the present, or worse? Can we ever truly mend ideas which originated in the dungeons of medieval Europe? No one speaks of dungeon or torture reform; however, this is what we are really talking about when we mask it these things in contemporary terminology by calling them prison or justice reform. Just because we have removed ourselves from that basis by renaming the dungeon to prison and the torture to punishment, and, in line with these new names, changed the shape and design to suit modern sensibilities does not change what they actually are. Can vengeance be reformed, or must it be abandoned?

"Mass incarceration" is only the latest manifestation of an ongoing problem one which the American public has gone along with since colonial times, but which began with our government's sanguinary European monarchist roots, centuries ago. Our culture once tolerated and even embraced the ideas of floggings to the bone, dismemberments and public humiliations such as binding people in the stockades and allowing the mob to spit on and throw things at the defenseless person (Pinker, 2013). We organized the most gruesome sorts of execution as social events, wherein children were encouraged to attend, picnics were held and souvenirs sold (Pinker, 2013).

At times, the sorts of things which carried the kinds of penalties described above included the impossible, such as turning one's neighbor into a frog using magic. In all too recent times they have included things such as being a black man while glancing in the direction of a white woman (Pinker, 2013). All of these sentiments were conditioned into the public mind over the course of generations. We are not, as some earlier apologists of these arrangements once argued, naturally

inclined toward believing that the best way to fix things is through force, or otherwise that might makes right, at least not wholly. Enough of us have collectively come to realize that the will of the strong is not typically in the big-picture best interests of the majority (or even necessarily the long-term best interests of the strong themselves), that we have developed social and political structures which exist largely to overcome the tendencies of those who would use what power they have to enforce their own authority.

It is true, that like animals, when we feel deprived, when we live in states of scarcity of resources, humans tend to fight over these things rather than cooperate and share (though not universally true, and those who cooperate still tend to do better). However, it has been a long time since most humans really needed to worry about this. We live in an age of plenty. The issue is that in the past, we did face these environmentally imposed hardships of scarcity, and the social and governmental systems which developed out of those times and around those problems tended to focus on enabling the most self-interested above the betterment of the whole. Today, we each of us, grow up under regimes which are still, to greater or lesser extent, based on how we dealt with these problems of endemic scarcity during times when they were not readily manageable. The poverty which so many endure today is one which is fundamental to the design of our societies, not the conditions of the planet itself. Yet, to some degree, we still fight wars over economic resources, and we still horde resources within our social structure, excluding and exploiting those groups which we have become historically accustomed to excluding and exploiting social and economic structures. Worst of all, we still, in action if not expression, largely buy-in to the

proposition that individual wrongs must be settled by force, whether we believe that force should be applied by the individual, the mob, or the agent of the state. Today however, we do not need to base our families' location on proximity to a fertile river valley and fight out who gets to live there.

We can see that these ideas are fading, but in most respects, today we are living with the fruits of our ancestor's struggles, and the marketing to the masses of the self-aggrandizing proposition of the mighty, that might makes right as the organizing principle of principalities and states which favor the strong (or empowered) and marginalize the rest. Still, for them (even the mighty), and for us, it would have been better in the past if people cooperated more and fought less, and it still would be better for all concerned. The advancements which brought us out of environmentally imposed scarcity arose primarily through cooperation. It is things such as international trade and recognition of shared interests which have reduced the number of wars over the centuries. It is this same force of nonviolent cooperation and our ability to compromise with each other which have reduced violence between communities² and within those communities between individuals, and likewise within families (Pinker, 2013). It is

² Lest we forget, wars used to be between tribes and city-states. Imagine a war between New York and Newark today. This is what it used to be like. That said, this is still what it is like for kids growing up in gangs, fighting between neighborhoods. These are—while largely centered on things which seem superficial such as one's reputation or pride, or material status symbols such as sneakers and cars—largely economic struggles over locally scarce resources and jobs. To that point, drug dealer, is a job description, which, in such areas where scarcity remains the norm, is often aspired to because it promises a prestige wage for people whose other job prospects (if any) are in the minimum wage or lower categories. Though it is interesting to note in spite of the impressions of potential wealth marketed to the prospective drug dealer, most remain below the poverty line for the bulk of their careers (Levitt & Dunbar, 2005; Levitt & Dunbar, 2005).

almost exclusively in those areas where resources have remained scarce and such cooperation has remained absent, that interpersonal violence has continued to prevail.

While most of us have realized that violence is not the answer in our personal lives, our culture persists in the belief that those of us who fail to cooperate with it need to be met with the violent response of tossing us in a dungeon and or torturing us. Fully appreciated for what it is, this is deeply ironic. Right now, we seem to be as society, beginning (once again), to rethink this proposition. The current calls for reform are however largely centered on reducing sentences for so-called non-violent offenders,³ or diverting *them* to treatment (Pertsilia, 2003). There is little meaningful discussion about what to do with people who commit violent acts and less about those who have sexually related crimes,⁴ or so-called

³ I say so-called because I think this is a relatively arbitrary distinction. While certain classes of harm which are designated criminal are arguably directed toward oneself versus others, it has been pointed out, rightly I think, that there is no harm done whether inwardly or outwardly directed which happens in isolation. Or as some might put it there are no victimless crimes. That is not to say that the person who for example breaks a drug prohibition demonstrates as deliberate an indifference to the plight of others in the act of using some substance as the person who carries out a direct act of violence. However, there is to be sure a high degree of likelihood that by virtue of the prohibition itself there is some violence or exploitation happening in the market activities surrounding the supply chain of the substance to which there is some direct causal link between the person breaking the prohibition and the persons harmed. That said, this is also often true of a great many market activities which are not prohibited, for example the trade of diamonds (blood diamond, 2014). The larger point here however is that reduction of sentences only for those we feel the most empathy toward misses the point of the reforms which are called for.

⁴ Much of the current handling of so-called sex offenders (a label which carries harsh, and typically lifelong social consequences for a wide range of both violent and non-violent offences) centers on erroneous beliefs about their recidivism rates being among the highest of all crime categories, when in fact, people whose crimes fit into these categories are among the least likely to recidivate. These beliefs root back to a poorly researched article in the

sex-offenders.⁵ In fact, if anything, the trend seems to persist in medieval styled traditional responses where violence and dysfunctional sexuality is concerned.

popular science magazine Psychology Today, published in 1986 by a person who was a so-called treatment provider, not a research psychologist, who recommended various experimentally unsound treatment regimens including electrical shock produced aversion to sexual stimuli and who claimed that the recidivism rate for sex offenders was 80 percent but provided no sources for these claims (When Junk Science About Sex Offenders Infects the Supreme Court, 20 17). The New York Times article cited here states that the rates are more like 3.5 percent recidivism (in other words, more than 95 percent do not reoffend) within three years (which is the time period beyond which recidivism drops to much lower numbers for all categories of crime). The facts around the dangers of repeat offending are much the opposite of the number broadcast to masses via sloppy sensationalistic journalism and the ill-considered reliance of the Supreme Court on this single non-research based 33-year-old magazine article. In response to these unfounded beliefs, most states have some requirement for sex offenders to participate in so-called sex-offender treatment programs in order to qualify for parole (which is nonetheless rarely granted to people with convictions in this category. In many cases, these programs are used to either clear a person from a potential civil commitment requirement (discussed below) or to find reasons to justify such a commitment.

The current treatment programs employed by criminal justice institutions revolve around outdated models for behavior modification which have always been controversial, and have long been abandoned as ill-conceived, if not unethical by the majority of psychologists and social scientists. Among the evaluation methods for patients of this kind of treatment, is the exposure of the subject to semi-pornographic material including images and audio, depicting children engaged in sexually suggestive behaviors or wearing revealing attire, as well as similar material depicting acts of sexual violence, during which the person being exposed to such materials (in some cases, presumably for the first time in their lives), is connected via electrodes attached to their genitals to a machine called a plethysmograph, which monitors blood flow, which in theory will act as sort of a lie detector to monitor whether or not the person subjected to this is turned on by the material they are being exposed to.

There are, to be certain, serial offenders in this and all crime categories (particularly addiction or impulse control related ones). But the solution is not to indefinitely imprison those who might legitimately need more supervision and treatment and call that treatment even when it is really prison. There are smarter ways to handle these things, some of which will be discussed below.

⁵ This largely pejorative term, often abbreviated both in writing and conversationally as S.O., or intensified to the levels of so-called predator or sexual predator (both terms with no scientific bases), depending on particularities attached to laws surrounding civil commitment- which is a loophole that allows some people who have been given

The call is, in these cases, all too often for permanent estrangement from society, long-term confinement, punishment and even death. But isn't discouraging these violent crimes the most important problem for which criminal justice exists? For now, at best, we can expect there *might* be some reduction to the time served on a sentence for some people in either of these sub-classes of crime. While this is an area of serious ongoing contention, there have been moves toward offering parole possibilities for some people which were previously denied any possibility for any such opportunity. What however does this do except to reckon with the fact that most people in these categories are unlikely to commit a second crime? What does it do to prevent the *first* offence of murder or rape? What does it do to minimize the overall level of harm inflicted in any given set of circumstances? Sentencing which reflects the anger—justifiable or otherwise—of those who would have it inflicted, does nothing to make the world a demonstrably better place. It only masks our failures to be able to solve things in any meaningful way. This way of addressing serious problems creates the illusion that serious steps

a specific length of sentence by the courts to be held indefinitely in so-called treatment centers (When Junk Science About Sex Offenders Infects the Supreme Court, 2017)-but which has become a term which is used interchangeably for all members of this criminal sub-class among Corrections Officers (C.O.s), the media, the general public, and perhaps most consequentially, the inmates whom many C.O.s encourage to further ostracize and target such individuals for harassment and violence within the institutional setting. It is interesting to note as well that this particular creation of a sub-class of criminals is unique to those who fall in this category. There is no such comparable thing done for people who for example have been convicted of murder. While our culture at large may label such a person a murderer, in the institutional setting they are not subject to any additional marginalization or labeling, in fact, if anything, they are elevated to the top of the institutional pecking order. Furthermore, there is a strong tendency within this setting to give sympathy to the person who claims actual innocence of murder, which is rarely, if ever, afforded to the person who claims actual innocence of a sex offence (Author, 2020).

have been taken to right some wrong, without ever actually doing something which could be described as remedial or curative.

Also, there remain other concurrent converse trends ongoing which call for harsher punishment and lifelong social sanctions against people who are convicted of various sorts of crimes.

Rather than a consistent pro-punitive position from one side of the political spectrum standing in opposition to a pro-treatment or restorative solution call from the other, there is a considerably mixed bag of views calling variously for exoneration demonization of this category of crimes or that, which vacillates loosely along party lines group or personal sentiments. The voices calling for comprehensive reforms based on views of the big-picture are present on both ends of the political spectrum, but are still meeting with resistance and are generally pushed to the margins. It does seem apparent that there is an overall trend toward reform-based solutions, but what does this do except dial us back to an earlier iteration of the overall problem?

Under the umbrella of reform, there is a trend towards institutional re-education programs.⁶ These however, typically are offered only to those who are highly

⁶ These are typically labeled rehabilitation programs, but are in-fact typically just a bunch of instructional classes intended to win individuals over to more socially acceptable lifestyles, or for lack of better terms, to indoctrinate or re-educate. While there may be merit to ideas or ideals they attempt to instil, the methods employed by these classes are not well conceived. Whether or not they are mandatory (meaning failure to participate results in additional institutionally meted out punishments) or optional (meaning failure to participate may limit chances for obtaining parole), they are effectively forced on the individual. Behavioral research has demonstrated that this is one of the least effective ways to encourage change in an individual, i.e. relying on entirely extrinsic (outside)

motivated to participate in such programs and keep out of trouble within the institutional framework, i.e. those least in need of motivation to change.⁷ Those who most need treatment in order to be functioning members of any kind of normative social structure, outside the prison pecking order, are typically the ones who get the least of it (Special Report on the Use of Solitary Confinement,

factors to motivate people (Benabou, R. and Tirole, J., 2003). Researchers have tested various more effective ways to encourage personal change than these, and they have developed a substantial body of evidence on what does and does not actually work when various things have been tried in the real world, but to my knowledge, none of this insight is being employed in any U.S. prison. These significantly more effective treatment regimens tend to be more personalized (though some involve environmental changes which can affect the collective behaviors of entire groups), and are therefore likely to be more expensive (though the environmental and policy based ones are not necessarily, and may even be less expensive than existing so-called security measures). They do require both more individual interaction and more skilled treatment provided by thoroughly trained individuals (where the current programs are based on manuals written by individuals with views which may not comport with research, and are frequently administered by people who have simply been trained in administering prison programs, often only generally, and not even specific to the programs they will teach, and who lack any special qualifications outside of a clean criminal record). Nonetheless, it is to be expected that the overall costs for proper treatment would amount to a reduction in total and long-term spending on dealing with the kinds of things law enforcement exists to address. Simply providing proper treatment, and coupling that with active and ongoing assessments, of dangerousness of individuals who present with a demonstrable need and using that as the primary guide in determining the levels of supervision and restriction needed to ensure public safety, could be expected to dramatically reduce the amount of money needed for the total lifetime treatment and housing (confinement) for any given individual. Furthermore, in so doing, one could expect this to be coupled with a more significant drop in crime rates than any business-as-usual law enforcement offerings or security could ever hope to offer. In short you get what you pay for, though right now we do pay too much for too little result.

⁷ That said, in my over 10 years' experience as a prison inmate, I have seen, anecdotally, the opposite happen. In other words, oftentimes the people who go home early are those who seem least motivated to change, and among those with numerous disciplinary issues within the prison environment. Those who appear to be most committed to positive change are often repeatedly denied parole. This in itself is an issue which deserves thorough scrutiny, and may be a significant enough issue to distort the statistics on both recidivism and parole success rates (Author, 2020).

2018). In many cases, prison worsens those who are most in need of a correction to their life-path.⁸ And while this fact is something which is no big secret—to the extent even perhaps that the public perception is that prisons make more people into worse criminals than they actually prove to (Pertsilia, 2003)—there is virtually no discussion on what to do about it, outside of the circles the reformers themselves travel in. In fact, even media outlets whose reputation is that of *liberal*, such as the New York Times, when reporting on prison *reform* are quick to declare without qualification, as though it were fact, things to the effect that some people will *always* need to be kept in prisons, citing no reasons to justify their opinions, or qualifications surrounding their implication of ability to prognosticate over the future of human cultural development, which such absolute statements tend overlook (Lessons From European Prisons, 2013). The *belief in* the necessity of this relatively new institution is so embedded into our culture today that it is all too often taken as some immutable fact of human existence. It is not.

Mass incarceration is part of a much larger ongoing problem that will not cease to be by merely gouging out the cankers of the system. Moreover, this problem will not be resolved by simply reformulating the most obviously dysfunctional aspects of it. As one cannot cure a wound by picking at the scab. Most of the proposals being considered today offer just that. Mass incarceration is a problem which is simply a presently salient aspect of the callous nature of the concept of punitive

⁸ It is interesting to note here, that the military have found similarly that those soldiers who go AWOL who are thrown in jail continue going AWOL 90% of the time. However, those who instead get extra duty, i.e. those compelled to become more engaged, typically stop going AWOL (Goleman, Destructive Emotions, 2008).

remediation of destructive behaviors. As Jeremy Bentham observed in the 1700s "all punishment is mischief all punishment is in itself evil". Fixing the massiveness of our current punitive response will only reduce this mischief and allow it to recede further from public awareness.

Until we have *replaced* this broken system, we *do* need in the meanwhile to reduce the number of people we lock up, *and* we need to go through with the various narrow reforms being suggested by the experts, but none of these are enough. In the bigger picture however, we need something which actually resolves the problems it seeks to remedy, something which serves all of our people and communities. So, we need to begin working on the replacement while we also make the temporary changes needed to reach the other shore.

Albert Einstein is, among other things, famous for having pointed out that it is impossible to solve problems at the same level of thinking that created them. What we call crime is largely what happens when a person puts his or her well-being above the safety and security of others. What we call criminal justice, is when we do to that person bad enough things to induce a sense of satisfaction in the mob, or in many cases, just the state 's officials. In subscribing to the concept of retribution via law and order, we elevate our combined senses of what promotes individual wellbeing and feelings of security above the actual safety and security of the society in which we live, or that is to say our actual collective good. We just do it in a way that maintains an air of order and proportionality (though the latter has largely been dispensed with). Neither the criminal nor the court demonstrates concern for what creates the greatest good for the greatest number, or the subtler problem of where to draw lines in facilitating *that*. And so,

it is both the individual who does a given harm and the criminal justice system which responds to said harm with more mischief which are in need of similar kinds of re-adjustment in order that they might function well in the social sphere.