

**Excerpts of a talk to a
Delegation of the
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Good morning. It is an enormous privilege to be invited to address the judges of the Beijing High People's Court. Thank you for inviting me to speak to you today. I am Eric Sterling, Executive Director of the Criminal Justice Policy Foundation (CJPF). I co-founded CJPF in 1989. Previously I served for 9 years as counsel to the U.S. House of Representatives Committee on the Judiciary.

Today I am going to speak from my experience in the American legal system to discuss the use of punishment as the primary tool of behavioral change and the evolution of my thinking about punishment. I will try to share some of the flavor of my experience, and some of the history of the use of punishment in the American legal system.

More than forty years ago, at the start of my legal career I worked in Pennsylvania as an Assistant Public Defender. Most of that work was about negotiating with the prosecutor to reduce the amount of punishment that would be imposed in exchange of the defendant's plea of guilty, thus saving the government the expense of a trial, and the small risk of losing the case. When I could negotiate drug treatment, it was always conditioned – if the defendant was unsuccessful in the drug treatment, the defendant would be further punished.

Then from 1979 to 1989, I worked for the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Crime. I assisted Members of Congress in writing laws regarding gun control, pornography, organized crime, money laundering and illegal drugs. I worked for an outstanding subcommittee Chairman, Rep. William J. Hughes of New Jersey.

In the 1980s, I was figuratively, a “colonel” in the war on drugs. I traveled to South America with Members of Congress to meet with leaders of other nations to express the concerns of the U.S. government, and to learn more about what the U.S. and our partners were doing to control the production of drugs.

A common theme of all the legislation that I worked on was the desire of Members of Congress to increase the amount of punishment that was imposed the perpetrators of crime – from the most minor offenders to the most serious.

You, as judges visiting the United States may be interested in a specialized court that developed to deal with the problem of drugs called a drug court.

Let’s think first about the basic function of a court. A court is an arm of the government that resolves conflicts between the government and citizens, or between citizens. A court has the power to compel the parties before it to obey its rulings. The court can order that money be paid, property be sold, and it can impose sentences of punishment. In our culture, historically we have imposed punishment for wrongdoing. Punishment can be explained in four ways:

First, punishment can be seen as the just deserts for the commission of crime. You harmed someone – you get harmed in return. This is a very primitive form of justice. Of course there is the question: What kind of punishment is the just deserts for a crime if no person was injured or wronged in the commission of the crime?

Second, punishment can be explained as a deterrent to future crime. The legal system tells the universe of potential offenders, “If you commit crime X, you will be punished in this way” – assuming you will be caught. Critical to this feature is communicating to the potential offender the knowledge of the likely penalty and the appreciation of a high likelihood of being caught. However, in reality the public, and universe of potential offenders, usually have no knowledge of the actual potential punishments that can be imposed for an offense.

Long sentences justified by legislators as “sending a message” of deterrence are often obscure or unknown. Similarly, the statement made by a judge that she is imposing a long sentence for this offender in order to “send a message” to some audience of potential offenders is usually never heard by the intended audience. *And in fact, most importantly for deterrence to be meaningful, most offenses go unsolved. Most offenders do not anticipate being caught – and that is not unrealistic.*

How much deterrence is conveyed by a very a long sentence if the offender does not anticipate being caught? Very little. Long sentences are actually imposed almost at random, and thus, now, very long sentences are often thought to be grossly unjust rather than a meaningful feature of a justice system.

Third, we can think of the sentence of incarceration as a way to protect society from future crimes by isolating or warehousing the offender. In prison, they

are prevented from committing crime again. This purpose suffers from the problem that, unless we hold all prisoners for decades or for life, they will return to the community. If we fail to think carefully about the experience in prison and how that impacts the offenders' behavior when they return, we completely fail in this purpose of protecting against future crimes.

Which leads to the fourth aspect of our punishment system, which is to reform or rehabilitate the offender so that when they leave the supervision of the justice system they are unlikely to offend again. In this we are actually trying to do something very useful, but very sophisticated, which is to change behavior. To succeed, we need to have a science-based understanding of human behavior and how it can be shaped. But most of what happens in custody is never rehabilitative – it is usually degrading and punitive.

Others in society may have mixed feelings about what it wants from the justice system. Persons who have no connection to the case have feelings – they may identify with the victim, they may fear becoming victimized, or perhaps they identify with the defendant.

Those most connected to a crime have needs, but they are often disregarded. Many crime victims may want vengeance, of course. In major part, courts have been created to prevent private acts of revenge, but just deserts are an important psychological feature of our justice system for victims and those who identify with them. Yet, it is rare that the imposition of punishment, even the harshest punishments, leave the victim feeling whole and secure.

Crime victims certainly want to be protected from their offender and any future crimes, and when the perpetrator has been apprehended, providing that protection is an obligation of the justice system.

In addition, crime victims deserve to have their injuries addressed. They want to be made whole. This is an important aspect of justice, but in general we fail to meet the needs of crime victims. Restitution is infrequent and when provided, usually inadequate. The system is primarily oriented around the offender.

Thinking about courts, to what extent is the role of prevention of future crimes consistent with the conflict resolution character of a court?

What if the treatment of the offender with the goal of preventing future crimes is in conflict with the objective of punishing the conduct that has taken place already?

Studies of psychology show that punishment to be effective needs to be immediately related to the misconduct and certain, and must not be excessive. We also know that it is more effective to change behavior by rewarding good behavior

than by punishing bad behavior. This is what animal trainers and parents have learned.

Traditional courts are slow in imposing punishment and are not set up to reward good behavior – for centuries they have punished bad behavior. But if punishing bad behavior does not work to change behavior, there is a futility in continuing to punish an individual’s repeated bad behavior. This is especially true if the “bad” behavior is not terribly serious.

I would like to focus now on the punishment that I was most involved with during my years working for Congress – the punishment of drug crimes.

The idea of punishing drug users arose in our society out of racism directed at Chinese immigrants. America’s first drug laws were directed at Chinese immigrants. In the late 19th century, Chinese immigrants came to the U.S. to work in mines, to build railroads, and do other hard labor. Like most immigrants, they worked hard. Native-born Americans resented the hard working immigrants. Some of the immigrants brought with them the custom of opium smoking. To stigmatize the Chinese, stories were spread that Chinese men used opium to seduce white women. Once the women were seduced by Chinese men, the women were forced into prostitution. The response was local and state laws making opium smoking a crime. At the federal level, importing opium for smoking was taxed and then banned.

None of this was science based. Male intoxication at railroad camps and mining camps has always been a problem. Alcohol abuse was and is a terrible problem.

America tried prohibition of alcohol use – again as a way for the native born to exclude or stigmatize immigrants then considered “undesirable” – Catholics like the Irish or Italians or Poles who drink, or Jews from Europe who drink. Prohibition was an effort by people of one culture in the country to shame and control people of another culture.

Drug prohibition was serving the same roles of social exclusion. While opium was associated with the Chinese, drugs like marijuana and cocaine were associated with the African-Americans. Police raided jazz musicians looking for marijuana, cocaine or heroin.

During our era of legal racial segregation – from the end of the 19th century until 1970 – drug prohibition was a tool of white supremacy and white privilege.

Notwithstanding the use of drug prohibition as tool of racial subjugation and a tool to maintain white privilege, enormous numbers of whites were using drugs and many were being hurt by their drug use.

Most people who start to use drugs see drug use as beneficial. People who start to use marijuana, cocaine, opioids, methamphetamine, or psychedelic drugs feel that their experiences with these drugs are beneficial. They feel relaxed or excited, they are numbed to the pain of their lives or acquire intensified appreciation of existence. They often use drugs with other people to feel connected to them – this is common with people who drink alcohol together. Many others use drugs to obliterate feelings of abuse, neglect, exploitation or shame. Heavy or frequent use of drugs and alcohol leads to many problems, and those with those problems may at some level both recognize and deny the existence of those problems.

Our society tolerates – indeed it exalts -- many activities that have the same benefits of connection and excitement that also risk physical injury and psychological damage. Activities of connection, such as team sports like football, soccer, lacrosse, etc. can lead to serious injuries or death. Many of these exciting activities are “simply” recreation: mountain climbing, scuba diving, auto racing, skiing, white water sports. People do many of these activities for the “thrill of it,” knowing that they risk injury or death.

We encourage our children to play football, soccer or hockey with complete knowledge that many of them will endure broken legs and arms, perhaps broken backs and necks, brain injury and some will die. We are eager to run risks, even with our precious children, when we think the rewards are worth it.

The features of danger and risk are built into American culture and into the capitalist system. The central feature of capitalism is the investment in “ventures,” and the higher the risk, the greater the reward.

Understanding the embrace of risk by American culture, it is obvious that trying to stop adventurous people from obtaining the thrills and pleasures of drug use by highlighting the risks may be very difficult. As a philosophical matter, it seems wrong to outlaw certain voluntary activities on the basis that they may cause injury when a great many other voluntary activities also cause injury are not only legal, but socially encouraged.

Economically, prohibition as the policy for controlling the use of drugs by trying to eliminate the supply is illogical. Supply control, of course, creates scarcity that dramatically increases the price and the profitability of the drug business. The greater the scarcity, the greater the reward. The harsher the punishment, the more deviant the outlaws who enter the business. There may be an overall reduction in supply, but rarely is that reduction substantial enough to outweigh the enormous costs that inflicted on many parts of society.

Prohibition means that the supply of drugs is unreliable. The contamination and uncertain quality of the drug supply endangers the drug users and is a major factor in the lethality of drug use.

Attempts to extend prohibition have led to increasing the social isolation of people who use drugs. They are rejected from employment, denied housing, denied education, excluded from health care. Because of our policies they are impoverished and made homeless. We increase the catastrophe of whatever mental illness they may have started with. We make drug use tools – what are called in the law “drug paraphernalia” – evidence for searches; and the possession of drug use tools is a separate crime. This means that syringes used for injecting drugs are reused and shared, and our laws and policies encourage the spread of lethal infectious diseases.

In the 1980s, judges found that many of the cases before them involved repeat offenders who had drug habits:

- Persons arrested and rearrested for loitering because the defendants were homeless.

- People rearrested for theft or prostitution because the defendants were unemployed but needed money to pay for drugs.

- People rearrested for selling drugs because that was the employment they could obtain.

Judges recognized that the tool that they had been using – punishment – was not sufficient to change the behavior of drug use; it was not leading to treatment.

A judge in Miami, Florida in the 1980s took over the role of the probation officer. The judge constructed a remedy in which the drug user waived various rights and began a regime of treatment that was directly supervised by the judge on a weekly basis. He called the procedure a drug treatment court. This was an enormous departure from the traditional role of the judge. Secondly, the role of the attorneys was changed from adversarial – which is exclusively oriented to advocate for the most advantageous position of their party – to a collaborative one with the other parties in which the eventual successful drug treatment of the defendant was the mutually desired outcome. Successful drug treatment meant -- first, abstinence from use of drugs and alcohol, second, no further criminal behavior, and third, reintegration into society with employment, adequate housing and healthy social relationships.

However, as currently organized, drug courts cannot be a solution for two entwined reasons:

- First, compared to other judicial activities, they are much too resource intensive. As the justice system is currently organized, the judicial branch cannot take on this role with current budgets, or even with substantially expanded budgets because, overwhelmingly, judicial caseloads far exceed the ability of a court to spend more than a few minutes disposing of each case. In addition, the largest fraction of justice system expenditures is committed to traditional punishment regimes and enforcement programs.

- Second, the management of rehabilitation is not fundamentally a judicial function. It was adopted by drug court judges out of frustration with the failure of the rehabilitation agencies, namely, corrections and the probation and parole

agencies to provide adequate drug treatment and to accommodate the reality of relapse as a feature of the disease of addiction.

The judicial embrace of the drug court function is very significant. It is rare that an institution adopts a wholly new role that is at odds with the historic rationale of the institution. Instead of confining itself to conflict resolution and issuing rulings directing the parties to act, and revoking the liberty of a defendant by turning custody over the defendant to the correctional bureaucracy, the court is taking upon itself the mission of providing services, and taking an approach that is inconsistent with the cultural history of criminal courts which is imposing punishments. In some sense this is akin the original juvenile courts that had a mission of rehabilitation rather than punishment of juvenile offenders.

Does the example of reorientation of the judicial function to the positive management of rehabilitation point to a groundbreaking re-conceptualization of the role of the justice system altogether? What does it mean when courts are abandoning the futility of the punishment model and determining that society's needs are best served when courts approach law-breakers with the objective of rehabilitating them to enter to economy and the society?

If it makes sense economically and socially to reorient law breakers to not offend again, and we understand that rewarding positive behavior works (and extensive punishment of the wrongful behavior does not produce positive behavioral change), then we need to mobilize to change the justice system to abandon its centuries of investment in punishments and make rehabilitation its primary objective. Some may object that providing the services to rehabilitate offenders so that they can get jobs, housing, health care and re-establish healthy family and social relationships seems like rewarding bad behavior. That is a legitimate objection.

We must ask, why do people commit bad behavior? Is it because they are intrinsically and irremediably bad? Or is bad behavior a logical response to conditions of deprivation? Is bad behavior a response to psychological shaping by experiences of abuse, neglect, and trauma that are unaddressed and untreated? Does society – family, school, community – begin to create for the offender an identity of bad boy and wrongdoer at an early age that the child, the adolescent, the adult grows to fulfill? Understanding that those who are offend are deviating from the norm, we recognize that this deviation is more likely because at some point, some basic need of the offender, such as treatment for trauma or disability, was not provided, and less likely that the offender is intrinsic evil. The evidence is that the overwhelming majority of offenders cannot be called intrinsically evil. (And for those whose lives and behaviors might be said to be, in some sense, intrinsically evil, can that character be changed by punishment anyway? Of course not.)

If the offender were your son or daughter, would you want your child to be healed and reintegrated into society? I think so. If this is what we want for our children, this should be what we want for all of society's children. We want to correct our children and their bad behavior. We want to protect their health. We would not be driven to abandon them and we would not focus on punishing them, because we understand that punishment does not change behavior.

It seems that the adults that we punish with imprisonment leave prison in two ways. There are those who have not improved, who are further held back by the consequences of the punishment and the "record" of their criminality – and they return to criminality. And there are those who do not commit crime again – because they overcame the obstacles of the imprisonment, not because the imprisonment produced in them an improved state of mind or provided necessary social skills for success in the community. If we can free ourselves of our desire for vengeance toward offenders, and we can recognize that offenders are often in that place because of their broken relationships to family and community, we can help re-integrate offenders into our workforce and our community.

So perhaps we must go back to the origins and question the role of courts, the justice system and crime. Perhaps we must question and then abandon the long tradition of responding to crime with punishment, and refocus on the socially and economically smart approach of rehabilitation. The successes of drug courts, based on the compassion of the drug court judges, point us in a direction that the entire justice system needs to turn to.

Thank you very much.