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Cultural Origins of
American Punishment:
Role of Faith Traditions

Introduction

I'm the Executive Director of the CJPF. I have been a lawyer since 1976. For 9 years during the 1980s I was counsel to the U.S. House of Representatives Judiciary Committee writing federal law in complex areas such as gun control, organized crime, pornography, money laundering and illegal drugs.

In 1989, I co-founded the Criminal Justice Policy Foundation. I have helped found other organizations such as Families Against Mandatory Minimums -- FAMM, and the Interfaith Drug Policy Initiative. I am still on FAMM's board. The Interfaith Drug Policy Initiative ran out of money in 2008 and has closed.

The Issue

Recently I was asked to speak to 20 judges of the Beijing High People's Court in the People's Republic of China about the American justice system. What could I say that respected the Chinese legal tradition, the probability of the judges' participation in the Communist Party on their way to becoming a high official in China, and that would be useful to them, and not simply some form of bragging about the American system of due process, respect for the presumption of innocence, blah blah blah?

I thought about the role of judges in the criminal context. When you open a law book, it says, whoever does such and such, shall be punished by a term of imprisonment of up to x years. All the crimes are like this: some conduct is described and is followed by the punishment, almost invariably a term of some imprisonment.

Most criminal cases are decided by guilty pleas. In the criminal area, most judges don't spend much of their time presiding over trials.

Most of their work is calibrating the amount of punishment to impose on the convicted. Usually they consider the deal that the prosecutor and the defense attorney have worked out and determine whether the agreed-upon punishment is sufficient. Usually the judge agrees. Sometimes the judge disagrees – but almost always because the judge believes the punishment is insufficient. Very rarely does a judge reject a proposed guilty plea because the proposed punishment is excessive! In general, judges use remarkably little discretion in determining how much punishment to impose.

Well, what is the point of the punishment?

Is punishment to inflict revenge on the defendant for the harm committed? In other words: the defendant traumatized someone, now society is going to traumatize the defendant in turn. This is the literal reading of *the general rule of punishment* of “eye for an eye, tooth for a tooth” set forth in Exodus 21:23-25. This general rule is amidst a large number of very narrow rules, including regulating slavery (including the sale of one’s daughter into slavery (Exodus 21:7-9)), and highly specific punishments such as death, banishment, fines (such as for causing a miscarriage (Exodus 21:22)), the destruction of property (such as stoning an ox that gores a person to death (Exodus 21:28)), and forfeiture of property (forfeiture of an ox that gores another ox – selling the living ox and dividing the proceeds (Exodus 21:35)), or more general restitution. This chapter of Exodus is the model of the contemporary criminal code: a specific type of conduct or transgression is spelled out and the specific punishment is set forth.

Many authorities suggest that interpreters of the Torah have long rejected the straight literal exchange of “an eye for an eye,” noting that there are no examples in the Hebrew scripture of this punishment being imposed. The phrase is often interpreted as focusing on the *value* of an eye for the *loss* of an eye.

But the current American fondness of the literal interpretation as a justification for harsh punishment is certainly not particularly sophisticated.

Is the purpose of punishment to simply lock the offender away and isolate them to “protect” society? Well, if this imprisonment is not to be actual life imprisonment, then we must be concerned with how the former offenders will live in society once they come out. Does anyone believe that the incarceration experience of most prisoners is actually

good for them and provides experiences that improve the likelihood they will not offend again after being released? Of course not. Those who do well after prison, do so despite the formalities of the punishment, not as a result of them.

Is the objective of the criminal sentence to deter other people – that is, to warn others that if they do what the offender did, they will be punished? This objective doesn't make sense because it does not reflect the psychology of most offenders. Offenders have never been thought to be expert analysts of cost-benefit ratios. As a rule, offenders don't have a great deal of self-control. The deterrence argument is implausible because most offenders have, at best, only a very hazy idea of the amount of punishment that is likely to be imposed. It is not the case that a potential offender says, "Oh, the sentence is 10 years in prison. That's too long for the crime – but the sentence of 5 years, no problem." Deterrence is grounded in an appreciation of the likelihood of being apprehended. The theory that deterrence is a meaningful objective for imposing a harsh punishment is one of the primary myths of the justice system.

In thinking of what I could tell the Chinese judges, I thought of the role of drug court judges – a role that developed independently in Miami and Oakland in the mid-1980s, and that has spread across the nation. In a drug court, the judge maintains control over the defendant who lives in the community with the primary concern that the defendant's behavior is changed so they don't misbehave again.

Upon reflection, this is the only intelligent thing you can realistically desire from the justice system – behavioral change. The idea that everyone with a stake is going to agree with some sentence that "justice has been served" is fairly naïve because of the conflation of punishment with the idea of justice. Usually cops and prosecutors have a very different idea of what the just term of punishment is from what the accused and their family believe. As a government program, the result we want from our justice system is less crime, meaning that those who are its subjects – the offenders – no longer offend when the system is finished with them. Drug court judges have great success. The defendants in their sophisticated programs that are not dependent on incarceration and punishment have lower rates of recidivism than the usual programs.

So that is what I spoke the Chinese judges about – drug court judges and the objective of positively changing behavior in a measurable way. Well, what would be my message to U.S. judges?

Looking at evidence, which is what judges are supposed to be expert at doing, psychologists have learned that punishment is not a very effective way to change behavior. Rewarding positive behavior works much better.

But at this point in our history – looking at our data on how much Americans are punishing our offenders, it seems that we – our society, the lawmakers and the law itself – are locked into an out-of-date psychology, one that is plainly not working.

We seem to be addicted to punishment, and like the tolerance of addiction, the person addicted needs bigger doses – in this case longer sentences. Thus, for decades now, the U.S. has been the world's leader in incarceration.

Why is this? Why is punishment so embedded in our culture? I wondered, is punishment for wrong-doing the clear lesson of our scriptural texts? Is there a clear mandate to punish? Is this the Judeo-Christian heritage? Or is this embrace of punishment a deviation from the consensus of the Western religious teaching?

If all other nations have much lower rates of incarceration and less reliance on punishment than we do, why is that? For the other dominant Christian nations of Europe and Latin America, is this due to other interpretations of the Western religious canon? Interpretations that have very different emphasizes from those that dominate in the U.S.?

Or perhaps, is the U.S. commitment to punishment not based on religious texts and traditions per se? Might our embrace of punishment have a relationship to our legacy of slavery and the role of racism in the institutions of our society – especially the law? How have our ideas of punishment for wrongdoing grown out of punishment imposed upon enslaved persons by their enslavers -- for not working, disobedience, theft, insolence, etc.?

Or is the act of imposing a long sentence important as a ritual behavior? We recall that public executions were for a long time important public rituals. The gallows was a fixture of public

infrastructure. The time of the execution was advertised and the condemned was paraded through the streets, accompanied by drumming. Or if the sentence were not a hanging, then a whipping at the public whipping post or placement in the stocks and pillories. Hundreds, perhaps thousands would gather for the ritual. In the 18th and 19th century, imprisonment was conceived as a reform for the brutality and torture of the execution and physical punishment.

In the 20th century, did the role of the contemporary judge, in the delivering from the bench the speech accompanying the imposition of the long sentence become the occasion for the ritual of punishment? The ritual character of this sentence is particularly noteworthy if the sentence, by virtue of the possibility of parole, is actually not going to be imposed.

Perhaps the ritual of the long sentence evolved because in many states a system of parole developed in which a board of punishment experts would be authorized to release most offenders before the specified term of imprisonment expired upon demonstration of good behavior. After all, this recognized the lesson of psychology that rewarding good behavior is more effective than punishment.

It has become a feature of post 1980s sentencing that the ritual value of *imposing* a long sentence would be misunderstood and conservative reformers would clamor for “truth in sentencing” – a feature of the 1994 federal crime bill – and attempt to force an end to parole.

In any event, we need a clearer understanding of why America now seems so committed to incarceration to a degree that is completely unlike that of any other nation.

Below is the data. Below are the rates of incarceration for various states – our local DMV (District, Maryland, and Virginia) jurisdictions, and the larger U.S. states, as well as those states with the highest and lowest rates of incarceration, expressed in number per 100,000 of population. Below the states is the rate for various nations – large democracies, and then a selection of other nations.

Data

For many decades the United States has imprisoned a very high proportion of its population. A year ago the Bureau of Justice Statistics reported that the *adult* incarceration rate had fallen in 2016 to a low of 860 prisoners in prisons and jails, per 100,000. This excludes persons in custody in immigration facilities. If you include juveniles, then over the entire population the rate was 670 per 100,000. Other recent counts put the U.S. rate at 698 and 655 per 100,000.

In 2018, Virginia's rate was about 779 per 100,000, Maryland's about 585, D.C.'s about 1,153, according to the Prison Policy Initiative.

Key States (per 100,000)

DC	1,153
Oklahoma	1,079
Louisiana and Mississippi also top 1,000	
Georgia	946
Texas	891
Missouri	859
Florida	833
Virginia	779
Pennsylvania	725
Indiana	723
U.S.	698
Ohio	679
Michigan	641
N.C.	639
MD	585
California	581
Illinois	564
NY	443
NJ	407
Massachusetts	324

Large democracies

United Kingdom	139
Canada	114
France	102
Italy	96
Germany	78
Japan	45
India	33

Other nations

Cuba	510
Russia	413
Brazil	325
Turkey	287
Iran	284
South Africa	280
Israel	265
Colombia	226
Singapore	201
Poland	199
Saudi Arabia	197
Philippines	172
Australia	167
Mexico	165
Indonesia	90
Bangladesh	48
Pakistan	44
Nigeria	36
China	118 (Omits administrative detention of 600,000)

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