of laws. More than law-abidingness is at stake. Why should the average citizen know more about the dire conditions in legal punishment today? The answer is at once simple and complicated. How we treat others dictates how we might be treated in turn, and this time the devil lives in the abstractions as well as the details. Indeed, the abstractions have to be addressed as much as the details.

Citizens listen in a democracy. Then they speak about what they know—at the polls, in the newspapers, through electronic means, and during public association—and the need to know more is especially great on this subject. The people are the ultimate punishers. They should have a better idea of what they are doing.

Of course, the difficulties in knowing are just as great, but when punishment becomes too strict, there is a communal duty to evaluate it, and we can do that only by finding all its meanings. Even then we must leave room for externalities, other kinds of illumination. The impetus to punish works through covert combinations. The complicated values and passions involved cannot be gauged, as they often are, through narrow allegations of reproach. To comprehend the phenomenon requires a story of explanation, not of blame. Nor, for that matter, will explanation suffice.

Political, economic, historical, religious, philosophical, psychological, and legal implications have combined to create a perfect storm of punishment in American culture. Tactical policies will not alter that situation. Experience shows that tinkering with the rules only redirects blame. Change, if it is to come, will be through new understandings of punishment.

Punishment Misunderstood

In order that the happiness of the saints may be more delightful to them and that they may render more copious thanks to God for it, they are allowed to see perfectly the sufferings of the damned.

Thomas Aquinas, Summa Theologica, Supplement Third Part, Question 94, Article 1

All punishment is in itself necessarily odious; if it were not dreaded, it would not effect its purpose; it can never be contemplated with approbation,

Jeremy Bentham, “Chapter X: Popularity,” The Rationale of Punishment

The Puzzle

Must suffering make sense? It can make sense with either more or less pain inflicted depending on the period in which you lived, and the question itself remains fundamental to many disciplines, especially theology, medicine, psychology, and political science. Pain, sometimes unbearable pain, comes to every life, and we tolerate it better if we have an explanation of the reasons for it.

In religious understandings, the question turns on acceptance of a divine plan. In medicine, diagnosis and mitigation are hallmarks. Psychology treats the mental anguish that we cause to ourselves and to others. Political science studies collective levels of distress. Yet despite the absolute centrality of the question in these fields, the answers offered remain tentative and subject to alternative forms of measurement.
Law provides the great exception. It actually depends on the deliberate, affirmative, and calculated use of suffering. In most other professions, suffering occurs, and disciplines react provisionally to it. Law creates systematic anguish in the name of punishment, and instead of responding to the suffering involved, it must justify the deliberate infliction of it through highly structured rationales and definitions.

There is no more distinguishing characteristic in legal thought. The schemes needed to convince a people to submit to chastisement require rhetorical sophistication and aesthetic appeal. Holistic in intent and intricate in resolution, the legal justifications for inflicting pain should be studied for what they leave out as much as for what they include. The beauty of the law lies in form, and the underpinnings that make punishment such a complicated subject are a good place to find it. Few things are as intuitively unpleasant as punishment. The need to make its exact a measured and agreeable system of control is therefore paramount.

Nigel Walker, a leading scholar in the field of penology, offers a typical, if crisp, example of what must be said and written. Walker is also useful because he has left out most of the obfuscations used to disguise the nastier aspects of the subject. In Why Punish? he presents "seven features of punishment" in a comprehensive legal definition. I abbreviate and paraphrase for purposes of brevity but keep Walker's language and structure.1 Punishment is:

1. The infliction of something that is assumed to be unwelcome to the recipient.
2. The infliction is intentional and done for a reason.
3. Those who ordered it are regarded as having the right to do so.
4. The occasion for the infliction is an action or omission that infringes a law.
5. The person punished has played a voluntary part in the infringement.
6. The punisher must offer a justification. "It must not be mere sadism."
7. The belief or intention of the punisher, not of the punished, defines the act.

As simple as it sounds, this arrangement manages many variables while leaving out a few others without seeming to be incomplete. Seven, after all, is a lucky number. But lucky or not, there is no way around the fact that punishment diminishes the recipient of it, a fact obliquely noted in the euphemistic admission that infliction will be "unwelcome." Walker's emphasis remains fixed on the punisher, and there are reasons for that. Fairness requires first and foremost that punishers be held in check. Authority to punish must come from beyond the inflicting agent, it must address the breach of a particular known law, and it must target a proven and voluntary violation of that law.

Every point made is reasonable, fair, and necessary, and together they give shape to the enterprise in punishment, but can we trust the list? These seven characteristics say nothing about the limits of the pain that can be inflicted. The law likes to mask its problems in the language it chooses.2

Walker, to his credit, hints at one of those problems in his short quoted aside. What are we to make of the qualification in the sixth item of his list when he says punishment "must not be mere sadism"? Can it, then, involve some sadism, and if so, how much? Notice, as well, that only number five in the list comments directly on the volition of the punished over that of the punisher, and number seven appears to take that part of five back: "The belief or intention of the punisher, not of the punished, defines the act."

These interpolations are not picky ones. They point to facets of punishment that the legal process prefers to ignore. Left to the imagination are the boundary lines of suffering that the law will permit itself to employ and the nature of their impact on the recipient of it. In effect, the authority to punish sometimes hides elements of the definition even from itself! Rare is the formal definition, to take just one example, that acknowledges any animus in the act. Covering the anger in punishment is a presumed objectivity, but no legal framework holds back its negative feelings forever.

The emotionalism of the punisher will out, and it finds its place in most systems when punishment is announced. A judge at the moment of sentencing feels empowered to say what a community thinks of the newly named criminal. All recognize a legitimate shift in tone at this moment. The release of pent-up resentment—in tacit acknowledgment of feelings previously quashed—gratifies both the holder and the observers of it. We accept harsh words at sentencing as part of the righteous urge to punish. A judge says to the convicted person, "You are as bad as we thought you were, and I am now going to tell everyone why."
A sometimes related and uglier emotion is never far from punishment. In perhaps the most adept philosophical account, "Of Cruelty," Michel de Montaigne concludes that many people like to dominate other people when they can. Ten minutes in any crowded playground or five on a busy highway will confirm the point for anyone. Montaigne knew its extremes from the religious strife and civil wars of sixteenth-century France. With cruelty everywhere around him, he writes the main purpose of education is "to unlearn evil." There is "a natural propensity toward cruelty," and he calls it "the extreme of all vices." Montaigne locates vindictiveness in all of us and says it will always be hard to overcome. He dreads the worst. "Nature herself, I fear, attaches to man some instinct for inhumanity."9

Even less hopeful, Friedrich Nietzsche just assumes the worst. He explains that the negative insinuations in punishment are so strong because cruelty is the basis of it all. Infliction unleashes a "festival of cruelty," which reaches its most jubilant form when organized by the state. Nietzsche is at his cattiest when he identifies a fundamental distortion in considerations of the subject. Punishers and their justifiers, he notes, fail to distinguish the origin of punishment (the pleasure it gives) from its purposes (revenge, deterrence, correction, etc.), and the conflation is as dangerous as it is convenient. By eliminating the distinction, a punisher can rest in the purpose, the rationale for the act, and forget the drive behind it. Lost is the unwarranted intensity that pleasure will give to infliction.5

Evasion of this truth leads to accusations of intellectual bankruptcy from Nietzsche. Cruelty is not only "one of the most ancient and basic substrata of culture"; it is so basic that it "cannot be imagined away."9 The pleasure in punishing must not be forgotten because it is its own warning. "Whoever battles with monsters had better see that it does not turn him into one." Without the knowledge of what we are capable of doing, punishers lose the balance that legitimizes their identity. "If you gaze long into an abyss," Nietzsche explains, "the abyss will gaze back into you."6

For a dramatic example, think of the suddenly false punisher in Shakespeare's Measure for Measure. As he gazes at what he has so unexpectedly become—a sexual harasser, intellectual bully, and torturer—the shaken Angelo can only exclaim, "O, fie, fie, fie! What dost thou, or what art thou, Angelo?"9

The point is not that Montaigne or Nietzsche or Shakespeare figures in American punishment regimes. They do not, but they pose subliminal problems that officialdom cannot afford to ignore and must handle in some way. The legal process in the United States responds through mechanisms that protect its functionaries from the dark side of punishment. The instruments of punishment are carefully divided. Legislatures create criminal statutes, police use them to arrest, prosecutors charge, judges decide, judges pronounce sentence, and prison officials carry out the sentence. The approach to punishment is multifaceted in the name of fairness and objectivity, but it serves an exculpatory purpose as well.

The separations in the function of punishment mean that no single official ever has to look directly into the abyss. No one punisher need feel the full burden of creating suffering. As a procedural safeguard and institutional relief, these divisions are as they should be, but, as we shall see in Chapter 4, the compartmentalization of perspectives also insulates each unit from the others. Everyone in the process of punishing has the courage of someone else's convictions to fall back on.

There is more. The mixed agency in punishment encourages a belief that all monstrosity, all blame, all loss of identity, all knowledge of the abyss, and all suffering belong to the erring recipient of punishment. Very few officials in the system actually have to see what they have done, and modern sensibilities add a special distance. The suffering of the convicted is carefully arranged to take place somewhere out of sight.

Powerful traditions in legal thought support the intellectual avoidances in punishment. Americans save their highest regard for judges, who are said to be free of rancor and in control of the mechanisms of punishment. The appellation "your honor" is more than a unique form of address. The epithet encompasses the entire legal system, guaranteeing its integrity. So strong are these communal attitudes, so generally do people believe that the convicted have gotten what they deserve in an objective forum, that modern criticisms questioning judicial objectivity have made little difference in popular understandings.

Assumptions about the honor of a judicially run system are all part of our need to believe in it. We forget that judges do not control the legal process anywhere near as much as is generally understood, and we overlook the fact that many problems in punishment are hidden from judicial view.8 Even if we are willing to presume a Judge Hercules who will hand down perfect decisions with preternatural wisdom, the difficulties in punishment are significantly greater than the law will admit in the administration of it.9
Consider one of the simplest of current assertions about punishment. Every court in the country accepts the principle that punishment should be proportional to the crime, and the assumption holds whether the presumed goal of the punisher is retribution, deterrence, incarceration, rehabilitation, communal security, or social justice. An additional mantra used everywhere bolsters and protects this appeal in proportionality: "the same punishment for the same crime." These joint claims are ones of basic fairness, and yet they tell us nothing about the length of a sentence to be imposed.

How, in the first instance, does one calculate the number of years to be served? In establishing proportionality and consistency as fairness, what is the gauge for measuring the gravity of a specific crime? Proportionality and the added notion of similar treatment for similar crimes are relational concepts. Together they are the virtue, the very legitimacy of punishment. The logic is impeccable, but missing from it is the basis, the source that might tell us what the ideal sentence should be.

Any sentence of length by itself is an arbitrary measure. Its integrity exists as a variable fixed by legislative debate, determination, and statutory construction. The basis of a sentence for, say, the crime of assault and battery exists not in the number of years assigned but in what that number means in relation to other numbers or years in prison for more serious crimes, such as armed robbery, kidnapping, manslaughter, or murder.

The comparative gauge is what gives meaning to what would otherwise be an arbitrary sentence. The number of years assigned for a lesser crime sets the template for assigning higher sentences to greater crimes. But stop and realize what this also means. The longer the sentence for a crime like assault, the greater in the name of proportionality will be the number of years assigned for a more serious crime, such as armed robbery, and the harsher the punishment regime is likely to become. Everything gets decided under a banner of consistency where proportionality is fairness.

As the gradations in punishment climb for greater crimes, "fairness" turns into that which is "less severe" than the sentence for a worse crime. Whatever its virtues, proportionality thus gives limited assurance to the design of a punishment regime. The opposite may, in fact, come closer to the truth: the more crimes a legislature establishes under rubrics of proportionality and consistency, the greater is the likelihood of a more extended and harsher range of penalties at the top end of the scale.

Does the benchmark of a moderate or lower sentence for a lesser crime as a gauge for measuring a higher sentence for a greater crime eliminate the arbitrariness of the benchmark selected? Hardly. When the sentence assigned for assault or any other crime is legislatively chosen, it exists as a variable in the practice of punishment with a range of years left open, say, from one to three years in prison. The factors that might adjust the number of years in the actual sentence for that crime include the harm done, the intent, the motives for the crime, a previous record, and every other circumstance of mitigation or aggravation.

Even a Judge Hercules will have his work cut out for him in this scene. The affirmations in statutory construction of a punishment regime do not begin to explain the hidden difficulties or variations in sentences that judges mete out. Differences in sentencing for the same crime occur all the time.

Years actually served might seem to be a simpler concept to measure the meaning of punishment. We know what years are by our own experience, but can we know years in this context? Can any person at liberty really comprehend what confinement does to time? "One day in prison is longer than almost any day you and I have had to endure," Associate Justice of the Supreme Court Anthony M. Kennedy declares. "Prison," explains one longtime convict, "is wanting to breathe with someone's fingers up your nose." Time changes in jail. Think about it by locking yourself in your bathroom for a day.

Can we know what the years actually mean to one serving them in prison? Judge Gerard Lynch, now on the Second Circuit of the United States Court of Appeals in New York, once asked his auditors to quantify in real-life terms a "short sentence" of seventy-eight months. "Imagine," he said, "being sent away from your family when your daughter is eleven, and returning on her eighteenth birthday."

The Puzzle Recognized

The problems in punishment grow the closer we look at incarceration. Time served, a passive conception, does not describe the life of anyone in prison. The standard joke—inmates are in control of the asylum—is the reality that every prisoner must learn to live with today. Organized gangs, predatory inmates, endemic violence, simmering personal disputes, indifferent or abusive prison guards, insufficient surveillance,
ethnic wars, dysfunctional cellmates, serious overcrowding, rampant disease, certifiable insanity, wretched physical circumstances, and a merciless pecking order make every jail sentence a daily ordeal of danger, humiliation, and insecurity. The magnitude of the situation, a magnitude on such a scale that it begins to define the country itself. Imprisonment has reached proportions unprecedented in the history of the United States. In the last three decades of the twentieth century, incarceration rates rose by 500 percent. Close to two million people are currently held behind bars in the American penal system. Seven million people are now under some form of penal supervision. To grasp what that means, you need only know that supervision now applies to one out of every thirty-two adults in the nation.

Incarceration rates are five to twelve times the rates of imprisonment found in Europe and Japan. Forty percent of the nation's prison population consists of impoverished African Americans who cannot afford private counsel and are thus ill equipped to handle an adversarial legal system geared to bargain between counsel. True, too, it is easier to punish someone who is different from you and whom you have no desire to know or understand.

The consequences of incarceration are, if anything, just as alarming. American jail sentences fail more than they succeed. The national recidivism rate for those who have been imprisoned is 67.5 percent. The notion that prisons serve as "houses of correction" can no longer be maintained. They exist now as holding pens with incapacitation as the objective. Rehabilitation has been discredited, and resources for it have grown scarce. The number of inmates serving life sentences has skyrocketed, as has the expense of maintaining such an elaborate system. The United States now spends more than $80 billion a year to keep its huge prison population in place.

As hard as it is to grasp the meaning of such numbers, incarceration levels pose an even greater puzzle. What are we to make of the apparent indifference of the American people to high rates of imprisonment and levels of punishment in a penal system that is manifestly worse than that of any other liberal democracy one can name? Why hasn't a citizenry dedicated to freedom and individual rights rejected institutional horrors that begin to rival the gulags of Communist Europe and the former Soviet Union? One can imagine two answers to the puzzle of communal apathy. The first conceivable explanation, the one that will dominate this book, traces indifference to an unplumbed cultural configuration of ignorance, confusion, anger, and misunderstanding. The second possibility is more disturbing. Is the prison system this way because the body politic wants it that way? Complicating either answer has been lack of communal discourse on the issue. The prolonged and bitterly divided debates over national ills in the presidential campaign of 2012 nowhere addressed the need for prison reform.

No authority that one can name will take on this controversy and give a straightforward answer to it even though it is one of the gravest issues of our times. Nor is the reason for hesitation lack of awareness. No less a personage than Associate Justice Anthony M. Kennedy carefully straddles the two explanations for passivity in an uneasy account of the problem. Is it ignorance or a more knowing disregard that explains the deplorable conditions in our penal system? In an address to the American Bar Association in 2003, Justice Kennedy balanced the alternatives against each other without choosing between them. The address begins with a revealing claim, "The inadequacies—and the injustices—in our prison and correctional systems" have to be read against "the continuing need to teach the principles of freedom" because "unbounded relativism as a civic philosophy soon becomes passivity and indifference." Empirical data and legal doctrine bear out the inadequacies alluded to here, and Kennedy confirms that our resources are misspent, our punishments too severe, our sentences too long. Much in the system is "unwise and unjust". More must be literally intolerable. "It is no defense if our current prison system is more a product of neglect than of purpose". But which is it, neglect or purpose? And whose passivity counts most? Shouldn't there be answers to these questions?

Justice Kennedy agrees that the current prison system actively seeks "to degrade and demean the prisoner," and he concludes "a purpose to degrade or demean individuals is not acceptable in a society founded on respect for the inalienable rights of the people." This leads to another conclusion: "Out of sight, out of mind is an unacceptable excuse for a prison system that incarcerates over two million human beings in
the United States" (7). The pivotal issue for Kennedy turns on forms of disregard, but whose disregard and at what level? Is it the people's disregard or the legal profession's or both, and if both, what is the connection that might respond to the unacceptable situation?

Always an adept compromiser, Kennedy heads for middle ground. “Even those of us who have specific professional responsibilities for the criminal justice system can be neglectful when it comes to the subject of corrections,” he charges, turning first to the legal profession. “When someone has been judged guilty and the appellate and collateral review process has ended, the legal profession seems to lose all interest.” But then this: “When the door is locked against the prisoner, we do not think about what is behind it.” The broadened use of the pronounal “we” extends the puzzle. “We have a greater responsibility,” Kennedy announces. “As a profession, and as a people, we should know what happens after the prisoner is taken away” (2–3).

The two-pronged assessment of responsibility, the legal profession and the people, holds with rhetorical finesse throughout the address, and it allows Kennedy to skirt an intellectual problem. Long ago Alexis de Tocqueville recognized a fundamental truth: “the stationary spirit of legal men and their prejudices in favor of existing institutions.” Law holds to the status quo. Justice Kennedy knows that he needs the people to effect change. There must be “a new public discussion about the prison system,” and “it is the duty of the American people to begin that discussion at once” (7).

But how? An implied logic, often referred to as Occam's razor, hovers ambiguously over Kennedy's assertions. Yes, the people, depending on how you define them, come first in principle, but raising vague principles so that the simplest hypothesis should prevail does not decide who must take the lead in this case, the law or the people. Nothing is ever going to be that simple here.

A key sentence in Justice Kennedy's appeal presents another rhetorical evasion, but it is doubly important because the same words give the direction that this book must and will take. Again Kennedy refuses to choose between the law and the people as his subject. “Were we to enter the hidden world of punishment,” he observes, “we should be startled by what we see” (3). The comment is helpful, but it does not go far enough. We should not be startled by the hidden world of punishment; we should be ashamed of it by knowing what we have seen.

The intellectual passivity or inability of both the legal profession and the people to react to the deprivations of a deteriorating prison system defy easy explanation without more basic recognitions. We have to know more about the theory and the reality of punishment in America if we are to come to grips with what Justice Kennedy rightly calls “an unacceptable excuse for a prison system” (7).

Looked at in this way, no one should be surprised that Justice Kennedy's eloquent legal appeal for reform has had little practical impact despite his leading role as the swing vote on the Supreme Court. His address to the American Bar Association presents the problem squarely and with the authority of one making legal decisions at the highest level, but if so, why hasn't his thorough account of the problem led toward a solution?

The best answer given anywhere to the communal passivity that Justice Kennedy describes comes from an obscure bureaucrat writing a story on the edge of the collapsing Austro-Hungarian Empire a century ago. Franz Kafka's bizarre account of unjust punishment, “In the Penal Colony,” gives all the reasons why those who might resist penal injustice do not.

The Parameters in Doing Nothing

Completed in 1914, just as everyone intuits the horrors unfolding in World War I, “In the Penal Colony” is Kafka's most terrifying story. There is no more explicit investigation of the vitality in punishment. Hannah Arendt may have been the first critic to put it fully into words when, cognizant of the even greater horrors of World War II, she wrote, “Kafka's nightmare of a world . . . has actually come to pass.” To gauge the pumping heart of punishment and our passive reactions to it, we must realize what we are capable of becoming; Kafka knew how to tell it in the realm of story.

Most previous critiques have focused on the story's mesmerizing torments or allegorical significance. Far less attention has been given to the writer's interest in punishment and the means by which people become inured to both the infliction and the receipt of it. Kafka delivers an arid message. “In the Penal Colony” announces what few want to face. Punishment, he says, fascinates through its pleasures, and those pleasures turn us against ourselves and paralyze our sensibilities.
The style and tone of "In the Penal Colony" are so ruthlessly neutral and spare that we can get the story in a few sentences. An explorer visits a penal colony that punishes every crime, however minor, with a slow, torturous death under a machine that inscribes the answer to the crime on the condemned man's naked body. The agonized victim dies only after realizing the ever more deeply tattooed message on his body. The purposes and success of this punishment regime are explained and demonstrated to the reluctant explorer by an officer who is in charge of the machine, but when the explorer indicates his disapproval, the officer tries to change his mind by having the machine needle the words "Be Just" on the officer's own body. The machine falls apart, killing the officer. The appalled explorer then hurries away, but not before preventing all others from leaving the colony with him.  

This summary does not do justice to Kafka's cold-blooded account of the torture engine, but it tells us what modern mechanisms have brought to punishment. Worship of the machine is the first thing noticed. "It is a remarkable piece of apparatus," exclaims the presiding officer in the first line of the story (140). Fascination with the machine adds wonder to punishment. Kafka proves that it is now easier, cleaner, and better entertainment to let a machine kill than to do it with one's own hands. World War I will dispatch fifteen million victims and wound another twenty million as the opening salvo in a century full of mechanized slaughter. 

The officer in charge, the punisher, has gone insane from conducting so many executions with the machine he adores, but there is method in his madness, and Kafka spells out the details, using the sordid impulses in all punishment. There is, first of all, satisfaction in killing before an admiring audience. Huge crowds have watched the machine at work, and the officer is proud of the uniform he wears for "the performance" (147). Second, the officer cares only about the execution going well. Victims are forgotten ciphers. Third, expertise enhances the enjoyment by giving the officer his own closed world of aesthetic appreciation. He gives pet names to the parts and plans of the machine; they are his "most precious possessions" (148). Fourth, "the technical problem," not the law, not the crime, not death itself, has become the rationale of punishment (147).  

Each of these gratifications distances the officer, an unnamed everyman, from the torture he inflicts, but Kafka adds a disgusting intimacy to the enterprise. The thing that every punisher tries to instill is acceptance of the punishment, no matter how cruel, by its victim. It does not matter that the original crime can be a negligible offense or one not fully articulated. Punishment alone conveys the message. Justice lies not in legal interpretation but in infliction. Thus, in the sixth hour, when the punished are finally too weak to scream, "enlightenment comes to the most dull-witted" through the inscription repeatedly stitched on the body. The victim decipher his crime through his wounds (150).  

Words, the prisoner's sentence, have become insufficient indicators of punishment by themselves. It is the body that records punishment, imbues it to the fullest, and then tells the mind about it. So powerful is this reciprocal moment of recognition between punished and punisher that the officer enters the machine himself to prove it. The fact that the machine collapses when asked to inscribe the message "Be Just" underlines an obvious theme (161).  

No machine, no matter how intricate or refined, can provide the meaning of justice. Punishment and the justice in it are relational concepts. Even so, as the story makes clear, machines can sustain a far more elaborate punishment regime. No one should forget that technological capability as much as policy has created the enormous size and highly structured security arrangements of the American punishment regime. It can be done because mechanism allows the possibility on an unprecedented scale.  

A subtler issue drives the officer of "In the Penal Colony" from madness in thought to madness in action. The once-smooth punishment regime has fallen into decay through overload of the system and a failure in higher authority. Punishment has lost the perfection in performance that the officer identified as justice. Consumed by his own responsibility in the ceremony of infliction, the man who is torturer has become a habit gives way to despair over its imperfect manifestations. Justice has devolved into getting horrible particulars right.  

Kafka offers several explanations for the disintegration of his punishment regime. A new commandant of the penal colony disapproves of the machine without having the active courage to resist it, but here, as always in Kafka, the story offers a darker possibility that is more powerful because it characterizes all punishment regimes.  

No matter how enlightened punishment becomes, no matter what aspirations theorists use to justify what should be done, the institutional
infliction of suffering will deteriorate into something worse than it was. The ideals of legal enforcement give way to the impetus in all punishment. Kafka's story foreshadows our own: American penology also had a plan, but its prisons have broken down under the weight of its claims about punishment. A third explanation by Kafka offers a ray of hope, but perhaps only a ray. Critics misread "In the Penal Colony" when they downplay the role of the visiting explorer and argue that Kafka needed the explorer for "technical reasons" to get his story out.36 The explorer is the story. How the explorer acts and does not act tells us what happens in the history of punishment regimes. This particular punishment regime collapses when an outsider says it is unjust (159–160). How much hope can we place in an outsider who announces that legal punishment, as justified, is actually unjust? That is a proposition to be tested in every chapter of this book.

Our knowledge of the explorer is limited but crucial. He arrives as a private citizen from an unnamed community. He is thought to have more influence than he has, but he is also our only moral guide. His name, "the explorer," implies more than a witness, and he moves from "indifference" through passivity and toward a more active appraisal of the torture mechanism (143). Notably, the punishing officer assigns the highest level of authority to this visitor and seeks his help, but it is an authority the explorer repeatedly disclaims. He is all or nothing.

How involved should this outsider be? "The explorer thought to himself: It's always a ticklish matter to intervene decisively in other people's affairs." He reminds himself instead that "he was neither a member of the penal colony nor a citizen of the state to which it belonged" (151). Yet he is "strangely tempted" to intervene, and the reason is clear. "The injustice of the procedure and the inhumanity of the execution were undeniable" (151). There is no moral uncertainty here. "I do not approve of your procedure," he says at last. "I was already wondering whether it would be my duty to intervene" (159–160).

What is anyone's obligation in such a situation? For a brief moment the explorer's hesitation gives way to a plan of action. "I shall tell the Commandant what I think of the procedure, certainly" (160). But this certainty immediately wavers, and the plan is never carried out. Given these vacillations, what are we to make of the explorer? We know that he has led a rich life of varied experience and that he is "fundamentally honorable and unafraid" (159). Fundamentally? For we also notice that the explorer does nothing. He does not contact the commandant. He does not intervene at any moment. He does not even bother to explain what happens to the officer. Instead, he rushes back to his ship ahead of schedule, pausing only to keep others from following him.

Semiofficial as an honored visitor but utterly private as an unaffiliated adventurer, the explorer is the puzzle in Kafka's story and ultimately the puzzle in the book you are reading. He stands for how anyone might hesitate between involvement and a simpler disengagement. Should the explorer have intervened or not? The point is that he does not. We are given a moral stance for engagement against a passive physical demeanor in response. He does nothing.

Inaction defies easy evaluation, but the explorer fails to intervene to prevent even the catastrophic death of the officer. "The explorer bit his lips and said nothing. He knew very well what was going to happen, but he had no right to obstruct the officer in anything" (163). Why not? Failure to intervene in the official punishment of the condemned prisoner can be construed as a bow to established authority. The incarcerated live under a legal fault to be paid for. The officer's spontaneous decision to punish himself requires no such explanation. Any moral agent might try to step in to prevent it, and again we are left with the question: What are we to make of the man of action who does not act?

Kafka does not help us with these problems after presenting them at length, but he wanted his account to be the lead story in a collection titled Punishment. The book was to give extended reflections on that theme, and although the idea was never carried out, the plan itself allows a larger comment.37

When the will to punish dominates, as it does in this story, all other relations dissolve. In one of Kafka's more nuanced touches, the guard who holds the condemned man to be executed treats his prisoner as the merest object on the end of a chain until the man is replaced by the officer. With that release, the two men suddenly become amiable competitors laughing with each other over food and other objects available to them. A dim spark of humanity exists in these minor figures, but punishment, the ordering device here, destroys its every possibility.

"In the Penal Colony" teaches that punishment will trump every other concern, including the meaning of crime, procedural integrity, verification of guilt, the rights of the punished, proportionality in punishment, and the mental balance of the punisher. Kafka proves that insensitivity
in the punisher is a norm. Indifference to suffering follows logically
from habitual infliction. Expertise in punishment may protect the
punisher, but it displaces concern for the punished, and this means infliction
will increase. Given enough time, severity will flourish in a punish-ment regime unless someone stops it.

Kafka’s explorer tells us even more. He stands for the proposition
that anyone looking at a punishment regime from outside of it must ac-
cept handicaps in perception. The punisher will always want the ap-
proval of this witness and will want it on the punisher’s own narrow
terms, and so the punisher is never going to be a reliable guide to what
actually happens in prisons. Left to one’s own devices but aware of limi-
tations in what a punisher will allow to be seen, an outsider must read
the situation through a mixture of attention (fascination over punish-
ment), disgust (the observed, manifestation of it), protest (recognition of
what would be injustice in any other setting), and uncertainty (confu-
sion over the trustworthiness of the enforcer, the rules that apply, and
the unknown scope of the operation).

An outsider who briefly witnesses a punishment regime will not know
what to do about it. The negative status of a prisoner eliminates the rights
of the normal self. The incarcerated deserve some punishment; that is
why they are there. Perhaps, though, they do not deserve the treatment
at hand even though they are defined through fault. If they seem less at
fault than the punishment administered, where should the line of inter-
ference be drawn? Legal punishment bespeaks a sovereign’s assertion
of integrity. When should an outsider challenge a legal response that is
also a claim of order restored?38

Kafka’s explorer epitomizes every uneasy public eye looking in. If he
falters, it may be in the same way that an American citizenry remains
passive in its limited knowledge of its own punishment regime. To the
insider, punishment performs an intense set of necessary practices that
outsiders are in no position to question; to the outsider, observation is
a momentary act with little or no frame of comparison. Punishers and
punished are enmeshed in the messy details of maintaining a prison.
The outside observer naturally remains tentative about interfering where
others appear so certain.39

The most hard-driving of rationalists among punishment theorists,
Jeremy Bentham, comes closest to explaining the emotional state of our
outsider. “All punishment is in itself necessarily odious,” Bentham writes;

“if it were not dreaded, it would not effect its purpose; it can never be
contemplated with approbation.”40

Why should a discreet witness invest serious consideration in some-
thing so odious, where, in fact, approval can hardly be expected any-
way? Why analyze feelings of dread, why challenge official approba-
tion, why embroil oneself in an argument with an imperious authority
of unknown dimensions? Most observers of punishment will act like
the explorer. They will flee to their own safe ship in the harbor, and
they will prevent anyone from escaping with them.

Punishment Out of Control

Punishment is misunderstood in part because examination of it rarely
leads to agreement. Experts in criminology argue over it all the time. It
may also be true that the only real experts are inside the issue. How
does one measure and agree on an appropriate amount of punishment
when the criteria for choosing are rational on the surface but deeply
emotional in impact and very different in practice? Public debates are
sharp out of ignorance, out of the inability to see what is really going on
in prisons, but also out of recognition of a prison system that is too
harsh and getting harsher.

Acrimony flourishes because the concepts used in argument do not
reflect what the punished undergo. Which of several conventional ideas
of punishment correctly justifies the appropriate length of a sentence to
be served? Debate is as endless as it is intricate over ideas that are as
irreconcilable as they are self-limiting.41 Should retribution drive sen-
tencing and other penal policies, or should the engine of concern be de-
terrence, rehabilitation, utilitarianism, incapacitation, or restoration?42

Abstract principles dominate these discussions and repeat the same
intellectual fallacy that Friedrich Nietzsche rejected more than a hun-
dred years ago. Arguments over the purposes of punishment ignore the
practice of it.43 Insofar as the length of a sentence can be justified, it
provides a sanitized gauge for the punisher, not the punished. A sen-
tence, short or long, ignores suffering that has little to do with time even
though time always counts. The years assigned do not touch the reality
that anyone confronting confinement endures in an American prison.

A governmentally commissioned bipartisan Ford Foundation report
from 2006 using that very title, Confronting Confinement, captures the
concreteness in American punishment. A summary of the report reads, "American prisons are dangerously overcrowded, unnecessarily violent, excessively reliant on physical segregation, breeding grounds of infectious disease, lacking in meaningful programs for inmates, and staffed by underpaid and under trained guards in a culture that promotes abuse."44

Prison practices outstrip all the theories. In the Rikers Island prison complex operated by the New York City Department of Corrections, class-action suits, one as late as 2013, have not prevented a pattern of "brutal and unlawful beatings" of inmates by uniformed guards. Organized groups of guards regularly take handcuffed inmates to unmonitored areas before attacking them. The results for inmates, according to court reports, have been broken jaws, facial fractures, major broken bones, perforated eardrums, permanent spinal damage, severe concussions, and life-threatening internal injuries that were diagnosed only because hospitalization was required. In a consummate irony, the video cameras used to ease guard surveillance have become a prisoner's best friends. They limit the locations for beatings and sometimes show the marks of injuries.45

Specificity conveys what generalization cannot capture in punishment. In the summer of 2013, nine correctional officers and supervisors at Rikers were arraigned on criminal charges after a security chief "ordered his subordinates to kick the inmate's teeth in" because "this guy thinks he's tough." The prisoner had dared to lock eyes with a supervisor. He was taken to a search pen "where five members from an elite correction unit were waiting for him." There, tackled to the floor, "he was repeatedly kicked with his body in a fetal position, covering his head." The legal defenses for such actions come tied to a cover-up and are always the same: "The officers did everything they were supposed to."46

Horrendous stories of prison abuse can now be found anywhere in the United States. A warden and a guard in North Carolina were suspended in 2012 for inmate abuse after allegations that "guards had forced them to rub hot sauce on their genitals, kiss deadly snakes, and imitate sex acts."47 Prison gangs in Maryland run extortion rings, drug-trafficking operations, money-laundering schemes, and organized sexual liaisons in which correctional officers participate. Maryland prisons have one of the highest rape rates in the country.48 In Mississippi prisons, "rapes, stabbings, beatings, and other acts of violence are rampant." Inmates claim that they have to set fires "to get medical attention in emergencies." Guards, as a matter of course, coerce prisoners for sex in exchange for food and phone privileges.49

Can theoretical alternatives about punishment reach such accounts? Conventional ideas about penology do not begin to answer this question, and it takes an outsider from another discipline to explain why. A theologian who writes about legal matters today, Oliver O'Donovan, reduces the ideas of punishment to three and decides that each misses the point of the suffering imposed. O'Donovan rejects the criminologists who compartmentalize the meaning of punishment: "those which find its purpose in retribution, those which find its purpose in reform, and those which find it in the protection it affords society." The "three-theory theory" is deeply flawed because it considers only the will of the punisher.50

O'Donovan knows that "those affected"—"victim, offender, and the rest of society"—cannot be defined by separating the categories of punishment into retribution, reform, and communal security, and he sees a more serious problem in the theoretical construct. "The three-theory theory encourages a style of argument like a race of hobbled horses," he says. "None of the beasts are capable of finishing the course, so the victory goes to the jockey who knocks his rivals over." O'Donovan also specifies the logical winner. The jockey who survives this struggle is going to be retribution, the default answer in a punitive system.51

We need only look to the punished to grasp O'Donovan's main point. How many prisoners, do you suppose, appreciate a claim of proportionality in retribution or pause to think of reform measures as anything but more punishment? Rehabilitation sounds great to the hopeful corrector; the person corrected hears more imposition of the system. Even the declared third theory of punishment, "the protection it affords society," will be meaningless to a prisoner. Protection is what every inmate sacrifices on entering the predatory zone of American prisons. The high recidivism rate in the country's prison systems suggests even more. Scholarly penchant for dividing punishment into intellectual categories have very little to do with solving crime.

Retributivism not only wins in O'Donovan's horse race, it leaves all other theories somewhere out on the track. Reprisal dominates American considerations of punishment on both philosophical and practical levels, and the predictable result has been more punishment. The facts are in. "The United States has become even more severe in its treatment of offenders in recent years."52
But if retribution is king, the winner of what is really a one-horse race, the reasons for it are complicated because the race itself, as O’Donovan admits, is an imperfect one. “None of the beasts,” he has noted, “are capable of finishing the course.” There is no real competition, and the theoretical inferences to be drawn are suddenly very different in a much messier intellectual situation than previously realized. Instead of retributivism vying with other theories, the issue is one of controlling retribution in the knowledge that there are few controls in place now. We need to know how this has happened. Why is retributivism so firmly in the American saddle of a race it can never really win?

Some superficial explanations must be dealt with first. Recidivism of inmates has justified reliance on retribution and confirmed most retributivists’ interest in incapacitation. Both viewpoints prefer long, fully-served sentences as the definition of a penal obligation with massive overcrowding in American prisons the predictable consequence. Retribution says you are getting exactly what you deserve. A policy of incapacitation says you remain incorrigible until proved otherwise by serving all of your time without further incident. The result is a vicious circle. Both positions forget that prisons now create more criminals than they reform.

If the logic is weak, the triumph of retribution is nonetheless complete and can be read very clearly in accelerating rates of incarceration. The completely incapacitated, the inmates serving life in prison in the United States, increased 83 percent from 69,845 in 1992 to 127,677 in 2003. Lifers now represent 9.4 percent of all offenders in state and federal prisons. Over 33,000 of these lifers serve without the prospect of parole, a sentence banned in most other countries.

Retribution also succeeds because it is simple to grasp. It relies on the oldest of ideas: the lex talionis, an eye for an eye. But lost in the equation, as even a leading retributivist points out, is a troubling question. “On what theory of lex talionis is it just to ignore repeated gang rapes inflicted on persons who have been convicted of drug possession or criminal fraud?”

The question is a vital one because it bears in mind what convicts receive rather than what they are said to deserve. It looks to the reality of punishment as suffering in prison rather than an abstraction over the length of a sentence, and it points to a particular problem. Experts estimate that “nearly 200,000 inmates now incarcerated have been or will be the victims of prison rape,” with the incalculable loss in dignity, identity, self-esteem, and safety that this means. For a retributivist to look this closely is to admit something else. The same questioner recognizes “a slippery slope of retributive thinking,” and he concedes that it leads to harsher levels of punishment. He expresses it this way:

The transitions from “because your act and your mental state at the time were blameworthy, you deserve punishment” to “you have a vicious character,” to “you have a hardened, abandoned, and malignant heart,” to “you are evil and rotten to the core,” to “you are scum,” to “you deserve whatever cruel indignity I choose to inflict on you” is, of course, not a logical transition. No single step logically follows from its predecessor. I fear, however, that the transition is psychologically a rather common and in some ways compelling one, one that ultimately may tempt us to endorse cruelty and inhumanity.

Retributivism welcomes such angry dismissal, and that is what is happening in American punishment. In its ideological dominance, a dominance that fuels certitude, retributivism wants incarceration to be strict, and it presses against the flexibilities in prisoner release. To punish is always to administer pain, but retribution wants that pain to be in the name of the injured victim as much as for the more neutral state. It never forgets the impact of the actual crime or the lowering of penalties for it.

For the same reasons, retribution does not deal with proportionality in punishment as well it might. Condemnation, accountability, standards, and righteousness control its modes of thought. “Retributive punishment for legal wrongdoing is justified in part because in treating the offender as a responsible moral agent it communicates to him a respect for his dignity as an autonomous moral agent.” So far so good, but sentenced criminals have abused that autonomy and so are expected to do without it.

An inexorable logic follows. Inmates have sacrificed the right to have their dignity respected at normal levels. The moral logic of retribution easily accepts the reflex in retaliation. It redefines the character of inmates through the attributes that have been lost to them, and that loss encourages the impulse to punish heavily.

More difficult to explain are the failures of other theories of punishment to reduce the impact of retributivism even though many experts
argue vigorously for alternatives.59 Most philosophers of punishment worry, in consequence, about excessive punishment in one way or another. Friedrich Nietzsche again leads the pack in condemnation, if not in constructive alternatives. "Thus do I counsel you, my friends, distrust all in whom the impulse to punish is powerful."60 His point seems obvious enough if we accept that punishment, the imposition of suffering, has its pleasures. No one who likes to punish should be allowed to inflict it, and yet too much infliction remains prevalent in punishment regimes even when this restraint is honored and followed.

Excessive punishment is the problem talked about everywhere that will not go away no matter what is said about it. Why not? Is it only retributivism? Not exactly. How well a punishment fits a crime also defies philosophical solution, and the discrepancy remains especially vivid since the law always presumes to assign an exact fit with every sentence it delivers.

This paradox, philosophical confusion against an exact legal sentence delivered in court with professional certainty, recalls a famous assertion by Louis Hartz. "Law," he observes in The Liberal Tradition in America, "has flourished on the corpse of philosophy in America."61 Many legal commentators give unwitting support to Hartz's claim by trying to treat punishment entirely through legal inquiry, but it cannot be done.

The sweeping philosophical investigations of the eighteenth century have shaped our modern theories of punishment and have given it whatever normative basis it has. They have established the terms that define ideas of punishment up to the present day, and they have provided the ideas, as well as the mechanistic principles, of the penitentiaries that have evolved into modern prisons. That their basic concerns are still our basic concerns may be an indication of how much we may still have to learn.

Not coincidentally, modern philosophies of punishment and the founding of the United States of America are parallel eighteenth-century achievements. Ideas about punishment are not just apparent in the national founding; they are fundamental to the creation of government and find their place in the Constitution of the United States. The figures that help define the modern polity—Niccolò Machiavelli, John Calvin, Cesare Beccaria, Thomas Hobbes, John Locke, Immanuel Kant, Montesquieu, and Jeremy Bentham, among others—make concepts of punishment central to government, and each has his influence on govern-

1. Punishment Misunderstood

8. Plea bargaining, crowded dockets, prosecutorial initiatives, and mandatory sentencing guidelines all limit the range and impact of judicial power. For these limits, as well as the high regard reserved for the judicial figure, see Robert A. Ferguson, “Inside the Courtroom,” in The Trial in American Life (Chicago: University of Chicago Press, 2007), 29–43.
10. See, for example, H. L. A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law, 2nd ed. (Oxford: Oxford University Press, 2008), 172. Hart, in describing “the claim of justice,” writes for everyone when he indicates that the expression “like cases should be treated alike” should always be heard.
18. For one of the most recent accounts detailing the routine horrors in today’s prisons, see Gopnik, “Caging of America,” 72–77.
to supervised reentry programs in keeping with "the management of classes of ex-felons for public safety identified in the new penalogy" (63).


27. See, for example, Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California (Berkeley: University of California Press, 2007).

28. Kennedy, "Speech at the American Bar Association Annual Meeting," 1-11, 2, 8. The quotations from Justice Kennedy's address in the next paragraphs are from this source and will be noted by page number in parenthetical references in the text.


30. Ronald Gray, for example, calls it "the most terrible of all Kafka's stories." See Gray, Franz Kafka (Cambridge: Cambridge University Press, 1973), 20.

31. For the record of the unprecedented level, scale, and horror of torture and punishment in modernity, see Jonathan Glover, Humanity: A Moral History of the Twentieth Century (New Haven, Conn.: Yale University Press, 1999).


33. For a quick run-through of the interpretive lenses applied to Kafka, see Ruth V. Gross, introduction to Critical Essays on Franz Kafka, ed. Ruth V. Gross (Boston: G. K. Hall, 1990), 1-17. The analysis that comes closest to my own interpretation is that of Keally McBride, Punishment and Political Order (Ann Arbor: University of Michigan Press, 2007), 27-36, although McBride, a political scientist, concentrates more on the political aspects of Kafka's tale.

34. Franz Kafka, "In the Penal Colony," in Franz Kafka: The Complete Stories, ed. Nahum N. Glazer, trans. Will Muir and Edwin Muir (New York: Schocken Books, 1983), 140-167. All quotations from the story in the following paragraphs are from this edition; page numbers are indicated parenthetically in the text.

35. All these distancing elements in punishment can be found, for example, in Adolf Eichmann's explanation of his role in the deportation and mur-


37. See ibid., 93. The other stories in the collection would have been "The Metamorphosis" and "The Judgment."


39. You can see aspects of this interaction, the invested insider against the wary outsider, in every current court case that deals with prisoner abuse.


41. See, for example, Marc O. DeGirolami, "The Choice of Evils and the Collisions of Theory," in Retributionism: Essays on Theory and Policy, ed. Mark D. White (Oxford: Oxford University Press, 2011), 193-194. DeGirolami argues that "scholarship too often sought and still seeks—to identify something conceptually pure about each of the 'theories of punishment' and to argue that one of them ought to predominate." These attempts, he adds, "may not be well served by categorically denying the irreconcilability and inevitable collision of the values of the criminal law."

42. For a good quick explanation of these philosophies and how they stack up against one another, see Terance D. Miethe and Hong Lu, Punishment: A Comparative Historical Perspective (Cambridge: Cambridge University Press, 2005), 15-24.


45. The information and quotations in this paragraph have been taken from the currently pending official amended complaint of a sixth class-action suit charging prison-guard abuse in the United States District Court for the Southern District of New York, in which eleven plaintiffs, all inmates actively tortured and injured by prison guards at Rikers, detail the illegal events that led to their extremely serious injuries. Only serious injuries that have been thoroughly documented have a chance of being heard in such cases. The court record also shows that guards try to avoid video
cameras in their attacks on prisoners. See Nunez v. City of New York, No. 11-CV-5845(LTS)(THK) (S.D.N.Y. May 24, 2012), the following enumerated complaints: 1, 2, 5, 6, 28c, 30–34 (pages 1–2, 4–5, 19, and 21–22 of “Amended Complaint”).


51. Ibid.

52. For the most thorough account of the theoretical victory of retribution over other policies in punishment, see the book-length debate between Jeffrie G. Murphy and Jean Hampton, which concludes, “There is a legitimate retributive sentiment” that controls discussions of punishment. Murphy and Hampton, Forgiveness and Mercy (Cambridge: Cambridge University Press, 1988), 164. For the increase in punishment rates, see Victor E. Kappeler and Gary W. Potter, “The Trend to Greater Punitiveness in the United States,” in The Mythology of Crime and Criminal Justice, 4th ed. (Long Grove, Ill.: Waveland Press, 2005), 317–327, 317.


54. I take these numbers and the paraphrase from Kappeler and Potter, Mythology of Crime and Criminal Justice, 320–321.


57. Murphy, “Some Second Thoughts on Retributivism,” 103 (emphasis in the original).


2. The Rachet Effect in Theory

1. Donald Clark Hedges is one of many to prove “there is considerable disagreement among philosophers concerning the meaning and just function of punishment.” See Hedges, “Punishment,” Philosophy and Phenomenological Research 18 (December 1957): 209.


