

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 execution 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."³

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 canniest 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.⁴

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."⁵ 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 legitimates 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?"⁷

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, juries 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."¹⁰ 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.¹¹ 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.¹²

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.¹³

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.¹⁴ "Prison," explains one longtime convict, "is wanting to breathe with someone's fingers up your nose."¹⁵ Time changes in jail.¹⁶ 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."¹⁷

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.¹⁸

Nothing about these conditions makes the incarcerated any better than they were, and all of them contribute to more crime. Just as worrisome is 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.¹⁹ 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.²⁰

Incarceration rates are five to twelve times the rates of imprisonment found in Europe and Japan.²¹ 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 bargains between counsel.²² True, too, it is easier to punish someone who is different from you and whom you have no desire to know or understand.²³

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 has climbed to 67.5 percent.²⁴ 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.²⁵ 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.²⁶

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?²⁷

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 straight 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."²⁸ 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" (4). Much in the system is "unwise and unjust" (4). Much more is literally intolerable. "It is no defense if our current prison system is more a product of neglect than of purpose" (7). 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" (7). 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