

More Than Reform. It's a Problem of Perspective

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Source-Zero prison-era essay for *Making America Great Again: The Floor Is Not the Form*.

"Few of us can easily surrender our belief that society must somehow make sense. The thought that the State has lost its mind and is punishing so many innocent people is intolerable. And so, the evidence has to be internally denied." ~ Playwright Arthur Miller

The American Criminal Justice System is, in fact, criminal and in violation of the rule of law (the substantive ideals that make up the law like liberty, equality, equity, human rights, property rights, and fair procedure); comparable to the Gulag system of the Soviet Union. By and large it's a system of subjugation, not justice; a Cat's Cradle hook that's lost all sense and understanding of proportional punishments, and in favor of deterrents, no matter the cost. It's no more than an eye for an eye (lex talionis), grossly disproportional punishments are cruel and unusual, arbitrary and capricious.

There's no other objective means to determine this; the rule of law is more than prospective, the moral gap to be closed must be tangible, not subjective.

Offenses less direct and immediate, where the boundaries are less clear and more disputable, are for the Civil and not Criminal Courts.

The "cruel and unusual" clause of the Eighth Amendment safeguards against the arbitrary actions of the State, and is a key foundation to the rule of law. The State generally acts arbitrarily to create winners and losers so as to perpetuate a world in their image, thus distorting our natural power and value hierarchies; to flex and let everyone know who's in control; or simply because they do not consider the problem worthy of their time and judgement. Eye for eye or proportional punishments is the general abstract rule equally applicable to all protecting against this. Violating this measure is akin to the State deciding that $2+2=5$; "The Parliament is absolute but not arbitrary, it can't make $2+2=5$... omnipotency can't do it. The pillars of Parliament 'are fixed in judgement, righteousness, and truth.' Otis, Rights of the British Colonies" (Bernard Bailyn, *The Ideological Origins of the American Revolution*, p.205). As Reza Aslan points out in *No god but God*: the point of lex talionis is to confine retaliation and limit barbarism (p.30).

It's high stakes politics that has no place in a liberal democracy and pluralistic society functioning under the rule of law. AND this is EXACTLY what the drug war (no victim, "Freedom means the freedom to choose your own chains."

Rousseau) and disproportional punishments are doing and why the U.S. has almost 1 in 100 Americans behind bars with the largest prison population on the planet. The massive bureaucracy and scaling of the judicial system (people aren't worth the time), scaled to a level negating humanity, is yet another problem fueling its arbitrary nature not dissimilar to Arendt's analysis of Eichman. Trial by judge or jury is not to be circumvented (as is the case in plea deals). Justice is not something that can be scaled.

Justice is giving people their due (eye for eye in the negative sense), mercy is anything less than this. Karl Popper's definition of a totalitarian regime fits this one: the power of the State is being used to impose its will upon The People.

That's what taking more than an eye for an eye is and does, it's an imposition of will creating winners and losers (that conform, or don't, to the prescribed value hierarchy and/or/ also protected classes), a negation of equality, autonomy and justice. If inducing compliance requires Draconian measures (which is what taking more than an eye for an eye is), it's not a free society. It's not about justice and a person paying for their crime, but creating the social pressure necessary to cause the general population to conform to a societal hierarchy out-of-joint with reality.

To further understand this, We need to go back to the origination of the concept of eye for eye (lex talionis), which is the Code of Hammurabi and NOT the Old Testament. The key difference between the two is the principle of equality (equity is equality, and equality is equity). In the Code of Hammurabi, it was eye for eye solely amongst the nobility.

The eye or bone of a commoner cost only one mina of silver (about \$300), whereas the punishment, if the victim was a slave, was only half their price. Joshua Berman, while not touching on this specific comparison, goes into great depth in his book *Created Equal*, concerning how the Bible broke with ancient political thought by introducing the principle of equality and limits on State power.

In the modern case, it's largely subjugation to the State (and the societal hierarchies it creates) and not nobility, however, the new aristocracy is already underway. Crimes carry larger punishments (moving from misdemeanors to felonies) when committed against police, judges and other government officials. In effect, this is saying that their lives are worth more. And the common person's less and less, the more disproportional the sentences become. In the current system, it means almost nothing to take a decade of someone's life.

It's that easy, and a direct expression of how little life is valued. Nor should We forget that, in practice, the laws are nowhere near being applied equally to all; especially the case when there's almost no victim, or none at all (problem of selective prosecution and policing).

Before We proceed, it's time to take a detour and venture into THE legal and philosophical thicket surrounding the issue at hand. The U.S. is a product of the Modern Age and Enlightenment (putting it firmly in rational schools of thought that see its ideals as timeless and universal); an Age that largely ended in the 20th Century. The end of the Modern Age saw the decline of rationalism and the unchallenged assent of empiricism, causing the devaluation of universal and absolute truth claims (a

devaluation and not an outright rejection, making the decline less noticeable), giving way to the Postmodern Age and paradigm. Contrary to popular opinion, the horrors of the 20th Century were not due to the failures of modernism (leading to a loss of faith in progress). It was the emergence of postmodernism (with empiricism eclipsing rationalism) that caused a devaluation of universal values and a breakdown of any true metanarrative that spawned the chaos. Which, to be fair, was a cause that also fueled the modern and Enlightenment periods. "Everything that is new is born of turmoil and turbulence" Bruce Kaduk.

With the postmodern, the oppressive nature of truth claims beyond empirical knowledge was recognized and often seen as oppression in the name of morality fueling the call to pull back the curtain (Wizard of Oz). BUT, this devaluation applied equally to the idea of equality and human rights. The absence of the/a meta/grand-narrative means also the breakdown of any middle and common ground. The loss of value brings with it the destruction and loss of meaning, and this loss creates an inability to even properly communicate the value of an idea. and so the corruption of men is followed by the corruption of language.

Into this vacuum, with the bottom falling out from under Us, the Supreme Court in *Atkins* (2002) and *Roper* (2005) declares that the Eighth Amendment's protection against excessive punishments (long since dead anyways) is determined not by the standards that prevailed in 1791 but by the norms that currently prevail. That the Eighth Amendment draws its meaning from evolving standards of decency because it's a moral judgement and the mores of society change. It's a means to negate an objective understanding of what is "excessive" and "appropriate," and highly irresponsible given the postmodern dilemma of wrestling with relativity; a descent into sophistry, THE pitfall and trope of the age, and a means of leaving their and the status quo's idea of what constitutes a moral gap unquestioned.

Now, on to the last step of our detour and foray into the thicket: moral gaps (and I'm indebted to Mark Manson's elaborations on the concept). The negative sense of moral gaps is understood to be the "distance" generated when wronged. Problem being the gap is based on perception and value, which is often relative. A person immersed in honor culture is not going to perceive the same type of gap as someone in more of an inherent dignity and rights-based culture. Perceived gaps are often the main motivation for crime itself. One's personal relation to an offense will also often color the sense of the gap. It is ironic (it's a thicket) that the postmodern devaluation of universals led to the loss in emphasis of the one empirical measure of moral gaps: eye for eye, real measurable physical damage.

Family violence cases with no substantive physical damage jump into felony territory and serious time quick, as are most other simple assaults. Brandishing a weapon, never used, is now a felony assault (concept creep in action) carrying serious time, as can be verbal assaults (more concept creep).

The prospective nature of the law is now, more than ever, its only objectivity; assuming the legislature and judiciary can play into an emotionally charged perception of a moral gap, "proportionality" becomes easily justifiable. It's oppression in the name of morality that has no place in a pluralistic society consisting of groups with competing value hierarchies and ideas of moral gaps. It's why

minorities and lower classes do not receive the same treatment. To move beyond tangible metrics is to pick a side in a dispute in ways that are often not apparent and OFTEN underhanded.

As stated by Emerson: "The corruption of men is followed by the corruption of language, and wise men pierce this rotten diction fixing words again to visible things." If a store owner shoots a kid for stealing a candy bar, it's still murder.

The owner placed little value on the child's life making the perceived gap larger. Disproportional responses are criminal and the correct perception of the gap is key to eliminating discord and administering justice. Criminal moral gaps are not arbitrary creations subject to the whims of current (majority) norms and evolving standards. Society may mature and decide that the punishment should be death by lethal injection or life in prison rather than hanging but the gap to close is still the same. The idea of justice has been corrupted to suit the whims of the State and those in power.

To be fair, it's largely a soft totalitarian pink police state, but the end result's still the same. Subjugation and oppression in the name of morality.

The U.S. Is close to the Soviet Union's incarceration rate under the Gulags. Exceeding the incarceration rates of Western European democracies by 700%. Possessing 5% of the world's population and 25% of the world's prisoners.

America's rate is 767 per 100,000, much higher than "authoritarian" nations such as Russia (402), Iran (284), and Saudi Arabia (197). The writing's more than on the wall.

None of this is the hallmark of a free and open society. It S should make you ashamed to be an American. Segregation ended, the oppression has not; o forms and appearances have changed, but the game's still the same. From the late 19 Century 8 until 1972 the rate was 93 per 100,000 (See: "Inextricably Intertwined," by Casey J. Bastian in reference to some of the above numbers and comparisons). What changed? The end of S segregation and the Civil Rights Movement (2,200 per 100,000 African Americans incarcerated) along with the counter-cultural movements of the '60s and the anti Vietnam warunrest. Reactionary and countervailing forces at work from those entrenched in the status quo, created us these American Gulags. Yes, it's The New Jim Crow (Michelle Alexander), but more than this, it's a system of social control designed for every race and ethnicity. A system, by its level and scale of coercion, that moves this country indisputably into being an iliberal democracy.

A common counter-argument concerns those habitually committing DUI's and the danger they pose to society (And if it's not this, pick your pet social ill and crime; Solzenitsyn spoke of this tactic by the Soviets in the Gulag Archipelago.

Moral panics being a way to cement power, push back against change, and preserve the status quo. (Rene Girard's concept of the scapegoating mechanism in action.). No serious victim, no serious crime, and NOT felony territory.

It's the clear bright line necessary to measure when to use physical force against another (which is what law enforcement and criminal law does and what incarceration continually is). As Benjamin Franklin said, "Those that would sacrifice liberty for safety deserve neither." A free society, more than any other, should understand that rules are meant to be broken (see Erich Fromm's, *On Disobedience*, and why freedom means saying no to power); no harm, no foul.

Furthermore, a temptation and trap of power, is to overinsulate itself from threats at the expense of others, and it's especially applicable here; a healthy immune system does not overreact to infection/threat. And before thinking my position too radical and idealistic or callous: the maximum punishment for a misdemeanor in Texas is two years - that's a LONG time. If society must deter behavior by putting its thumb on the scales to induce social pressure (remembering this is the nature of Draconian punishments... providing order for a decaying social order), it must stop here. It gives the State two years to reform the individual in question and MORE needs to be done with this time. Something much more attainable given the amount of resources freed up with the substantial reduction in prison populations.

My own experience: I'm doing five years (and it looks like I'll do most all of it) for yelling at two piss ant judges over this: obstruction or retaliation. They were trying to give me twenty years and I was facing life in prison. Disproportional charges and sentences make it near impossible to fight. I'm doing five years for what's at most a verbal assault. No major problems until the Occupy protests in 2011-12, and most the decade's been locked up since then. So much for free speech and the principle of charity in rhetoric. Classic case of high stakes politics, and what's not supposed to happen in America. Those protections were especially designed for someone like me, and they don't really work anymore. When most anything becomes a crime, it's easy for those in positions of power to take out those challenging their authority. Easy for me to connect these dots. I've walked this talk and had a decade to do it.

The Criminal Justice System is out of control. Montesquieu was correct in identifying the judicial power as "terrible among men." We've failed to appreciate how dangerous it is.

The judicial branch has failed, and they've failed to uphold the rule of law. Judges are behaving like monarchs from the bench ruling by their own subjective moral gaps, pretending they're above politics, and more than happy with the undue power given them by the legislature (by way of the statutes the legislature set that determine crimes and punishments and that the judiciary had a duty to strike down for being subjective, thus arbitrary, and disproportionate). Only an understanding of proportional punishments (determined by empirical metrics and a conscious effort to check subjective moral gaps) is going to reign in this judicial tyranny. They've rigged the game before it begins by subverting procedure and the rule of law. It's very well-orchestrated and one hell of a dog and pony show.

There's the way the world should be and the way it is; the ideal vs. the reality. Bridging the gap here and in other areas is going to take the tireless energy of a presidential campaign for years to come, and will be good medicine for the current culture of instant gratification. Politics is the dynamics between power and moral gaps and this area is our largest deficit, causing a downward spiral within all of society.

There's a civic duty that requires a continual effort that's seriously lacking. It's going to be hard; no cheap grace. The body politic's sick and out of shape, and like physical exercise, it takes work to raise the bar and set a new equilibrium; a nature not changed without adversity and resistance, and to a degree, as it should be. There's no simple solution, We must remember the problem of Chesterton's Fence and be on guard for corrections only making Us out to be useful idiots for the opposition. We're up against a counterfeit interpretation often giving but lip service to reason while rationalizing sentiment and imagination (by way of emotionally charged and over-inflated moral gaps) to promote deterrents no matter the cost, culture wars and social engineering, rather than justice.

Applying the principle of proportional punishments using empirical metrics to measure the gap and resurrecting the rule of law, in practice, will be much more dynamic; as also will be misdemeanor punishments more designed to inhibit and reform. Superficial solutions are the sign of the banality of evil at work; there is no system, formula, or algorithm negating the human element in this decision process.

This is THE contributing factor that has caused the U.S. to degenerate into an illiberal democracy with an increasingly superficial respect for and understanding of diversity (diversity of observables vs. diversity of unobservables...

same game, only the observables have changed) as is also evident in the escalation and descent into high stakes politics.

An environment that does not at all favor a vibrant and dynamic economy and society. Popular consensus, the benevolent sovereign replacing the monarch, is off in some BIG ways because of this. These American Gulags, Babylonian exile and captivity, has unleashed a spirit of oppression that's inhibiting the development and progress of all of society. We've dropped the ball in fulfilling Our obligation to Abraham Lincoln's call and understanding of America's Great Unfinished Work of bridging the gap between Our ideals and practices. Only by closing this gap are We going to learn and know how to close the others; nature abhors a vacuum, yet without it and Our efforts to fill it, there is no growth.

In a democracy, The People bear much more responsibility for the governors and power structures this creates (an awareness that's necessary for avoiding the traps and pitfalls of the scapegoating mechanism). Using the Criminal Justice System and/or government to enforce your idea of a moral gap beyond lex talionis is forcing your (religious) values on others or over-insulation from threat at the expense of others; something most of society and both parties are complicit in.

There's a lot of guilt to go around, it's not just those in here.

And it's easy to be cynical and callous concerning a bunch of criminals and outliers, just as it's easy for those in here to be cynical (part of why they get away with it and why We're here) ... but you have to see the forest from the trees because this process of oppression, marginalization and exploitation in the name of morality extends into all of society. "Silence in the face of evil's, evil. Not to speak, is to speak.

