



ALTERNATIVES TO

BY JUDGE MONROE G. MCKAY

THE FOLLOWING SPEECH  
CLARK LAW SCHOOL AT BRIGHAM



# PUNITIVE PUNISHMENT

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**A**fter much consideration, I have settled to speak on a long-standing concern about our national addiction to a punitive approach to problem solving. Of course, I do not speak for the court. This is not about specific case-related material, but only about you as lawyers, who are a leavening lump in the greater society.

I am embarrassed by the fact that we lead the world in per capita prison population; our rate is 755 prisoners per 100,000 members of the population.<sup>1</sup> Our nearest competitors are Rwanda and the Russian Federation, but even they are well below us. Other industrialized nations such as Canada, Australia, Greece, France, England, Germany, and Japan have less than one-seventh our per capita prison population. In our circuit, approximately 55% of our cases have to do with the criminal justice system, and the other circuits are comparable. Yet, we seem to be more crime-ridden, fearful, and insecure than our competitors in the industrialized world.

I cannot help but wonder if our cultural preference for punitive solutions is not one of the misguided contributors to misbehavior. Perhaps it has caused us to neglect more effective ways of dealing with otherwise disapproved behavior. Sometimes it seems to me that we are more interested in expressing our disapproval than in reducing the problems.

Of course, the courts have nothing to do with setting the policy. We do not initiate prosecutions, and even the trial courts are closely constrained in the decisions about sentencing. I should not and do not make any specific proposals about what, if anything, we as a country should do about this embarrassment. I only make some suggestions about ways of thinking about problem solving. I recently read a thought-provoking comment by William Patry that caught the spirit of my own thoughts. He said:

*If we want effective laws, we can't have that if it's based upon an alleged moral case. For politicians or lawmakers to act in an effective way, they have to act like economists. You have to investigate the real world consequences of what you're doing and decide whether those laws, if enacted, do the thing you want them to do.*<sup>2</sup>

I offer you two thought pieces about this matter. One is what I call “before,” and the other is what I call “after.” To follow my point, you need to know that, in my view, a rule is only a rule if it has a sanction for departure from the standard.

#### **THE PEACE CORPS AND THE RULELESS REGIME**

My first anecdotal point is about “before.” When I became a Peace Corps director in Malawi, Africa, my predecessor had rules to spare. He reportedly had a staff



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member assigned to patrol that mud hut country looking for violators. Morale was low: we were in trouble with the host government, and volunteers were distracted from their charitable missions by constant complaints about trivial matters.

I closed everything down and had the volunteers all gather at an old lake-side hotel, where the host government spent the first meeting berating my staff and me for every imaginable default. Some of my staff wanted to retaliate, or at least make a defensive show. In the evening, I went for a walk along the beach to think through whether I should just close down the program and send us all back to the United States or stay in Africa.

As I walked along, I saw a group ahead gathered around a small fire. Someone spotted me and said, “Shh, here he comes.” Someone else said, “Oh H——! Let him hear it.” I knelt and listened for a while. When the berating ended and a pause seemed to beckon me to respond, I made a critical decision on the spot. Joseph Smith said the way he governed such an admirable community as Nauvoo was to teach the people correct principles and then let them govern themselves, and I determined to follow this same principle. Because it would have discredited my message in their eyes, I did not reveal the source of what came to me.

I reminded the group of the visionary mission they had signed up for and that many of them had lost their way in chafing at the rules and enforcement. I said, “From here on out, there are no rules.” That is, I would, of course, talk to them about how they ought to behave themselves, but there would be no sanctions.

Some chorused, “B.S.” I stated that, as a show of good faith, I was restoring the month’s pay and midterm leave I had docked from a certain volunteer present in the group for the unauthorized use of a Peace Corps vehicle, which he wrecked while driving drunk. He had endangered the life of his counterpart, whom he was supposed to be training to be a medical aid.

For a couple of months, a few volunteers seemed to be testing me. But before long, we had a total turnaround. Some of my staff called a meeting to say how wonderful it was that, of the nearly two hundred volunteers, we had only five miscreants. My staff wanted me to send the troublemakers home. It was clear to me that my personnel did not understand the essential element that had brought us to that happy point. They did not recognize



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that no system can produce zero tolerance—that the best possible system can only produce optimal results. If we now turned to sanctions for some, the key element of our success would be lost.

This ruleless system had succeeded to the point that Washington, D.C., told me we were the only program in Africa not in trouble with the host country, though this was probably an exaggeration. They wanted me to expand the program, but I declined. I also did not tell them our success was a product of our Ruleless Regime.

That same approach has been followed in my judicial chambers for thirty-three years. We get our work done timely and well. We run a ruleless shop—that is, one without sanctions. We do not work for the clock.

**AMNESTY AND RECONCILIATION**

My second anecdotal point is about “after.” The setting is South Africa under the leadership of Nelson Mandela. After all the deprivations toward the black citizens, many of which could properly be described as crimes against humanity, the South Africans decided to forgo the retributive and punitive models. They instead established a truth and reconciliation commission. The basic format was that offenders who came before the commission, candidly admitted their part in the persecution, and then asked for forgiveness would be granted amnesty.

While Lucy and I were serving a mission to South Africa in the 90s, one man confessed to and demonstrated the torture he had committed. One of his victims was a member of the commission. The vote to grant him amnesty was joined by his former victim.

Among the formerly minority-ruled countries in Africa, South Africa, so far as I can tell, is doing the best job of any of

them and has the best prospect of succeeding despite a much more complicated problem of integration and reconciliation than the others.

My great disappointment has been how frequently friends and colleagues have responded with something other than admiration when I have given this account. A typical response has been, "How can they let them get away with that?"

As an aside, I tell you of a brief experience that may not prove too much, but is a success story in the setting of the LDS Church. Jim Parkinson, a member of the charter class, and I were traveling in Southern Africa with a group of African Americans from Mississippi. We were in Cape Town on a Sunday and decided to go to church. The leader of the group and one other asked to join us. Given our history, I concede that I was a little nervous. I saw a number of old friends and visited happily with them. After the meeting, as we stood in the parking lot, Jim asked our leader what he thought. He said he was astonished. He had attended church with many mixed-race congregations, but this was the first one that did not segregate themselves when they sat down. He added that he thought we should do something about our music and our preachers. He used to sing in a black choir. I do not know that it is a cause-and-effect result of the national policy of truth and reconciliation, but I like to think that policy contributed.

## CONCLUSION

Now, do not tell people I proposed eliminating prisons or even that punishment is never appropriate. Of course there are some people we need to isolate from the rest of society. I have only suggested some ways of thinking about rules and punishment that might improve our outcomes, particularly about prison as a general deterrent as opposed to a specific deterrent. I have long been persuaded that any plan whose objective is zero tolerance will automatically be less effective, and probably more expensive, than one whose objective is *optimal*.

I do not pretend these two examples are some panacea for overpopulating our prisons or that they are appropriate in every situation. At most, they are examples of successful thinking against the grain. It would be my hope that you who are among the privileged, you who have influence among the most influential, and you who have access to power will do the creative thinking and courageous acting that will begin to ameliorate this national tragedy.

When I became chief of the circuit, I promoted an investiture program. Judge Ed Dumbauld, an exceptional scholar and federal district judge from Uniontown, Pennsylvania, attended. We had become friends, and he sometimes shared with me poems from the revival of Dutch letters in the late 1800s.

At a dinner after the program, probably because he thought I currently was or might become a little full of myself, he recited in English this Dutch poem with which I leave you:

*What have you preserved from your frenzy?  
A lamp that flickers; an eye that weeps.*

*What is there from the storm, that you withstood?  
A mournful leaf, that has not yet found rest.*

*What has love done in your heart?  
It has made me understand the pain of the lonely.*

*What remains of all the glory that surrounded you?  
Nothing but a singing memory.*

H. W. J. M. KEULS

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## NOTES

- 1 Walmsley, Roy. "World Prison Population List (8th edition)." *King's College London: International Centre for Prison Studies*. December 2008. [http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wppl-8th\\_41.pdf](http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wppl-8th_41.pdf).
- 2 Patry, William. "Patry Speaks on Copyright Law." *TheWrit*. Winter 2010. <http://www.law.onu.edu/publications/writ/WRIT2010.pdf>.