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# Punishment: Drop City and the Utopian Communes


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# **PIRATES, PRISONERS, AND LEPERS**

LESSONS FROM LIFE OUTSIDE THE LAW

*Paul H. Robinson and Sarah M. Robinson*

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## CHAPTER 3

# PUNISHMENT:

## DROP CITY AND THE UTOPIAN COMMUNES

**I**f the preceding chapter's discussion on the human inclination toward cooperation has you feeling all touchy-feely, with the urge to sing *Kumbaya*, hang on. The feeling may soon go away. What happens when a group member refuses to join in the group's cooperative spirit and instead seeks to take advantage of others? What is the group to do? Ignore him? Persuade him? Punish him?

The use of punishment has been energetically opposed by a host of modern scholars and reformers. In expressing an increasingly popular view, one scholar explained “the institution of criminal punishment is ethically, politically, and legally unjustifiable. . . . [A] society concerned about protecting all of its members from violations of their claims of right should rely on institutions other than criminal punishment.”<sup>1</sup> Indeed, one of today's most influential penal policy scholars, David Garland, professor of sociology and law at New York University, echoes the philosophy: “It is only the mainstream processes of socialization (internalized morality and the sense of duty, the informal inducements and rewards of conformity, the practical and cultural networks of mutual expectation and interdependence, etc.) which are able to promote proper conduct on a consistent and regular basis.” Thus, “punishment is never fated to ‘succeed’ to any great degree.” A society “which intends to promote disciplined conduct and social control will concentrate not upon punishing offenders but upon socializing and integrating young citizens—a work of social justice and moral education rather than penal policy.”<sup>2</sup> In the magical years of the 1960s social revolution, groups of people not only talked about the destructive effects of punishment but put their beliefs into action by establishing antipunishment communes. By their actions they would prove the power of noncoercive means of living together, a demonstration that could inspire and lead the rest of the world.

**I**n May of 1965, six acres of scrubby land outside Trinidad, Colorado, were purchased for \$450 by three recent college graduates. The trio envisioned a utopian community where everyone would “be allowed to do what they wanted.”<sup>3</sup> The land became home to Drop City, a commune whose philosophy was anarchy—not the anarchy of “bombing and terrorist practices” but rather one that “opposed external authority, power, and coercion in favor of voluntary cooperation and self-imposed restraints”<sup>4</sup>—a living form of the scholarly urgings described above. Any action designed to collectively coerce individual behavior, such as punishment, violated the Drop City philosophy of permitting “unrestricted individuality.”<sup>5</sup> Members believed they rightly could and should individually complain to a person about objectionable conduct. It was through the cumulative effect of these personal expressions of disappointment or displeasure—the application of social pressure—that a wayward member could be educated and

corrected. But coercive sanctions imposed by the group—the imposition of punishment—were prohibited.<sup>6</sup>

This did not mean, however, that there were no common understandings or agreements about how communal life was to be lived. All property was to be held communally among all residents. Indeed, the deed to the land stipulated that it was “forever free and open to all people.” There could be no attempts to limit who joined the commune. All members were to help all others with their projects, be it building new structures or constructing art displays. Meals were communally cooked and eaten. All assets and earnings of individuals went into a common bank account. Food, building materials, personal needs, and utilities for all were paid out of the common account.

In just the first few weeks of working together, the group built a rough geodesic dome as a shelter, planted a garden, began raising chickens, and started several art projects. Visual excitement mattered to the group; art was important. Even the refrigerator became a sequin-encrusted beauty.

Arriving after the completion of the first dome, an inspired, self-taught engineer directed the group in a revolutionary new method of dome construction using reclaimed car tops, an approach that yielded sturdy homes for less than \$200 each. Many exciting variations on the domes were ultimately constructed, for which the commune became world famous. Drop City was a dynamic and inspiring community.

The Drop City commune was ahead of its time. Its members not only talked about the rejection of punishment but indeed lived it. They were demonstrating the practical power of the antipunishment model for the rest of the world and affirmatively hoped that the larger society would come to see its value and follow their lead.

In the summer of 1965, a man calling himself Peter Rabbit (most residents took on fantastical new names when they joined) came to live at Drop City. From the beginning of his tenure, he had no interest in the communal activities. He would not contribute to the routine communal work tasks, would not contribute to communal art or building projects, was combative, and would not share what supplies he had, as the commune’s rules required. While the group was very unhappy with him and told him so, they concluded that their nonpunishment philosophy prohibited them from officially sanctioning him.

Drop City was located near a small town. The members had regular dealings with the people and businesses there. When Peter Rabbit stole tools from the only lumberyard in the town, a business that had been good to the group, the members were particularly upset. They feared it would damage their relationship with both the lumberyard and the town. Again, however, they concluded that their philosophy did not allow them to sanction Peter.

Peter spent his time in the Rabbit Hole, as it was called, a dome that the community had built for him and his family. His main activity was to write about Drop City in articles that were widely published. His writings upset most members because they believed much of what he wrote was untrue, because he wrote as though he were the leader of the commune, and because some writings defamed specific members and some were obscene and racist (some material was seized by the post office). Despite their upset, however, the members felt they could not sanction Peter. On the contrary, their philosophy obliged them under their communal project rules to help him disseminate the writings that they so abhorred as false and malicious.

In early 1967, Peter Rabbit came up with the idea of holding a “Joy Fest,” in which the commune would host whoever might want to come and listen to music, learn the Drop City message, and discuss art. The majority of residents opposed the idea, pointing out the potential for disaster if hordes of people arrived at their subsistence-living encampment. Even if they gave up all of their own resources, Drop City simply did not have the means to feed or shelter a large group of people. Many members saw the plan as threatening the very existence of the commune they had devoted two years of their lives to build. They tried individually to convince Peter to change his plans, but he would not. Failing to persuade him, they pitched in to dig latrines and purchase extra food.

The announcement of Joy Fest brought hordes of new arrivals, far outnumbering the small number of long-term residents. The residents spent their time trying to keep things working, but disorder reigned nonetheless. Sanitary facilities and drinking water were seriously insufficient, chaos took over the kitchen, and families no longer felt safe. The Drop City banner had been one of people coming together for community and art, but Joy Fest produced a new banner—as one member described it: “a place to pursue perpetual fun, where a person could get high, maybe get laid, and feel no responsibility.”

The scheduled end of Joy Fest came and went, but large numbers of people stayed on. The members decided that perhaps they needed a policy after all that limited the size and membership of the commune. Many of the new arrivals were unstable people with drug and other problems, including underage teenage runaways. The group then also decided they needed to adopt formal conduct rules that prohibited illegal drug use. Just as the old understandings and agreements were ignored, because of the no-punishment policy, the new rules were also disregarded.

The drug problem became worse. The stream of new arrivals continued.

There’s just so many people coming through here all the time. We used to have some rules, but they never worked out. Right now there aren’t any. We used to have rules about dope and like that but they just . . . they just never worked out.<sup>7</sup>

About this time, some members went into town to buy the group’s groceries. By chance, they happened to see Peter Rabbit at a local restaurant eating a steak. Drop City had always required that all money held by commune members be placed in the common bank account. It now became clear that Peter Rabbit had been getting money but not contributing it. When challenged, Peter confessed his deception but refused to change his ways and to contribute in the future. Despite this, the group concluded, as they had many times before, that they could not sanction Peter. But now there was growing discontent, and a growing reluctance of others to continue contributing to the communal fund, a fund from which Peter drew support.

Not long after the steak incident, a Marine deserter named Jethro joined the commune. As one commune member describes the events:

One day a vehicle roared past my dome. I hurried out and saw [Jethro] and Mantis riding in circles about the property on a new little motor scooter. Everybody was taking rides on it, whizzing around, falling off.

“Who does it belong to?”

“Us.”

“Great. Where did it come from?”

“I bought it.” Jethro skidded off down the road.

Clard (a community founder) was standing there, looking glum. “The money to buy that scooter came from our bank account. He cleaned us out.”

Jethro had been put on the account only days before. The communal bank account instantly became defunct. Nobody was willing to put more money into it.<sup>8</sup>

With no one any longer willing to contribute to the common account and without any means of controlling misbehavior, it became clear that the possibility for cooperative action had been essentially destroyed.

Soon after, the founders abandoned Drop City.

**F**riendship and shared values will take a community only so far. Inevitably people will have personal conflicts or their differences in values will surface. Some people will occasionally, or even regularly, promote their own views at the expense of others, as Peter Rabbit did at Drop City. And in many such instances, “reeducation” through individual conversation or through social pressure won’t do the trick. Only coercive sanctions—punishment—will have an effect. And such sanctions are most effective in gaining compliance and least disruptive to the community when done by the community as a whole, restrained and legitimized by the group’s collective judgment, rather than imposed ad hoc by one or several individuals.

Social pressure and the influence of social norms can be important and powerful forces, but they also have important limitations. For them to be effective, the person to be influenced must care about what other people think of him and must think such opinions more important to him than his other needs and wants. That was never the case with Peter Rabbit, and every community no doubt has some people for whom this often will not be the case. Given the natural differences in opinions and interests among people, strong conflicts will inevitably arise, and every society must have a mechanism that will effectively deal with those conflicts by setting and enforcing some basic rules.

Presumably one could carefully screen membership, to permit into the group only those who are generous and like-minded in all important respects. And one could exclude from the group any member later found to be lacking in this respect. But such membership restrictions are obviously inconsistent with the principle of “forever free and open to all people” so proudly proclaimed on the Drop City deed. More importantly, membership screening and exclusion is not feasible for the general society—the population for which the scholars quoted above press their no-punishment regime. The general society must deal with every person no matter how troublesome. The only means of excluding someone from the larger society would be to, say, put them in prison—but that would be the use of punishment, of which these scholars would disapprove.

One would want rules and a system to enforce them that is fair and just and would want the system to impose the minimum suffering possible to achieve its goal. (The general level of punishment severity in the current American criminal justice system is probably far beyond what it needs to be.) But a punishment system is not an option, but rather an essential precondition to effective social cooperation. The community’s core shared values must be respected, and those who will not defer to them must be sanctioned, not only to compel them to respect the



community's values but also to assure others that those values are indeed important and do deserve their continuing deference.

The Peter Rabbit story makes the point. Once it became clear that he would not defer to the values of Drop City—that he would not contribute his money to the communal coffers from which he drew—the communal fund and the commune itself collapsed. Only a sucker would continue to contribute to an enterprise that supported those who rejected its core values of social cooperation and its shared judgments of unacceptable conduct.

The real puzzle of Drop City is why its members repeatedly chose to be the easy suckers for Peter Rabbit to exploit from the start. When he would not contribute to communal activities, they overlooked it. When he stole from the local lumberyard who had helped them, they did nothing. When he published writings abhorrent to them, they helped distribute them. When he arranged Joy Fest over their objections, they hosted it. It was only the final indignity of confirming his permanent refusal to contribute to the communal coffer—after he had been caught eating steak while they lived at subsistence level—that brought down the curtain on this tragic comedy.

The story is painful to follow—like watching a trusting and gentle dog get repeatedly kicked by its abusive owner. One may wonder how Peter Rabbit in good conscience could have so regularly taken advantage of people so obviously trussed up by their own misconceptions, and so helpless to deal with the reality around them.

Even more puzzling is how these people could be oblivious for so long to their role as professional suckers and could keep themselves so ignorant about the dynamics of human nature. The commune members were not stupid people. Perhaps they simply could not bring themselves emotionally to admit that the principle driving their project was so seriously flawed, perhaps like Soviet agricultural practices under Stalin, which allowed thousands of people to starve to death rather than admit that the principles of effective farming did not track approved communist ideology.<sup>9</sup> The Drop City members stuck to their misguided principles in the face of an increasingly obvious reality until that reality bit them in the ass.

Perhaps today's antipunishment scholars have a similar road of discovery to follow. But it would be best if we did not travel it with them.

One can feel admiration for the idealism of the Drop City members and even agree that informal social pressure ought to be the preferred reaction to minor social deviations. But at the same time, one can only be astonished by their naive folly and wonder whether it was some form of pathological arrogance: Humans for 125,000 generations have relied upon an effective sanctioning system to assure social cooperation, yet the people of Drop City somehow did not need one? Is it that they thought themselves a special breed of human? Probably not—after all, they initially sought to include all comers in their project. It seems more likely that they simply suffered a blind commitment to a false principle they could not bring themselves to admit was false.

The real tragedy of Drop City is that if the members had taken their early experience to heart—as an education about how human groups can and cannot work and the essential role of an enforcement system in maintaining cooperative action—they could have saved Drop City and its important, inspiring marriage of art and community. But their initial ignorance combined with their arrogance to destroy what they had created and what it could have been.

The modern abolitionist movement, opposing all forms of punishment, and much of modern penal theory seem to be playing out the Drop City tragedy. Luckily, it is at the moment

primarily an academic game (as much of modern academia is). That means it is not currently doing much real-world damage, but it also means that it will probably live on forever in the ivy towers because reality cannot reach it to bite it too in the ass. But we need to remain aware that this dangerous ignorance is afoot and to make sure it remains locked away in the ivy towers forever.

**T**he people who remained at Drop City, after the commune leaders gave up, lived on their own terms. The “UFO Marine” went everywhere with a loaded gun, constantly threatening to kill people. Violent motorcycle gangs and speed addicts moved into the artistic domes, which gradually fell apart or were destroyed by vandals.

Peter Rabbit persuaded a well-to-do benefactor named Rick Klein to purchase land on which Peter started a new commune, named Libre (Spanish for “free”). But life at Libre was not exactly “free.” It was strictly regulated, with rules and with sanctions for rule violations. Libre did not allow new members without a close examination of them and their motives for joining. Membership required the unanimous approval of all existing members and proof of self-sufficiency. Each family lived separately in their own structure and had to receive community permission to build any new structure. Further, “Libre quite deliberately never built any central facility, any common building, where crashers might land.” When a member of Libre was arrested for growing marijuana on the property, spending a short time in the local jail, upon his return to Libre he was informed that he had been expelled. He was obliged to leave the community and the home he had built there. Libre grew and still exists today. Peter Rabbit lives there with his two wives.

Drop City, in contrast, became a “hobo camp” with overflowing latrines, hepatitis, violence, and drugs. Ultimately, the “forever free” clause was removed from the property deed and the land was sold to a neighbor as a pasture for goats.

The dynamic at work in Drop City is not unique to that particular utopian experience but rather is the standard form of such no-punishment experiments.

**I**n 1968, as Colorado’s Drop City began to fade, another attempt at a punishment-free community was just beginning in a remote part of California.<sup>10</sup> Black Bear Ranch was to be a radical new model community in which no central authority would compel a particular code of conduct by anyone. The founders wondered: “What would happen . . . if we threw out all the rules and started over?” One of the founders dreamed “that I would find and establish a community—of artists, I thought—who would live and work together in harmony with nature.” Following the dream, the founding group purchased a piece of property that had once been a gold mine, on which stood a house and a barn. The group raised funds, bought supplies, and prepared for the utopian life they envisioned. The commune’s slogan was “free land for free people.”<sup>11</sup>

(For those readers who can only too easily guess what is coming next, our apologies. Being mesmerized by a slow-motion train wreck may not be admirable but, let’s admit it, it’s hard to look away.)

Upon arriving at the property after their fund-raising and supply-purchasing mission, it was apparent that the word had already gotten out about the planned commune: The house on the property was already occupied. The founders moved into the barn. No one in the group had any knowledge of wilderness survival or even of how to perform simple country tasks such as

chopping wood. They divided into work groups but then did little work. After four feet of snow fell and the group ran out of kerosene for the heaters, one man had to hike eighteen miles on homemade snow shoes to bring in more fuel. The commune was free of restraints but also free of food, warmth, and sanitation.

In the bitter winter, the free-sex policy was suspended when the women began to withhold sex to protest the lack of heat. Rather than freeze and starve, the group decided they needed some rules after all. One member recounted later that “using a combination of revolutionary rhetoric, blandishments, and threats, they organized.”<sup>12</sup>

But while they created a set of binding rules, they did not adopt a system for sanctioning violations of those rules. (Oooops.) Thus, many members still refused to work. When one man’s “lack of physical labor and ceaseless sermonizing” frustrated the others, absent communal punishment, another resident broke a glass jar of honey over the man’s head.

The official policy of not punishing wrongdoing applied not only to adults but also to children. The children quickly learned the lesson and regularly undertook outrageous conduct, such as ransacking or burning the homes of people who would not do as the children demanded. The adults, caught by their no-punishment rule, thought it best to comply with the children’s demands. In one instance, the children wanted Easter candy and demanded of a man who owned a working car that he go into town to get it. The man understood that refusing this demand he be the Easter Bunny meant his house would be burned, so he went.

In the fall of 1969, a group of black militants moved into a cabin and began to transform the place into an armed fortress, a guerrilla base. The land was, after all, “free to all.” The militants carried loaded guns at all times and followed their own agenda, with little interest in the larger group. Although the commune’s principles made all private property communal, the militants would not share their supplies. While the commune’s principles required that everyone work to support the commune, as in tending the common garden, the militants worked only for themselves.

It was eventually concluded that their conduct was not consistent with the commune’s principle of “internal harmony,” and commune members therefore undertook to use dialogue and social pressure to reeducate the militants. They were told to “mind your own business.”

One morning, about a month after arriving, Roy Ballard, the militant leader, forced all of the commune members out of their houses at gunpoint and had them line up out in the open. Another armed militant was positioned on a knoll aiming his weapon at their backs. Ballard demanded to know what the community was angry about, a question that the commune members did not quite understand. One commune member stepped forward and tried to persuade Ballard to put the gun away. Ballard raised a 30.06 to the man’s chest and told him to be quiet or he would be shot. After a few minutes of tense silent confrontation, and for reasons not apparent to the group, Ballard lowered his gun and walked back to his fortress. When the commune members awoke the next morning, the militants were gone. The strange confrontation ended for reasons as mysterious as why it occurred.

After the militants left, Hells Angels arrived. But the commune members had now been scared into a slightly different view of the world. The bikers were informed that the land was no longer “free to all” and that they could not stay. They stayed anyway.

Perhaps because of the scarcity of free food and beer, the Angels eventually did leave. The commune members quickly installed boards full of sixteen-penny nails sticking up—a

“wicked, tire shredding barricade at the gate”<sup>13</sup>—to keep out any new residents. The land “free to all” was now officially closed to all.

With outsiders excluded, the commune settled down to tend to their own private utopia. But utopia remained elusive. A group of adults charged with child care decided instead to drop acid. When the neglected children were discovered, their parents took up sticks and started to search for the tripping child-minders, to beat them for their lapse. It was determined that the commune’s system for regulating conduct among its members must evolve. Perhaps rules and sanctions for violations were needed after all.

Under new rules, no person could join the community without being a guest for a set time period—a probationary period—and then getting a large majority to agree to extend an offer of membership. Only two licensed guns were allowed on the property, and those weapons were to be kept by the community, not an individual. Failure to keep public areas “restaurant clean,” to wash dishes according to an exact protocol, or any other violation of numerous rules would lead to verbal reprimand. Subsequent violations of the rules would require an appearance before “the circle”—a mandatory group meeting where the violations would be publicly discussed. Repeated violations meant permanent expulsion, with forfeiture of whatever the person had built or contributed.

While it can hardly be a model for the larger society, as was hoped—as noted, there is no “excluding” people from society, unless one means by that life in prison or the death penalty—the Black Bear commune, with its written rules and sanctions for violations, continues to exist today.

(A change in track avoids the train wreck. Aren’t you glad you kept reading?)

**T**olstoy Farm, started in Washington State in 1963, was another communal experiment of the antipunishment model that sought to follow the standard counterculture values of peace and love and noncoercion.<sup>14</sup> The group rejected all regulation and tolerated all forms of thought and behavior, including drugs, nudity, and free sex. Its only rule was that no one could be forced to leave. Tolstoy Farm was to be a place where members worked for the common good and the desire for acceptance by the group would itself persuade members to act cooperatively. It was an experiment “to prove that man could live noncompetitively without private ownership and the external compulsion of law.”<sup>15</sup>

(Again, the reader can no doubt predict the coming difficulties. We’ll keep it short.)

The lack of restraint resulting from the lack of sanctions made life increasingly difficult. All purchases were from the communal funds and required a majority vote, but many members preferred not to use such things as toothpaste, tampons, soap, or laundry detergent, so they refused to vote for such things, thereby forcing their own (un)sanitary habits on others. There was also an arson problem, as some members would simply burn the possessions of people who offended them. Soon the commune began to slide into dangerous disarray. Something had to be done.

When a resident began shooting at the communal house, he was put in a car, driven off the property, and told not to return—violating the only fixed rule the commune had set for themselves. But this incident did not prompt a reevaluation of their philosophy, so things continued to deteriorate.

The founding members quickly built private homes in order to move out of the communal house. Hart House, as that was called, continued to house newcomers, whose numbers included

runaways, drug users, and mental patients—the “crashers and the crazies”—from which the founders tried to distance themselves. In the spring of 1968, Hart House mysteriously burned to the ground. One account claims a mentally unbalanced girl did it; another that the founders did it.

The founding philosophy was eventually replaced. Rules were imposed and sanctions introduced, the ultimate sanction being expulsion. Drugs were forbidden, and underage people without parents at the settlement were barred. Even people who did not manage their personal trash properly were found to be unsuitable and told to leave. The Tolstoy Farm commune continues to exist today.

This pattern is repeated in every known no-punishment experiment: After an initial period of delight runs into the realities of life and human nature, the cooperative action fails and the group either disbands or adopts rules and sanctions (commonly using the threat of exclusion as the ultimate sanction).

To some readers, these stories hold no surprise. The dynamic that plays out here will seem entirely predictable, a matter of simple common sense. How could a society deal with serious wrongdoing other than by punishment? If the offender is sufficiently indifferent to others' interests or sufficiently convinced of the importance of his own interests over those of others, why would such a person change his ways simply because of others' complaints? In most instances the offender knows he is injuring others or at least knows that the victim and general community will disapprove, yet does what he wants anyway. Social pressure might work for some offenders some of the time, especially for children being disciplined by parents. But why would one think that social pressure would be sufficient to get all offenders to comply all the time? The puzzle for some people will be: What were these commune founders—or the punishment abolitionists of today—thinking? Although there have sometimes been claims to the contrary, we know of no society that has existed without some kind of punishment system.<sup>16</sup>

The repeating pattern of the stories, showing the importance of punishment to maintaining effective cooperation, has been confirmed by a variety of social science studies. The studies conclude that people are predisposed to cooperate with others (as discussed in the previous chapter) but only as long as the others in their group do not behave selfishly. When others violate shared group norms, cooperation breaks down and eventually members will stop cooperating.<sup>17</sup> Yet the introduction of a punishment can resurrect cooperation.<sup>18</sup>

Recall the “public goods” experiments discussed in the previous chapter, in which each member of a group is given an allotment of money that he or she can contribute to a group fund or keep for themselves. The money added to the group fund gains “interest” and is then divided equally among all members, whether they contributed to the group fund or not. As reported earlier, most people contribute to the group fund, even though they cannot be sure that others will do the same.

A variation of the experiment is relevant here: The experimenters conduct repeated rounds of the process among the same group. As the rounds go on, it becomes clear to members that some are not contributing to the group fund (yet are still receiving an equal portion when the fund is divided at the end of each round). This is like the Drop City members discovering Peter Rabbit eating steak at a restaurant in town rather than contributing his money to their communal fund.

As the experimental subjects realize the lack of contribution by others, most stop contributing, just as the Drop City common fund collapsed. In other words, even people who are inclined to be highly cooperative will stop cooperating when faced with persistently selfish group members. Being cooperative is one thing; being taken for a fool is another.

Another variation of the “public goods” game is even more illuminating for our purposes. In this version, group members are given the opportunity to punish those who refuse to contribute to the group fund (but who will share in its distribution). However, the imposition of punishment is personally costly—the punisher must contribute part of his or her own money to do it. For every dollar a punisher contributes, the offender will be penalized three dollars. Despite the personal cost, cooperators are still punish noncooperators.<sup>19</sup>

Even more illuminating is what happens next. Once punishment is allowed, the cooperators, who otherwise would have quit, begin contributing again.<sup>20</sup> Indeed, nearly everyone begins contributing, thereby yielding the greatest benefit to the group and all individuals in it.<sup>21</sup>

In other words, the utopian communes could have advanced their agendas—of promoting love, peace, art, community, or whatever else they were interested in—if they had understood that the one thing they had to do—the one thing that was essential to maintaining cooperation within the group—was to provide a system for sanctioning those who violate important group norms. A group can dispense with many of the standard norms and restrictions—it can promote free love and communal property—but it cannot dispense with a system of punishment for those who refuse to defer to the norms the group needs to remain cooperative (such as norms against physical aggression or risk-creating conduct). Informal persuasion is a useful first response to a violation if the offender perhaps did not appreciate the seriousness of the wrong he was doing. But it must be backed by fair and just punishment if group cooperation is to survive.

Social scientists once described humans as operating in rational self-interest, but studies like these have revealed a more nuanced picture. Humans are not motivated by pure self-interest.<sup>22</sup> In fact, people have a strong predisposition toward cooperation. But they are sensitive to being taken advantage of and are willing to incur costs to punish others who do not similarly cooperate.<sup>23</sup> Some describe humans as “wary cooperators.”<sup>24</sup>

Once one sees the essential connection between cooperation and punishment, it should be little surprise to find that humans, as a species with a natural predisposition to cooperate, also are a species with a natural predisposition to punish wrongdoers. Cooperation conferred an important evolutionary benefit on humans. As the previous chapter reviews, it helped early humans survive in a hostile world characterized by fierce competition for resources, predators that were stronger and faster, and natural threats like drought and famine. Cooperative groups also benefited from the efficiency of division of labor, shared resources, and the spoils of group hunting. It was punishment of wrongdoing that allowed humans to maintain their evolutionary advantage through cooperation, and thus it was punishment that was the key to our success as a species, and probably to our very existence as a species.

Evolutionary scientists have puzzled over one aspect of punishment within early human groups. While punishment might have been essential to the success of the group, who in the group would have been willing to take on the personal risk that came with being the one who actually imposed the deserved punishment? As in the “public goods” game, it only takes one person in the group willing to punish to maintain cooperation, but why would an individual take the risk? Why not let someone else do it? Of course, if all members took this view, the entire

group would suffer, but it is easy to imagine that each individual might focus only on the immediate personal risk rather than the long-term detrimental effect on the group. We are not selfish devils but neither are we all angelic heroes.

The long-term benefit to the group requires that someone take on the risk of being the one to impose punishment. If an individual needed to intellectually reason out the long-term cost-benefit analysis of the choice to impose punishment, would anyone do it? On the other hand, if the felt need to punish was instinctually driven, the chances that at least one individual would take on the job increases. Some evolutionary scientists argue that it would only take a few individuals willing to do the punishing, even if there were large numbers of rule breakers. They point to the use of tools and weapons that the group together controlled. A single person could inflict heavy punishment at reduced risk on even a physically stronger violator. Others in the group might join in to defend a member against an unjustified attack, but not in this instance, where the attack is seen as just punishment for the violation of a group norm.<sup>25</sup> Thus, a few group members willing to inflict punishment could maintain the group's cooperative dynamic. That cooperation helps to ensure a greater survival rate for the group as compared to groups without punishment, with that willingness to punish being passed through natural selection to future generations, ultimately becoming part of human nature.

**H**umans did not invent the use of punishment. They developed and refined a practice that existed in a more rudimentary form in predecessor species that similarly depended on cooperative action for their evolutionary success. We see rudimentary forms of punishment for “norm violations” in other species, especially our close primate relatives, and especially among socially cooperative animals. Even nonvictim members of a group act aggressively against violators, such as those perpetrating aggression or theft in violation of group norms and expectations.<sup>26</sup>

Indeed, punishment behavior is not limited to primates. Within the highly-social naked-mole rat communities, for example, queens appear to focus attacks on lazy workers. Wolves apparently refuse to play with those who violate the social rules governing play fighting, and violator wolves leave the group and die at a higher-than-average rate. Behavior akin to theft is a common target for punishment. For example, elephant seal pups caught trying to nurse from a female who is not their mother are not just shooed away. They are often bitten severely and sometimes killed. Young male deer attempting to sneak copulations with females belonging to adult males are not just shooed away but commonly attacked.<sup>27</sup>

The larger point here is that wherever one sees long-term cooperation within a group, one also will see a system of punishment for the violation of important group norms—whatever norms are essential to continued cooperation. The more essential cooperation is to the survival of the group, the more deep-seated will be the commitment to punishment. With cooperation at the root of human success as a species, a deep commitment to punishment among humans is exactly what one would expect. The utopian communes, or any other human groups, are free to explore any and all variations of lifestyle, but they cannot escape the fundamentals of human nature.

Bring on the free spirits, free love, free lunch, and whatever else human creativity might invent, but be warned that it will all collapse if you do not also bring on a system to punish violations of the norms essential for social cooperation.

## NOTES

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1. James F. Doyle, "Radical Critique of Criminal Punishment," *Social Justice* 22 (1995): 7, 21–22.
  2. David Garland, *Punishment and Modern Society* (University of Chicago Press, 1990), 288–289.
  3. Timothy Miller, *The 60's Communes: Hippies and Beyond* (Syracuse University Press, 1999), 35.
  4. Marguerite Bouvard, *The Intentional Community Movement: Building a New Moral World* (Kennikat Press National University Publications, 1975), 87.
  5. Hugh Gardner, *The Children of Prosperity: Thirteen Modern American Communes* (St. Martin's Press, 1978), 44.
  6. The factual narrative is drawn from these sources: Mark Matthews, *Drop City: America's First Hippie Commune* (University of Oklahoma Press, 2010); Timothy Miller, *The 60's Communes: Hippies and Beyond* (Syracuse University Press, 1999); James F. Doyle, "A Radical Critique of Criminal Punishments," *Social Justice* 22 (1995): 7, 21–22; David Garland, *Punishment and Modern Society* (University of Chicago Press, 1990); William Hedgepath, *The Alternative: Communal Life in New America* (Macmillan Company, 1970); John Curl, *Memories of Drop City: The First Hippie Commune of the 1960s and the Summer of Love: A Memoir* (iUniverse, Inc., 2006); "Trofim Lysenko," *Wikipedia*, [http://en.wikipedia.org/wiki/Trofim\\_Lysenko](http://en.wikipedia.org/wiki/Trofim_Lysenko).
  7. William Hedgepath, *The Alternative* (Macmillan, 1970), 156.
  8. John Curl, *Memories of Drop City: The First Hippie Commune of the 1960's and the Summer of Love*, (New York: iUniverse, 2007), 152.
  9. "Trofim Lysenko," *Wikipedia*, [http://en.wikipedia.org/wiki/Trofim\\_Lysenko](http://en.wikipedia.org/wiki/Trofim_Lysenko).
  10. The factual narrative is drawn from these sources: Bennett M. Berger, *The Survival of a Counterculture* (University of California Press, 1981); Don Monkerud, *Free Land: Free Love: Tales of a Wilderness Commune* (Black Bear Mining and Publishing Company, 2000); Peter Coyote, *Sleeping Where I Fall: A Chronicle* (Counterpoint, 1998).
  11. Coyote, *Sleeping*, 148.
  12. *Ibid.*, 151.
  13. Monkerud, *Free Land*, 142.
  14. The factual narrative is drawn from these sources: Timothy Miller, "Roots of Communal Revival 1962–1966," *The Farm*, <http://www.thefarm.org/lifestyle/root2.html>; Rosabeth Moss Kanter, *Commitment and Community: Communes and Utopias in Sociological Perspective* (Harvard University Press, 1972); Robert Houriet, *Getting Back Together* (Coward, McCann, and Geoghegan, Inc., 1969).
  15. Houriet, *Getting Back Together*, 206.
  16. See Paul H. Robinson and John M. Darley, "Intuitions of Justice: Implications for Criminal Law and Justice Policy," *Southern California Law Review* 81 (2007): 1, 13–16.
  17. See Ernst Fehr and Simon Gächter, "Cooperation and Punishment in Public Goods Experiments," *American Economic Review* 90 (2000): 980; Ernst Fehr and Herbert Gintis, "Human Motivation and Social Cooperation: Experimental and Analytical Foundations," *Annual Review of Sociology* 33 (2007): 43.
  18. Fehr and Gächter, "Cooperation and Punishment"; Fehr and Gintis, "Human Motivation." Of course, only one per group needs to punish in order to prompt cooperation.



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Others had no need to do so once another person punished and prompted as needed. Fehr and Gächter, “Cooperation and Punishment”; John R. Hibbing and John R. Alford, “Accepting Authoritative Decisions: Humans as Wary Cooperators,” *American Journal of Political Science* 48 (2004): 62; *see also* Steven A. Frank, “Repression of Competition and the Evolution of Cooperation,” *Evolution* 57 (2003): 693, 694 (“Those individuals that invest in policing their selfish neighbors gain by living in a more cooperative group in the second time period of interaction within groups.”); Terence C. Burnham and Dominic D. P. Johnson, “The Biological and Evolutionary Logic of Human Cooperation,” *Analyse und Kritik* 27 (2005): 113; Paul H. Robinson, Robert Kurzban, and Owen D. Jones, “The Origins of Shared Intuitions of Justice,” *Vanderbilt Law Review* 60: 1633, 1643–1649; Samuel Bowles and Herbert Gintis, “The Origins of Human Cooperation,” in *Genetic and Cultural Evolution of Cooperation*, ed. Peter Hammerstein (MIT Press, 2003), 7 (“When the group is threatened with extinction or dispersal, say through war, pestilence, or famine, cooperation is most needed for survival. But the probability of one’s contributions being repaid in the future decreases sharply when the group is threatened, since the probability that the group will dissolve increases, and hence the incentive to cooperate will dissolve. Thus, precisely when a group is most in need of prosocial behavior, cooperation based on reciprocal altruism will collapse. Such critical periods were common in the evolutionary history of our species. But a small number of strong reciprocators, who punish defectors without regard for the probability of future repayment, could dramatically improve the survival chances of human groups. Moreover, humans are unique among species that live in groups and recognizing individuals, in their capacity to inflict heavy punishment at low cost to the punisher, as a result of their superior tool making and hunting ability. Indeed, and in sharp contrast to non-human primates, even the strongest man can be killed while sleeping by the weakest, at low cost to the punisher. A simple argument using Price’s equation then shows that under these conditions, strong reciprocators can invade a population of self-regarding types, and can persist in equilibrium.”); Hudson K. Reeve, “Queen Activation of Lazy Workers in Colonies of the Eusocial Naked Mole-Rat,” *Nature* 358 (1992): 147–148; Marc Bekoff, “Wild Justice, Cooperation, and Fair Play,” in *The Origins and Nature of Sociality*, eds. Robert W. Sussman and Audrey R. Chapman (Aldine Transaction, 2004): 53, 62; T. H. Clutton-Brock and G. A. Parker, “Punishment in Animal Societies,” *Nature* 373 (2005): 209, 212; T. H. Clutton-Brock, S. D. Albon, R. M. Gibson, and F. E. Guinness, “The Logical Stag: Adaptive Aspects of Fighting in Red Deer (*Cervus elaphus* L.),” *Animal Behavior* 27 (1979): 211, 212 (1979); T. H. Clutton-Brock, D. Green, M. Hiraiwa-Hasegawa, and S. D. Albon, “Passing the Buck: Resource Defence, Lek Breeding and Mate Choice in Fallow Deer,” *Behavioral Ecology and Sociobiology* (1988): 281, 287–288; Joanne Reiter, Nell Lee Stinson, and Burney J. Le Boeuf, “Northern Elephant Seal Development: The Transition from Weaning to Nutritional Independence,” *Behavioral Ecology and Sociobiology* 3 (1978): 337, 344; Joanne Reiter, Kathy J. Panken, and Burney J. Le Boeuf, “Female Competition and Reproductive Success in Northern Elephant Seals,” *Animal Behavior* 29 (1981): 670, 676.

19. At least one person per group must be punishing, but nowhere is the number given. Fehr and Gintis, “Human Motivation,” 48. Of course, only one per group needs to punish in order to prompt cooperation. Others had no need to do so once another person punished and prompted as needed.

20. *See* Fehr and Gächter, “Cooperation and Punishment”; Fehr and Gintis, “Human Motivation.”

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21. The article talks about aggregate contributions from ten groups of four people per group. The average among the groups is that punishment prompts cooperation of 83 percent. Fehr and Gintis, "Human Motivation," 48.
  22. Fehr and Gintis, "Human Motivation," 45.
  23. John R. Hibbing and John R. Alford, "Accepting Authoritative Decisions: Humans as Wary Cooperators," *American Journal of Political Science* 48 (2004): 62.
  24. John Alford and John Hibbing, "The Origin of Politics: An Evolutionary Theory of Political Behavior," *Perspectives on Politics* 2 (2004): 707, 709.
  25. Bowles and Gintis, "The Origins of Human Cooperation."
  26. Terence C. Burnham and Dominic D. P. Johnson, "The Biological and Evolutionary Logic of Human Cooperation," *Analyse and Kritik* 27 (2005): 113; Bowles and Gintis, "The Origins of Human Cooperation"; see also Steven A. Frank, "Repression of Competition and the Evolution of Cooperation," *Evolution* 57 (2003): 693, 694 ("Those individuals that invest in policing their selfish neighbors gain by living in a more cooperative group in the second time period of interaction within groups."); Paul Robinson, Robert Kurzban, and Owen D. Jones, "The Origins of Shared Intuitions of Justice," *Vanderbilt Law Review* 60 (2007): 1633, 1643–1649.
  27. Hudson K. Reeve, "Queen Activation of Lazy Workers in Colonies of the Eusocial Naked Mole-Rat," *Nature* 358 (1992): 147–148.

# LIVING BEYOND THE LAW: A SUMMARY

## *Narrative Line*

The daily carnage and conflict we see in the world around us suggest that humans are by nature at best self-interested and at worst predators. It is the civilizing influence of government and law, the common wisdom tells us, that provides the limited stability that we do enjoy. But recent science suggests a different view of human nature and, thereby, may suggest a different effect of governmental law.

What is our human nature? If we could see human groups operating outside the influence of civilized society, its government, and its laws, we might know. And luckily, the diversity and unpredictability of human history and experience give us a collection of naturally-occurring experiments by which we can answer the question. As it turns out, the answers have dramatic implications for shaping civilization's modern institutions.

## **PART I. HUMAN RULES**

Contrary to common wisdom, humans are not purely self-interested, but rather are naturally inclined toward cooperation—as long as they are not being taken advantage of by others. And it is this natural inclination toward cooperation that accounts for the extraordinary success of the human species against great odds.

But the critical benefits of cooperative action are available only with the adoption of rules and a system for punishing violations of those rules. Rather than an evil system anathema to right-thinking people, punishment is the linchpin for the benefits of cooperative action that have created human success.

## *Chapters and Primary Stories*

### **1. What Is Our Nature? What Does Government Do for Us, and to Us?**

Illustrative stories include a Los Angeles preschool-graduation parents' brawl and a Miami T-ball game parents' melee.

### **2. Cooperation: Lepers and Pirates**

Illustrative stories include the 1867 forcible exile of lepers to a permanent colony on Molokai island, Hawaii; the 1972 plane crash in the Andes Mountains that led to cannibalism; and self-regulation among the pirates of the Caribbean in the 1700s.

### **3. Punishment: Drop City and the Utopian Communes**

Illustrative stories include the utopian anti-punishment hippie communes of the late 1960s.

It is part of human nature to see doing justice as a value in itself—in people’s minds not dependent for justification on the practical benefits it brings. Doing justice is so important to people that they willingly suffer enormous costs to obtain it, even when they were neither hurt by the wrong nor stand to directly benefit from punishing the wrongdoer.

However, it is not punishment itself that people demand and that promotes and sustains cooperative action, but rather *just* punishment. The same human desire to have justice done includes a natural distaste for injustice.

On the other hand, while doing justice and avoiding injustice are important, they are not everything. Emergency conditions, especially the need to survive, can subvert them. But even when subverted, the desire to do justice and avoid injustice is not lost. It commonly spontaneously returns when conditions permit.

How can it be, then, that we see a world full of conflict and injustice that seems to contradict any notion of a human inclination toward cooperation and justice? Again, the absent-law natural experiments reveal much about how things can go wrong. Most prominently, the exercise of authority seen as illegitimate, as not acting in the group’s interests, can alienate and subvert cooperative action rather than build it.

As part II explains, these and other lessons about human nature have serious implications for shaping modern institutions, especially the criminal justice system by which we seek to control wrongdoing among people.

#### **4. Justice: 1850s San Francisco and the California Gold Rush**

Illustrative stories include California gold miners in 1848–1851; San Francisco vigilante committees of 1851; Nazi concentration camps of the 1940s; and wagon trains for westward migration in America beginning in the 1840s.

#### **5. Injustice: The Attica Uprising and the *Batavia* Shipwreck**

Illustrative stories include the 1971 prisoner takeover of Attica Prison in New York and the 1628 wreck of the *Batavia* on islands off Australia.

#### **6. Survival: The Inuits of King William Land and the Mutineers on Pitcairn Island**

Illustrative stories include the Netsilik Inuits living in the extreme conditions of far northern Canada in the 1900s; the mutineers from the *HMS Bounty* who settled on isolated Pitcairn Island in 1790; and the escaped slaves on Jamaica who, in the 1700s, formed themselves into hidden communities known as the Maroons.

#### **7. Subversion: Prison Camps and Hellships**

Illustrative stories include World War II Japanese prisoner camps in the Philippines; subsequent transport of prisoners to the main islands in the “Hellships”; and the 1864 wreck of two ships—*Grafton* and *Invercauld*—on the same Auckland island, with the two groups, unknown to one another, handling the crisis very differently.

## PART II. MODERN LESSONS

Given the human nature revealed in part I, it is no surprise to find that social science confirms that people across demographics and cultures broadly share certain intuitions of justice and that a criminal law that adopts rules and practices that conflict with those shared intuitions is one that loses moral credibility with the community it governs. The research also shows that that loss is disastrous for effective crime control, because it undermines the law's potentially powerful influence in gaining deference as a moral authority and in shaping and internalizing norms. Without credibility, the system prompts resistance and subversion rather than support and acquiescence.

Is modern criminal law in danger of losing moral credibility with the community it governs? Clearly yes. It routinely adopts criminal law rules and practices that regularly produce results so unjust as to seriously conflict with the community's intuitions of justice. While these doctrines are commonly promoted by politicians as good for fighting crime, they in fact hurt effective crime control by undermining the system's moral credibility and thereby its social influence with the community.

At the same time, the criminal justice system regularly adopts criminal law rules and practices that predictably produce failures of justice that similarly seriously conflict with community views. These are commonly promoted as needed to protect personal rights, but they do so without an appreciation for how the system's resulting loss of credibility damages crime control. Doing justice may at times have to be compromised to protect rights, but it ought to be done only when and to the extent necessary—a dramatic change from current practice.

### **8. Credibility: America's Prohibition**

Illustrative stories include 1920s American Prohibition; and lawless northern Pakistan in 1990.

### **9. Excess: Committing Felony Murder While Asleep in Bed and Life in Prison for an Air-Conditioning Fraud**

Illustrative stories include a Florida case in which twenty-year-old Ryan Holle is given life without parole for lending his car to a roommate who uses it to help commit a robbery while Ryan is home asleep; and a Texas case in which William Rummel gets a life sentence for a minor \$130 fraud.

### **10. Failure: Getting Away with Murder Beyond a Reasonable Doubt**

Illustrative stories include an Illinois case in which Larry Eyler, a serial torturer-murderer of young gay men, is released to kill despite overwhelming evidence of his guilt because a police officer held him for questioning for too long; and a Kentucky case in which Melvin Ignatow's hidden photos of himself committing torture-murder are discovered, but he can't be prosecuted even though he had earlier perjured his way to an acquittal.

A loss of moral credibility is disastrous not only because it undermines effective crime control but also because of where that loss can lead. Once enforcement falls below a critical point that allows criminal elements to corrupt or threaten the process itself, there is no easy way back to stability and governmental control without infringing on liberties in the most serious way, dramatically more than would have been required to avoid the problem in the first place.

The criminal justice system need not be stuck with its current sketchy reputation. It can change the way it does business by committing itself *above all else* to doing justice and avoiding injustice.

As part I makes clear, that change is not just another in a long line of modern innovations, but rather a return to what human groups did before the advent of government and law. It is not a modern reform at all but rather returning us closer to the way humans dealt with one another before modern reforms disconnected us from one another and from our human nature.

Five specific proposals are offered, which logically follow from the analyses in part II.

### **11. Collapse: Escobar's Colombia**

Illustrative stories include drug-trafficker kingpin Pablo Escobar's taking control of the Colombian government in the 1980s, and what was required to regain governmental control.

### **12. Taking Justice Seriously: Five Proposals**

1. Purge the criminal justice system of rules and practices that give offenders more punishment than they deserve.
2. Purge the criminal justice system of rules and practices that subvert having justice done.
3. See the big picture: Set punishment according to an offender's blameworthiness as compared to other offenses and offenders.
4. Create or designate a public body—a justice commission—to both promote justice and fight injustice.
5. Regularly ask whether the present community's judgment might be wrong.

### **Epilogue: What Are They Doing Now?**

Picks up each of the book's stories where it left off and tells what has happened to the people since.