

Colorado Springs Independent: Crimes of Punishment

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by J. Adrian Stanley

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On the Huffington Post, David Fathi's blog entries sport headlines like "Supermax Prisons: Cruel, Inhuman and Degrading" and "A Reprieve for Turkeys, But Not for People." (The latter article was festively timed for Thanksgiving.)

Suffice it to say, the man has some opinions when it comes to the American style of dishing out justice.

Fathi worked as a staff attorney for the American Civil Liberties Union from 1990 until 2010, when he was promoted to his current position as director of the ACLU National Prison Project. The project has been around since 1972, fighting unconstitutional prison and jail conditions.

Fathi's experience isn't limited to his ACLU work. From 2007 to 2010, he also served as director of the U.S. program at Human Rights Watch, which researches and defends rights of vulnerable groups. Fathi, who lives in Washington, D.C., has also lectured internationally on criminal justice issues and written editorials for the Los Angeles Times, Chicago Tribune, Houston Chronicle and others.

For all these reasons, the Independent was excited to catch up with Fathi when he visited Colorado last week. A bonus was learning of Fathi's intimate knowledge of issues close to home: the impact of certain policies and procedures at El Paso County's jail, and the effect of Colorado's private prison systems on human rights protections.

Indy: El Paso County's jail has long held Immigration and Customs Enforcement detainees, and makes a good sum of money doing so. Do you see any conflicts in doing this?

David Fathi: There are a number of problems. First of all, it just makes it very difficult for ICE to enforce minimal standards of health, safety and humane treatment when it's subcontracting with so many jails large and small all over the United States. So there's a real accountability and oversight problem.

And secondly, there's the fact that ICE detainees, they're civil detainees. They're not even accused of any crime ... let alone convicted of any crime. And so when you have them held in jails, which are facilities for people who are accused or convicted of crime, you get an almost inevitable lowering of the standards.

The courts have said that civil detainees are entitled to better conditions and better treatment than criminal detainees, but if they're all being held in the same jail, [and] they're all being guarded by the same staff, inevitably you're going to get kind of a dilution of the supposedly better treatment that the ICE detainees are supposed to receive.

Indy: El Paso County recently got into trouble with the ACLU when it disallowed prisoners from sending letters and instead allowed only postcards. It's since rescinded the policy. You have written about other crackdowns on inmates' ability to communicate with the outside world, across the nation. What's driving this trend and what are its consequences?

DF: Well, it's hard to know what's driving it — and I'm sure you know that I am [legal] counsel along with the ACLU of Colorado on the El Paso postcard case, and also we have a similar case against Boulder County.

The postcard rule, as far as I can tell, it really is just a fad. The infamous Sheriff Joe Arpaio in Maricopa County, Arizona, went to postcard-only policy a few years ago and as far as I can tell, this really is a copycat phenomenon. There's no sort of reasoning that's going on behind the adoption of these policies. But the consequences can be quite severe for prisoners and for their families.

It's important to realize that these policies affect not only the rights of prisoners, but the rights of free people on the outside that want to correspond with them. And we know from just the two cases we brought here in Colorado that the postcard-only rule can really interfere in a significant way with prisoners' attempts to remain in contact with their family and friends on the outside. And we know that one of the best predictors of successful reintegration after incarceration is whether you have kept in touch with your family on the outside. So it really is a counter-therapeutic and counterproductive measure from a public-safety perspective.

Indy: This push to cut off prisoners from outside contact is a trend in prisons as well, right?

DF: Yes. For example, in the federal system — maybe this is what you're referring to — they've established so-called "communication management units" at federal prisons in Terre Haute, Indiana, and Marion, Illinois. And those are facilities where contact with the outside world is very, very severely restricted. It's eliminated in some cases.

And then you have the phenomenon of supermax prisons, which you have a few [of] here in Colorado, where communication both with other prisoners and with the outside world is severely restricted. So it really is a worrying trend toward greater and greater isolation for at least some prisoners. And again, that's very counterproductive from the re-entry and public-safety point of view.

Indy: What are the First Amendment ramifications of these types of policies? In defense of his postcard-only policy, our sheriff [Terry Maketa] has said that when someone goes to jail or prison, they give up many of their rights: their right to freedom, their right to wear what they want.

DF: Well, obviously the sheriff got some bad legal advice and has reconsidered his position, at least on postcard-only policies. But I'd say the way you just characterized what the sheriff said, that certainly is a gross oversimplification of the law.

It is obviously true that prisoners have fewer rights than non-prisoners. But it is also true, the Supreme Court has said, that no iron curtain separates prisons and jails from the Constitution of the United States.

And in the First Amendment context in particular, the short version is there has to be a security rationale for restrictions on prisoners' First Amendment rights. And restrictions on prisoners' outgoing mail actually has to reach a more demanding legal standard, because the Supreme Court has said outgoing mail has fewer implications for prison security than incoming mail. Which makes sense, right? Because you're worried about stuff coming into the prison or jail. You're less worried about stuff going out.

So policies like the Boulder and El Paso County postcard policies have to meet a more demanding legal standard. They actually have to be necessary or essential to serving a legitimate prison or jail interest.

Indy: You've written about the devastating effects of solitary confinement. Concerns about that form of punishment have recently come to light due to the isolation inflicted upon Wikileaks detainee Bradley Manning. Why is this so damaging, and is there any move afoot to ban it?

DF: We at the ACLU have made fighting supermax and long-term solitary confinement a top national priority of ours, and we have many, many allies in this fight in the civil rights and the religious community. And I really think that we have, for various reasons, reached a tipping point in public consciousness about the harms of long-term solitary confinement.

And let me just point out one aspect that many people aren't aware of: Long-term solitary confinement, supermax confinement, may well become what the death penalty has already become, which is a form of treatment that is seen by the rest of the world as so unacceptable that they will not extradite people to the United States, if they will potentially face supermax confinement.

Indy: Colorado is home to some private prisons. Are there valid ethical concerns about privatization of such an integral part of our justice system?

DF: There are very real concerns. There are real concerns with oversight and accountability.

In most states and under federal law, private corporations aren't subject to Freedom of Information laws, so they just operate in a lot more secrecy than public agencies, which do have to produce documents when they're asked. There's less democratic control. In most states, the

governor can hire and fire the commissioner of corrections, but the governor can't hire or fire the head of the Corrections Corporation of America.

But the real risk, the real danger, is when you combine the profit motive with a uniquely powerless population that doesn't have a lot of political friends and allies. Typically, when a corporation provides bad services, injures or kills people through its operations, there's market discipline. If a hospital did that, people wouldn't go to that hospital anymore. But those kinds of checks really don't operate in the private prison context. Obviously, prisoners don't have consumer choice; they can't choose to go to another prison...

Let me mention one other problem with the private prison industry. President Eisenhower, 50 years ago, warned us about the growth of a military-industrial complex in this country, and what we are increasingly seeing is a prison-industrial complex, a whole constellation of companies and individuals who have a very concrete financial interest in greater incarceration in this country. And that's a dangerous situation. That's bad public policy.

Our incarceration, our criminal justice policy, should be determined by what protects public safety, not by what generates the most profits for CCA or the GEO Group.

Indy: Another subject you've written extensively about is the death penalty, which you oppose. In recent years, the Innocence Project and post-conviction DNA testing have been successful at proving the innocence of prisoners — some serving life sentences or even facing execution. Do you think that's been a wake-up call?

DF: The short answer is yes. I think that part of the staggering growth we've had in the prison population over the last 30 years, the six-fold increase in the prison population, has been facilitated by people having confidence in the criminal justice system — confidence that the system gets it right and convicts the guilty and acquits the innocent. And I think the innocence movement has cast doubt on that. ...

Although the highest-profile cases have been with the death penalty, I think there's a sort of bleeding over of lack of confidence in the criminal justice system more broadly.

Indy: So what do you think the biggest issues are in the prison system in America right now, and what can we do to fix them?

DF: Well, I think probably the biggest is mass incarceration. It's the sheer scale of incarceration in this country, which has no parallel in any country, and certainly no democratic country.

We have about 2.4 million people in prisons and jails, which is the largest absolute prison population in the world, and, more significantly, we have the highest per capita rate of incarceration in the world — a rate that is 5 to 10 times higher than what we usually think of as our peer nations, like Canada, France, the U.K., Italy, Germany. ...

On any given day, one in every nine black men in the United States is behind bars. That is a statistic that almost defies belief. So those are, I think, the twin biggest issues: mass incarceration

and what one author has called "the new Jim Crow," the incarceration of African-Americans to the point that it has become a form of social control.

Indy: What can be done about it?

DF: There is some good news. After years of rapid and substantial growth, the incarcerated population in the United States has actually leveled off, and in many states it's actually dropped slightly. So things are, if they're not getting better, they're not getting worse as fast.

And I think the financial crisis is a golden opportunity to take a hard look at our prison system from a cost-benefit analysis. For other public services we expect value for the money we spend; we need to look at our prison system and see if we're getting value for the massive amounts of money that we spend there. Incarceration is incredibly expensive — I don't know the Colorado-specific numbers, but in many states it's ... even \$40,000 per person per year.

Indy: So if prison isn't the answer, what is? No doubt, we do have dangerous criminals from whom the public must be protected.

DF: I think the first question we need to look at is: Why do we treat as criminal offenses problems that many of our peer nations treat as otherwise? And I'm thinking primarily here of drug use, drug possession, small-time drug selling.

The war on drugs has been a huge driver of prison growth in this country, and it doesn't need to be that way. We could treat drug addiction and drug use as either a private matter that the state has no business intervening in, or we could treat drug addiction as an illness that requires treatment, not punishment. So those are fundamental social choices that we have to resolve as a society.

But even with respect to ... criminal behavior that requires punishment, incarceration is not a one-size-fits-all response. There's all kinds of graduated sanctions: electronic monitoring, probation, community service.

For certain types of violent serious offenses, incarceration will always be appropriate, but if we only incarcerated violent criminals in this country, our prison system would be a fraction of the size that it is now.