THE PUNISHER’S BRAIN

Why do we punish, and why do we forgive? Are these entirely learned behaviors, or is there something deeper going on? This book argues that there is indeed something deeper going on, and that our essential response to the killers, rapists, thieves, and liars among us has been programmed into our brains by evolution. Using evidence and arguments from neuroscience and evolutionary psychology, Morris B. Hoffman traces the development of our punishing brains throughout human history.

Humans, he argues, evolved to cooperate with one another, albeit grudgingly, in order to ensure our survival. That grudging cooperation focused on two areas that were essential for our survival as a social species: not stealing each other’s property or well-being and not breaching promises. Punishment made stealing and breaching sufficiently expensive, and therefore deterred enough of it, to enable our intensely social species to survive and flourish. We blame and punish based on our assessment of two factors: the wrongdoer’s intent and the harm caused. But punishing wrongdoers was also costly to the group, because it risked retaliation and the loss of group members if the wrongdoers left the group. We therefore also evolved a deep reticence to punish and a corresponding urge to forgive, also based on intent and harm. Our ancestral groups delegated the responsibility and authority for punishing and forgiving to one group member – the judge – or a subset of the group – the jury. Over time, these urges to blame, punish, forgive, and delegate became codified into our present legal systems. After tracing the trajectory of this development, Hoffman shows how these urges inform our most deeply held legal principles and how they might animate some legal reforms.

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THE EVOLUTION OF JUDGE
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Morris B. Hoffman
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Before I thank the many people who have contributed to this book, a few apologies and explanations are in order.

Although I spend my days punishing people, I am no expert in the science of punishment. Amateurism is, unfortunately, part of this interdisciplinary territory. Whether you prefer a scientist stomping around in law or a lawyer in the china shop of science may be a matter of taste and perspective. I just hope the chasm I leave between the law and the other disciplines I invade is not so great that I cannot be saved by helping hands from the other side.

Some of my descriptions of natural selection and neuroscience may sound naive or even flat out wrong to science-savvy readers. No doubt there are many examples of both naiveté and error. But other times missing the mark has been quite intentional, when I’ve decided to sacrifice scientific precision on the altar of readability. Examples include phrases that seem to suggest evolution is goal-oriented, including the very first sentence in the Introduction (“Evolution built us to punish cheaters”). I know that natural selection proceeds by chance, driven by random mutations and the ineluctable fact that genes will tend to be selected for whenever they give their carriers a fitness advantage in a particular environment.

A special apology goes to my biologist friend Tim Goldsmith, who schooled me early on in our joint writing efforts never to use the words “urges” or “instincts” to describe behavioral predispositions. But until Tim or someone else comes up with words substantially less clunky than “behavioral predispositions,” “urges” and “instincts” will just have to do.

I have sacrificed some of the legal discussions in the text on the same altar of readability, including summarizing some difficult criminal
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law concepts like attempt, insanity, and the four modern theories of punishment. Special apologies in this regard go to my friends Gideon Yaffe, who has written what I think is the definitive book on attempt, and Stephen Morse, a pre-eminent criminal law theorist with whom I have written about the insanity defense. Throughout the book, whether short-shrifting science or law, I hope readers find that the notes, and especially the sources mentioned in the notes, will be an adequate safety net.

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