



The Perch Pod Episode 46

The Rise and Fall of the Death Penalty

With Maurice Chammah

Jacob Shapiro:

You're listening to The Perch Pod from Perch Perspectives. Hello, listeners, and welcome to another episode of The Perch Pod. As usual, I'm your host, I'm Jacob Shapiro. I'm also the founder and Chief Strategist of Perch Perspectives, which is a human centric business and political consulting firm. Joining us on the podcast today is Maurice Chammah, who is a staff writer at the Marshall Project, which does nonprofit journalism about criminal justice.

Jacob Shapiro:

And also, the author of the book, Let the Lord Sort Them: The Rise and Fall of the Death Penalty in the United States. Maurice and I also went to college together at Cornell University, and have been very close friends for over a decade now, which is wild to think about Maurice. I just want to thank Maurice for coming on and sharing his perspective with us.

Jacob Shapiro:

Listeners, I can't recommend his book highly enough to you, especially if you're an American listener, and especially if some of the issues that we talked about here ring home for you. This is obviously a little bit of a different topic for the podcast, but that's intentional. It's intentional for two reasons. I always wanted this podcast to just be interesting conversations with interesting people about things that are even tangentially related to geopolitics.

Jacob Shapiro:

And I think there are plenty of tangents here that relate them. But also, as Maurice really describes well in his book, how we treat prisoners, and how we deal with life and death, really does go to deeper questions about what justice is, and what our societies think justice is, and what we think about as a collective of terms like good and evil. And that really is what politics is all about.

Jacob Shapiro:

Politics is about justice, and power, and the interaction between them. So, in that sense, this is about as raw as politics really gets, because it literally is about life and death. So, I hope you enjoy it, it's a little bit



different. Again, thanks, Maurice, so much for coming on. Listeners, as always, check us out at perchperspectives.com.

Jacob Shapiro:

If you want more information about the services we provide, or you want to check out some of our newsletters, write to us at info@perchperspectives.com. If you have any comments about the podcast or any other suggestions, take care. We will see you out there. Cheers. Maurice, I call everybody my friend that comes on the podcast, but you're actually my friend. It's really nice to have you here.

Maurice Chammah:

Yeah. Thank you so much for having me. I'm thrilled that we're doing this.

Jacob Shapiro:

Me too. I wish we're doing it in person. But COVID, and everything else that's happening in the universe means, well, we're still looking at each other. Listeners, you don't get to look at Maurice. But I get to look at Maurice while we're talking. Yes, so we're going to go off the beaten path of the usual topics for this podcast a little bit. Although, we'll try and bring it back home. Because fundamentally, as an old professor of mine used to say, everything is about... let's see if I get this quote right. Everything is about sex death, or God, I think.

Jacob Shapiro:

You can basically boil everything in the universe down to those three topics. We don't have to go there. But I wanted to start off by saying, I feel like we're probably going to go towards the abstract part of the conversation, because that's the stuff that I like the most. So, I wanted to start by asking you, because you tell the story of the rise and fall of the death penalty in the United States in this book, through the worldview or lens of a number of different characters.

Jacob Shapiro:

And I wanted to ask you, who was your favorite character, whether that's the most compelling, or the one you most empathize with, or the one that was most intellectually compelling to you? Who's the character that hit you the hardest that you would want readers of your book to focus in on?

Maurice Chammah:

That's a great question, because I feel like I have my personal answer to that question. And then, I have the character that many people have told me, they found the most compelling. And these two characters are both really the central two, of the book. They're both women who made their career as lawyers in Texas.

Maurice Chammah:



I sometimes have to be careful when I say that this book, which is about the death penalty, mostly focuses on lawyers, because I realized for certain people, that is a turn off. But I really came to see through the research that lawyers are these really interesting figures in our society, especially in the context of social justice to the public policy debates, who craft the stories that we all then take in and make decisions based on.

Maurice Chammah:

Most recently, abortion is back before the Supreme Court, and it is an abstract constitutional issue that is getting thought out. But fundamentally, the lawyers are the ones saying, well, here's a set of facts out of Mississippi, out of Louisiana, out of Texas. Here's the experience of an individual woman, and they're lifting these individual stories up to the public sphere.

Maurice Chammah:

And then, those are the stories that we all see these policy issues through. So, I knew that that was how policy works. And I think, in telling the story of the death penalty, I had come to realize that so much of how we understand the criminal justice system is through the individual stories, this person committed a crime, this person was harmed, it's going to be society's response.

Maurice Chammah:

And the people who tell those stories, and who craft them, and who get all the facts, and put them together in a series of events that then lead to an argument are lawyers. And so, the character or the person in the book use the word character, but these are real people. It's a nonfiction book. I just use the word character from a storytelling perspective.

Maurice Chammah:

For me, the one that I just kept coming back to is a woman named Danalynn Recer. She is a lawyer who lives in Houston, and in the early '90s, went to the University of Texas as an undergraduate, basically, committed to spending her life doing social justice activism. And I think this is a familiar storyline to a lot of young people either on the left or the right, frankly.

Maurice Chammah:

And her idealism at that age really spoke to me, and then the way that she went from idealism to practicality really spoke to me. So, what I mean is she starts in the '90s as a student learning about the history of lynching in America, the horrific history of violence against Black Americans in the wake of the Civil War, and well into the 20th century.

Maurice Chammah:

She comes to believe that the modern death penalty is an outgrowth of that, and then she decides I'm going to go to law school and eventually, I'm going to represent men who are facing execution today. And I think another thing that is so compelling to me about her is that nowadays in the public sphere,



people like her are often held up as heroes, probably most famously, a lawyer named Bryan Stevenson wrote a book called Just Mercy.

Maurice Chammah:

Now, that is a film in which the actor Michael B. Jordan plays Bryan Stevenson, and it's really a hero tale of the crusading defense lawyer fighting the machine. But I was also trying to tell this larger story about why America had embraced the death penalty. And crucial to that story was an era in the 1990s when the death penalty was tremendously popular.

Maurice Chammah:

And because it was tremendously popular, the people who defended death row prisoners, but also really, anyone facing prison time for committing a crime, were really looked down upon, and pariahs in society. And I've interviewed dozens of these people who came of age in the '90s. And they all described the conversation at a dinner party where someone says to them, how could you represent those people?

Maurice Chammah:

How could you put yourself on the line for these people who have caused tremendous harm in our society? And today, things look very different. And there's much more of an understanding that many people who commit crimes aren't doing it because they're born inherently evil, but because they have been affected by all kinds of public policy decisions, whether that's failures around mental health or housing.

Maurice Chammah:

People who are born into terrible poverty, and there's also an awareness that our prisons are filled with people who committed relatively low-level nonviolent crimes like possessing drugs. And people like Danalynn Recer have come to be heroes for telling these stories. But what I learned from this book research is that that took work.

Maurice Chammah:

That took entire careers of people post-law school, being pariahs in society, and just slowly moving the needle, and telling these stories of people who commit crimes, and pushing us towards a more merciful idea of what our criminal justice system could be. And that long span that sets up the moment we're in now, where criminal justice reform is a household phrase, was really fascinating to get into. And Danalynn Recer I think, really spoke to me as this irascible, zealous prophetic figure before her time.

Jacob Shapiro:

Those are great adjectives. I hope somebody describes me as that someday. Completely unrelated to the topic of this podcast and your book. I was arguing with somebody who's our age last night about whether we came of age in the '90s. And my answer to this question was unambiguously yes. And she



was arguing with me that we definitely came of age in the 2000s. Do you feel like we came of age in the '90s or the 2000s?

Maurice Chammah:

This is very funny because my wife and I actually have precisely this debate. Not exactly about when we came of age, but that I frequently think things happen in the '90s that actually happen in the 2000s because they were the formative memories for me. And so, as a result of that, I continually mistake the early 2000s for the '90s.

Maurice Chammah:

You obviously could never mistake 911 for having happened in the '90s, and that was formative. But culturally, the Backstreet Boys, or movies that came out that were the things that we imbibed as middle and high school students are all actually from the 2000s. And much of the '90s, we were too young to take in what was happening in the world.

Jacob Shapiro:

Yeah, I guess. So, my point was that I feel like my soul or my worldview was forged with the bouncy optimism of the '90s, whether that was its music and its dress. That was my worldview. And 2001 shattered everything, it was a different world after 2001. But I feel like I was already somewhat formed by that point.

Jacob Shapiro:

Even interacting with 911, I came from this '90s world where it was like, "Wait, bad things happen. I thought we were done with all this." Whereas, I imagine that people who came of age after 2001 have a completely different experience. For them, their entire lives, we've already been at war. They don't remember a period where everything was fine. I don't know. We don't-

Maurice Chammah:

That's true. No, I think you have a point there. I think our upbringing, especially as relatively privileged, especially really, as white men in America. We both had Jewish upbringings, which is a slightly more complicated tale, but it was a world of plenty in a lot of ways. My first awareness of politics was definitely the Clinton-Lewinsky scandal.

Maurice Chammah:

And that was scandalous, but it didn't fundamentally suggest that the world is really broken. And it seemed like one leader was an idiot, and did something really bad, and our institutions were going to fight over it, but it felt like so low stakes in retrospect.

Jacob Shapiro:



Yeah. All right. We won't go too far on that. I'm curious, you said that, so Danalynn Recer is your favorite character. Who is the character that everybody else tells you is their favorite? And are you surprised that it's not one of the people actually on death row that is one of those characters? Or was that an intentional choice to make this story about lawyers as the stewards of these ideas?

Maurice Chammah:

So, a good question. So, the book does talk about a lot of people on death row. I want to be careful in how I talk about this. I knew that many readers would find the life experiences on people on death row, very hard to sympathize with or understand. Even if they could sympathize with the poverty, the dysfunction, the trauma, the violence that marked the early lives of people in death row.

Maurice Chammah:

And that led them to the point where they committed a murder, I knew that as a writer of a nonfiction book for an audience of book readers who were going to pay 20 something dollars for this book, that those narratives, you have to bring people to them, in the sense that you can't just... part of the problem of the criminal justice system is this empathic divide between people who make policy decisions and vote, and people who are actually affected by these systems.

Maurice Chammah:

And lawyers are these really interesting mediators between those two worlds. They're the people who go to the jail, Danalynn Recer would spend hours and hours and hours of the jail, getting to know, befriending these people who are facing the death penalty or life in prison. She gets to their families. She'd go to their churches. But she was a highly-educated person, who had spent her formative years in Austin, Texas.

Maurice Chammah:

So, she was, to me, this very interesting mediator between these worlds. And that was another thing that I think pulled me towards her. Now, the person that most readers have told me they connected with and who emerged, I think, as a key person in the book later into the research process, she was not one of the first people I encountered. And she was also somebody that my editor really encouraged me to focus on, is named Elsa Alcalá.

Maurice Chammah:

And just the thumbnail sketch of her life is that Elsa was born in Kingsville, Texas, which is closer to the border into a lower-middle class Mexican-American family. Her parents both died when she was very young. And she's in middle school, and she was in the middle of five siblings, and they ended up basically raising each other without a whole lot of parental or adult involvement of any kind.

Maurice Chammah:



It was before the era in which child protective services might have swooped in, and they lived as kids in a house together. And given that history, it's easy to imagine that some of them may have ended up in more dire circumstances. But most of them went to college. And in Elsa's case, she went to law school. And then, she had this illustrious career where she first became a prosecutor in Houston in 1990s.

Maurice Chammah:

And Houston was the epicenter of the American death penalty, it was the epicenter of a punitive criminal justice system. And she became a prosecutor who sent multiple men to death row, and many, many, many men to prison for long terms, for violent crimes, and was really bought in on that system, was really mentored by some of these tough on crime prosecutors.

Maurice Chammah:

And then, as an ambitious Republican Mexican-American woman, is appointed to a series of courts. She becomes a criminal court judge in Houston, and then works her way up, and is eventually a judge on the highest criminal court in Texas. It's called the Court of Criminal Appeals. And there, she has this entire turn in her viewpoint, where once she's not just in Houston, and she's looking at the whole state of Texas, and she's learning about more and more cases, she's starting to see injustices.

Maurice Chammah:

Some of those injustices reminder of her upbringing, and the horrible life stories of people on death row, precisely the kinds of stories that Danalynn Recer has been telling. And over time, she becomes this vocal critic of the death penalty in Texas, and also the American criminal justice system, and is slowly radicalized into what we would consider a more of lefty position these days.

Maurice Chammah:

And that entire I think, life story, and the huge turn in it, I think, is really compelling to a lot of people. And it in some way, mirrors I think the turning viewpoint of a lot of Americans over the last 30 years when it comes to criminal justice. And so, that's the story that really spoke to people. And I'm, as a result, very glad that it's there, too.

Jacob Shapiro:

Yeah. It actually makes the '90s comments somewhat relevant, because I do remember in the '90s, this was a thing that people would argue about all the time. And it's not something people argue about anymore. We're arguing about gay marriage, or marijuana legalization, or abortion, this one has fallen off.

Maurice Chammah:

It has. I interviewed a longtime Texas Republican politician named Jerry Patterson, who was very involved in these issues. And he was a state senator in the early '90s. And he said to me that anytime he



was out in public back then, and he would meet somebody, just a member of the public who was excited to meet a politician, and nervous, and didn't know what to say.

Maurice Chammah:

Their go-to gut question was do you support the death penalty? And of course, they knew his answer was going to be yes. And it would give him a moment to have a little glory. But the death penalty was definitely a culture war issue. And I felt like part of the process of this book research, which was essentially looking at the last 40, 50 years, was about reminding everyone that we used to have this other culture war issue that has fallen off the radar. And it's interesting to look at why it fell off the radar and what it says about us.

Jacob Shapiro:

Yeah. Well, I think that's a good place to do a little bit of background. I don't want to give people too much, because they need to go and read your book. You hear that, listeners? But walk us through a cliff notes version of how the United States basically bans the death penalty for all intents and purposes in 1972.

Jacob Shapiro:

And then, in a period of four years, if it comes roaring back, and then has this renaissance, and now is going into this slow death, pun intended, which is the basic thesis of your book. But just set the scene for us as to what happens in 1972. And then, what changes between '72 and '76 that brought us to our current reality?

Maurice Chammah:

Sure. One thing I feel like I'm always telling people, when I just meet them out in the world, and they ask about what I do, and I tell them that I mostly read about the death penalty. They think of it as something that's always been around in American life. And to some extent, that's true, but it's also not true. And there are states like Michigan, for example, that hasn't had the death penalty since the 1850s.

Maurice Chammah:

So, the death penalty has actually had this very chaotic history in the United States. And in the 1960s, we almost abandon it entirely. And this was, at the same time, that France, and England, and Germany, many, many European countries were banning the death penalty. And also, banning things like life without the possibility of parole. These are really harsh criminal justice sentences.

Maurice Chammah:

And in 1972, the Supreme Court ruled that the death penalty was violating the Constitution, and not that executing somebody for a murder in it of itself violated the Constitution, but that the system of laws that we had in all the different states that carried it out, was creating a system where who got the death penalty was totally arbitrary.



Maurice Chammah:

One judge compared it to being struck by lightning. Of all the murders in America in 1971, a random scattered handful, mostly black, mostly poor, but even among those populations, random groups were being executed. And that could have been the end of the death penalty in the United States forever, which I think is really shocking.

Maurice Chammah:

And instead, what happened was a huge backlash in which many states said, if you're going to try to get rid of the death penalty, we're going to do everything we can to bring it back. And many, many states, mostly in the south went about writing these new death penalty laws. I should also say, historically, this was the Nixon era.

Maurice Chammah:

And there was a really strong American backlash to the Civil Rights Movement. There was this sense that the Civil Rights Movement had produced all of these gains that White southerners were really angry about, whether that's in the area of voting rights, or in the area of education and welfare. There was a lot of anger around that.

Maurice Chammah:

And there was also a lot of anger in how it seemed like the Supreme Court was constantly giving criminals "new rights." I mentioned in the book, the movie, Dirty Harry, which is probably familiar to the listeners, and that movie better than anything, encapsulates that era, and that viewpoint of criminals are running amok, and we're just handcuffing police and prosecutors as they try to go after them.

Maurice Chammah:

So, that rage to this idea that criminals, and it's a racially coded idea for sure, but that they're running amok leads to this backlash, where states race to write new death penalty laws, and they start sending people to death row again. And in 1976, the Supreme Court revives the death penalty, basically saying you've figured it out, you have these laws, we're willing to let you send people to death row again, and start executing them.

Maurice Chammah:

Executions start to happen in the late '70s. And then, this, that's the first couple of chapters of my book. And then, I tell the story about how the numbers grow, and grow, and grow in the '80s and '90s. And fall, and fall, and fall from about the year 2000 to today.

Jacob Shapiro:

All right, a lot to unpack there. The first thing I want to ask is, because I think you're right about talking about the politics of the time, because it was a backlash to the Civil Rights Movement. But you've got



the Vietnam War, too. You've got the assassination of Dr. King, and RFK, and JFK. There's a real crisis of confidence or crisis of identity within the United States at that point.

Jacob Shapiro:

This is also the birth of the modern Republican Party, the southern Dems, basically get expelled from their positions by a Texan, good old Lyndon. While he's dropping the bombs in Vietnam, he's also slowly unprying their hands from the power that they've enjoyed for all these decades, and all this stuff gets wrapped into it. So, I've seen a lot of people comparing the 1960s to the moment that we're going through right now.

Jacob Shapiro:

Does the moment we're going to right now feel like that to you based on the research you've done? And maybe it's not going to be about the death penalty. Maybe it'll be about reproductive rights or other legal issues that we're talking about. But do you feel that that's a good comparison? Or do you think that the '60s and '70s really stand alone on their own, and we shouldn't be trying to compare them as if they were similar phenomenon?

Maurice Chammah:

I think the historical comparison is worthy, as long as we're hyper aware of all the caveats. I don't think that the 1960s and '70s had a comparable rise in anti-government militancy on the right, for example. The birth of the modern Republican Party and the southern Dems was skeptical of federal power, but was basically bought in on government institutions, in a way that you cannot say, of a large swath of the country now that voted for Trump.

Maurice Chammah:

But I do think that what is a really clear comparison between then and now is the use of coded language around race to anger people. By which I mean in the 1970s and '80s, a major way in which the nascent Republican Party that we know today built its power, especially in the suburbs was through the fear of crime. The death penalty was the biggest, most symbolic response to the sphere of crime, but not the only one.

Maurice Chammah:

Certainly, just the construction of prisons, and massive ballooning of things like three strikes laws, and zero tolerance policies that increased the sizes of prisons were part of that story too. But I spent a lot of time in this book research looking back at Lee Atwater, and the Michael Dukakis race in 1988. And the way that Republicans now, in ways that they will admit after the fact, used race to whip up people to vote based on fear.

Maurice Chammah:



Atwater, I think one at one point actually said specifically, we used to use the N word, and now we can't anymore, so we just use the word criminal. And many high up people in Nixon's administration have essentially admitted this after the fact. It's not exactly a secret. And I feel like I see strong elements of that in Trump's rhetoric in 2016.

Maurice Chammah:

Of course, he was more focused on immigration and referring to Mexicans as rapists and criminals. And frankly, Trump is not the person to look for coded language. He's a little more explicit, but under Trump, there's a really large swath of American leaders who do in a way that very much reminds me of the '60s and '70s, talk about the menace of crime in a way that feels like they're talking about race without talking about race.

Maurice Chammah:

A lot of the research for this book involved reading trial transcripts from the '70s through the '90s, which maybe sounds boring, but it's actually incredibly fun, because these read as like these duels between the prosecution and the defense over the fate of human life. And there are these really fascinating, and textured debates about what we as a society should do to respond when somebody has done something awful.

Maurice Chammah:

When by something awful, I mean committed murder, or multiple murders really violated the social contract in the deepest possible way. And I found those debates fascinating to read. And one reason why was because you would see a lot of the similar coded language trickle down from Washington.

Maurice Chammah:

So, you would see prosecutors say things like when you go home at night, and you're walking the streets, you're always afraid of them, you're worried they're going to break into your house, and kill someone close to you. And technically, they are talking about serial killers, or criminals, or they're not talking about people of a particular race.

Maurice Chammah:

But you can easily imagine the members of what we're often all White juries, thinking, yeah, you know what, I am worried about those people. And they don't even have to admit to themselves that they're talking about Black-Americans, but they are. And this coded language just percolates through all these different trials.

Maurice Chammah:

And that, to me, I think lit up my sensors to where in current political rhetoric when you hear politicians talk about crime. Especially, in the last year, where there's been a major kind of backlash to the police protest of last summer. People talk about rising crime and again, they don't have to talk about race, but



there's racial elements to what they're saying between the lines that you have to have your antenna up to catch.

Jacob Shapiro:

Yeah. That's a really good point that I hadn't thought of. And it seems to be metastasizing almost into every single issue, not criminal justice reform. This is a lighthearted example. But my wife and I were at a Luke Combs country concert a couple of weeks ago. And she hadn't heard the Let's Go Brandon stuff. And after the concert, scores of people just shouting at the top of their lungs, Let's Go Brandon.

Jacob Shapiro:

And she was like, "What is this Let's Go Brandon thing?" And I explained it to her, and she pointed out, she was righteous, "That's so stupid. If they hate Joe Biden, why don't they just say, Fuck Joe Biden. I don't understand why we need all this coded language stuff." But I think that's a very low stakes example.

Jacob Shapiro:

But I think you're right that all the media ecosystems and social media ecosystems that we all live in. We all have our own vocabularies now for how we're talking about these things. And it probably makes it hard to talk about them to people who don't share our political perspective.

Maurice Chammah:

I think that's true. And I think the seeds of that story began 20, 30 years ago. And these criminal justice trial examples are an early example of them starting to percolate. I also think that there's a certain pleasure of being in group that has a winking vocabulary, even when you know that everyone on the other side actually knows what it is you're saying.

Maurice Chammah:

It's not like Democrats don't know what Let's Go Brandon means. But it's like there's a pleasure in spitting in people's faces by saying like, I'm not actually saying F Joe Biden. It almost reminds me when we were children, and you would put your hand right in front of someone's eyes, and you'd say, "I'm not touching you, you can't get mad, I'm not touching you." If that's similar, like there's a sort of childish energy to it.

Jacob Shapiro:

Yeah. The second thing I wanted to pick apart from what you were talking about before though, was obviously, the geography of the death penalty in United States, which does get directly on to some of the things that are in the wheelhouse of what I do. And to ask why the South is the one leading the charge here.

Jacob Shapiro:



You tease us in the book with this thing about cultures of honor, and about why cultures of honor create societies that might have been more conducive to slavery. And maybe that explains why the South has been a leader when it comes.

Jacob Shapiro:

I think, maybe after this, we'll have to disaggregate incarceration, and death penalty, and talk about similarities and differences between them. But for just the death penalty, why is the South the one leading the charge? And why Texas in particular? Is Texas different from the South, or is it a southern thing?

Maurice Chammah:

So, in the book, I make the argument that Texas became the epicenter of the death penalty for both cultural reasons, and for logistical policy oriented structural reasons. But at a certain point, those reasons become self-reinforcing and over determined.

Maurice Chammah:

And so, it's a chicken egg debate, like so many other things where part of it is that Texas had this idea of itself as a frontier society that needed to use the things like the death penalty to combat a more violent culture, which is not empirically true, necessarily, but it is a perception.

Maurice Chammah:

And then, the perception helped create the reality, which is we have then more violent responses to crime, which then produces more violence. So, I think that the reason the death penalty is so strong in the South is an impossible story to tell without slavery and the Civil War. In the book, I do just tease, and I dabble in the historical literature that tries to understand why the South developed certain cultures out of slavery.

Maurice Chammah:

But of course, slavery began primarily with economics at the heart of it, and then over time, becomes a cultural story that people tell stories, basically, to justify the economic arrangements that that Black people are lesser than white people, and thus, more fit for working. And then, after slavery is abolished, and the South loses the Civil War in the late 19th and early 20th century, the narrative is we need big prisons and lynchings in order to maintain safety, because Black people are inherently more violent.

Maurice Chammah:

And then, it gets even more abstracted in the later parts of the 20th century, but you still see references in court to Black people being more dangerous because of their race. And you can draw a straight historical line all the way back to the early 1800s without really even too much work. I don't know, I lose my train of thought entirely. I'm trying to think of what's the best point to jump off from there.



Maurice Chammah:

I think that one reason why the modern death penalty has been so powerful in southern states, is because the cultural belief in the death penalty, the desire to have a death penalty, and also the political incentives to keep a death penalty. The extent to which Governors, State Supreme Court justices who are elected, and local prosecutors who are elected could benefit politically from pursuing the death penalty is just so strong at all layers of government in southern states.

Maurice Chammah:

So, you look at a place like California or Nevada, they may have really gung-ho tough on crime prosecutors, who want to send lots of people to prison and to death row. But then, you have Governor Gavin Newsom, who has no interest in executing anybody. And what I learned is that in order for a state to really maintain a death penalty system, which is a lot of work, and a hard thing to do, and it's expensive.

Maurice Chammah:

In order to do that, you have to have every single institution working in political lockstep, the courts, the governor's office, the local district attorneys. And if any one of those shows some ambivalence, because they're personally ambivalent, or because they're answering to voters who don't all support the death penalty, someone like Gavin Newsom, a lot of his constituents don't support the death penalty because it's the more blue state.

Maurice Chammah:

It can totally disrupt the extent to which the actual death penalty ever actually gets carried out. So, I think there's this cultural story to tell about the South. But what that ends up meaning in the present, and I think you could extrapolate this into other policy areas, too, is that in order to have a certain outcome, you have to have lots and lots of different institutions in society working in lockstep. And that's what we see with the death penalty in Texas as the uber example.

Jacob Shapiro:

Well, and then to zoom out again, so that was a domestic geography question. But I was just as you were talking, looking this up, because I should have had these figures at my finger before. But I'm countries with the most confirmed executions for 2019. So, this is pre-COVID is, I also love, they say that they don't know the totals for Vietnam, North Korea and Syria. I'll just leave that aside.

Jacob Shapiro:

But the top six is China, Iran, Saudi Arabia, Iraq, Egypt, the United States. It's not a list you really want to be on. And it's certainly, all those countries are fundamentally different than the United States in many ways. Do you have an answer for why the United States is stuck to the death penalty, while other liberal democracies in the world have basically outlawed them?



Maurice Chammah:

Yeah, absolutely. And I think about that list all the time, the fact that we... and this is a constantly rhetorical point made by opponents of the death penalty in the US. They always are saying like, do we really want to be in the human rights company of Saudi Arabia and China? And the answer to that question that I've come to, and it's taken a lot of years to get there is a slightly uncomfortable one.

Maurice Chammah:

And that is that the death penalty in America is unique from these other countries, because it is actually more directly the product of our democracy. In these other countries, it's in some ways, a tool of authoritarianism. And the number of people who are being executed because they committed murder versus because they displeased the non-Democratic leadership of that country is sometimes blurry.

Maurice Chammah:

In the case of North Korea, it's extremely blurry. It's totally black box. You have no idea how many of those people committed murder, and how many of them just displeased the leadership there. America is not exclusively alone in the world. The other example that is worth noting here is Japan, which actually also has a death penalty that is a little bit more democratic like here.

Maurice Chammah:

But the point I always make about America is that unlike all these other countries, we have the death penalty because we chose it, and we want it, and we profess to keep wanting it. And at this point, roughly 50% of Americans still say they believe in the death penalty, even after decades of examples of likely innocent people being executed.

Maurice Chammah:

Even after more than a decade of scandals in which people died on the gurney in ways that look horrific and torturous. And the public is made aware of this. So, there's just a strong democratic impulse. And I think America, unlike western European democracies, has democratized its criminal justice system more than some of these other places. And to illustrate this, I'll just quickly tell a story about Germany. So, about five years ago, I... or I guess it was, start that sentence over again.

Jacob Shapiro:

It's fine. Time in the age of COVID makes no sense anymore.

Maurice Chammah:

That's very true. Six years ago, I had this incredible opportunity to visit prisons in Germany. And part of what was so incredible about it was that I went with American criminal justice professionals. I went with a delegation that had been put together by, I think called the Vera Institute. And the delegation included four commissioners of State Departments of Correction in America.



Maurice Chammah:

So, the top guys at various prison agencies, some prosecutors, some policy wonks, and associated other people. And I was, I think, the only journalist on this trip. And the idea was that I would be embedded in this delegation as they saw German prisons through American eyes. And German prisons, this may be news to listeners or not, are very different than American prisons.

Maurice Chammah:

They mostly resemble college dormitories. You walk into anyone's room, and there's a phone, and a computer, and there are communal kitchens where they can all use knives to cook food, even if they've been convicted of murder. It's extremely progressive in the sense that it puts a lot of trust in the incarcerated people.

Maurice Chammah:

And the people who work in these prisons don't see themselves as guards, which is the way that maybe corrections officers in America are likely to be trained and thought of, and more to see themselves as something more akin to social workers that they want to get to know the people who are incarcerated, and help them therapeutically figure out what went wrong in their life that led them to commit an assault, or a theft, or a murder.

Maurice Chammah:

And then, after a few years, they are released back into society. And at that longest amount of time that people in Germany for the most part are incarcerated is something like 10 to 20 years. In America, it's very frequently if you commit murder, you're going to be in prison for 40 years to the rest of your life, or 40 years may be the rest of your life. Because our prisons are so bad.

Maurice Chammah:

I tried to think of a stronger word, or a more nuanced word than that. But American prisons are hellacious places to spend time. And so, I have this really rich textured week in Germany, and I learned that Germans as a whole, as voters aren't necessarily always thrilled about this. That there will frequently be a murder that is high profile, and reaches the tabloid newspapers in Germany as it would in America.

Maurice Chammah:

And there's societal outrage and anger at the person who committed this crime. And there's a layer of society there, there are prosecutors and judges who are not elected like they are here who say, "Well, society is mad and thinks this person should get the death penalty or be in prison for the rest of their lives." But we want a more therapeutic justice system.

Maurice Chammah:



And so, they're actually just going to go to prison for five years or 10 years. And there was a libertarian policy. I'm just going to call him a policy wonk, a guy who worked at a think tank who was on this trip. And I remember a conversation with him where he said I'm very uncomfortable, because this actually feels less democratic than the United States.

Maurice Chammah:

It feels like these judges and prosecutors purport to know better than the population, what the policy answers are to crime. And I came away from that thinking that is true. And in America, we always valorize democracy as this incredibly important thing that we wouldn't want to trade away.

Maurice Chammah:

But when you get direct democracy, and that also allows for the base emotions of anger and outrage to swamp the emotions like mercy, and sobriety that judges and prosecutors could present. And we directly elect our prosecutors and judges, and they don't do that in Germany. And we have death penalty, death sentences handed down by juries of just 12 people who are brought in off the street, which they do not do in most Western European countries.

Maurice Chammah:

And so, I think the uncomfortable answer to this question, and this has been a long-winded way of getting there is that they have decided to trade away a little bit of their direct democratic processes in the interest of having sober, careful expertise, lead them towards a more merciful system. And whether that's right or wrong, it's not for me to decide.

Maurice Chammah:

But I came away from that trip with a lot more clarity about the fact that American punitiveness is not just a bunch of leaders manipulating us. It's something we as a society have chosen.

Jacob Shapiro:

That's a great answer. Also, I'm impressed with us that we got about 42 minutes in before needing to stop, and untangle incarceration from the death penalty, and how they're related, and how they're different. So, why don't we just dive right in there? Because the book is on the death penalty, but your life, oh, hello, Ethel. A demon cat has just appeared on Maurice's screen. So, if he dies suddenly, it's because Ethel is the demon of an ancient world.

Maurice Chammah:

It's true, but she may chime in with the relationship between incarceration and the death penalty.

Jacob Shapiro:

I would be happy. Well, don't trust anything Ethel says. It really is. It's the siren song of your moral capitulation into degeneracy. So, how is the death penalty similar or different from incarceration? Do



you think about those things as fundamentally different things? Because we're talking about the geography of this stuff, incarceration rates are also greater in the southern part of the United States.

Jacob Shapiro:

The United States also incarcerates at a much more frequent level than most of the other countries in the world. So, how do you go about disentangling those things? Or are they all part of a system, and you have to think of them in the same breadth?

Maurice Chammah:

They are all deeply enmeshed with one another. And so, I do often think of them in the same breadth. The death penalty is a very rare thing, even in countries that use it a lot. Just frankly, I don't have the numbers for China. But the number of people who are incarcerated there versus the number of people who are sentenced to death and executed there, there's a massive distinction.

Maurice Chammah:

And like America, all these other countries with the death penalty sentenced to death and execute a tiny, tiny, tiny fraction of people, of the people that are incarcerated. And in America, there are thousands and thousands of murders every year. And this year, there are going to be between 10 and a dozen executions in the entire country.

Maurice Chammah:

And so, the death penalty is this extremely rare punishment, compared to incarceration, but it's also an incredibly important symbolic punishment, because it's the part of criminal justice policy that became a cultural issue in the '90s. And it became the way for political leaders here to say to the public, we're doing something about crime, even if it was not a particularly efficacious way of dealing with crime.

Maurice Chammah:

Because you're only sentencing a tiny fraction of people to death. So, when I just entangled them, I mostly describe the death penalty as the symbolic peak of a punitive criminal justice system. And I think that this would hold true in countries other than the United States. If you have the death penalty, then life without parole seems less severe by comparison.

Maurice Chammah:

Whereas, in Western Europe, life without parole seems incredibly severe, because they don't have the death penalty. And they don't even really sentence people to life without parole. And then, as a result in America, that means that 40 years seems even more lenient by comparison. Again, in Germany, 40 years seems incredibly punitive. And it trickles all the way down, not to invoke trickledown theory here.

Maurice Chammah:



But it does really trickle down culturally in the sense that when you have this incredibly punitive possibility at the top of the system, no matter how rarely you use it, it renders everything else more lenient by comparison, and it skews, and I don't mean that word judgmentally, but it empirically skews your perception of what is punitive and what is lenient. Because it's part of the picture. And if it wasn't, then the range of possibilities for how to punish a crime would be much narrower. Yeah, I'll leave that point there.

Jacob Shapiro:

Yeah. It's also difficult because the data here is harder to deal with, because it's pretty clear who executes most of their people in the world. But who imprisons people at certain rates is harder, because China has an official rate, but then how do we talk about Xinjiang? Because that's probably millions right there. And then, there's administrative detention, versus prison, versus this, that and the other thing.

Maurice Chammah:

And how do we disentangle... I think something I struggle with when you talk about criminal justice policy in other countries, or I should say, in authoritarian countries, is that the distinction between, like I said before, people who commit crime, and people who do something that angers the government is sometimes a hard line to draw, and sometimes a murky line.

Maurice Chammah:

And in the United States, there are people who are incarcerated for like Chelsea Manning, who do something that is treasonous, or that is perceived as treasonous to the government. But the vast, vast majority of people in America who are in prison are there because they are accused of a crime, and not a crime against the government.

Maurice Chammah:

A crime against other people, or a crime that the public has deemed democratically to be illegal, like the drug crime. So, it can be hard to disaggregate because other countries are incarcerating and executing people for reasons other than committing a crime, as we as Americans understand that phrase.

Jacob Shapiro:

Yeah, no, it's impossible to deal with because if you take out the big authoritarian exceptions, like Russia and China, I'm looking at this list now have largest number of prisoners per 100,000 people. And you got the United States, but then you have El Salvador, which is the stand-in for all the narco states, and all the drug terrorism that happens in Central and South America.

Jacob Shapiro:

So, that's its own bucket. You've got Turkmenistan, everybody's favorite dictatorship with the DJ, President, dictator. And then, you've got random democratic countries in there, like Rwanda and Costa



Rica, which you wouldn't think would be on that list, and the United States is there with them. So, I have no way to generalize that, but it's-

Maurice Chammah:

It's a hard thing to do. And I think one thing about the death penalty is that as it gets... I think one way to think about it is that 500 years ago, pretty much every society had the death penalty, and use it a lot. And it was a fairly solid fact of life. And over the last 200 years, with the rise of human rights discourse, and a new understanding of human life is sacred, in that sense, you've seen less and less use of the death penalty.

Maurice Chammah:

At the one extreme, no death penalty in the EU, and at the other extremely authoritarian countries like North Korea, and places like the United States, somewhere in between. And as the world generally turns towards away from the death penalty, the data you get is noisier. And I think that this is actually true within the United States as well.

Maurice Chammah:

For example, in the last several years, the Trump administration was responsible for 13 executions, and states were responsible for roughly a similar amount. And had Trump not been in office, had it been President Hillary Clinton, the federal government probably would have carried out no executions. And the number of people executed in the United States would've dropped to the lowest point ever.

Maurice Chammah:

But then, it would have zoomed right back up when a Republican was in office again. So, it's like, as the death penalty disappears, internally to America, and I think you could extrapolate and say across the world, just the information you have to analyze about it is much, much noisier. And it's harder to generalize in a global way.

Jacob Shapiro:

Which is a good segue into asking you, because the thesis of your book is that the death penalty is on the way out in the United States. And it'll be a slow torturous deterioration, but that it will eventually go. Has anything that's happened with the Supreme Court in the last two to three years or since the book came out changed your mind? Because there's some weird stuff happening in the Supreme Court.

Maurice Chammah:

It's true. A story I sometimes tell before to get a dark laugh is that when I was proposing a book, I wrote a book proposal, and went to publishers in mid-2016. And a question I got over and over again was, well, what do you expect to happen with the death penalty under President Hillary Clinton? And I think, like many, surprised by not just that we elected Trump, but the overall cultural swing represented by him.



Maurice Chammah:

And while I was finishing up the book, he was pursuing lots and lots of executions, and you saw what felt like a turn back towards the death penalty. And I sometimes started saying that the book's subtitle could be the rise and fall and question mark of the death penalty. And to me, it raised the question of going forward, what are we going to do?

Maurice Chammah:

But I still, when I try to take a step back from the individual news stories, because when one execution is on the news, it can swamp your understanding, and make it seem like the death penalty is much more prevalent than it is. And Kim Kardashian is talking about how someone innocent is going to be executed, which has happened a few times recently.

Maurice Chammah:

It can seem like the death penalty is rearing its head back up. But I don't think that the events of the last couple of years hold a candle to the pro-death penalty backlash of the 1970s, in which states were racing to meet the Supreme Court's demands. Now, there was a moment five years ago in which it seemed like maybe the Supreme Court might be on the precipice of abolishing the death penalty once and for all.

Maurice Chammah:

And there was this moment in 2015, '16, when I talked to a lot of defense lawyers, and they were totally convinced this could happen. And you can imagine an alternate history in which Hillary Clinton was elected president, and appointed two or three people to the court, and there was a solid liberal majority to just strike down the penalty once and for all.

Maurice Chammah:

And that might have led to a backlash, the counterfactual history there gets pretty speculative the deeper you get into it. But I think what happened under Trump is that he appointed three very conservative justices who are very pro-death penalty, as seen in their unwillingness to rule in favor of people on death row. And that just means that the story is no longer at that level.

Maurice Chammah:

Much like how we can maybe think of abortion if the court strikes down Roe v. Wade. By making a big decision like that, they take themselves out of the picture, and the story becomes about the states. And in the Roe v. Wade context and abortion, I think we may be looking down the next few years of a lot of states trying to pass anti-abortion laws.

Maurice Chammah:

But in the world of criminal justice, and the death penalty more specifically, but I would really generalize to all criminal justice, the trend is not as clear. And if anything, it cuts the other way. So, Virginia



abolished the death penalty, it was the first southern state to do so in the last couple of years. No state has brought the death penalty back after abolishing it.

Maurice Chammah:

So, it's just been a series of states abolishing it. Virginia, Colorado fairly recently, there's some momentum behind an abolition push in both Ohio and Nevada, go on and on about the pictures in different states. But even in conservative southern states, the number of executions are going down year by year.

Maurice Chammah:

And I wrote a story earlier this year, for the Marshall Project where I work, about a bunch of very pro-Trump, very conservative state legislators in Oklahoma, who are really worried about executing someone innocent, and are pushing bills in their state legislature that would really slow down the death penalty. They won't end the death penalty. These guys aren't opposed to the death penalty in theory.

Maurice Chammah:

But in practice, what they're proposing would really, really slow it down. So, I still feel like the trend is all in one direction, even if the pace of change, again, gets noisy, and slows down, and speeds up here and there. I just think that the next 10 years, it's going to be a lot of these... the death penalty will continue to decline. But it's going to be a lot of messy fights.

Maurice Chammah:

And honestly, the death penalty might start to feel... I mean, I wrote this book as a work of history to look back at what was an important year issue in the last 40 years. But I think in the next 10 years, the death penalty will only decrease in relevance to Americans, as our criminal justice debates get swamped by the question of funding or defunding the police and the question of whether we want to continue having more than two million people in our jails and prisons at any one time.

Jacob Shapiro:

You wrote this book from a very clinical objective point of view. So, feel free to dismiss the question I'm about to ask is too charged. You talked about focusing on lawyers and the judicial system, do you feel in a sense so that the legislative branch has let us all down in the United States on that score?

Jacob Shapiro:

Because we don't have any federal laws that have been agreed to across the board. The Supreme Court shouldn't be deciding these issues. If we really love this democracy that we talk about all the time, our elected representatives should get together, and pass laws that reflect the interests, or the wants and desires of the country.

Jacob Shapiro:



And that just doesn't seem to happen. It seems like some kind of weird chess game, where both sides are trying to push their pieces to the board, and get the right justices in the right order so that they get what they want to subvert democratic principles. And then, I get frustrated, and to light myself on fire. So, just tell me if I should light myself on fire, or if I'm being too harsh.

Maurice Chammah:

You maybe being a bit too harsh. And I may be a little too naive or optimistic. But I fell into reporting on criminal justice issues about 10 years ago. And pretty quickly, I realized that I enjoyed it, partially because there was a lot more bipartisan energy, and a lot less culture war refuting over it.

Maurice Chammah:

There was cultural refuting over the death penalty in criminal justice in the '80s and '90s, to be sure, and in the early 2000s. But by 2010, '11, when I was starting to get into the stuff, you were seeing more and more conservatives back the idea that there's too many people in prison. And sometimes they came at it from a Christian evangelical place where the argument was, we do really believe in redemption.

Maurice Chammah:

And we don't think we should throw people into prison for the rest of our lives, no matter what they've done. Sometimes it was a hardnosed conservative argument about money, where it was like we as a country are just spending way too many taxpayer dollars on these prisons that stink at rehabilitating people. And regardless of whether we think those prisons are abusing the people in their care, we're just not getting our bang for a buck as taxpayers here.

Maurice Chammah:

That hardnosed thing. And then, one reason why many conservatives have turned against the death penalty, and that's not something we got into, but I got into it in the book is because it is also the ultimate example of big government coming in, and doing something really big, which is killing someone. It's an ultimate example of the government.

Maurice Chammah:

And that, I think dilemma has really spoken to a lot of younger conservatives. So, all those forces have led conservatives and Republicans in the United States to look in a more complicated way at criminal justice. And although it seemed as though Donald Trump represented a swing back towards tough on crime policies, even Donald Trump signed the First Step Act, which was a very modest, hard fought bipartisan congressional bill that made it slightly easier for some people to get out of federal prisons sooner.

Maurice Chammah:

I obviously want to hedge how big of a change that was. But it wasn't a meaningful, real bipartisan criminal justice reform bill. And so, to me, there was always something somewhat exciting about



reporting on an issue that blurs the lines a little more, and isn't just a strictly red versus blue, left versus right debate.

Maurice Chammah:

And even though the world in America, American society is getting more and more polarized, I still find criminal justice the home where there's a little more hope about the ways that conservatives and liberals can work together on issues, and come to the table with very different viewpoints.

Maurice Chammah:

You've got the conservative person talking about taxpayer dollars, and the liberal person talking about racial justice, but they can together pass things. And these Republican legislators in Oklahoma I mentioned are also a great example of that. One of them literally sent me a YouTube video of a song he'd written called Trump Train that was like a country song about get on the Trump Train.

Maurice Chammah:

And he was like, I love Trump. Also, I am super concerned about innocent people being executed, and I want to reform the criminal justice system. So, I find some hope in this particular policy area that may be lacking in others.

Jacob Shapiro:

I can't think of a better place to end it than there. So, Maurice, you'll have to come back. And in the meantime, thanks for coming on. We appreciate you.

Maurice Chammah:

Yeah, thank you for having me.

Jacob Shapiro:

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