

*From England*

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## **ON BEING A PRISONER IN THE UK IN THE 21ST CENTURY - DOES THE WILBERFORCE JUDGEMENT STILL APPLY?**

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by Andrew Coyle

I should like to begin by placing this inaugural professorial lecture in context. In 2003 the University of London appointed me Professor of Prison Studies. This is obviously a matter of pride for me personally but, of much more importance, it is a welcome and overdue indication that the study of prisons has become a mainstream academic discipline. I say overdue, because today there are over nine million men, women and children locked up in prisons around the world, with over 75,000 of them in prisons in England and Wales. Prisons are no longer at the margins of our society. Unfortunately they are now as much a reality to some sections of our society as are schools and hospitals. This fact becomes even more stark when one considers particular groups in society. For example, the Commission for Racial Equality has reported that in 2002 for every one African Caribbean male in university there were two in prison. Between 1999 and 2002 the prison population in this country increased by 12 per cent while the number of black prisoners increased by over 54 per cent. One could go on for some time recounting similar statistics, for example, about increases in the number of women in prison and the number of children in prison service custody.

This increase in the numbers of our fellow citizens who are in prison and the use that we now make of imprisonment have important consequences for the kind of society that we wish to be. Speaking in December 2004 at the launch of the report by the Parliamentary Joint Committee on Human Rights into Deaths in Custody, the Chairperson, Jean Corston MP, noted:

*Crime levels are falling but we are holding more people in custody than ever before. The misplaced over-reliance on the prison system for some of the most vulnerable people in the country is at the heart of the problems that we encountered ... Extremely vulnerable*

*people are entering custody with a history of mental illness, drug and alcohol problems and potential for taking their own lives. These people are being held within a structure glaringly ill-suited to meet even their basic needs.*

It is important that matters such as these should be subject to rigorous academic research, and where better for this to happen than within a School of Law, particularly one as distinguished as that in this College.

### **Introduction**

I have chosen as my subject ‘On being a prisoner in the United Kingdom in 2005: Does the Wilberforce judgement still apply?’ Since it was first delivered in 1982, a single sentence in this House of Lords’ judgement has become one of the most frequently quoted in the legal world of prisons in the United Kingdom. Speaking with the agreement of his colleagues on the bench in the case of Raymond v Honey, Lord Wilberforce said:

*Under English law a convicted prisoner retains all civil rights which are not taken away expressly or by necessary implication.*

Many people in this audience will know the background to the judgement. The Prison Act 1952 empowered the Home Secretary to make rules ‘for the regulation and management of prisons.’ One of these rules gave prison governors the power to intercept outgoing letters of prisoners. A governor intercepted and failed to send on a letter regarding legal proceedings from a prisoner to his solicitor. The prisoner sought a declaration that the governor’s conduct was unlawful. The governor relied on the prison rules to justify his conduct. In its judgement the House of Lords made clear that the prison rules had no power to forbid a prisoner access to the courts.

Law Lords choose their words very carefully, conscious that their meaning will be dissected and analysed forensically long into the future. Lord Wilberforce could have restricted himself to saying that a convicted prisoner retains the right of access to the court. Instead he chose to say that a convicted prisoner ‘retains all civil rights which are not taken away expressly or by necessary implication’. It goes without saying that the noble and learned lord knew exactly how history would interpret his judgement. He was making a judgment about the status of persons who are in prison. He was confirming that the prisoner remains a citizen, albeit a citizen whose rights have been partially and temporarily restricted. This has significant implications for the way that persons are treated while they are in prison.

The judgement, it seems to me, also contained a number of assumptions. The first is that depriving a citizen of his or her liberty is a very serious matter and for that reason only those offenders who really need to be in prison should be held there. Deprivation of liberty should only be imposed on those persons whose crime is very serious or presents a serious threat to public safety.

If this is the principle that is to be applied, in general terms by the government and in individual cases by sentencers, one is left with some unanswered questions about the change in the number of people in prison from the time of the Wilberforce judgement to today. In 1982 there were 43,700 people in prison in England and Wales. Ten years later, in 1992, the number had risen by 2,000 to 45,800. By 2002 it had risen by 27,000 to 70,800. Over the last five years it has risen by a further 5,000, with 75,479 persons in prison on 11 March 2005. That is an increase of 74 per cent since the time of the Wilberforce judgement.

England and Wales has not been alone in increasing the number of persons in prison. Many countries, especially in the Western world, have had similar or even larger increases. During the same period, for example, the number of people in prison in the United States of America has risen from half a million to over two millions. By any definition there has not been a comparable rise in crime rates during this period. Nor is there evidence of comparable increases in detection rates over this period. It is not my intention in this lecture to discuss why these increases have taken place, but that is a discussion which should not be avoided.

What I do want to discuss are some of the consequences of this increase in the use of prison. The first is that imprisonment is no longer the exception that it was originally. For some sections of society the prospect of spending some time in prison is simply a fact of life. Closely linked to this has been a change of emphasis in the way that prisoners are treated, a move described by one academic commentator as viewing prisoners as 'objects rather than subjects'. By that, he meant regarding them as damaged persons who are obliged to submit to various experiences and programmes aimed at changing their personal behaviour while in prison. In other words, there has been a concentration on reducing their potential for reoffending rather than on increasing their potential for personal development and contributing to society.

In this lecture I intend briefly to trace the history of the prison in this country, showing how we moved, to use a modern word, 'seamlessly' from individual prisons which had a close link to local communities, to a national prison system which in due course became more important than individual prisons, in other words the sum became greater than its parts. I will explain how the development of this national system coincided with the growth of the academic discipline of criminology and how that in turn has been used to justify an increasing use of imprisonment. I will then discuss how central government has sought to find the best organisational structure to manage this national system, moving from the Prison Commission to the Prison Department and the Prison Service, then to an Agency and now to the National Offender Management Service, at each stage trying to improve the system, like Diocletian with his continual reorganisation of the Roman Empire into four vicariates and then 12 dioceses, but always failing to ask the fundamental question as to whether the system itself was flawed. Finally, I will propose a different model for the future.

### **The Beginnings of the Modern Prison**

The growth of prisons as we understand them today in England and Wales can be traced to two happenings. The first, in the second half of the 18th and early part of the 19th centuries, was the determination of a number of influential persons to improve the terrible conditions which were prevalent in existing lock-ups and jails. The best known of these individuals was John Howard, who first became aware of the problem in prisons during his tenure as Sheriff of Gloucester. The second development was related to the first. Until Howard and others began their work, no respectable person would consider working in a prison. With the introduction of the reforms, work in prisons, at least at a senior level, came to be considered as a more reputable form of public service.

This introduction of what one might describe as prison professionals had important consequences for the way imprisonment came to be used, as the concept of prison as a place of personal reform began to take hold. The Scandinavian scholar Nils Christie has explained how this concept gradually took root:

*Study after study has shown how penal measures and long term incarceration have been made more acceptable to society if they were disguised as treatment, training or pure help to suffering*

*individuals in need of such measures. The more the element of intended pain has been kept out of the picture, the easier it has been to evade justice and legal protections.*

### **The Growth of Criminology and its Effect on the Use of Imprisonment**

Around the same time as the craft of prison management was beginning, there was a parallel development of what came eventually to be described as the new academic discipline of criminology. Academics, public officials and others began to turn their attention to the phenomenon of crime, how it was to be defined, who committed it, the reasons why they committed it and, in due course, how might they be prevented from doing so. Throughout the course of the 19th century this overlap between theory and practice continued to expand. It became fashionable to describe people who committed crime and also some of the mentally ill as ‘deviants’. So was born the notion of the criminal as ‘the other’, a person who is different from normal people, who needs to be set apart from the rest of society.

In order to understand how the place of the prison has taken such a firm hold in British social life in the last two centuries one needs to be aware of the influence of academic criminology. The definition of what constitutes crime and deviance has a major subjective component. The development of criminology was founded as much on the conventions of the time as on objective truths. It was grounded in specific institutional practices, political movements and cultural settings. In a word, the practice fed on the theory and the theory fed on the practice. This link between academic criminology and penal practice continues today and has a direct effect on the way imprisonment is used in this country.

The suggestion from academics that crime was an aberration from the norm and that, rather like a young tree which is growing in a crooked manner, people who committed crime could be trained to live law abiding lives suited the new structures of imprisonment which were being applied in Great Britain. It led to the growth of what became known as the ‘theory of rehabilitation’, the concept of restoring people to their previous good reputation. Throughout the first half of the 20th century a new breed of experts who began to work in prisons, social workers, probation officers, teachers, psychologists, psychiatrists and assistant governors, took on the task of rehabilitating men and women who had originally been sent to prison as punishment for the crime they had committed.

The notion that people could be trained out of criminality in the prison setting, like plants forced on in a greenhouse, was an attractive one on several counts. It gave governments a justification for an expansion of the machinery of criminal justice. It gave courts a justification beyond that of mere punishment for imposing sentences of imprisonment. It also gave prison administrators the chance to claim a professional status which went beyond that of mere jailer. The optimism which resulted was voiced by Sir Alexander Paterson, one of the foremost prison administrators in the early part of the 20th century. Giving evidence to the Persistent Offenders' Committee in 1931, he noted,

*The problem of Recidivism is small, diminishing, and not incapable of solution.*

### **The Organisation of the Prison System**

I am slightly running ahead of myself. Let me return to the late 19th century when it was decided that a single organisation should be created to oversee the management of all prisons in England and Wales, including those which had previously been the responsibility of local authorities. The Prison Commission was set up in 1877 and for the first 20 years of its existence its Chairman was a soldier, General Sir Edmund du Cane. Prisons were places of regimentation and discipline was strictly enforced. Little was expected of prisoners other than that they should do what they were told. The principles on which prisons were run were simple and easily understood by staff and prisoners.

This straightforward philosophy was challenged by the Gladstone Report of 1895. Its most famous conclusion was that:

*We start from the principle that prison treatment should have as its primary and concurrent objects deterrence, and reformation.*

This principle and the subsequent attempts to implement these two 'primary and concurrent objects' have been blamed for much of the uncertainty and confusion which bedevilled the prison service throughout the succeeding century.

### **1963 to 1990**

By the middle of the 20th century there was a strong view in the Home Office that the autonomous Prison Commission needed to be brought under tighter central control and, after several false starts, legislation was introduced to abolish it, tucked away in Section 23 of the Criminal Justice

Act 1961. The proposal met with strong opposition in the Commons, in the press and in other circles. The government stood alone in supporting the proposal, enthusiastically backed by officials in the Home Office. As was the case forty years later, the government majority was so large that its will was bound to be approved by parliament. This indeed happened and on 1 April 1963 the Prison Commission was dissolved and replaced by a new Prisons Department in the Home Office, which took over the management of all prisons. Throughout this period very little changed in the way prisons themselves were managed. In general terms prison governors were left to govern their prisons as they saw fit, provided they observed the Prison Rules and Standing Orders. This began to alter from about 1990.

### **1990 to the Present**

The years after the Strangeways riot and the subsequent Woolf Report were ones of significant change in the management of prisons and the prison system. The period since then has been characterised by an increasing emphasis on how the prison service is organised and on managerial processes. In 1993 the Prison Service was re-defined as an 'Agency' of the Home Office. This was an attempt to separate the operational management of prisons, which was the responsibility of the new Agency, from government policy relating to the use of imprisonment, which was to remain within the main Home Office. These developments were in tune with wider government initiatives at the time about how public institutions should be managed.

During this period the prison service introduced a different style of management. It published a Statement of Purpose, a Vision, a set of six Goals and eight Key Performance Indicators against which achievement of its goals was to be measured. This tradition has continued and at the last count the prison service had 14 key performance indicators or targets, reinforced by 45 key actions and outcomes. In moving in this direction, the prison service was following a path down which the government had already led many other public services. This involved adopting a much more managerial approach to running prisons and the application of many of the principles which had long been adopted in the business world. It is quite proper that the prison service should account for the way in which it spends public money and should be measured by how it meets the objectives which have been set for it by government. However, one disadvantage of this has been an increasing emphasis on what has become known as managerialism, that is, a concentration on process, on how things are done, rather than on

outcome, that is, what is being achieved. There is a crucial difference between good management, which is necessary in prisons, and managerialism, which can make good management more difficult.

### **The Reality of Imprisonment Today**

What is to be said about the reality of prison in England and Wales today? At some levels, the Prison Service can point to significant progress in terms of what it has achieved. For example, the most recent annual report notes that the escape rate is 0.2 per cent. 9,169 prisoners completed offending behaviour programmes (that is, about 7 per cent of all prisoners received into prison). 34,482 Basic Skills awards at entry level or level one or two were reached (it is not clear how many prisoners that involves, since some will have achieved more than one award). Of the prisoners discharged, 32,592 had what the report describes as a job, training or education place outcome. It is difficult to know what overall proportion that represents since the prison service does not publish data about the number of prisoners released each year. It is also not clear what the term 'outcome' means in this respect; it appears to include those who have the promise of an interview for work, training or education.

These are on the positive side. The annual report also lists some negative results. On average prisoners spent 3.3 hours a day on some kind of purposeful activity. That means that for 20.7 hours a day there was no purposeful activity. 21.7 per cent of prisoners had to share a cell designed for single occupancy. The report tells us that there were 135.9 self-inflicted deaths per 100,000 of the average prison population. That translates into 95 persons, 83 of whom hanged themselves, 10 of whom died from a ligature and two from cuts to their throats or wrists. Thirteen of the 95 were women.

At the beginning of March the Council of Europe Committee for the Prevention of Torture published the report on its visit to the United Kingdom in 2003. It expressed considerable concern at overcrowding levels, at the low level of purposeful activities and at the fact that prisoners are no longer entitled to one hour's exercise a day in the fresh air.

Senior management in the Prison Service has given a high priority to what it calls the 'decency agenda'. The Director General has said that one basic test of whether a prison is running decently is 'whether or not staff would be happy with their relatives being held there'. The need for such an agenda was underlined by the previous Director General who told the Prison Service conference in 2000 that

*a minority of staff ... a pervasive and dangerous minority, see prisoners not as people entitled to be treated with dignity but as some form of sub species.*

In a similar manner the Prison Service has committed itself to diversity and equality, particularly in respect of race relations, and has been very active in disseminating policies which underline its determination. Yet one has only to read the transcripts of evidence which have been given in recent months to the public inquiry into the death of Zahid Mubarek to realise how far the Prison Service is from reaching its own admirable targets in this respect.

No one doubts the aspirations of the Prison Service as a body and the majority of its staff to achieve high standards of decency in its prisons and dignity and respect for prisoners. Which begs the question, why cannot these standards be met? There are a number of answers to that question. In the first place, it seems to me that in recent years the Prison Service has done neither itself nor society any favours by convincing successive governments of its ability to cope with whatever pressures it faces.

In the early 1990s it coped with overcrowding by redefining its capacity. Overnight, cells which had been built to hold one prisoner were said to be capable of holding two prisoners. A new classification of 'operational capacity' was introduced; this was 'a safe level of overcrowding' and ten years on it is regarded as the norm. This measurement applies solely to sleeping space and takes no account of pressure on kitchens, on health provision, on sewage systems, or on education and work resources. The latest visit to England by the Committee for the Prevention of Torture paints a stark picture of the consequences. It found that Liverpool Prison had a certified capacity for 1,190 prisoners but was holding over 1,400. Of these, there was work for 460 and educational facilities for another 240; leaving 700 confined to their cells with nothing to do.

By the late 1990s the increased population meant that more resources were needed simply to survive. Aware of the political imperatives of the time, the Prison Service suggested to the Treasury that if it were given additional resources it could introduce a series of behavioural and other programmes which would reduce the likelihood that prisoners would re-offend after they were released. And so was introduced the target of 'reducing re-offending'. This was not a new ambition for the Prison Service. It can be traced back at least to the assurance of Alexander Paterson 80 years ago that the problem of recidivism is 'small, diminishing, and not incapable of solution'.

The Treasury responded by pouring significant additional resources into the Prison Service, which allowed it to embark on an extensive new building programme and an expansion of educational and behavioural courses. What we now have is a significantly larger prison system which costs significantly more than it did before. Which leaves us with the question, to what end? Some commentators argue that this will result at some point in the future in a reduction in the rate at which those who leave prison are later convicted of further offences. I have suggested that this is a claim which is not new among those involved in prison administration. It is a worthy objective, which would be to the benefit of society were it ever to be achieved; but it is one which has never yet been realised.

I have to confess that after more than thirty years in and around prisons I am more than ever convinced that at best prisons can only ever make a very small contribution to an overall reduction in crime. The evidence also suggests that what happens to prisoners during the period of their imprisonment is less influential in affecting their future lifestyles than the life experiences which they encounter on release.

Prisons should play a very narrow role in any democratic society. They can never be, as has been suggested recently, secure colleges of learning. Their primary function is to deprive people of their liberty in fulfilment of a court decision. They will always be places of personal pain and loss. We should never deny that fact. That is not to say that they should be places of despair or hopelessness. The real skill in prison management is to make them places where pain is tempered by optimism, where loss is tempered by hope. If that is to be the case, what is to be said about the prison of the future?

### **The Future**

Concern about an excessive use of imprisonment is frequently expressed by those working within the system. Speaking in 2002, the Director General of the time said:

*As I have told the Home Secretary, no one, including me, thinks that locking more and more people up is a sensible way of spending public money. Many of the people we are locking up will not benefit in any way from their sentence. Many of them will lose jobs, accommodation and family support and will become more criminal.*

The Home Office has announced its decision to limit the number of prison places to 80,000. That decision is to be welcomed, although one might question why the limit was not placed at 70,000, or 60,000 or 50,000. If we are serious about prison reform we must begin to plan for a more parsimonious use of imprisonment. The evidence from other comparable European countries is that the number of people in prison in this country could be significantly reduced without increasing any risk to the safety of society.

If the first feature of prisons in the future is that there should be fewer of them, the second is that they should have much stronger local connections. There is a long tradition, particularly in some local prisons of working with local groups. The benefit of such work would become even more real to all involved if those helping and those being helped came from the same community. This could be the beginning of a process through which ordinary members of the community, educated by reports in the local media, could begin to understand that the people who are in the local prison are from their communities, will return to their communities and that it is in everyone's interest that they should be integrated into those communities when they are released.

So, the future may include a reduced number of people in prison and smaller prisons with much stronger local connections. The third leg of this triangle would be a new infrastructure to support such a model. The prison system is virtually the only major organisation in this country which is totally under central government control. If prisons are to have stronger links with the communities in which they are located there is a strong argument for making them more locally accountable. One way of achieving this would be by dismembering the current national prison system and replacing it with a more locally based structure. As well as strengthening local community links, this new change could reinvigorate the relationship between prisons and the courts which they serve. It would also make fiscal arrangements for prisons more transparent. At an annual cost per prisoner of over £35,000, a prison for 500 people costs the taxpayer over £17 million per year, in addition to the capital costs of building it. This does not mean much at a local level when the amount is subsumed into a national budget controlled from Whitehall. If, on the other hand, the spend was identified locally, as it is for schools and hospitals, there might be much closer scrutiny of whether the local taxpayer was getting value for money.

There are a variety of possible models as to how local prison systems might be structured and time does not allow me to examine them in detail. The proposed new National Offender Management Service is unlikely to be a good model, since this will remain a national service, as its name indicates, albeit with more regional management. There are a number of existing local structures, both within the criminal justice system and in other arrangements for local government, which could be considered for application to the prison system.

Re-organisation of prisons on a local basis would provide an opportunity to re-define the nature of imprisonment. We have seen how the original concept of imprisonment as a place of exile has not changed a great deal in reality over the last 200 years, despite a number of changes in rhetoric. Offenders who are sent to prison are still taken away from their own communities in the hope that the experience they undergo in the closed world of the prison will somehow change their behaviour and attitude to life, making it more likely that they will become honest citizens. The fact that 56 per cent of them are reconvicted within two years of being released is regarded as a failure of the prison system to engineer change rather than a failure of the concept of imprisonment as a vehicle for change. Instead of responding to this problem by doing more of the same and doing it more efficiently, the future may lie in a more rigorous examination of what the model of imprisonment which was conceived in the 19th century and flowered in the 20th century should look like in the 21st century.

Just as we aim for honesty in sentencing so we should aim for honesty in imprisonment and recognise that the prison can never in itself be a place of reform. Prisons are expensive resources where a small number of offenders need to be sent as punishment for the harm they have done and in the hope that somehow they may benefit from that experience. If we acknowledge this, we can go on to identify the essential features of the prison of the future:

- It will be used as a place of last resort. It will no longer be the default position, but will be an alternative to other disposals which will become the norm
- It will hold a small number of people
- Its staff will be recruited locally and trained according to local needs
- It will have strong links to the community in which it is based
- Throughout their sentence prisoners will be given access to local resources and facilities which they can continue to use after release.

So, what is my conclusion? Does the Wilberforce judgement still apply in 2005? The answer has to be that it does. And the consequences of that principle are every bit as important as they were in 1982. Prisoners are not merely offenders, whose potential for reoffending has to be reduced. They are also citizens whose potential for contributing positively to society must be developed to the full. A recognition of that principle will help us to realise the Home Office vision of a safer, more just and more tolerant society.

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