

## **THE USE OF PUNISHMENT - AN INTRODUCTION**

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**by Sean McConville**

I first went to prison in the autumn of 1967, and can still vividly recall that confused sequence of impressions as the season progressed into winter. I had fleetingly visited prisons before and had come away convinced that they were a different part of the planet from any I had previously seen. Some of the surroundings had been exotic for a newcomer: sombre buildings, bars, gates, high walls and the continuous noise of locks turning and doors banging; perhaps imagined, but everywhere I went, high social tension. The little world of the cell had an enormous impact. In the Victorian prisons these were 8 feet wide, 12 in length, 9-foot ceilings (frequently vaulted) and a high, barred window –dirty or opaque glass restricting the view, and a cleverly sloping sill to prevent the prisoner drawing himself up to look out. This was indeed a strange and awful habitation in which to pass the greater part of each day and the passing of the months and years. The sight of a young man of my own age in parti-coloured clothing walking alone around the exercise ring in one of these prisons – a high-security prisoner at the start of a life sentence, I was told – kept me awake that night and was in my mind for weeks.

As it happened, my ‘own’ prison was not of the jailhouse type. It was a decommissioned US Army hospital, dating back to the Second World War: long rows of Nissen huts simply laid out on the fields and linked together by walkways. This was an open (minimum-security) prison. The low walls that marked out the estate were no more formidable than those with which any property owner would protect his holdings; the intention was to keep would-be lovers and traffickers (and the merely curious) out rather than keep the prisoners in. Here the apparatus of captivity was in the mind rather than the buildings.

The inmates fell into two main categories: minor offenders whose sentences showed them to have impressed the courts as nuisances rather than threats, and those who had almost completed long sentences in closed prisons and were now being tested, re-socialised and ‘decompressed’, preparatory to

release. The categories could be misleading. Among the ostensibly minor offenders in those years there lurked incognito a man who had already committed murder, and who would go on to become one of the most notorious serial killers in criminal history. And among the known murderers (and there were many) there was a large group who were non-criminal in the sense that neither before nor after their terrible deed had they broken or would break the law. Chance, a combination of circumstances and, sometimes, an episode of passion, had propelled them into the criminal process. They were ordinary, civil and often deeply remorseful and conscience-torn, and it was difficult not to see them as instances of the fate of many, but for the grace of God.

In two instalments I was to spend the better part of a year at this prison and was thereafter committed to a life of punishment – that is to say, a life spent studying, writing, lobbying, consulting and litigating – all in connection with the penal process. Hardy had perhaps got it right – the course of our lives can be determined by a chance meeting, or indeed a failure to meet. In my case a fascination was born which has scarcely waned in the intervening years, and which still grips and constantly stimulates.

The setting, as I have indicated, was prosaic – unremarkable if somewhat dilapidated buildings in an inappropriately bucolic setting. The magnetism of the place and the ineradicability of the experience lay in the life that was lived there, the penal portion of our times. Men had come by many different paths to be prisoners, uniformed officers, clerical or trade staff, or administrators. For some, the personality was penetrated to the core; for others, the prison may have been no more than a passing episode, and that one of many. But for all, for a time at least, this was life in an extremity of conditions.

Imprisonment is loss of freedom. This is an obvious enough statement, but it must be given meaning either by experience or study. The most minute decisions are denied the prisoner – his clothing, food, work, study, correspondence, visitors and daily routine are all governed by detailed rules and these are interpreted by others. (At the time to which I refer, prisoners were denied access to any but a handful of the rules – lest they manipulate them to their own advantage, it was contended.) Privacy is removed and one loses the ability to control personal space and choice of companions. Personal security acquires a centrality it never previously had: companionship and mutual support become extremely important – sometimes literally vital. Always there is the corrosive contemplation of

the outside world – past, present and to come – and consignment to what at times must seem the fate of the spectre: present, seeing and hearing, full of regrets and longings, but without substance and unable to act. In prison, it is said, those who learn to live in the present are, if not the happiest, those most able to minimise suffering.

On the other side of the counter, officers and administrators are similarly cast adrift from the ordinary world. Although theirs is not a pariah occupation, it is one that produces unease in outsiders, sometimes mixed with a morbid curiosity. Fairly strict rules and a fear of being compromised prevent discussion of the prison with civilians and this adds to a sense of oddness, both for those who work within it and those who meet them socially. Patterns of shift-work, staff housing policies and sometimes the out-of-the-way location of the prison increase distance from the everyday world and make for a degree of introspectiveness. After-hours socialising in the staff club, where conversation centres on institutional life, compounds all of this. Some staff count off the months and years to the release of retirement and pension. As at any prison, it was well-known but referred to only guardedly, that the pressures of this life could have unhappy effects on some families.

As the years passed, I visited and sometimes worked in other prisons in many different countries. The basic patterns were to be found almost everywhere. Some effects were diluted, others intensified. Staff who lived in their own houses and were dispersed through an urban community, for example, were less inclined to be prisonised. Prisoners who lived in one of the gang-ridden penitentiaries of Illinois, Indiana, or California were forced into intense relations of dependence and exploitation with each other and were understandably preoccupied with personal security. Even without the textbooks, I would have understood immediately that the women's prisons I visited were ordered in a very different way, with most women far more strongly attached than men to life beyond the walls, and with little violence and much less regimentation in their institutional experience.

One of the mysteries of that autumn of 1967 waited some years for its resolution. What was supposed to be happening in prison? Were the men there for punishment? If so, what form did it take? That question was apparently resolved by an aphorism formulated in the 1930s by a great figure in British penal history, Sir Alexander Paterson: 'Men go to prison *as* punishment, not *for* punishment'. Initially satisfying, closer examination suggested that this was no answer – or at least not a full one. If they were in prison as punishment,

what was supposed to be happening to them there? Were they simply supposed to be in a kind of civic suspended animation? Another answer was offered – Rule 1 of the Prison Rules: ‘The purpose of the treatment and training of prisoners is to fit them to lead a good and useful life.’ Looking around, weighing the routine of each day, I wondered further: by which official actions were the treatment and training provided? I saw men leading a life shaped by the necessities of a residential institution – a daily routine of rising, eating, washing, limited trade-training and workshops, interviews, housekeeping work and rules: a mass of details and a tangle of wishes and frustrations managed only by a great deal of uniformity in clothing, possessions, entitlements and treatment, and a hierarchy of authority of which the prisoners comprised the bottom layer. Despite a significant amount of goodwill and co-operation, life was a kind of crippled existence, permeated with stigma, shame and loss of position and social freedom.

I could not see in institutional life itself the basis of that reconstruction that was supposed to lead to a good and useful life. There was provided a form of conversation therapy. At one level this was practical, useful and problem-solving, addressing the mess that many of the prisoners had made of their lives and that went well beyond their brush with justice – marital discord, divorce, child access and custody, disputes, alcoholism (these were the blessed pre-drugs days), poor work skills, illiteracy, unemployment, homelessness, mental and physical health problems and so on. A truly impressive amount of good was done in tackling those obstacles to a good and useful life. But was this ‘treatment and training’; did it address the mental and emotional problems that perhaps had generated many of the more practical difficulties?

There was at that time a deal of awareness about the psychological background to many of the men’s crimes. But what to do about it? With a population of several hundred and maybe three or four members of staff at all equipped to carry out psychologically based casework, and those involved in numerous other duties besides, this was a hopeless endeavour. (Ignoring the questions about the efficacy of such interventions, even when carried out in optimum conditions.) In truth, sympathetic members of the uniformed and civilian staff, and others such as the chaplain, listened to prisoners’ accounts of these deeper problems, and did what they could to understand and advise. Some no doubt accumulated experience and wisdom over the years, but there seemed to be very little difference between these informal

counsels of the prison – and one must not omit prisoners themselves from this list of counsellors – and what might be available through the confidants and confidences of the average workplace.

At the end of my spell in prison, therefore, I was little wiser as to what the institution was supposed to be *doing*: mere existence hardly seemed enough. Some years later, conducting research on penal history, I came across part of the explanation of the ‘treatment and training’ that was so central to imprisonment that it occupied Rule 1 of the English prison rules, yet was so elusive, vague and hard to identify. (And the open prison at which I had worked would have most certainly been the optimum habitat for Rule 1 – in the overcrowded, under-funded and increasingly dilapidated local prisons of the time, Rule 1 could scarcely have had a meaning even as an aspiration.)

From my research it appeared that the last time that most English prisons had been precise instruments of punishment – routine specifically tied to objectives – was prior to 1898. From the 1860s until the turn of the twentieth century, the purpose of English local prisons (a rough equivalent to the American jail) had been to inflict a known and measured deterrent experience on the convicted offender and to stand *in terrorem* to the general population. This was done through remorseless isolation, discomfort, exertion, cold and deprivation – working to the limits of physical and mental endurance and systematically on all the senses. Public sentiment and political thought shifted, and at the beginning of the twentieth century the Victorian pain and discomfort machine that was imprisonment was set aside in favour of something more vaguely punitive. The staff remained the same, the conditions as bleak, sordid and unpromising as before, but pain and discomfort were not actively sought through the regime. That they necessarily occurred was acknowledged, a form of deterrence in the twilight.

In the late 1890s Evelyn Ruggles Brise, the head of the English prison service – young, new in post and carrying on his shoulders some great reformatory expectations – confronted a public-relations difficulty: how was he to explain to Parliament and the taxpayer what was happening in their prisons now that the crank (a friction machine to enforce useless hard labour in solitude) and the tread wheel were gone? He came up with an answer that has served until our own times. Unlike foreign experimental methods (he was referring to the European Continent and the United States of America) the English penal method was ‘quiet and unostentatious ... orderly government’. This was no military-like system that dealt with men

by numbers, ignoring their humanity. Instead it insisted on ‘order and obedience and cleanliness and industry, as a primary and essential condition of imprisonment’. These qualities (incidental, one might observe, to any institutional routine) gave English imprisonment its distinctive and ever-so-convenient reformatory power. Just being in prison, in other words, was a reformatory experience.

In this way was the public relations problem solved in 1898, and without much comment this remained the position for most of the twentieth century in the majority of English prisons (there were a few notable exceptions). When I went looking for treatment and training in my open prison in the autumn of 1967, I should have realised that it was all around me – in the rising and setting of the sun and the routine that filled the time in between. What was prison for? Reformation. And how is reformation achieved? Being in prison.

It was an undoubted nonsense, yet over the decades, and within its folds and vagueness there were many attempts to find a rational and defensible regime and to use imprisonment as a positive means of reducing reoffending. Some of these experiments hung on gossamer; others were demonstrably practical. From the late 1960s, however, the penal wind shifted and new-old purposes were given to imprisonment: those crystallised around retribution and public protection. These remain with us at the top of the public agenda despite their manifold imperfections. As shall be seen elsewhere in this book (and in many of the critical sources cited in the bibliographies) retribution is an objective consisting of rather more metaphysics than its greatly assorted proponents might care to recognise, a range of problems in its calculation and calibration and a deal of uncertainty in its administration. (Yet in 1991 – at least in theory – it became the basis of English sentencing.) Public protection is nothing new in penal policy and, although banished to the background in more sanguine times, has always been a major requirement of the penal process. The English prison population has almost doubled in the last decade, and politicians of both main parties seem to be set on the American path and imagine they can build themselves out of crime.

I hope I may be acquitted of egoism in inserting my own penal experiences and collections into this account. The point that I have wished to make could have perhaps been more compressed, but that would not fully convey the vagueness of penal policy, the uneven ground on which it is based and the tides and swells that carry it here and there.

This is not a book about imprisonment or indeed about the specifics of penal policy, but is much more generally about punishment. These preliminary observations are intended only to underline the dramatic elements in punishment and some of the distinctive characteristics of the institutions that administer it. That I should turn to the prison for examples is not simply a matter of personal experience, but of the defining nature of imprisonment in our times. In Western societies (with the exception of the United States) prison is the state's ultimate expression of power over the citizen. But its purposes are diffuse as well as precise: many would argue that it is the sanction and the fallback that makes more lenient punishments possible. While the shadow of the prison looms very faintly over the law-abiding, it is unquestionably the threat that compels payment of fines and compliance with the requirements of non-custodial punishment. Indeed, no matter how inventive we are with words, we come back to 'non-custodial' to describe fines, probation and community service in all their various forms and combinations. Prison is the penal gold-standard. The common element across the range of punishments, custodial and non-custodial, seems to be a loss of autonomy, adulthood even. The errant employee receiving a formal verbal warning is in some way cast back to childhood. The motorist rebuked by traffic police must be polite and submissive or risk stronger sanctions. Those on probation must keep appointments, are asked to account for themselves and must follow directions. Community service also obliges one to turn up on time and to carry out the designated task: rebelliousness, truculence or non-compliance will be further punished. Punishment at this end of the spectrum shades off into the deference, compliance and orderliness that we all must show in everyday life; it starts with a mother's displeasure with her infant and follows us into education and then the world of work.

So is punishment a universal experience and, if it is, is that a good thing? Is there an amount of punishment in a person's life that is necessary to civilise him or her? Contrarywise, is punishment a distorting and mutilating experience? Is it the antithesis of civilisation and will our progress, as Churchill suggested, be marked by a decline in its severity? Or is punishment the inevitable consequence of the way we choose to live, confirmation that we are inhabitants of an unjust society? Attempts to answer these questions could fill many paragraphs and pages, and certainly take us to the heart of several key psychological, political and philosophical disputes. These conundrums will never be settled or stilled, but from time to time a consensus emerges and

may even become an orthodoxy and a test of intellectual respectability. Inevitably that will be the source of a heterodoxy, and so on. Exploring this ground, this collection makes no claim other than the projection of some freeze-frames from an endlessly shifting and developing debate.

This is not to say that exactly the same arguments are rehearsed each time the topics are considered: over time the area of contention moves around a larger landscape of uncertain size and delineation. For most of the twentieth century the explicit consensus was that decent societies were non-punitive. The prevailing view (certainly in political circles) has not swung around to the opposite, but to an acceptance of the apparently productive and positive nature of punishment and a willingness to increase its use in pursuit of order and social engineering. Looking no further than 25 years into the future, it is hard to see what direction a new consensus will take, or around what propositions it will form, or when, or how.

This collection was not conceived as a review of particular aspects of penal policy, although it should be of interest to anyone who wishes to cast penal policies in a wider and more reflective context. No one line of approach has been taken, and it will be found that the authors differ in backgrounds and disciplines and also in philosophical and political stances. All the essays have attended to the complexity of the various arguments, have a cautiousness about contradictions in penal thought and a reluctance to draw apparently straightforward and facile conclusions. All are aware of the volatility of penal thought and its susceptibility to be influenced by and employed in the see-saws of party politics.

The book gets under way with a contribution from Alan Duce, an Anglican clergyman and prison chaplain of many years' standing. It is a commonplace that many of the core elements in criminal law derive from religious teaching. At one level it should be easier for a person with strong and clear religious beliefs to deal with punishment and its variety of issues. An unchanging moral code – even though interpretation may shift somewhat with the times – takes one past some of the preliminary difficulties of the secularist, particularly the justifications for criminal law. A voice that speaks from revealed doctrine can be much more confident than one that proceeds on the basis of present usefulness or even tradition. That is not to say that all religious interpretations can be equally confident and certain, or that the believer can ignore a clash of values, with religious doctrine taking one

strong line and social and political consensus another. The havoc caused in the various Christian denominations by changing sexual mores demonstrates the intensity of those conflicts.

Alan Duce, however, looks not so much to debates about the origins of laws as to Christian thinking about punishment. A particularly interesting aspect of his contribution is that he is a working Christian who must every day find an approach to his institutional duties which is compatible with the doctrines of church and conscience: *can* one serve Caesar and God, Duce asks. Anyone who has spent any time in prison and who is at all reflective, will agree that the conscientious chaplain's task is one of the most vulnerable and difficult in the institution, but at the same time is possessed of enormous potential.

How can a religious approach maintain its integrity within a state ordered and politically determined system of punishment? Obligated to make judgements, how can a religious person reconcile that duty with his understanding that all human judgement is imperfect? And given that one must minister to the offender, who is often in emotional, psychological and spiritual distress, what can and should be done to bring him a personal accounting for the harm that has been done to his victim, to society and indeed to himself? Central to all the monotheistic religions is the doctrine that man has been created by God, and that all share in the fellowship of that common creation. How then can punishment be conceived and administered, judging without excluding, condemning without extinguishing hope? Is there a danger that the teaching that all are sinners will simply dwindle into an empty and rather ridiculous unwillingness to denounce crime and uphold moral virtues? And in this connection, is everyone *entitled* to forgiveness? Are there crimes that are beyond our capacity to forgive? Must a notorious and wicked criminal remain only that or are we all in the process of becoming, until we die?

What has Christian theology to say about repentance? And what of vengeance and retribution? In the turmoil of these questions, what is truth?

From the outset, all contributors agreed that the variety of our disciplinary backgrounds would enrich the project not simply because of the different perspectives, but also because we would need a common language and this would oblige us to climb over the various boundary walls of our intellectual neighbourhood. Academic psychology has perhaps pushed those walls higher than most, as it has become ever more specialised and fragmented. (Though, on reflection, this has been the fate of many if not most branches of the

social sciences: a depressing development.) I owe a particular debt of gratitude to Rowell Huesmann and Cheryl-Lynn Podolski, who worked and reworked their essay on the psychology of punishment in order to make it more accessible to the nonspecialist. Anyone who follows a trade for a while must pick up the shortcuts, and the academic trade is no exception. There are various ways of starting lectures, and the first few minutes in a series can be critical. At the risk of (undoubtedly justified) accusations of hamming it up, I must reveal an opening line I sometimes use when meeting a new class or seminar group to discuss punishment. I look around the assemblage and remark ‘Everyone here, myself included, has been punished.’ I go on to outline the range of actions or inactions that constitute punishment from, say, a mother’s unhappy frown or a partner’s silence, to the heaviest of state punishments. Punishment, thus defined, is unavoidable in the course of our lives – even among the meekest, most conformist and law-abiding.

Belonging to a generation that witnessed (and experienced) corporal punishment in schools, and was angered and revolted by it, I cannot be sanguine about the ubiquity of punishment. It is a matter of some consequence that we should know, as parents, persons in authority or, the effects of punishment. Some retributionists would see the punishment of wrong as an end in itself, but for those who feel that the principal penal objective is a change of behaviour, it is important to know what scientific studies have to say about effectiveness. Strange indeed, that in the face of all the obvious costs of punishment to the person, family, community and state, there is little to show that legislators attend to this kind of evidence. The abundance of research material and the nature of a range of findings are examined by Huesmann and Podolski.

Starting with the combination of genetic, physiological and environmental factors that contribute to aggressive and antisocial acts, Huesmann and Podolski outline major theories of the learning process and relate these to punishment. This is a critical linkage: unless one is a sadist or a particularly metaphysical retributionist, one must consider punishment as a type of learning. That being so, if a form of punishment does not educate or socialise in the way one expects, or if it produces results contrary to those which are sought, one must make changes. The punishment in question must be modified, or inflicted in a different way, or take place at a different point in the offending behaviour/punishment sequence, or be dropped altogether. As the authors show, existing scientific knowledge gives important guidance on these matters.

I have never actually heard that classic humbug ‘This hurts me more than it hurts you’, but it certainly was an implied part of the situation in some schools and institutions. It would scarcely have been *respectable* for a grown-up to beat a child were that simply a venting of anger, rage or frustration. Yet we know that this is precisely what happens in many of those punitive encounters. What does punishment do to the inflictor and to the person being punished who sees the behaviour and grasps the motivation of the inflictor? And what happens when punishment is ritualistically carried out in front of a class of immature and suggestive children? Contrarywise, is a punishment which is seen to fit the offence, which is proportionate and connected with some immediacy or directness to that offence, not an important and constructive part of civil life? How can penal policy be informed by studies of the learning process and the effects of childhood punishment?

This is precisely the topic taken up by Mark Fleisher, an ethnographer who has studied one of the groups prominent in virtually all discussions of crime and punishment – the youth gang. On any consideration, it is an oddity that those who shape, make and apply criminal policy can speak in confident terms about who they would like to see punished and the condign effects that punishment would have. Are they not sometimes thinking about their own imagined reaction to punishment, rather than that of the target group? Yet anyone who attends the criminal courts regularly, or works with delinquents, knows how misleading this assumption might be. There are persons whose ties to society are so weak or misdirected, or who are so damaged, inadequate or degraded, that they are manifestly beyond the effects of punishment. Others, more shrewd and cunning, have taken a calculated risk and often accept their punishment stoically. More rarely, there comes before the court the adherent of a political, social or religious cause, for whom punishment is an apotheosis.

Mark Fleisher approaches the place of punishment in the life of a youth gang in the only way that can be sensible – an understanding of the daily life and world-view of the members. Relevant matters include the physical territory controlled by the gang, their criminal activities, their interactions with each other and with the ‘straight’ world. The last comprises school, adults (though some of these are far from straight), police, courts and custody. Given the great importance of early socialisation, it is no revelation that hardcore youth gang members come overwhelmingly from neglectful and abusive families and go on themselves to early parenthood. Such facts are repeated so often that we seemingly cease to listen to them.

How can punishment reach such young people? Even should they calculate the risks of being caught and dealt with, many are beyond the basic restraints of shame and fear and thus apparently the deterrent effects of punishment. When these teenagers are locked up, their reactions are not as might be expected by respectable society. Fleisher points out that they are made apathetic rather than devastated by loss of freedom. In prison the gang member does not miss the major institutions that shape other lives – these have at best been peripheral. Indeed, incarceration creates new opportunities. Behind the bars they encounter delinquents from other gangs and areas and, in a real sense, broaden their criminal education. The supposed benefits of imprisonment – academic and vocational training, drug treatment and psychological counselling, appear to be far outweighed by the near-indelible stigma of imprisonment and the barrier this constitutes for employment. The marketplace is bleak and unforgiving for these minimum-skill and tainted youngsters. Fleisher argues that juvenile justice policy ‘sets the stage for failure’. He proposes instead comprehensive intervention and prevention programmes.

One of the most remarkable phenomena of modern times has been the vast and rapid expansion of imprisonment in the United States. The incarcerated population – federal, state and county, prison and jail, has risen beyond two million. Nor is this simply a reflection of an increase in the general population. Between the 1920s and 1970s the *rate* of imprisonment stayed stable in the US (that is, as a proportion of the population). In the last 30 years, however, it has increased by several hundred per cent. The costs are enormous, but there are many politicians and analysts who insist that every penny budgeted for incarceration is well spent: society benefits by removing offenders from circulation and by the deterrent effects of incarceration. This is a topic that has driven liberal and conservative thinkers into opposing camps where a generation ago there was a surprisingly strong consensus that imprisonment is an expensive means of making bad people worse. Electorates, however, are willing to back this modern shift in penal policy and there are few politicians willing to criticise or oppose it (whatever their private reservations).

But it is certainly a major deployment of a nation’s resources and America’s penal policy is the subject of Marcellus Andrews’ economic analysis. Social analyses of punishment must fairly quickly come to the realisation that penal policy is hard to separate from social, urban and educational policy and that employment structure and levels, the fiscal regime and even international economic relations all have consequences for crime and punishment. With

the tools of the economist, Andrews covers this ground, starting with a discussion of the nature of choice and therefore of deterrence. Just as lawyers, when driven into a corner, will turn to the concept of the 'reasonable man' (who coincidentally is likely to be on their side), so economists approach choice with the rational man or woman in mind. Calculations of the costs and benefits of punishment are heaped upon this somewhat improbable figure, even though the realities of criminal justice, on even the most superficial acquaintance, indicate that the rational decision-maker may be more elusive than the unicorn, or at least the salamander.

And quite apart from criminal irrationality, it may not be too wise to assume that public policy is shaped by rational decision-making. Andrews sets out a cost-benefit analysis looking not only at money but also opportunity cost: 'if I do this to what extent am I prevented from doing that?' And then there are accountancy-type calculations. Given that an offender commits crime at such and such rate and that I can convert that into a money cost, I can calculate how much saving there will be to society should I lock him up. One theorist computes the annual net saving from the incarceration of a convicted person – the social benefit – to be around US\$16,700. In this sense imprisonment pays and it is rational to seek to build our way out of crime.

But 'crime' is heterogeneous, ranging from income-tax evasion to aggravated homicide and treason. Does the calculation of benefit hold across the board? Does society benefit to the same extent from the incarceration of all categories of criminals? Is the criminal such a lost cause that removing him or her from society (or rather to a different part of society) is wholly beneficial? Andrews poses some difficult questions here, particularly about the impact of imprisonment upon particular communities.

Is there an even more intractable problem to be addressed? In a society that has grown fabulously wealthy, there has emerged a greater degree of class polarity than any would have expected 50 years ago. A substantial group – unskilled, uneducated and poorly socialised – seems to be excluded from the world of work and consumption by the imperatives of a high-investment, high-skill economy. The prospects of unskilled work becoming available on its previous scale seem remote. What are we to do with this group on the margins of our society, a disproportionate section of which belongs to ethnic minorities? And if we cannot offer a solution to the economic problems of these groups, are we not condemning them – and ourselves – to an increasingly divided, security-conscious, highincarceration society? Is there any way out?

With these questions we move into the form of meta-analysis that is attempted by Richard Sparks. The treatment of persons under punishment has long been taken by observers of the political structure as an important index of its values. With this as a starting-point, Sparks asks what the changes in penal policy of the last generation or so tell us about how we live, and where our society might be going. That we live in a different world – startlingly different, in many ways – cannot be gainsaid. Fifty years ago the Cold War dominated international relations at every level. In the West, wealth and well-being were based on heavy industries that in many respects had changed little since Queen Victoria's death. The social order had certainly been shaken and in part demolished by the two great wars, but although empires had fallen the structures and mores of earlier times were still a powerful presence. Nations sat behind their frontiers, as did the social classes, and travel across either kind of border was for the lucky minority. Technological innovations of many kinds, globalisation and one of its consequences – mass migration – the dissolution of old social structures and modification or abandonment of a range of key values, all amount to change, large-scale and profound. What connections can we make between these sweeping developments and modern penal thinking and policy?

Sparks points out that the penal system used to be identified with social welfare – education, social work and mental health. Whereas penal thinking and policy have not totally broken away from welfare, the attitude towards the 'normal' adult offender has significantly shifted. One of the consequences of developing special policies for groups such as the mentally ill or afflicted, drug-addicted and drug driven and juvenile offenders, is that the remaining majority may be more directly and severely held to account. This 'normal' group has been the focus of a good deal of political debate, and that in turn has had a significant partypolitical component. Sparks analyses both the nature of this attention and the language and tone of debates. He surely makes a telling point when he refers to the 'emergency' posture that governments have adopted in these deliberations.

The security of its citizens is a cardinal task of the state. An intriguing part of Sparks' essay deals with the management of risk. He draws our attention to the fact that risk is at the centre of the 'new' economy and its political structures – risk assessment and management have spawned a number of new legal, organisational and financial arrangements. The transfer of private-sector approaches into the public sector has gone well beyond language

and management styles, and many functions long thought to be definitively within the public sphere have been sold, contracted or delegated to private-sector organisations. These transfers frequently focus on risk and the consequent private profits are justified by the transfer of risk. The shift from one sector to the other is the outcome of some degree of fragmentation of state operations and has significant implications for criminal and penal policy. The control of risk leads us beyond deterrence, reformation and retribution to incapacitation in one form or another. Sparks, with others, argues that risk – or at least thinking and talking about risk – has become a pervasive part of public life.

It is essential to acknowledge the realities that lie behind the intrusion of a consciousness of risk into everyday life and its consequent projection onto the political agenda. We may note that the way we live and the political-economic choices that have been made (and one may question the extent to which they have consciously been made or fully understood) have had a number of outcomes, including a rise in crime. It is quite another and much less defensible position to imply that concern about risk is unreasonable. Statistics, both from police reports and victim surveys, show levels of theft (including burglary) and offences against the person that are unacceptably high and that, although spread across a number of social groups, particularly blight the lives of the most vulnerable – the urban poor and many ethnic minorities. Fear of victimisation, however, can be unreasonable and it certainly can also be an unproductive part of political life. As in many other approaches to policy, finding the point of balance is a delicate and sometimes hit-or-miss affair, especially given the rough and tumble of party politics, the impact of sensational cases, and the constantly shifting locus of the balance.

A consequence of the rise of social democracy in Western countries has been the erosion of class structures and the promulgation of an egalitarian agenda. While social justice has been advanced by many of these changes, it is still uncertain where the new style of politics is going. As noted above, in some respects there has been an increase in social polarisation. Freed from class anchors and, to an extent, from party disciplines and structures, politics are necessarily more volatile than before. Authority has been challenged in many ways and there is certainly far less deference to professions and other elite groups. The media and its creations – celebrities – have a place in national life that requires a more subtle analysis than we usually see. The authority of these groups appears to be new, both in strength and persuasiveness. This is

the background to a number of observations that Sparks makes about populism. It is not appropriate to summarise these here – they are wide-ranging and reasonable, if polemical. Are we now living in political doldrums caught between two tidal pulls, social democracy and a new type of individualism?

One reaction to the individualism of Western society, and to the politics and state action that accompany and express it, is a lamentation for the loss of community. There are several distinct voices in this chorus. One need not greatly detain us for it is simply nostalgic. It looks back to the post-war period (and beyond) and seeks a restoration of what was a settled social order. The family was strong, fathers worked in a well-established occupational structure, mothers stayed at home – and both parents stayed together. All kinds of agencies, from church and school to the neighbourhood, assisted in promulgating and upholding moral standards. Esteem mattered, anonymity was difficult and shame was devastating. There is a high degree of rose-tinted nostalgia in this account of course, but its veracity or otherwise need not detain us: there is no going back.

If this is conservative nostalgia, what of the left? There remain many advocates of big-state social intervention, but for all that they are a corralled minority, mainly talking to each other. Although democratic socialists were among the most steadfast opponents of Leninism in its several varieties, the collapse of the Soviet empire has lessons for many types of statism, democratic and undemocratic alike. Its proponents might (or might not) demur, but communitarianism is an attempt to defend some key values of the old left without having to defend its baggage. Some varieties of this doctrine have claimed to be the ‘third way’.

This is the territory explored by Nicola Lacey, who examines punishment as an expression of ‘shared values and commitments’. She points to the much-discussed weaknesses in retributive and utilitarian approaches to punishment; she also argues that mixed (more pragmatic) positions also have drawbacks and may in particular not be able sufficiently to integrate, or even reconcile, their several components. Lacey attempts to go to the heart of the issue by asking us to consider how punishment affects the social good, which she sees in broad and shifting terms.

Over the last two and a half centuries there have been repeated attempts to systematise our thinking about penal philosophy and policy and to clear the ground for a more certain and justifiable approach. Looking to the twentieth century, Lacey reviews the rise and decline of the rehabilitative school. The

reformatory movement arose from an appreciation of the many factors that contribute to criminal behaviour, including both inherited characteristics and the effects of the social environment. For a number of reasons this approach failed to deliver promised reductions in re-offending. As this failure became more manifest and attracted criticisms about its vagueness, lack of accountability and intrusiveness, the rehabilitative programme was modified or abandoned. It would be fair to say that in this essay Nicola Lacey treats these developments as though they were fairly autonomous. It is not in any way that she is unaware of political and economic dimensions, but rather that she does not seek to address the linkages in the limited space available.

The vogue penal doctrine from the 1970s and 1980s has been retributivism. This satisfied conservative thinkers by emphasising individual responsibility and making the offender more clearly accountable – he or she had committed the crime, not their environment. Those on the liberal left were also attracted to retributivism because it appeared to limit punishment to harm done, as distinct from deterrence or reformation, which were not so constrained. In the event, retributive calculations on the quantum of harm of a particular offence were hard to agree: even harder to compare the harms of different offences and harder still to justify scales of punishment. Garnering both conservative and liberal support, retributivism offered a vocabulary and grammar attractive to politicians and was widely adopted as a basis for criminal legislation and sentencing scales. It remains the dominant element in British sentencing policy, for example, despite its many imponderabilities and implausibilities. Apparent simplicity masks a thicket of complexities.

How might we proceed, asks Nicola Lacey. She sets out the communitarian conception of the person as ‘one which recognizes human identity as a fundamentally social construction’. That being so, she goes on to argue, ‘personal autonomy and welfare can only be realised in a social context’. The principal purpose of punishment according to this doctrine would not be deterrence, reformation or incapacitation, but rather to ensure that the community’s values are taken seriously. The *symbolic* property of punishment would therefore be central. Lacey uses this point of departure to criticise the use and administration of imprisonment in Britain and the United States.

Those who have noted in recent years the reports of pathetic but potentially dangerous groups of vigilantes rampaging around British council estates (public housing) as they seek out supposed paedophiles (reportedly turning on one occasion on a paediatrician) must have cause to think twice or thrice

about 'community values': far rather, some would insist, the values of an educated elite than the imaginings and ignorant passions of the mob. But where does this leave the communitarian? For the purposes of argument, leave aside the mob and consider only the vote-hungry, office-hungry politician who claims to be the authentic voice of the people. Lacey does not duck these issues and sets out the dangers inherent in some communitarian positions.

It does not arise directly from communitarian thinking, but restorative justice shares many of its concerns and values. The conventional criminal justice process is expensive, bureaucratic, not particularly satisfying to victims and has a poor record of effectiveness. Even community penalties, some would argue, all too easily become formalities – official process with little substance or human effect. Imprisonment is costly and however well administered, has the negative effect of further sundering ties between offender and community. Popular dissatisfaction with criminal justice is a compound of feeling that here, as elsewhere, things are not working, that elite groups evade criticism and are not accountable, and that ordinary people are excluded from important decisions that affect the quality of their lives. Into this complex of disputes and concerns comes the notion of restorative justice. As the name clearly proposes, the objective is a form of restoration – directly in the sense of restoring stolen property, making reparation or (more difficult) reestablishing a sense of security or tranquillity; indirectly in the sense of healing the wound that the crime has inflicted on the victim and the community. There are besides a number of other goals, including a reduction of re-offending and fear of crime. The restorative process is seen as engendering or strengthening a sense of community, which in itself has productive effects and may reduce criminality. The key methodology is a meeting or series of meetings which require the participation of the victim, the offender and a community representative.

One might relatively easily get support for the use of this procedure to deal with and divert away from the formal justice system minor and less hardened offenders. Indeed, shorn of its terminology, it would appear to be no more than the type of informal procedure that has been followed in certain neighbourhoods, communities and jurisdictions for many years. Richard Young and Carolyn Hoyle, while approaching the restorative justice movement in a questioning manner, suggest that it has far more potential than an apology to a neighbour in the presence of a police officer. They trace its modern origins to Canada and, significantly, to the 'sentencing

circles' which drew on indigenous Canadian peace-making processes. Adoption and adaptation seem to have gone furthest in New Zealand, where 'family group conferencing' is the standard response to serious youth crime. In England and Wales, by contrast, restorative justice projects are mainly used for minor offences by young people.

Restorative justice is widely discussed in criminal justice circles and has caught the eye of government and the judiciary in a number of countries. For the method to have a practical impact, however, it would need to be able to take on adults convicted of more serious offences. Some such programmes are now in train and are being evaluated. Much will turn on their effectiveness and economy. Positive evaluations in turn may affect public perceptions and willingness to countenance this form of complementary justice. Among other considerations, however, Young and Hoyle point out an inherent conflict between governments' desire for speedy justice and the inevitably protracted business of arranging restorative justice conferences to accommodate the various parties.

The hard case for most people when considering restorative justice is the violent or sexual offence. Some argue that bringing the victim of a sexual or other violent assault into the presence of the criminal adds one trauma to another. And even if there is not a meeting, a horribly painful and haunting episode is re-opened. (This of course is also a criticism made of the conventional trial.) On the other hand, were such a victim to *choose* a restorative justice conference format and provided they were given sufficient emotional and practical support, might this not open new possibilities for all involved?

For restorative justice to become a significant part of the criminal process, the state has to take a hand. At what point should state agencies become involved – pre-trial, sentencing or post-sentence – and who should be the lead officials? The division over the last issue seems to boil down to a choice between police or social workers. There are obvious differences in training, work experience and orientation here, but is it possible for these two sets of functionaries to work together – or does that simply add further complication and delay and shift the focus from the victim and the offender?

We have become a pronouncedly rights-conscious society. When added to the confrontational nature of Anglo-American and common law jurisprudence, even the most respectable and conformist among us are extremely wary about

making admissions. (Our car-insurance companies constantly insist on the point to their customers.) Yet restorative justice requires admissions and acceptance and one cannot imagine a productive meeting or conference conducted along adversarial lines. One of the appealing points of the method, surely, is the learning that takes place when culpability is admitted and fully assumed. Yet there may be conflicts of interest, and the possibility of injustice: what part therefore should legal advice play in these proceedings? Would it be possible to avoid a restorative justice process being offered as an inducement to admit guilt? What safeguards do we have against a manipulative use of this prospect by police or prosecutors, and would such use not devalue and inevitably destroy the process?

An essential function of state justice is to provide a set of procedures that help remove emotion from an examination of deeds and circumstances that are fraught with it. I have already noted how some writers on the communitarian theories of justice are bothered by what could degenerate into mob justice. Do similar problems exist for restorative justice? Is not the dispassionate tariff of punishments provided by the state safer? Might the state allow the restorative process to run but provide a backstop to prevent excesses? How do retribution and just deserts fit in when reparation and penalty are considered?

Some of the most interesting information provided by Young and Hoyle concerns victims' reactions. Opinion polls consistently show public dissatisfaction with what is seen to be over-lenient sentencing. Media reports and comments on cases frequently do not set out all the facts and circumstances which are made known to the sentencing courts. When that is done and members of the public are asked to sentence hypothetical cases, their sentences apparently turn out to be in general agreement with court practice. Does this open the way for more public acceptance of restorative justice procedure? Possibly, with careful education, media goodwill and with no sentencing disasters (a restorative justice procedure followed perhaps by a horrible crime). Chance plays a much greater part in public policy than many imagine or the textbooks allow.

An editor who carries his or her own contribution in a collection of essays faces a small but delicate point of arrangement: where should that essay go in the sequence? Put it first, and readers might imagine it is a claim to set the tone; last, and the vain editor is claiming a final word. In truth, I had no such difficulty. Placement came quite naturally, since my piece is an attempt

to defend the moral element in punishment and the place of the responsible individual in penal doctrine. It follows three essays that certainly have a different emphasis in their analysis of crime, the individual and society. Its place in the sequence is intended to be some kind of answer or at least alternative to these different perspectives, but it is certainly not the last word in a difficult and elusive discussion.

One of the chief sources of criminology was the investigation of the regularities of crime. Age, sex, domicile, parents' education and occupation all proved powerful predictors of crime. From the time of the first collation of national criminal statistics, what had previously been anecdotal evidence was confirmed: criminal behaviour was not randomly distributed throughout the population. It followed that crime was greatly influenced by social factors and that therefore (some held) individual culpability was diluted. Criminologists discussed and investigated the form and extent of this dilution. But the social approach to criminology was not the only one. Building on Darwinian biology, attempts were made by the Italian criminologist Cesare Lombroso and his followers to construct a different kind of determinism – that of the 'born criminal'. And if there were a significant heritable element in crime, where did that leave culpability? For the last 50 years and more, the biological contribution to criminology has been neglected, tainted by its association with Nazi ideology and crimes. Remarkable advances in genetics have changed that, and we now have to consider the possible impact of that science on the criminal process and our thinking about punishment.

Rubashov, Koestler's Old Bolshevik protagonist in *Darkness at Noon*, had spent 40 years in the service of his party, an organisation that doctrinally denied the existence of the autonomous individual: 'The definition of the individual was: a multitude of one million divided by one million.' Rubashov himself called 'I' 'the grammatical fiction'. In the days, hours and minutes before his party-decreed death, Rubashov speculates on the nature of the individual and traces the monstrous course of his party, and his own life, to an inability to acknowledge the full existence of the individual, and the willingness only to embrace the aggregate.

Stalinism was an extreme doctrine of social determinism which produced unspeakably cruel results. Far less sinister are those doctrines that draw attention to the aggregate to give a compassionate context to individual wrongdoing. In a universe of causes, those theorists argue, the doctrine of free will must be seen as metaphysical, and without free will there can be

no absolute culpability; culpability indeed must always be primarily a matter for social determination. Here, although the background is far from Stalin's Russia or Rubashov's regrets, the critical issue is the weight placed upon the individual. I contend that some social theory approaches to punishment have moved too far towards the aggregate, ironically in the interests of a humane criminology and penology.

Absolute doctrines of social determinism now find adherents only in tiny anachronistic sects and cells. But what if a new and scientific form of *biological* determinism were to gain acceptance? I consider some of the implications of the new biology, and the possibilities of genetical testing, against the background of a criminal process which, as we have noted, in the last decade or more has shifted from the traditional objectives to risk assessment and control, and which seems to be willing to advance yet further to social defence in the form of long periods of incarceration. Given those strategic objectives, is it not extremely likely that the possibilities of the new technologies will be harnessed to the criminal process?

For more than a century we have downplayed the role of the autonomous individual in the criminal process: do we now have the will to resist calls to identify the 'born criminal'? And once identified, must we not subject him or her to measures of social protection – custody, semi-custody, direction, exclusion – all determined not by guilt or harm done, but by our assessment of the risk of future behaviour? The saving grace of a dynamic ontology, a constant 'coming to be' would be unacceptable; the notion that a person might change would be irrelevant. Those who futuregaze usually find themselves in embarrassed retractions or *post hoc* rationalisations. Perhaps these ruminations on the application of the new biology and its technologies will in ten years' time leave me red-faced and nonplussed: I hope they will.

But whether or not the new biology and criminal justice take the course I anticipate and fear, my essay is a plea for the individual to remain as the defining object of criminal justice and the penal process. By 'individual' I mean a person endowed with moral capacity and entitled to be treated by the state as a moral agent. This means that we have got to accept, at least as a doctrine, the notion of free will, to conduct ourselves 'as if'. Any other course is problematic for criminal law and punishment. I do not place the same emphasis as some of my colleagues on the social dimension of crime and the criminal. I cannot of course avoid a full recognition of the inequities and inequalities of life: we are called upon to do justice in an unjust world.

Rather than seek a wider equitable balance or at least a substantial measure of compensatory adjustment in the administration of criminal justices, I contend that the chances of life must be accepted as inseparable from our human condition. That acceptance, combined with a belief in moral capacity, lends dignity, grace and even heroism to our lives.

This introduction, and the book, have been completed close to a Midsummer's day. It would be reassuring to be able to join with Shakespeare and declaim:

If we shadows have offended,  
Think but this, and all is mended,  
That you have but slumber'd here  
While these visions did appear.

If the essays are up to the mark they will certainly provoke discussion; none, we hope, will offend. We had best not go into their soporific properties, but again we take a positive view. The issues that 'we shadows' bring before you will not, however, easily be mended. Rather, they will continue to occupy a central place in moral philosophy and in public policy, and in the working out of democratic politics.

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