COMMISSION ON ENGLISH PRISONS TODAY

The Principles and Limits of the Penal System

Initiating a Conversation

PAPERS FROM SEMINAR 1

The Principles and Limits of the Penal System

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Terms of Reference and Background for the Work of the Commission on English Prisons Today

Terms of Reference

1. To investigate the purpose and proper extent of the use of prison in the 21st Century
2. To consider how best to make use of the range of community sentences that currently exist, the principles that should guide them and to explore new ideas
3. To consider the role of the media—both broadcast and print, in helping to re-shape the debate about the reform and proper use of imprisonment,
4. To investigate those issues which drive up the prison population in an age of globalisation
5. To place any recommendations within the broader workings of the Criminal Justice System of England and Wales, giving due consideration to international development.

The Commission will look at the driving forces influencing change and practice including legislation, politics and the media.

The Commission will think radically about the purpose and limits of a penal system and how it should sit alongside other social policy strategies. We should not be constrained by "starting from here" but create a vision for a different future.

Background and History

The prison population is now at an all time high but it has not always been so. The Commission commemorates a period of significant decarceration.

Between 1908–1939 the prison population of England and Wales halved, from 22,029 prisoners to just over 11,000. As a result some 20 prisons had to close—despite the fact that the crime rate actually increased during this period. This is the longest period of decarceration in world history, but it has rarely featured in any discussion about the use of prison in our public policy.

How are we to explain this phenomenal drop in numbers? Naturally we could point to the impact of the First World War, but there is more going on here than the sad simple reality of conscription and the high numbers of young men who died in the trenches. Instead we could point to:

- A general scepticism about the use of prisons that was widely shared—from politicians such as Winston Churchill (who had been a prisoner-of-war during the Boer War) and who set about reducing the numbers of people being sent to jail whilst he was Home Secretary between 1910–1911
- The scepticism of conscientious objectors and Suffragettes who had been imprisoned, and who campaigned for change on their release
- The existence of a credible alternative to prison in the shape of probation
- The support given to penal reform from leading civil servants such as Alexander Patterson, who were prepared to advocate for change from within Government
- The creation of the Howard League for Penal Reform which campaigned for changes to the prison estate, and provided a focus for activities of the various reformers.

Two conscientious objectors—Stephen Hobhouse and Fenner Brockway who had both been imprisoned, established an independent commission on the state of the penal estate, and published their book—*English Prisons Today* in 1922. It had an immediate impact of popular and political thinking about what to do with offenders and the limited role that existed for prison in dealing with those who broke the law. Their impact would last until the outbreak of the Second World War.

The Howard Association was founded in response to the first Royal Commission on Capital Punishment that ended public executions.

The last royal commission (1993 under Lord Runciman) looked at the criminal justice system and concentrated on criminal justice processes, policing and the courts.

Commissioners

Cherie Booth QC	Barrister; Crown Court Recorder
Oscar Campbell	Serving prisoner
Baroness Jean Corston	Labour Peer and former MP, author of report on vulnerable women in penal system
Professor Andrew Coyle	Professor of Prison Studies, King's College, London; former prison governor; founding Director of International Centre for Prison Studies
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Professor Martin Wasik	Professor of Law, Keele University; Crown Court Recorder; former Chair, Sentencing Advisory Panel
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Introduction

All signs point to a current crisis in the English criminal justice system. Prison numbers and overcrowding are at an all-time high, courts are over-subscribed, the police over-stretched, and the public unconfident in either the efficacy or justice of the penal system. Re-offending rates remain high, with 2/3rds of prisoners re-offending within two years of release, a figure that goes up to 74.8% for men aged between 18–21. Though the amount of crime reported to the British Crime Survey has declined by 42% since 1995, few academic commentators attribute much of this reduction to a greater use of imprisonment. In any case, most people still believe that crime is rising and fear of crime is relatively high, suggesting that we need to look beyond the facts to understand public opinion about crime and punishment.

The Howard League for Penal Reform had formed the Commission on English Prisons Today to initiate a conversation about these very issues in order to try to develop solutions and alternatives to current practices. The remit of the Commission is broad, to examine 'the driving forces influencing change and practice including legislation, politics and the media. It will consider the principles, purpose and limits of a penal system and how it should sit alongside other social policy strategies.' Its aims are also wide, as it seeks to 'prompt public debate using local and national media, consultation meetings with key players, seminars and public events including evidence sessions in public, feature articles, consultation papers, website consultations/questionnaires and other ways of engaging with people'.

This collection of papers sets out a basic framework and starting point for generating discussion by introducing four key themes: principles, limits, alternatives and emotions. As Ian Loader points out in the first paper, there is an extensive body of academic work on the principles that should underpin the penal system. An understanding of such literature, which tends to focus on the various possible justifications of punishment, is crucial if we are to not only understand the current system, but also change it. All too often, however, this kind of work seems distant or perhaps unappealing to policy-makers and the public. Instead of replicating this scholarship, Loader identifies three main aims of any penal system as 'doing harm', 'helping offenders to make good' and 'doing the necessary minimum'. Each of these approaches, he claims, chime with 'public' or perhaps 'common sense', widely-held expectations of how society should respond to crime.

Turning his attention to the 'limits' of the penal system, Andrew Coyle points to the need to differentiate between internal (largely economic) factors and external ones driven by sentencing and popular opinion. Over the past ten years the Labour government has created more new criminal offences than were introduced in the previous 100 years. To a large extent, the impact of this legislative activity can be found directly in the ever-growing numbers behind bards. Such penal excess, or the absence of limits, can be reconciled reasonably easily with the first of the previous principles and perhaps, with difficulty, with the second (if we believe that all of these newly criminalised acts are committed by people who the criminal justice system can 'help').

It seems completely at odds, however, with a penal minimalist framework within which other sentencing goals can be realised such as proportionality and rehabilitation.

Perhaps more promising in this regard are the notions of restorative justice as set out by Carolyn Hoyle in the third paper. Though currently existing only at the margins of the English criminal justice system, restorative justice may provide a meaningful alternative to custody and a means of integrating offenders into their communities. For this to happen, however, public and political sentiment would have to shift considerably away from a belief that the justice system should 'do harm' to those who have offended and would need rather, to embrace more confidently the goals of reform within a framework of penal minimalism.

On what grounds might this case be made? In the final paper in this collection Angus Skinner suggests somewhat iconoclastically that we may wish to rethink our penal system in order to increase our own happiness. Crime, victimisation, and punishment, as well as our responses to them, whether on an individual or societal level, are all profoundly emotional events and processes. If we accept the primacy of the first penal philosophy—that of doing harm—then we are left, as a community, with the negative emotions with which we are all too familiar: anger, fear, pain, mistrust. What if, instead, we could imagine a system that prioritised forgiveness, or hope, or compassion? Would such sentiments undermine or enhance the penal system?

The four papers collected here do not provide answers. Rather they seek to ask questions. Each is clearly motivated by concern about the current system. Though improvements have undeniably been made in certain aspects of prison conditions, and in the professionalisation of the police force, for example, and though certainly crime has fallen, the starting point of this Commission is that we have ended up with a system that nobody knowingly would have chosen. Instead of trying to build our way out of overcrowding, or legislate our way out of fear, perhaps it is time for something entirely new and bold? Whatever happens, this is a conversation we, as a society, need to have.

The Principles of the Penal System

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There is a rich, diverse body of writing and debate about the principles that should underpin the penal system in a liberal democracy. This writing is focused on how to justify punishment, understood as the organized infliction of pain by the state upon an individual following a conviction for criminal wrongdoing. The debate typically revolves around the competing claims of retribution/desert, individual and general deterrence, incapacitation, rehabilitation and repair as plausible answers to the questions: Why punish? How much? To what end? Yet philosophical reflection on these questions is too often disconnected from analysis of how the actually existing penal system operates day-in-day-out, or of the forces that determine its size, scope, practices and effects. The result is a debate about principles that exercises little purchase over penal culture and practice, or the 'incorporation' of such principles into criminal justice and penal institutions in ways that decorate them rather than guide their operations. The Criminal Justice Act 2003 (s.142), for example, lists punishment, crime reduction, public protection and reparation as the approved purposes of sentencing without the slightest hint that these aims may clash, point sentencers in different directions, or require prioritizing.

This is not to dismiss the value of thinking hard about the principles that ought to underpin the operation of the penal system. It is, however, to register the importance of connecting consideration of such principles to political debate and decision-making about crime and punishment, to the working practices of professionals in the system, and to public sensibilities towards punishment. I therefore see little value in using this paper to assemble (or reiterate) a wish-list of penal principles, as if the job at hand is merely to state high ideals and mobilize support for them. Doing so would also foreclose (rather than invite) the public debate that our society pressingly needs to conduct about the purpose and limits of the penal system—a debate which the Commission on English Prisons Today has set itself to promote.

Instead, I want to focus attention on what is at stake when we talk about—and deliver—punishment. What choices are we, as a society, expressly or implicitly making when we punish in this way or that? What does our resort to the penal system as a vehicle of social regulation say about what our society has become, or aspires to be? To further discussion of these questions, I shall describe three 'public philosophies' of punishment that are, I think, operative in current debate, each attracting some degree of popular, political or professional allegiance. They are, in other words, reconstructions of where some British citizens recognizably are, rather than statements about where they ought to be. If one wishes to foster debate on the principles that should underpin the penal system, one needs in my judgement to start here.

Public Philosophies of the Penal System

These public philosophies can be distinguished according to whether their adherents wish the penal system to i) do harm; ii) make good, or iii) do the necessary minimum. The key elements of each are set out in Table 1 and sketched below. The possible relations between them are addressed, briefly, in conclusion.

1. Doing Harm

Few people actively believe—or say they believe—in doing harm. Nor does it loom large in philosophical treatises about punishment. But the idea that the penal system should be harsh, austere and expansive is one that appears to hold much popular and political appeal, and which has underpinned much of the system's recent growth. The logic of this position runs broadly like this: the purpose of the penal system is to delivery punishment (that is to say, pain). It should do so both in response to the harm that the criminal has inflicted upon the victim (retribution), and in order to communicate to the offender and to others that the behaviour being punished will not be tolerated (deterrence). The driving emotions here are crime—related anger and fear, vengeance towards those who have harmed us and (lest we forget) audience pleasure at the punitive spectacle. The overarching rationale is one of public protection, and in a political and media climate where this has come to mean freedom from crime—risk, a harsh and expansive penal—or, more accurately, prison—system is viewed as vital to public safety – if only as a means of temporary respite. This is the public philosophy which has in recent years animated the escalation of the prison population, the criminalization of young people, the return of indeterminate sentences for 'dangerous' offenders, and public distaste for parole —or, indeed, for any penal disposition that is considered 'soft'. It typically represents offenders as dangerous 'others' irrevocably set in their ways; whose interests exist in a zero—sum relation to those of victims and wider society; and who are thus the legitimate object of exclusion and banishment. Yet, as the recent fate of the penal system in England and Wales has demonstrated, this philosophy has its pathologies: in the amount of public money it is prepared to throw at prisons as a mechanism of social regulation; in the way it turns professionals in the system into turn—keys and time—keepers, and in its lack of regard to the question of what the limits of the penal system should properly be.

2. Making Good

A second outlook conceives of the penal system as a means of making good —of repairing the damaged lives one of whose effects has been the commission of crime. It typically takes as a starting point the fact the population under penal supervision is disproportionately composed of individuals from fractured family backgrounds, who are poorly educated and often experiencing mental health problems. They are, in other words, 'troubled' as well as 'troubling', and the recurring failure to recognize this and act accordingly is a source of both anger and shame. On this view, the penal system should be a site, not merely or mainly of punishment, but for the provision of the kind of educational, health and related services that improve the chances of that individual leading a 'good and useful life' (to cite Prison Rule No.1) upon 'returning' to society. Sometimes, this philosophy is premised on the idea that society, or the state, bears some responsibility for the failures that have resulted in criminal offending and have an obligation to repair the damage. In today's volatile political and media climate, its adherents more often claim the mantle of public protection, arguing that without such remedial intervention offenders will return to a life of crime. The relationship between the

needs of offenders and those of victims and wider society can, in other words, be positive-sum—something that is brought to the fore in those variants of the making good philosophy that inform restorative justice. In all cases, however, this ambition is premised on an understanding of offenders as, on the one hand, lacking in the material and psychological ingredients of a law-abiding existence and, on the other hand, amenable to interventions that seek to improve their life—chances or change their behaviour. This is, in addition, a philosophy that supplies those working in the system with hope and an affirmative moral purpose. Yet it too is not without pathologies. Some of these are well-known—notably its tendency to intervene into the lives of offenders in a manner that is intrusive, disproportionate and rights—disregarding. It may also, paradoxically, inflate the size and cost of the penal system since proven success in 'making good' can encourage greater resort to penal solutions. It can also inflate expectations in what that system can accomplish, resulting in a penal system that promises things it is ill-equipped to make good on, or delivering services that are better provided by other social institutions.

3. Doing the Necessary Minimum

This latter criticism is the starting point for a third public philosophy of the penal system which invests very little hope in what the system can accomplish and seeks to minimize both its aggregate use and the harm that it does to those who are brought within it. This rests on the observation that the penal system in general, and the prison in particular, are perennially failing social institutions about which it is wise never to be sanguine. The anger and bewilderment that typically drive this position flow from what is viewed as a recurrent failure to recognize—and face up to—this failure. The watchword here is parsimony. The penal system should be thought of and used as a social control agency of last resort and those within it should be treated with dignity and respect in institutions whose organizational cultures and practices value and seek to protect human rights. Offenders on this view are, and remain, citizens; they are simply paying their dues to society in proportion to the harm they have caused. One variant of this outlook comes with a Treasury—mindset: there is little point in spending any more of a limited public purse than is strictly necessary on a system that so consistently fails to meet its crime reduction goals. Another version highlights the criminological truism that policing and penal institutions play a small, necessary but ultimately peripheral part in the production and maintenance of social order, and that a secure society is best fostered and sustained by wider mechanisms of economic inclusion and social regulation. This philosophy thus strives to 'talk people down' from their—sometimes apparent, sometimes deep-seated—attachment to penal solutions to problems of crime and disorder. Yet this minimalism also comes with potential costs: it has little positive to say to those often well-intentioned practitioners who work in a penal system it holds to be damaging and wishes to shrink. It also risks, in a desire to turn hearts and minds elsewhere, reducing public interest in the operation of penal institutions with the effect that those within it are left, as the saying goes, to 'rot with their rights on'.

Conclusion

These 'public philosophies' of punishment do not exhaust the ways in which it is possible to imagine and organize the penal system. Nor are they mutually exclusive—though they cannot be combined willy-nilly and present choices that are not easily wished away. 'Doing harm' and 'making good' seem particularly to point in divergent directions, though attempts are routinely made to reconcile them by 'bifurcating' the population under penal supervision into those who are 'damned' and those who can be 'saved'. Doing the 'necessary minimum' can also, in principle, be combined with either doing harm or making good. One can imagine a small penal system of last resort that punishes severely those who have exhausted all other attempts at regulation (though I think this entails a degree of cognitive and emotional dissonance); or one can posit such a system that strives to make good those who are within its care (though I think this system has a propensity to expand).

My own view, for what it is worth, is that our society needs to think much harder about the benefits of, and how to create the conditions for, a 'minimum necessary' penal system than it has been accustomed to doing in recent decades. But the purpose of this paper is not advocacy. It is simply to remind us of the choices that we make when deciding how—and how many and how much—to punish so as to stimulate public debate about the penal system we have got and its relationship to the one we may want.

Table 1: Public Philosophies of the Penal System

	Doing Harm	Making Good	Doing the Necessary Minimum
Organizing Rationale	Public protection	Reintegration	Parsimony
Key Values	Austerity Harshness Exclusion	Inclusion Positive intervention	Human dignity Human rights
Cousins in Penal Philosophy	Retribution Deterrence Incapacitation	Rehabilitation Reparation	Desert/proportionality
Representation of Offenders	Dangerous other 'Set in their ways'	Deficient Reformable	Rights—bearing citizens
Emotional Motors	Fear Anger Vengeance Pleasure	Anger Shame Hope	Anger Bewilderment
Pathologies	Costs Penal expansion Professional morale	Intrusive Paradox of the good system Unrealistic expectations	Professional morale Public inattention

The Limits of the Penal System

Professor Andrew Coyle
International Centre for Prison Studies

A penal or punishment system does not have any internal limits, other than those of resources. Externally it is limited only by the amount of criminal legislation that is enacted and by the manner in which that legislation is interpreted by the courts.

The Current Situation in England and Wales

The recent history of criminal legislation in England and Wales is a startling one. Throughout most of the 20th century we became accustomed to having a new criminal justice act in each parliament; that is to say, about one every five years. Generally these were considered pieces of legislation, carefully drafted and building on what had gone before. This picture began to change in the latter years of the last Conservative government and has accelerated under the Labour government. Since 1997 the government has enacted 23 criminal justice acts and has created 3,000 new criminal offences[1]. We have now become used to criminal justice legislation which amends provisions brought in a year or so previously. A recent example of the creation of a new criminal act is to be found in the Education and Inspections Act 2006, S.103. This provides that if a child who has been excluded from school is found during school hours in a public place during the first five days of an exclusion the parent of that child will be guilty of an offence and liable to be fined.

Some of the new legislation has brought with it mandatory sentencing so that judges are prevented from taking full account of circumstances in individual cases. In addition there has been relentless pressure on judges at all levels to pass more prison sentences and longer prison sentences. For example, in the Appeal Court on 29 January 2002 Lord Chief Justice Woolf issued new guidelines for cases of mobile phone theft. He said that except in very exceptional circumstances a custodial sentence would be the only option available to the courts. The tough sentences would apply "irrespective of the age of the offender and irrespective of whether the offender has previous convictions". The lowest appropriate sentence was 18 months, but terms of up to three years would be imposed for offences involving no weapons and up to five years if a weapon was involved[2].

The consequences of this pressure were felt quickly within prisons. In November 2004 the chief executive of the National Offender Management Service told The Guardian newspaper that in the previous year the courts had imprisoned 3,000 people 'for thefts such as shoplifting or stealing a bicycle, even though they did not have any previous convictions'[3].

These are some of the reasons why the prison population in England and Wales rose from under 45,000 in 1992 to over 65,000 in 1998 and stood at more than 81,000 in early October 2007. This sits alongside the fact that since 1995 overall

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1 **Liberal Democrat Press Release We can cut crime, 22 January 2007**

2 **BBC News. 29. 1. 2002**

3 **Travis A. 2004. Blunkett on film sways judges. The Guardian. 17 November 2004**

crime in England and Wales has fallen by 42%[4]. It should be noted that there is no direct evidence to correlate this reduced crime rate with the increase in the rate of imprisonment. This becomes clear when one looks at changes in imprisonment rates and recorded crime rates for a number of jurisdictions between 1991 and 2001[5]:

Jurisdiction	Crime Rate	Prison rate
Canada	—17%	+2%
Denmark	—9%	—9%
England and Wales	—11%	+45%
The Netherlands	+13%	+105%
Spain	+3%	+28%

Increasing the Number of Prison Places

A major element of the government's response to the increasing prison population has been to provide more prison places. A few years ago there was some concern expressed about where this might lead. In 2002 the Director General of the Prison Service referred to "the insanity of a prison population that may hit 70,000 this summer"[6] and in 2004 the Home Secretary announced plans to limit the prison population to 80,000 by 2009[7]. A year or so later another Home Secretary had reverted to a determination to build his way out of prison overcrowding[8], although within a few months of announcing 8,000 new places he found himself increasing that figure to 10,000[9].

The reality is that no jurisdiction has ever built its way out of prison overcrowding. The provision of more prison places invariably means that more people are sent to prison. Alexander Paterson, a famous English Prison Commissioner in the 1920s, recognised this fact: "Wherever prisons are built, Courts will make use of them. If no prison is handy, some other way of dealing with the offender will possibly be discovered."[10] As in so many other matters, the USA provides us with a cautionary comparison. In 1992 there were some 1.3 million prisoners in the United States. By 998 this figure had risen to 1.8 million. The latest figures from the US Bureau of Justice show that there are now 2.3 million prisoners in the USA[11].

4 **Home Office Statistical Bulletin 11/07 Crime in England and Wales 2006/07 London: Home Office**

5 **Barclay G. and Tavares C. 2003. International Comparisons of criminal justice statistics, 2001. London: Home Office**

6 **Narey M. 2002. Director General's opening address to Prison Service conference. London: Prison Service**

7 **Blunkett D. 2004 Reducing Crime—Changing Lives: The Government's plan for transforming the management of offenders. London: Home Office**

8 **Home Office Press Release. Home Secretary Pledges 8,000 New Prison Places—Putting Public Protection and the Law—abiding Majority First. 21 July 2006**

9 **Reid J. Speech to an audience of offender management stakeholders during a visit to HMP Kennet, Maghull, Merseyside. 16 February 2007**

10 **Ruck S.K. (ed). 1951. Paterson on Prisons: Being the Collected Papers of Sir Alexander Paterson. London: Frederick Muller Ltd**

11 **US Bureau of Justice Statistics: http://www.ojp.usdoj.gov.bjs/prisons.htm**

The message for us in this country is that there is no obvious limit to the number of people that we can send to prison. Unless we decide otherwise, it is not beyond the bounds of possibility that at some not too—distant point we will have levels of imprisonment in England and Wales that equate to those current in the USA. If that were to happen, the government would have to provide, not 8,000 additional places, not 10,000 new places, but 240,000 *more* prison places.

The Future

So, what are the key issues which the Commission on English Prisons should consider before reaching a decision as to whether there should be any limits on penal policy?

First of all, it should consider the current use of imprisonment in England and Wales.

- Why has the prison population gone up while crime has come down?
- To what extent is the prison now being used increasingly as a method of dealing with the marginalised people in our society, fulfilling Charles Murray's vision of "the custodial state"[12]?
- To what extent do we need to take account of the exhortation from Oklahoma State Representative Lucky Lamons, a former police officer and now member of the Oklahoma Sentencing Commission, that "We need to incarcerate the people we're afraid of, not that we're mad at."[13]

The second key issue is to do with public perceptions of personal safety and the need to develop a new communications strategy.

- Arguments about "too many people in prison" or "the highest imprisonment rate in Western Europe" leave people cold. Faced with the information that the prison population in England and Wales is now over 80,000, the ordinary person in the street is likely to ask whether that is a high figure or a low figure and may well take the view that if that is what it takes to make society safer, then so be it.
- The same applies to arguments about the cost of imprisonment. The £2.3 billion spent on imprisonment in England and Wales each year is a small figure in comparison to money spent on the health service or on education and also on the police. The public may well take the view that this is money well spent.
- Similarly, the public is liable to be unimpressed by the information that it costs in the region of £35,000 a year to keep a person in prison. The response will be either that this is a small price to pay for public safety or else that prisons should be made more austere and therefore less costly.

Currently the prison service does very well in protecting the public from those who have been convicted of serious crimes, although there may be a need to consider the lengths of sentences that are now being imposed. This will include consideration of such matters as the recently introduced Indeterminate Public Protection sentences.

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[12] **Herrnstein J. and Murray C. 1996. The Bell Curve: Intelligence and Class Structure in American Life. New York. Free Press**

[13] **State Rep. Lucky Lamons (D—Tulsa) speaking to the Associated Press on 15 December 2004**

The main question is how society should deal with, in the words of Representative Lucky Lamons, those "that we're mad at". In this regard the Commission may wish to consider whether the debate needs to be restructured along the following lines:

- Most crime is local and its effects are experienced locally. It may, therefore, be that the solution to it will also be found locally.
- The criminal justice system is not well equipped to deal with matters which should primarily be the responsibility of other agencies. These include mental illness, personal drug and alcohol abuse and inappropriate individual behaviour, especially by young people.
- Most of the spending at the "back end" of the penal system, principally on prisons and probation, is controlled and distributed nationally.
- If these resources were re-allocated to allow greater local control there would be greater community ownership of these services. This would have the potential to lead to a redistribution of resources from penality, that is, punishment after the event, to prevention before the event, resulting in a greater sense of public safety and security.

Restorative Justice: the Potential for Penal Reform

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1 What are the Problems?

This paper considers two of the main problems with the current penal system—prison overcrowding and high rates of recidivism—and suggests that restorative justice may be able to provide at least partial solutions.

At the end of September 2007 there were over 81,000 people in prisons in England and Wales. Arguably, this represents a crisis of penal policy and sentencing, rather than of prisons *per se*. Overcrowding, and the consequential harms it visits on all prisoners, but particularly vulnerable ones, is primarily a product of penal policy and sentencing, rather than the workings of the prison estate. As the 2001 Halliday report made clear, sentencing has become more severe. Judges and magistrates are both awarding more custody than they used to—the average length of a custodial sentence awarded in the crown court is about 50% longer than it used to be 10 or 15 years ago. Magistrates in particular are sentencing a significantly higher proportion to custody.

If prison worked, at least utilitarians could feel comfortable about the high numbers of men and women serving increasingly long sentences in less than ideal conditions, even if retributivists were alarmed by disproportionate sentences, but when prison fails either to rehabilitate or deter offenders from committing further crimes, it is hard to see which of the justifications for the pain of imprisonment are satisfied by the current penal system, as incapacitation is likely only to be necessary for a small proportion of those currently held. With two out of three people, and three-quarters of all young offenders, reoffending within two years of release from prison it should be clear that as an instrument of desistance our prisons are as ineffective as ever.

The sentencing goals of retribution and incapacitation can be satisfied by imprisoning far fewer people than we do today. In turn, the goals of a fair, humane and effective prison system are more likely to be achieved with fewer people in the system. In an overcrowded prison control is prioritized and rehabilitation, skills, reintegration and other goals aimed at challenging recidivism are marginalised.

It is beyond the remit of the Commission to explain why sentencing is increasingly punitive, but the apparent lack of confidence in non-custodial penalties shared by sentencers and the general public must be part of the explanation. Better use needs to be made of the available alternatives to custody, including fines, which have become unpopular amongst magistrates. But a more thorough and imaginative use of restorative justice is also a viable alternative to imprisonment, particularly, although not exclusively, for the majority of juveniles and for adults who are currently sentenced to less than two years, sentences which represent an inefficient use of custodial resources.

2 What is Restorative Justice?

There are almost as many definitions of restorative justice as there are academics, practitioners, and policy makers interested in it and considerable divergence over what practices and principles it embraces. Nonetheless, most agree that at its essence it encompasses values, aims and processes which have as their common factor attempts to repair the harm caused by criminal behaviour. Most restorative justice advocates agree that its core values include: mutual respect; the empowerment of all parties involved in the process; accountability; consensual, non-coercive participation and decision-making; and the inclusion of all the relevant parties in dialogue, namely offenders, victims and those who make up the wider community in which the crime occurred.

Restorative justice embraces multiple aims but those who have attempted to put it into practice in the UK have focused on: a reduction in the risk of re-offending by holding offenders accountable, by requiring them to explain how they think their actions might have affected others; the lessening of the fear of crime; and a strengthening of a sense of community. Restoration should address a wide range of harms, including material and emotional loss, safety, damaged relationships, dignity and self-respect.

In England and Wales, restorative justice has been deployed primarily for individual offenders, and most typically young, first-time or minor offenders, usually in police-led restorative cautioning teams or in the warnings and reparation orders operating within the Youth Offending Teams. More recently, it has been used to describe a range of responses to criminal or even ant-social behaviour ranging from bullying programmes in schools to direct mediation between adult offenders and their victims between conviction and sentencing and direct or indirect mediation and conferencing for offenders serving both community and prison sentences. This broadening remit brings enormous potential to those who recognise the limits of criminal justice, but also raises important questions about what restorative justice is and should be. In particular, whether it should be thought of as punishment and, if so, what due process protections should be in place? How it can co-exist with criminal justice when the severity of the offence may be thought to require an element of retribution? These are the issues the Commission will give serious thought to over the next 18 months. What I want to do in the remainder of this brief paper is simply raise for consideration a few areas of concern that I believe restorative justice has the potential to address.

3 Can Restorative Justice Provide Solutions to the Penal Crisis?

Restorative justice in the UK has fast become the most over-evaluated and under-practiced area of criminal justice. It is fair to say that there are currently many more books and articles written on the subject than there are restorative practices in the community. Restorative justice—as distinct from probation-based mediation—was introduced into UK, via the Thames Valley Police restorative cautioning scheme, in 1994. The Labour government was initially impressed by its apparent success and introduced various youth justice measures, under the Crime and Disorder Act 1998 and the Youth Justice and Criminal Evidence Act 1999, which had the police and other key agencies involved in restorative justice. Following the advice of Halliday and Auld in 2001, the government also introduced the conditional caution, in the Criminal Justice Act 2003, which attaches restorative or reparative conditions to adult cautions. Despite all of this legislative activity and academic scrutiny, there remains little restorative activity on the ground and what restorative measures exist

are focused primarily on young offenders or on first time adult offenders charged with relatively minor offences. It remains, in other words, on the periphery of criminal justice and, as such, unable effectively to tackle the current penal crisis. This is not true of other jurisdictions: for example, restorative family group conferencing is a central part of the youth justice system in New Zealand, for all but the most serious offences, and it is used as a response to sexual assault and family violence in South Australia.

There are two main reasons why restorative justice exists only at the margins: one is a failure of courage and imagination; cautiousness and particularly risk aversion in penal policy has determined a reluctance to conceive of restorative justice as an alternative to prison for serious offenders and offences. The other reason is the emphasis on restorative justice as a disposal, rather than a process, which means that one-off restorative interventions which do not immediately result in desistance are followed by increasingly punitive criminal justice disposals for those who are considered to have blown their chance.

Recent experiments in restorative justice with just over 100 prisoners and over 300 adult offenders prior to sentencing provided promising results in relation to reconviction and satisfaction of victims and offenders with the process. Their evaluation for the Home Office by Joanna Shapland and her team at Sheffield University makes clear that restorative justice can work at several stages within the justice system as a part of a package of post disposal measures to provide a service to victims and offenders. It provides useful information for sentencers and, in many cases, a diversionary measure. These findings should give policy makers the confidence to integrate restorative measures more fully into the criminal justice system with the explicit aim of reducing the number of offenders sentenced to prison. This process will not be successful, however, without a fundamental rethinking of the purpose of restorative justice. This Commission should explore the potential of restorative justice as a process, rather than a one-off disposal. This should sensibly start within the youth justice system, as sentencers could be persuaded that youths, if not adults, deserve more than one chance.

Although the youth justice system has over the past decade introduced a number of apparently effective community programmes, targeted at first time offenders and high-risk children, the underlying message to young people is that they get just a couple of chances for restorative justice to work before being moved swiftly up the system with imprisonment becoming a real possibility for those who re-offend. Whilst referral orders, widely considered to be the most restorative of the youth justice measures, divert many young offenders from prison for imprisonable offences, their introduction has made only a slight dent in the numbers of juveniles in custody. This may not be the case if such orders were seen as the start of a more long-term restorative process, rather than a last-chance disposal. Advocating repeated use of restorative justice for a recidivist offender would inevitably raise the same concerns that were expressed about repeat cautioning by the Audit Commission in the mid 1990s. But a well implemented restorative conference looks very different to an old-style police caution, and restorative justice reconceived as a process would look different to a one-off restorative conference.

With some courage and confidence in restorative philosophies, we could envisage restorative justice as an ongoing (albeit time-limited) process; as a series of structured interactions between offenders and significant others that explore and seek constructive responses to the dynamics of a particular person's offending.

Whilst the earliest meeting or meetings could include the primary victims, the latter ones would not need to. They would focus more on the harms done to the wider community and the relationships between the offender and those closest to him or her. In some cases they would connect only to other statutory and voluntary agencies who could offer assistance and support, such as with drug misuse or relationship counselling. For more serious offenders or offences they could tie into other criminal justice responses, such as probation or community service orders.

Too often restorative conferences open up potentially helpful communication and then just as quickly close it down by failing to offer a mechanism for continuation. My own research into restorative cautioning found that it had enormous potential in repairing damaged relationships within families. Skilled restorative justice facilitators provided some young people with the first opportunity in a long time for them to have their parents' undivided attention. Young offenders and their parents were given the time and space, as well as the encouragement, to explore problems in their lives and in their relationships. This produced some cathartic moments in such encounters. But if both parties are sent away after a channel of communication has opened up it is highly likely that in the sometimes chaotic and stressful lives they lead these paths would soon close. If it is right that damaged relationships, particularly damaged families, provide fertile ground for both the onset of offending behaviour and recidivism, restorative justice, more than any other criminal justice intervention, has the potential for repairing these broken relationships, but only if it has the chance to work. Relationships can take years to break down; it is simply naïve to expect a one hour, one-off intervention to repair them. We could do a great deal towards reducing prison numbers if we rethink restorative justice as a process, with the potential, over time, to repair damaged relationships.

A Final Note of Caution

If we are to encourage politicians and policy makers, and indeed the public, to embrace restorative justice for minor or for serious offences, and, more importantly, to conceive of it as an ongoing process, we need to keep in mind the importance of developing restorative jurisprudence: to better understand the role of restorative justice in relation to both rehabilitation and retribution and other philosophies of punishment, and to consider how restorative processes can be protected by legal standards and ethical safeguards, that give room for deliberative accountability whilst keeping an eye on proportionality and fair process. Without these safeguards for victims and offenders, the risks of secondary victimisation, disproportionate sentences or net-widening are real.

The Pursuit of Happiness

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Background

Happiness is much in vogue. There may be many interesting sociological questions as to why but it is important to bear in mind that the issues involved have been considered in public and philosophical debate since Aristotle and before, and are of global as well as western interest. The medievalist Howard Kaminsky argues that "there are two cultural principles in play in our society: one turns on the axis of citizenship, the other on what Thomas Jefferson called the pursuit of happiness." Handling tensions between these two becomes a central matter for individuals, communities and policy.

Locke had formulated the principle (or human right) of preserving "life, liberty and estate [or property]." 18th century Enlightenment thinkers, grappling with notions of beauty and virtue without divine guidance, followed David Hume's turn away from Descartes to assert that "reason is and only ever should be the servant of the passions" and in turn Jefferson and his colleagues replaced property with happiness, and at least its pursuit as an inalienable right.

Why is this relevant to the Commission's task? Because the growth in prison numbers, the public and political pressures, key questions of how to deal with sentencing (and also how to run prisons) cannot be answered without attention to emotions, including happiness. Emotions of all kinds have come centre stage in several public policy issues. That is because of increasing evidence that they play vital roles in human flourishing, whether for individuals, groups or countries.

Our brains have a negative bias-not surprisingly since those of our ancestors without this bias were generally washed away or eaten up. This has left us (we are all in this boat together) with somewhat problematic brains—though they are also fantastic. Negative emotions—fear, pessimism—play vital roles, helping us avert danger. Positive emotions are not just the absence of negative emotions. While negative emotions keep us focused and concentrated, positive emotions help us be open, flexible, creative. Positive emotions broaden our intellectual, social, emotional and physical resources, building up reserves we can draw upon later.

This is the key finding behind the development of positive psychology at the beginning of this century. For much of the 20th century psychology was solely focused on mental illness, and achieved quite a lot along the way. A more holistic approach was called for. Since positive emotions—love, joy, being in flow—are not just neutral states then they must be essential bases for virtuous spirals of human flourishing. And crucially this is true not just for individuals but for groups, organisations and communities.

The Launch and Scope of Positive Psychology

In the millennium launch of positive psychology—this extraordinary paradigm shift not only for social science but also for society—Marty Seligman and Mihály Csíkszentmihályi wrote:

> *"Entering a new millennium, we face an historical choice. Left alone on the pinnacle of economic and political leadership, the United States can continue to increase its material wealth while ignoring the human needs of its people and that of the rest of the planet. Such a course is likely to lead to increasing selfishness, alienation between the more and the less fortunate, and eventually to chaos and despair.*
>
> *"At this juncture the social and behavioral sciences can play an enormously important role".*
>
> *This far-reaching vision, as they recognized, requires change at three levels*

Individual

- Community/organisation, and
- Systems.

Change at just one level will not be enough. Indeed solely pursuing individual happiness is most unlikely to meet with success. In this regard there are vital lessons to learn from the extensive damage done by aspects of the self-esteem movement. In an earlier key work (The Optimistic Child) Marty Selgiman identified the shallowness of much carried out under the rubric of improving self-esteem. He considered it a major factor in the global epidemic of depression in children and adults. These findings have been further re-enforced by scholars such as Dweck and Twenge.

Potential Applications for the Commission's Specific Interest Individual Level

There are examples of the application of individual positive psychology interventions in criminal justice, notably exercises in forgiveness and gratitude. And there is considerable scope for developing much further a strengths based focus to assessment and engagement.

Several studies have highlighted how negative experiences effect people more than positive ones. More recent studies have focused on what good events and experiences overwhelm bad ones. Natti Rodel showed the positive effects on at risk street youths of encounters with volunteers, whose true altruism they perceived and some reflected. What seemed crucial was the authenticity of the volunteers' perceived 'goodness'.

So I argue that there is considerable scope for development of applications of positive psychology approaches at an individual level. There are (slowly) increasing resources in the UK to draw on but, as Lord Layard has argued, a great acceleration is required. The Commission could add its voice to this debate.

Community/Organisation Level

The Californian criminologist Elliot Currie argues persuasively that there is a "culture of exclusion" in play at least in the US. Describing the policy of increased imprisonment as utopian (as if it would end crime) he highlights the damage it has done to American communities, shredding the very fabric of some communities, the only things—family and community relationships, employment which might have led to reduced crime.

Evolutionists argue, with good data, that high-risk behaviour of aggression and violence is a logical response to low opportunity and the absence of hope; that teenage pregnancies are logical responses to comparative shorter life expectancy.

The danger in the UK (including Scotland) is of following further down the US road of increased imprisonment. If a different route is to be taken it will require different approaches to community well-being.

The Commission could highlight the vital importance of investing in community well-being.

The Commission might also explore the field of positive organisational scholarship. If the organisations we have, and we have many, are not enabling us as a society to secure the progress we want then we need to examine that. Appreciative inquiry is an approach to organisational development that has moved away from the normal deficit approach (and also the utopian idea that reorganisation will solve much). Reframing evaluation around appreciative inquiry is part of the route out of the UK's trap in deficit models of accountability and regulation.

System/Policy/Legislative Level

This is the level I urge the Commission to devote most energy to. In Ian Loader the Commission has a member with leading expertise in the policy issues of crime and human emotions.

In several great and challenging fields of human endeavour the need to address human emotions at the centre of policy has and is being addressed. In South Africa, in Northern Ireland and elsewhere truth and reconciliation commissions are vital to establishing new bases for societies to flourish. In Canada and in Australia similar approaches in relation to child abuse within religious orders are producing good results. People often want a simple apology, an emotional closure with hope that life will be better for others.

The Commission's task is no more complex. The precise routes and final recommendations need careful thought.

Sentencing and policies that surround it are largely effected by the principle of proportionality (the punishment should fit the crime). In, in my view, an important article Bagaric and McConvill link happiness and pain as currency in the principle of proportionality. That is closer to people's experience (as the study shows) than proportionality linked to property. Adam Smith was right, when we add our economic and social exchanges then what we feel is more important than what we own.

Conclusion

The Commission could outline and offer a breakthrough approach. One to turnaround the current direction of increased and ineffective imprisonment.

The role of the media is well-positioned in the terms of reference and a vital focus. Professor Richard Sparks has written cogently on this topic and is a member of the Howard League Scotland Committee, as also is Richard Moore, journalist and author.

There are no easy answers. We are on the road to narrow victory, slowly accumulated. International assessments of strengths show that people in Eastern countries are much better on two in particular: self—regulation, no surprise there; and zest. Perhaps we need more of both. The pursuit of happiness is worthwhile, common flourishing even more so.

"Psychological Capital for Competitive Advantage" is the title of an increasingly influential book in the US. Its key concepts—hope, efficacy, resilience and optimism are crucial for offenders as much as corporate bodies. And crucial for the Commission also.

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