Penal reform: a history of failure

J M Moore looks back at the history of reform and traces the causes of its perpetual failure.

The history of prisons and the history of penal reform are intimately intertwined and are both characterised by their long histories of failure. Imprisonment has, since medieval times, been widely used in England for custodial, coercive and punitive purposes. The medieval prison not only held debtors and those awaiting trial, but was also widely used for the punishment of minor offenders. Church authorities also used punitive detention extensively. In Tudor times population growth and improvements in farming techniques meant that, for the first time since the Black Death a surplus population emerged who, becoming transient, were perceived as a threat to the good order of society. Initial attempts to deal with the problem using vagrancy laws, that saw first offenders whipped, branded and returned to their parish of origin and recidivists liable to execution, failed to solve the problem and a carceral solution emerged. The Elizabethan Houses of Correction started with the Bridewell in London and soon multiplied in both urban and rural areas, providing a national network of prisons where vagrants and other poor people could be incarcerated, their labour put to good use and good habits instilled in them.

By the late eighteenth century when John Howard was visiting prisons the Houses of Correction had largely lost their reformative functions and were often indistinguishable from local gaols. Death, normally commuted to transportation to the American colonies, had become the normal punishment for most felons until American Independence, when incarceration in existing prisons and on the Hulks (adapted warships) had to be used as substitutes. This initiated a debate about the need for penitentiaries, although with the introduction of transportation to Australia, it's urgency diminished. The discourse on penitentiaries did eventually lead to the construction of Millbank Prison, completed in 1822. Parkhurst and Pentonville were subsequently constructed as penitentiaries for boys and men respectively, to serve time in before transportation.

From early in the nineteenth century two pressures built up in the English penal system, which combined to create the modern national prison system. The first was a dramatic expansion of the number of people requiring state punishment. The routine discipline and punishment of the labouring classes had previously been largely imposed privately, often by employers with whom many, particularly younger, workers had lived. During the late eighteenth and first half of the nineteenth century the middle classes increasingly looked to the local state to take responsibility for imposing discipline and inflicting punishment. Boroughs and counties dramatically increased their carceral capacities as existing gaols and Houses of Correction were expanded and new ones built. The second pressure was within the government's convict service, which was required to respond to the increasing refusal of colonial societies to accept transported convicts. In 1840 transportation to New South Wales stopped and attempts to identify other destinations, such as the Cape Colony, failed. Tasmania's refusal to accept convicts from 1853 effectively ended mass transportation. England had to house its own felons. The national Convict Service, established in 1850, became the Prison Commission in 1878 when it took direct control of all local prisons creating a national and centrally controlled prison service.

The establishment of prison at the core of the English penal system was mirrored and often driven by the growth of the penal reform movement. This movement was divided into three key groups who, although often operating in alliance to promote compatible aims, had very different motivations and ideologies. The first were Evangelical Christians, including William Wilberforce, John Howard and Elizabeth Fry, who were primarily concerned with prisoners' souls and regarded the chaotic social economy of prisons as morally corrupting. How in such a chaotic and disordered environment could the confined reflect on their sins and find their way back to God? The Evangelical reformers argued for a disciplined regime and the creation of an ordered institution. The second group were the Utilitarians, who objected to the inconsistency of punishments; for deterrence to work potential law breakers needed to be certain about the exact punishment for each offence (Bentham, 1843). They were also concerned that transportation and execution wasted the convicted felons' labour. In the late eighteenth century Bentham lobbied hard for his Panopticon, which he proposed to manage as a private contractor utilising the prisoners labour for his own personal profit. Both the Evangelicals and the Utilitarians accepted that the primary purpose of public punishment was deterrence and that state penal sanctions should make those convicted an example to potential lawbreakers. Whilst the Evangelical reformers were concerned with individual reformation they neither saw it as the primary penal purpose or as inevitable. Prisons should offer the opportunity for a religious experience leading to reform but it was accepted that many prisoners would reject this opportunity.

The third group were the reformative penologists who argued that the individual offender was morally diseased and that the function of punishment should be to

cure them (Wines, 1872). Based on theories developed by Alexander Maconochie these ideas were promoted by social reformers such as Matthew Davenport Hill, Florence Nightingale, Charles Dickens and Mary Carpenter in England and utilised by Walter Crofton to develop the Irish Convict system. Enoch Wines became Maconochie's leading disciple in the United States and incorporated his ideas at the heart of the American reformatory movement where they were practised at the Elmira reformatory and other progressive institutions. Maconochie's ideas and language were incorporated in the 1870 Declarations of Principles of the American Prison System. The American reformatory movement's ideas were in turn to have a major influence on the 1895 Gladstone Committee, Evelyn Ruggles-Brise, the Prison Commissioner who introduced Borstal, and in particular on Sir Alexander Paterson, the Prison Commissioner who dominated the English prison system in the inter-war years.

Penal reformers played a central role in the development, growth and legitimatisation of the modern prison. It was reformers such as Howard who were the driving forces in transforming the English prison from a disorganised community where the pains of imprisonment were largely generated by neglect to ordered and disciplined institutions where prisoners were either kept in isolation or silence was ruthlessly imposed. Whilst reformers may have been concerned about the moral and physical contamination of the old gaols, they were equally determined to make prisons places of terror. By vigorously promoting prisons' reformative potential they played an important role in legitimising the dramatic increase in incarceration. A passionate belief that prison could work justified the building of new prisons and the establishment of new regimes. The advocates of reformative discipline were the driving force behind the introduction of indeterminate sentences with sentence length being dependant on the 'reform' of the prisoner not on the severity of their crime.

Reformers of all types have rarely questioned the focus and purpose of the criminal justice system. In particular, they have accepted that the powerless and poor are the legitimate and appropriate targets of penal action. In developing their new economies of punishment Howard, Bentham, Maconochie and Paterson all accepted that the raw material for their systems would be those at the bottom of society. Today our prisons are overcrowded, the majority of released prisoners are rapidly reconvicted and nearly all contemporary penal regimes are condemned as impoverished. If these were problems that were solvable by prison reform the necessary measures would surely have been identified and implemented at some point over the last 200 years. Indeed, many of the reforms currently being campaigned for have been thought of long ago. Most have been previously implemented. Some have, for a short period, appeared successful. Alexander Maconochie's regime on Norfolk Island, Walter Crofton's Irish Intermediate Prisons, the inter-war Borstals and the Barlinnie Unit are all examples of genuinely reformative regimes. But as the American Friends Service Committee (1971) observed 'the criminal justice system has a phenomenal capacity to absorb and co-opt reforms … (and) grinds on inexorably'.

So why does penal reform always fail? Thorsten Sellin (1976) has argued that prison's historic roots lie in the slave societies of antiquity whose laws were based on the social status of different individuals. At the top of society were citizens who, except for offences directly against the state, were subject to a form of restorative justice. The legal penalties they were liable to were mostly financial. Even murder had its price. Those further down the social hierarchy were liable to carceral and corporal punishments. Placing prisons in this historical context explains why they have always disproportionately incarcerated the poorest, most powerless and socially-excluded groups in society, a tendency that has continued to the present time (SEU, 2002). Prisons are institutions designed not for justice

but for the exercise of power. That is why we see the fraudulent benefit claimant imprisoned whilst the fraudulent taxpayer's conduct is normally dealt with by a financial payment not involving their criminalisation. Breaches of health and safety placing lives at risk will be resolved administratively through agreement, whilst even the most minor breaches of an ASBO result in imprisonment. The current penal system has built into it an injustice that no reform can ever remove. Reforms can provide temporary respite but time and time again the punitive function has reasserted itself. To make real and lasting change requires going beyond penal reform, it requires acknowledging that our current system is based on the imposition of punishment on the weak, and accepting that it must be abolished (Hulsman, 1997). By doing this we will generate the opportunity to develop a citizen's justice system designed to resolve problems, treat all with equality and reject the infliction of pain. ∎

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