

Physician, heal thyself is a taunt which may be offered to historians and social analysts in the certain knowledge that it will strike home. How, in the midst of widespread social change can one separate the superficial from the fundamental, the fateful from the transitory, this or that current from a gathering tide? In a hundred years time outcomes will be known, and our questions answered, but without the finality of hindsight we proceed uncertainly. That said, historians will come to see criminal justice as one of the undoubted obsessions of our times.

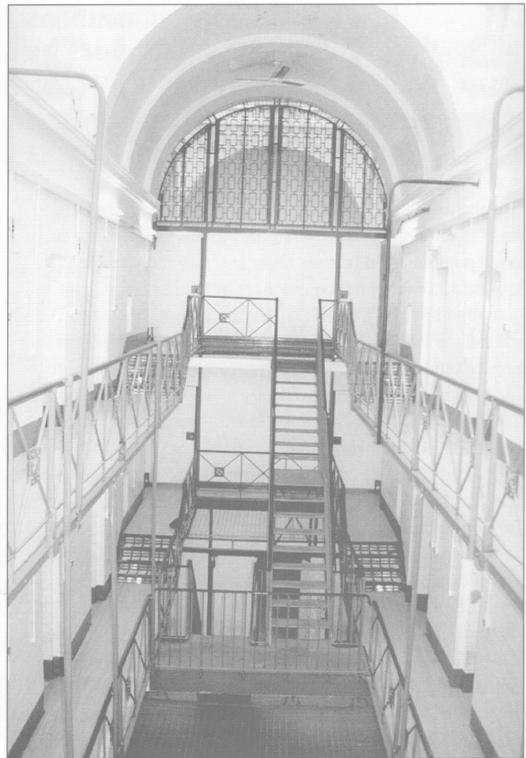
An historic folly?

Seán McConville considers the politics and ethics of containment.

The American century

Even now we know that this has been the American Century. A country which in 1900 was beginning to show its economic and political potential, still looked diffidently beyond its shores and remained in the shadow of Europe's cultural achievements and religious inheritance. In the intervening years, the United States has progressed to world dominance in the military, economic and cultural spheres. The nineteen-eighties and 'nineties confirmed it as the only true superpower. Its influence reaches to all parts of the world; its ways are studied and imitated; its successes are constantly sought.

Innovation, energy, flexibility organisational ingenuity and cycles of renewal and rethinking have constituted the engine of this American transformation. These characteristics are immensely attractive examples to political and business leaders throughout the world. Some parts of the American



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model have worked well out of their native context; others have failed miserably in the United States and abroad. Criminal justice has had a mixed record of success and failure.

The aspect of American criminal policy that is least understood abroad is the changed circumstances of the policymakers themselves. Political parties have largely ceased in the United States to act as that filter between public opinion and policy that is essential to a healthy democracy. While at the lower levels of the political parties an apprenticeship is required of those who seek political advancement, this is much less true at the higher reaches. The expenses of mounting a campaign for a modest public office are now such that the candidate with most access to funds is likely to secure the party's endorsement. The near universal system of primaries (elections before the elections, to secure the party's candidature) allows a well-funded candidate to advance without a political record. Media attention and paid advertisements are critical, and fund-raising is unceasing. This system imposes strong pressures

on candidates to outbid each other in dramatic statements and policy commitments: reflection or hesitations can be portrayed as fatal weaknesses.

Politics and criminal justice

The political process has not gone so far in Britain, but over the last twenty years criminal justice has been opened up as a field for political contest, in a context which increasingly emphasises media packaging and expensive advertising. This has taken it beyond the boundaries of legitimate debate, and turned it into one of the principal devices for exploiting difficulties and hesitations for party and career purposes. In a democracy there must be ample scope for decent and principled differences on the nature of the good society and the place of criminal justice within it. Democracy itself is injured where the ethics of political contest are disregarded, and the main object of the exercise is to wrong-foot or even blackguard one's opponent. Crime and punishment now provide political projectiles that

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previous generations of leaders disdained.

Most of the US drive to the greater use of imprisonment in the nation’s history is the product of a political system which can no longer handle these issues. But while this historic step may have emerged from structural change in politics, and the chance of local melées and incidents, it has since spawned a rationalising theory. Deterrence, reformation and even retribution have been abandoned in favour of incapacitation: prolonged confinement is justified on a cost-benefit basis. Analysing the deprivations of personal and property offenders, and turning these into annual costs, a Benthamite calculation is made.

Utilitarian calculations

The American economist Steven Levitt estimates that the average crime costs \$3,000 and the average criminal commits fifteen offences

a year. If imprisonment can be provided for a cost less than \$45,000 per offender per year, therefore, it can be argued that there will be a net social gain from a policy of containment. The United States has, in fact, become very efficient in building and running prisons, and Levitt is able to show that with imprisonment costing some \$30,000 per year, containment offers an annual net gain (‘profit’) of about \$15,000 per offender.

These types of calculation are disputable, and ignore several broader costs of imprisonment, but let us assume for the moment that there is such a clear utilitarian advantage in treating imprisonment simply as containment, and that such a ‘profit’ on investment may be shown to an accountant’s satisfaction. How should we react to this favourable investment news?

Over the years there have been many disputes about whether

imprisonment and other punishments should be seen as deterrents, as means of reform, or as forms of retribution. There are some empirical means of settling these debates, but they include a substantial moral and political element, not open to investigation. All these objectives, moreover, recognise the human nature of the offender, acknowledge a capacity for choice, and recognise moral character as an essential assumption in any theory of criminal responsibility. The disagreements between scholars, jurists and others interested in such matters can be sharp, but the human element in punishment is not obscured.

The essence of containment

A containment strategy is very different. Apart from basic food, health and psychosocial provisions, containment requires little or no acknowledgement of the human and moral nature of the offender. Indeed, the essence of incapacitation is that the offender lies beyond human intervention and influence, whether measured by susceptibility to deterrence or reform, or expiation through suffering. This is a simple policy: prolonged confinement, backed by the taxpayer’s support, as a form of social hygiene. American politicians and their publics have embraced it enthusiastically.

For a minority of compulsive offenders, flawed to and beyond the bounds of mental health, indefinite containment may be the only option, until we have discovered other means to deal with them. From such people the public needs protection, and if it is not provided confidence in government will drop dangerously.

But as a general policy containment is deeply troubling. Those who are incapacitated include the objects of special sentences (‘three strikes and you’re out’) and also that element in longer sentences arising from a tariff which in England over the last thirty years has drifted ever higher. For the generality of offenders containment as public protection is based on the restricted and misanthropic view that we always are what we were at the time of our offence. A slightly modified version of this states that people may change, but we cannot

know when they do, and therefore it is easier to proceed as though they are immutable. The Christian (and humanist) view is quite clearly opposed to such a static view of being, and was well expressed by Archbishop William Temple in his Clarke Hall Lecture, *The Ethics of Penal Action*: “No character is fully formed till death, and there is always place for remedial and reformative treatment... to treat the character as what it may be is to treat it as what in actuality it is: for it is chiefly potentiality.”

Punishment and ethics

To give incapacitation primacy in penal policy is an opting out of human relations and the human obligation; it is a form of consumerism applied to criminal justice. All major religious and secular philosophies agree that our most binding duty is to treat each other as human beings, and to seek a human response. Containment means that we can’t be bothered to engage the offender: “It is too much trouble, too unreliable, and might make civic demands which I have neither the time nor the inclination to meet.” The offender becomes a commodity or waste product.

Periodic elections do not in themselves make a democracy, and a willingness to pay taxes does not make one a citizen. Competitiveness, marketing and technology have taken the United States into what is virtually rule by plebescite: leadership becomes an ever more sophisticated casting of the polling runes. Punishment as incapacitation is the product of such a political and moral vacuum; it is one of the flaws in a highly successful civilization. The danger is that, blinded by the corona of the American achievement, our politicians may be unable to see this penal policy for what it is: socially divisive, corrosive of public sensibilities, and the stimulator of expectations which can never be met. Surely the analysts who deal with our times will see it as a folly, a blemish of truly historic proportions. ■

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